EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100417/2021 (V)

Held on 10 and 11 May 2021 (By CVP)

Employment Judge: J Young

Ms Susan Sage	**Claimant** **Represented by:** **Mr Alasdair Bryce – Solicitor**
Bankfoot House (Moffat) Ltd	**Respondent** **Represented by:** **Mr Stewart Healy- Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the claimant was not unfairly dismissed in terms of Section 98 of the Employment Rights Act 1996.

REASONS

1. In this case the claimant presented a claim to the Employment Tribunal complaining that she had been unfairly dismissed by the respondent. The respondent admitted dismissal but denied that it was unfair stating that the reason for dismissal amounted to gross misconduct.

2. The issues for the Tribunal therefore were:-

(i) Whether the respondent had a potentially fair reason for dismissal.

(ii) Whether the respondent dismissed the claimant for that reason.

(iii) If so, whether dismissal for that reason was within the band of reasonable responses.

(iv) Whether the procedure was fair.

(v) If the claimant succeeds what compensation should be awarded to the claimant being the remedy sought.

Documentation

3. For the hearing the parties had helpfully liaised in providing a Joint Inventory of Productions paginated 1 – 144.

The Hearing

4. At the hearing evidence was given by (a) Janet Tildesley, a volunteer board member with the respondent since 2009 and who had taken on responsibility for staffing issues at Board level and to act as a link between the Board and the manager of the respondent care home. Prior to retiral she had held the position of Director of Social Work for Falkirk Council; (b) Lydia Burnett, also a volunteer member of the Board of the respondent since 2015 and from October 2020 Chair of the Board. She is a Senior Project Manager for a mental health charity; and (c) the claimant.

5. From the relevant evidence led and documents produced and admissions made I was able to make findings in fact on the issues.

Findings in Fact

6. The respondent is a charitable and non-profit making organization operating a care home in Moffat known as Bankfoot. It is funded by donations from the local community and local churches who are very involved. When full it cares for 26 residents. Many of those residents are from the locale. With 45 employees it is the largest employer in Moffat.

7. The claimant had continuous employment with the respondent in the period between 14 July 2009 and 19 November 2020. She accepted Terms and Conditions of Employment on 7 September 2010 (J117/118). She was employed as a Care assistant initially on nightshift between the hours of 8pm – 8am. Subsequent to her return to work on 21 September 2020 after an absence through stress she worked dayshift. On each shift she was in the "frontline" in assisting residents rising and retiring to bed; in personal care such as washing, dressing, feeding and ensuring medication was taken; and in assisting in any activities. Most of the residents are physically very frail and a number have issues with dementia.

8. Employees of the respondent were subject to their Disciplinary Policy and Procedure (J73/80) which advises of the procedures to be followed by way of investigation, possible suspension, disciplinary meeting and appeal in the event of conduct or performance issues arising. In the event of gross misconduct such as those matters identified at paragraph 5 of the Policy the respondent may dismiss without previous warning and without notice.

Workplace issues

9. At commencement of the claimant's employment and for some time thereafter the manager of Bankfoot was Sharon Lomax. There were no issues between the claimant and Ms Lomax until sometime in 2018 when the claimant required to report a matter to the Board when Ms Lomax was on holiday which soured relations between them. In the course of 2019 the claimant was absent from work after breaking her arm. On her return she considered that Ms Lomax was intent on making life difficult for her and this affected relations with other staff.

10. Following a disciplinary meeting on 28 January 2020 the claimant had received a final written warning on circumstances involving her "sleeping on your shift on 13 January 2020" that being a matter that the claimant continued to dispute (J94). The warning was to last for a period of 12 months and would thereafter be disregarded for disciplinary purposes if the claimant's conduct was satisfactory in that period.

11. The claimant was absent twice in 2020 with stress at work. She returned from the first period of absence in July 2020 but was signed off again with stress within a short period and then returned to work on 21 September 2020 after Sharon Lomax had left the respondent's employ.

Covid measures

12. Subsequent to the Covid pandemic becoming apparent in the UK the respondent required to take measures in relation to the operation of Bankfoot to protect residents. On 4 May 2020 Jeff Brown, the then Chair of the Board of Directors, wrote to employees (J69/72) advising of requirements which the respondent wished to put in place. The respondent was aware that many of the care staff had "second jobs" and appreciated that given the level of pay for carers generally this was a common occurrence. However given the concerns of Covid and the need to protect residents included in the measures for employees were requirements that they could:-

"not work for any other Care Provider nor engage in intimate care activities other than for those in their own household" and

"staff who work outwith Bankfoot but who are not involved in the Care sector should notify the manager of their other employer and the type of work involved so that this can be risk assessed. The staff member will be given access to the decision of the risk assessment". (J71)

13. At this point the claimant was absent from work with the respondent due to stress in the working arrangements at Bankfoot and after receiving approval had taken some work at Annandale Bed and Bath Service. However in July 2020 she was fit to return to work with the respondent as confirmed by her GP. At that time she had a discussion with Mr Brown and he wrote to her outlining arrangements which would require to be put in place on her return (J67/68). The claimant had undertaken some voluntary "dog walking" and part of those arrangements included confirmation that it was acceptable for the claimant to "walk your dogs as normal in the fields" provided social distancing was maintained. She also conducted volunteer work with the Town Hall Trust

and was to discuss that with her Manager Sharon Lomax so that a risk assessment could be conducted "but our initial assessment is that this would be fine".

14. The letter also advised that the claimant would not be able to volunteer or "work with any other care provider such as Annandale Bed and Bath Service or carry out cleaning jobs for other households during the Covid 19 period. This is part of the regulations for all our work force. If you are going to do any additional work outwith Bankfoot it may well fit into a category that is acceptable, but it must all be risk assessed". (J67)

15. At that time it was indicated it would be possible to return to a dayshift role rather than nightshift on an altered hours basis.

16. The claimant subsequently made a request for a risk assessment to visit an individual to provide "wellbeing support". This risk assessment was conducted by Sharon Lomax on 1 August 2020 (J66) and approval was given to the visits on conditions regarding social distancing, wearing a mask, and washing hands. A hand sanitiser was provided to the claimant for use in the visits. On the form it was noted that the claimant "used to provide cleaning services but no longer does this". The purpose of the visit was described as:-

> "Susan visits lady who is shielding to ensure she had provisions and checks on her wellbeing".

17. By this stage the general restrictions imposed by the Scottish Government had eased. A further letter was sent to staff on 3 August 2020 emphasising and repeating that the requirements to be complied with remained as identified in the letter of 3 May 2020. (J64/65).

Claimant return to work from 21 September 2020

18. The claimant made a return to work on 21 September 2020 by which time Haidee Young had been appointed manager. She discussed with Haidee Young a "Return to work plan" (J60/66) which included that the "additional Health and Safety requirements arising from Covid 19 must always be adhered to". The claimant also signed for certain "Performance Targets" which she was expected to follow including the requirements that:-

"Staff will not work for any other care provider, nor engage in intimate care activities other than in her own household

Staff who work outwith Bankfoot House but who are not involved in the care sector should notify the manager of their other employer and the type of work involved so that this can be risk assessed".

The claimant signed to agree to follow the Performance Targets on 21 September 2020 (J62/63). Those targets were to be monitored on a weekly basis.

19. On 4 October 2020 the claimant's activity of dog walking for an individual who was shielding was risk assessed by Haidee Young and the outcome was that the "task not to go ahead at present" given the risk of infection and it being carried into the care home (J59).

Suspension of Claimant

20. On 15 October 2020 Mr Brown advised Haidee Young that he had received a call from a householder to say that a member of staff at Bankfoot (the claimant) had been cleaning for her on 10 October 2020 and was concerned about the policy of the respondent in staff working elsewhere given the risk of cross infection.(J58) On receipt of this information the matter was discussed with Mr Tildesley and the claimant was advised that she was suspended on full pay pending an investigation. The claimant's position was that when she was advised of her suspension she was told that the information on her cleaning elsewhere had come from a "reliable staff member".

21. Subsequent to suspension the claimant was "in town" and approached by someone who knew her who said that she had "heard that (the claimant) was in trouble at Bankfoot" and "what trouble was it this time". It was clear that the information about the suspension which the claimant regarded as confidential had "leaked". She contacted Haidee Young about that matter who advised that when the claimant was suspended she had gathered the senior staff to advise of the position and indicated that she would treat this matter as a grievance to ascertain the position.

Investigation

22. Haidee Young commenced investigation into the allegation against the claimant. She interviewed Jeff Brown on 20 October 2020 who confirmed he had received the information from the householder who alleged that the claimant was conducting cleaning work for her. (J50/51)

23. She also interviewed one of the care assistants in Bankfoot on 22 October 2020 to advise that there had been a grievance raised by the claimant in relation to the knowledge of her suspension "leaking out" and that this individual's name had been mentioned in relation to the matter. The care assistant advised that she had had a phone call from a Ms A and from what was said it appeared that the claimant must have said something about being suspended to a Ms B. The care assistant denied that she had been responsible for leaking any information. She said in the course of that conversation that she was aware that the claimant had been cleaning "for her friend Ms A however Ms A stopped this a couple of weeks ago possibly around 12 October." (J52).

24. The claimant was interviewed on 30 October 2020 on the allegations that she had been working outside Bankfoot in the capacity of a cleaner. (J53/57). For this meeting the claimant had prepared a statement (J88/89). That statement was given to Haidee Young who read it and returned it to her. The statement confirmed that she had signed the weekly monitoring report but "did not disclose that I was undertaking a few hours work outside Bankfoot. I thought that I could do this work as it did not involve personal care and due to my

financial situation it was necessary for me to earn extra money". She also advised of the conversation in town when she was approached to be asked what she had been "up to".

25. In the meeting the claimant's position was that she did not think going "into a household to help someone who was struggling" was part of the restrictions in place. She thought that it was "only about personal care". Her position was that she had been offered work in a cleaning capacity "about 4 or 5 weeks ago" and went to see what was involved and told the individual that she would require to be "out of the house when I was in". She had been "twice to the house" and that she had helped "a couple of people. Maybe just to hoover". She was asked why she had not asked for this to be risk assessed as she had done for "dog walking". The claimant indicated that she was "not clear because its not personal care" and thought this was "just personal now" because there was a "history at Bankfoot of some staff who would make comments" and that it could be malicious. She named individuals who she thought might be responsible. Haidee Young indicated in the interview that she could reassure the claimant "that the allegation has not come from a staff member and there was no information that the allegation was malicious" (J55).

26. The claimant also wondered why it was "wrong to go to visit people for welfare" when she knew that there were individuals at the home who were "going out to the pub".

27. The claimant was asked why having requested a risk assessment on dog walking had not sought a risk assessment for cleaning and stated "I would have but I haven't been cleaning because the woman was always in, I couldn't do it".

28. An investigation report was prepared (J35/58). Haidee Young decided that there was sufficient evidence available to indicate that the claimant may have been carrying out cleaning work without that being risk assessed in breach of the requirements. There was a suggestion from the claimant that she had been visiting another household and doing some work outside the home. The

allegation that she had been cleaning had come from the lady who had contacted Mr Brown. Information from the care assistant who had been interviewed suggested cleaning work was being undertaken. She recommended that the matter proceed to a disciplinary hearing.

Disciplinary Hearing

29. The respondent decided that the claimant should attend a disciplinary hearing which would be heard by Ms Tildesley (as Chair) and David Booth another of the Directors of the respondent. Prior to instituting that meeting they did discuss whether statements should be taken from the individual who had made the allegation to Mr Brown and the other householder for whom it was alleged the claimant had cleaned. The respondent was aware that the individuals concerned were elderly and likely to be anxious and agitated. They decided to hold a disciplinary hearing and if it was necessary to obtain further information from the individuals themselves then they would do so. Subsequent to that hearing they decided that they had sufficient information and so did not interview the householders themselves.

30. The claimant was invited to the disciplinary hearing by letter of 14 November 2020 (J81/83). That letter advised that the allegation against her was that she had:-

> "Failed to meet the required standard of professional conduct by allegedly undertaking additional work outside Bankfoot House without notifying the manager so that this can be risk assessed. This allegation directly contravenes a requirement which applies to all staff working at Bankfoot House and in addition constitutes a failure to meet performance target 4 which is an element of your Performance Management Plan agreed on 21 September 2020."

31. The claimant was advised that if the allegation was upheld then there would be consideration given on whether this placed residents and the staff of Bankfoot at risk; cause reputational damage and constitute a breach of trust.

If that were the case then that may constitute a breach of the standards of the Scottish Social Services Council (SSSC) Code of Practice.

32. The claimant was provided with a copy of the investigation report with appendices and advised that she was entitled to be accompanied at this meeting by a "relevant person". She was advised that Ms Young would present the case for the respondent and the claimant would be given the opportunity to ask questions and present her own case. If the claimant intended to call any witnesses she should advise the respondent in advance of the meeting.

33. The hearing took place at the Town Hall so that there was compliance with appropriate social distancing measures and notes were taken (J84/89). The claimant was accompanied by a friend. As part of the hearing the claimant presented her statement which she had prepared for the investigatory meeting (J88/89) and this was read out to the meeting.

34. In terms of the notes the claimant indicated that she had visited "Ms C on 10 October to assess the request from Ms C for cleaning work. She said that she had undertaken some cleaning work from Ms C during this visit for which she was paid £10. Having discussed Ms C's requirements Susan felt that she did not want to take up work with her. She had been made aware that Ms C could be difficult to work for. Susan telephoned Ms C on 12 October and told her she would not be working for her."

35. It was stated that the investigation into the grievance raised by the claimant had not found any evidence of senior members of staff at the care home releasing information about her suspension.

36. It was also noted that the claimant indicated her visits to Ms A had taken place prior to her return to work. On Ms Young noting that she had been advised by a staff member that the claimant had visited Ms A around 12 October the claimant indicated that she "had visited Ms A in October and undertaken some cleaning for her on that visit. But said that she had said she would not be visiting again" and that she "should have told Haidee that she had visited Ms

C and Ms A." The claimant explained that had she decided to take up ongoing work with either Ms C or Ms A she would have approached her manager.

37. She maintained in the disciplinary meeting that she had been on medication and this had an impact on her mental health making her forgetful as an explanation as to why she had not disclosed visits to Ms C when the allegations were first made.

38. At completion of the disciplinary hearing there was a dispute on whether Ms Tildesley had indicated to the claimant that the decision was a foregone conclusion. The circumstances appeared to be that on leaving the claimant indicated that she was happy with the way matters had been conducted at the disciplinary hearing to which Ms Tildesley responded, according to the claimant, that "you might not be so happy when you get the decision". Ms Tildesley denied making that comment, She indicated a conversation along those lines had taken place and she may have been clumsy in what she said but she did not make that remark. She was trying to convey to the claimant that whatever the outcome she hoped the claimant remained happy about the way in which the disciplinary hearing had been conducted.

39. A discussion subsequently ensued between Ms Tildesley and Ms Booth as to the decision which was to be made and a written statement was prepared which was read out to the claimant when she was invited back to the meeting later that day (J90/91).

40. The decision was that the claimant was to be dismissed from employment with effect from 19 November 2020. Arrangements were being made to pay the claimant in lieu of notice albeit the panel considered that there had been gross misconduct. The claimant was reminded of her right to appeal.

41. The panel considered that the claimant was aware of the requirements regarding outside work which applied to all staff at Bankfoot. That was a very necessary precaution and requirement given the Covid situation at the time. It was concluded that the claimant had undertaken "additional work outside Bankfoot on two occasions for two separate individuals" and she had not

notified her manager of the work to enable it to be risk assessed. The two incidents related to the visit to Ms C on 12 October 2020 when she worked for an hour and received a payment and also the admitted visit to Ms A in October when she had returned to work at Bankfoot. It was indicated that the guidelines were in place to protect residents of the care home and that by not adhering to the rules staff and residents had been put at risk. It was also considered that there was reputational damage by non adherence as the families and the local community required to trust that the care home operated to the appropriate standards given the high risk of transmission of Covid.

42. It was concluded that there was gross misconduct for "serious breach of the company's rules policies and procedure" and conduct likely to "bring the company's name into disrepute". It was also noted that a final verbal warning had been given to the claimant on 28 January 2020 which was in place for 12 months.

43. By letter of 20 November 2020 the claimant was advised of that decision in writing (J92/93).

Appeal

44. The claimant appealed by letter from her solicitor of 24 November 2020 (J95/96). The letter indicated that it was understood the claimant had made clear "in the course of the disciplinary hearing that she had met with two separate individuals about the prospect of additional work being undertaken" but that the Directors at the hearing did not seem interested in considering that information. It was stated that the claimant did not accept instructions from either individual to carry out work at their home and having declined the offer of work did not see that that gave rise to an obligation to report the matter for any risk assessment. The conclusion that the claimant had undertaken additional work outside Bankfoot on two occasions for two separate individuals was challenged as the evidence supplied by the claimant contradicted that account.

45. Arrangements were made for appeal which was to be heard by Ms Lydia Burnett and Graham Black (Director of the respondent) on 4 December 2020 and that the specific issue that would be considered was:-

> "that Ms Sage did not accept the instructions from either individual to carry out work at their home and therefore had not undertaken additional work outside Bankfoot".

46. The appeal date was altered to 15 December 2020 and by letter of 7 December 2020 notes of the disciplinary hearing were sent to the claimant. It was made clear that these notes were not a verbatim account of the proceedings but agreed as being accurate between Ms Tildesley and Mr Booth.

47. However the proposed appeal hearing required to be cancelled as the claimant was unwell and by letter of 28 December 2020 it was confirmed that the claimant's preference was for the appeal to be dealt with "on the papers" rather than waiting until she was fit to attend any further hearing. There was sent to the respondent by her solicitor a copy of the notes that the claimant intended to rely on at the appeal hearing (J103/104). In essence the matters raised were:-

(i) The claimant wanted to be reassured that the statement she handed to her manager at the investigation meeting was taken into account.

(ii) It was maintained that her manager had said that the initial allegation had come from a "good and reliable" staff member and the claimant did not accept the manager's denial of that.

(iii) Ms C was contacted on 12 October to advise that after assessment of her requirements the claimant would not be taking up that position but she was not suspended until 15 October 2020. There was nothing to be risk assessed by 15 October as she was not going to another employer.

(iv) The claimant indicated that she had gone to see Ms A "during October when I was off sick". She considered that doing a light role at least generates some income but the work was "too much for me and I did not return".

(v) The claimant advised that she could submit names of the staff involved regarding the release of confidential information.

(vi) The history of bad feeling at the home impacted the investigation. The claimant had been through considerable stress as a consequence.

(vii) The claimant had not conducted any personal care. She did not consider that her actions in respect of visits to Ms C and Ms A placed Bankfoot residents in any form of risk as both occasions were isolated "and both terminated prior to my attendance at work".

(viii) Both the claimant and Mr Perry who accompanied her at the disciplinary hearing felt there had been a decision made prior to any consultation between Ms Tildesley and Mr Booth given the remark made as she walked out of the hearing.

(ix) Information given to staff was advice about what steps should be taken and were not "rules". She had been employed by the respondent for over 11 years and it was only when she had made a direct complaint to the Board regarding resident's care that it became apparent she was considered unfit.

48. Ms Lydia Burnett and Mr Black met by "Zoom" to consider the appeal and notes were taken of that consideration. (J105/107) It was agreed that it would be necessary to check when the claimant returned to work after illness as there was a suggestion within her grounds of appeal that any work done for either Ms C or Ms A had taken place prior to her return. It was also considered that the grievance investigation would be reviewed. .Also the panel would check with Ms Tildesley about her comment at the end of the disciplinary hearing.

49. It was clarified that the claimant had returned to work on 21 September 2020 and continued working until the suspension of 15 October 2020 and therefore there did appear to be occasions when the claimant had worked either at Ms A or Ms C during the time when she was working at Bankfoot. There was a clear policy in place that any activity of that nature there was to be risk assessed before being undertaken. That was there for the protection of residents and staff in contracting Covid 19. The claimant appeared knowledgeable about the policy given she had referred other matters for assessment. It was considered that the measures put in place were not optional for staff. The outcome of the grievance was that it was not possible to establish from whom any leak of information came. Ms Tildesley explained her position on remarks at conclusion of the disciplinary hearing.

50. By letter of 4 January 2021 (J109/110) the claimant was advised that her appeal was not upheld. The panel found that on the claimant's own admission she carried out work in two other places without disclosing this for risk assessment. It was stated "this is detailed in both her statement of 29 October (lines 15 and 16) and the notes from the disciplinary hearing of 19 November 2020 (lines 43 and 44 and 71 and 72)". It was conceded that the statement of 29 October 2020 (and the notes of the Zoom meeting (J105) which also suggested such an admission) did not support that conclusion. That statement indicated:-

> "I accept that I signed the report but did not disclose that I was undertaking a few hours work outside Bankfoot. I thought that I could do this work as it did involve personal care and due to my financial situation it was necessary for me to earn extra money".

51. The letter emphasised the seriousness of working outside Bankfoot Home amidst the Pandemic and that minimising contact with others was key in fighting the spread of the virus into the care home.

Remedy

52. A Schedule of Loss for the claimant was relied upon in respect of the remedy sought of compensation. (J111) That showed that at termination of employment her gross weekly pay amounted to £287.30 with net weekly pay at £236.93. Supporting wage slips were produced (J112/116). The claimant commenced further employment with effect from 23 January 2021 at approximately the same wage which employment continued at the date of hearing.

Submissions

For the Respondent

53. It was submitted that the reason for dismissal in this case was conduct and that the necessary elements of the test within *Burchell v British Home Stores (1978) IRLR 378* was satisfied.

54. A reasonable policy had been put in place regarding the measures that required to be taken as a result of the Covid pandemic. This was particularly important for care homes. There was a need for all possible measures to be put in place to prevent transmission of the virus into the care home and deaths.

55. The policies put in place for the respondent were reasonable and clear. While the claimant may have thought that she could make visits before any risk assessment that was not borne out by the policy in place.

56. The evidence was that the individuals for whom cleaning work was undertaken were Ms A and Ms C were elderly and vulnerable. If statements had been required of them they would have been taken but here there was sufficient evidence within the paper submitted by the claimant and the evidence in the disciplinary hearing to make the necessary conclusion that work had been conducted. It was a surprise that the claimant initially denied any work had been carried out as clearly that was the case.

57. It was clear that the claimant could have telephoned either of those individuals to ask what was entailed in the cleaning work required and then have the matter assessed by her manager. That was simply not done.

58. The policy was clear and there was an admission that the claimant carried out work for Ms C on 10 October 2020. There was also evidence that work had been carried out for Ms A in October 2020 at a time when she was back at work. Therefore there was a reasonably held belief that the claimant had breached the policy.

59. The conduct of the claimant was blameworthy. She should not have made visits to these homes and carried out work. There was a risk to reputation also given the high profile of the care home within the community.

60. The notes of the disciplinary hearing had not been challenged at appeal and the claimant had been able to make written representation.

61. In all the circumstances the dismissal was fair. In the event that was not a view held by the Tribunal then contributory fault would reduce any compensation to nil.

For the Claimant

62. There was no dispute that conduct was a potentially fair reason for dismissal and that the tests within *Burchell* were the ones which required to be applied in this case.

63. It was submitted that there was inadequate investigation and this led to an unfair dismissal. The letter from Mr Brown (J71) talked of staff who "work outwith Bankfoot…" What the claimant had done here was to go to assess work and while there did a little work.

64. The position of Ms A was not brought during the investigation hearing. She was told that the information had come regarding Ms C from a "reliable staff member" which was not true.

65. The fact that the claimant indicated matters were personal required to be fed into her concerns and yet that background had not been explored.

66. Ms C had given some information in a phone call with Mr Brown and an unnamed member of staff had given information in a grievance hearing regarding Ms A. These were vague allegations and they needed to be investigated more substantially. It was necessary to get to the bottom of the connections between the various parties and who said what and when and the respondent had failed to do that.

67. The position of the claimant was clear namely that if she was going to do any work on a regular basis for Ms C or Ms A she would have sought risk assessment.

68. There was a clear inconsistency for the respondent to clarify namely whether the claimant had done work for Ms A prior to her return to work or not. They had not sought to clarify that matter.

69. There had been a pre-determination of the issue. The comment made by Ms Tildesley at the end of the disciplinary hearing vouched for that. Also notes of the discussion between the panel members were clearly wrong in asserting that the claimant's statement of 29 October 2020 admitted two occasions when work was carried out in October. Their enthusiasm to dismiss made them blind to what was actually said.

70. As a result there was no genuine belief reasonably held in light of what had been ascertained.

71. The respondent indicated there was a potential for reduction of any award on a "just and equitable" basis but this was an individual who had a good career and was found to be a responsible and caring employee. There had been no willful disregard of rules in this case.

Discussion

Relevant Law

72. In the submissions made there was no dispute on the law and the tests that should be applied. Reference was made to Section 98 of the Employment Rights Act 1996 (ERA) which sets out how a Tribunal should approach the question of whether a dismissal is fair. There are two stages, namely, (1) the employer must show the reason for the dismissal and that it is one of the potentially fair reasons set out in Section 98 (1) and (2) of ERA and (2) if the employer is successful at the first stage, the Tribunal must then determine whether the dismissal was unfair or fair under Section 98 (4). As is well known, the determination of that question:

> *"(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."*

73. Of the six potentially fair reasons for dismissal set out at Section 98 of ERA one is a reason related to the conduct of the employee and it is this reason which is relied upon by the respondent in this case.

74. The employer does not have to prove that it actually did justify the dismissal because that is a matter for the Tribunal to assess when considering the question of reasonableness. At this stage the burden of proof is not a heavy one. A "reason for dismissal" has been described as a "set of facts known to the employer or it may be of beliefs held by him which cause him to dismiss the employee" – *Abernethy v Mott Hay and Anderson [1974] ICR 323.*

75. Once a potentially fair reason for dismissal is shown then the Tribunal must be satisfied that in all the circumstances the employer was actually justified in dismissing for that reason. In this regard, there is no burden of proof on either

party and the issue of whether the dismissal was reasonable is a neutral one for the Tribunal to decide.

76. The Tribunal requires to be mindful of the fact that it must not substitute its own decision for that of the employer in this respect. Rather it must decide whether the employer's response fell within the range or band of reasonable responses open to a reasonable employer in the circumstances of the case (*Iceland Frozen Foods Limited v Jones [1982] IRLR 439*). In practice this means that in a given set of circumstances one employer may decide that dismissal is the appropriate response, while another employer may decide in the same circumstances that a lesser penalty is appropriate. Both of these decisions may be responses which fall within the band of reasonable responses in the circumstances of a case.

77. In a case where misconduct is relied upon as a reason for dismissal then it is necessary to bear in mind the test set out by the EAT in *British Home Stores v Burchell [1978] IRLR* 379 with regard to the approach to be taken in considering the terms of Section 98 (4) of ERA:

> *"What the Tribunal have to decide every time is broadly expressed, whether the employer who discharged the employee on the ground of misconduct in question (usually, though not necessarily dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating and compendiously what is in fact more than one element. First of all, there must be established by the employer the fact of that belief, that the employers did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. Thirdly, we think that the employer at the stage at which he formed that belief on those grounds at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case. It is the employer who manages to discharge the onus of demonstrating these three matters we think who must not be examined further. It is not relevant as we think*

that the Tribunal would itself have shared that view that view in those circumstances."

78. The foregoing classic guidance has stood the test of time and was endorsed and helpfully summarised by Mummery LJ in *London Ambulance Service NHS Trust v Small [2009] IRLR 536* where he said that the essential terms of enquiry for Employment Tribunals in such cases are whether in all the circumstances the employer carried out a reasonable investigation and at the time of dismissal genuinely believed on reasonable grounds that the employee was guilty of misconduct. If satisfied of the employer's fair conduct of a dismissal in those respects, the Tribunal then had to decide whether the dismissal of the employee was a reasonable response to the misconduct.

79. Additionally, a Tribunal must not substitute their decision as to what was a right course to adopt for that of the employer not only in respect of the decision to dismiss but also in relation to the investigative process. The Tribunal are not conducting a re-hearing of the merits or an appeal against the decision to dismiss. The focus must therefore be on what the employers did and whether what they decided following an adequate investigation fell within the band of reasonable responses which a reasonable employer might have adopted. The Tribunal should not "descend into the arena" – *Rhonda Cyon Taff County Borough Council v Close [2008] ICR 1283.*

80. Also in determining the reasonableness of an employer's decision to dismiss the Tribunal may only take account of those facts that were known to the employer at the time of the dismissal – *W Devis and Sons Limited v Atkins [1977] ICR 662.*

81. Both the ACAS Code of Practice on disciplinary and grievance issues as well as an employer's own internal policies and procedures would be considered by a Tribunal in considering the fairness of a dismissal. Again however when assessing whether a reasonable procedure had been adopted Tribunals should use the range of reasonable responses test – *J Sainsbury's Plc v Hitt [2003] ICR 111.*

82. Single breaches of a company rules may find a fair dismissal. This was the case in *The Post Office t/a Royal Mail v Gallagher EAT/21/99* where an employee was dismissed for a first offence after 12 years of blameless conduct and the dismissal held to be fair. Also in *A H Pharmaceuticals v Carmichael EAT/0325/03* the employee was found to have been fairly dismissed for breaching company rules and leaving drugs in his delivery van overnight. The EAT commented:

> *"In any particular case exceptions can be imagined where for example the penalty for dismissal might not be imposed, but equally in our judgment, where a breach of a necessarily strict rule has been properly proved, exceptional service, previous long service and/or previous good conduct, may properly not be considered sufficient to reduce the penalty of dismissal."*

83. This all means that an employer need not have conclusive direct proof of an employee's misconduct. Only a genuine and reasonable belief reasonably tested.

Conclusions

84. The reason for dismissal in this case was given as conduct being one of the potentially fair reasons. There was no dispute that was the reason for dismissal. No other reason was put forward.

85. I accepted that the claimant had received the letter of 4 May 2020 (J69/71) advising of "Temporary changes to working requirements" as a result of the Covid pandemic and that there were clear requirements which were to apply to "all staff". There was particular reference to the provision that:-

> "Staff who work outwith Bankfoot but who are not involved in the care sector should notify the manager of their other employer and the type of work involved so that this can be risk assessed. The staff member will be given access to the decision of the risk assessment."

86. While the claimant was not at work at this time I was satisfied that she had received this letter along with other staff.

87. The claimant had also received a letter from Mr Brown in July 2020 on her anticipated return to work which noted that:-

> "As we discussed you will not be able to volunteer or work with any other care provider such as Annandale Bed and Bath Service or carry out cleaning jobs for households during the Covid 19 period. This is part of the regulations for all our workforce. If you are going to do any additional work outwith Bankfoot it may well fit into a category that is acceptable but it must all be risk assessed…"

88. Her return to work was short lived but on 1 August 2020 the claimant did undergo a risk assessment with her then manager Sharon Lomax regarding visiting a lady for wellbeing and support which was allowed, with some precautionary measures.

89. The claimant received a further letter of 3 August 2020 from the respondent reinforcing that staff who worked outwith Bankfoot were to notify the manager of their other employer and the type of work involved to ensure that the risk could be assessed.

90. Further emphasis on these matters was contained within the documents on the claimant's return to work on 21 September 2020 (J60/62). The provision regarding working elsewhere was reinforced. There was also at that time a "Performance target" document agreed (J63) which set out similar provisions including that if the claimant wished to "engage in any other work not involved in the care sector" then it was a requirement that work be risk assessed.

91. Accordingly apart from the general letters to staff of May and August 2020 there were within the letter from Mr Brown of July and in the Performance targets specific to the claimant clear restrictions against the claimant carrying out "cleaning jobs for other households during the Covid 19 period" or being engaged "in any other work not involved in the care sector". In those circumstances there was a need to have the work risk assessed. The claimant

knew of the process of risk assessment. She had sought a risk assessment on 1 August 2020 to approve "wellbeing" visits and in respect of dog walking on 4 October 2020.

92. The necessity for that restriction was self-evident in the circumstances surrounding care homes at the time. That sector required to be extra vigilant in preventing possible source of infection reaching the care home environment. It is and was well known that the virus was extremely infectious and transmissible and particularly dangerous for the elderly and frail.

93. The investigation conducted by the respondent arose out of a call to Mr Brown from a householder who indicated that cleaning had been carried out by the claimant on 10 October 2020. The claimant was suspended as a result. A complaint was rightly raised by the claimant that information on her suspension had "leaked" into the community. As part of the enquiry in that connection a further allegation was made that there had been cleaning work done by the claimant for a separate householder.

94. In those circumstances it was inevitable that there would be an investigation with the claimant as to the position. That meeting with the claimant results in a view from the claimant that she thought that the restrictions only related to "personal care" and not "going into a household to help someone who was struggling". At that time there was an admission that the claimant had gone to "help a couple of people – maybe just to hoover. These people had been self isolating for a week". Also her statement said that she had done some work "outside Bankfoot".

95. That led to the claimant being called to a disciplinary hearing wherein the allegation was set out that there was misconduct by the claimant "allegedly undertaking additional work outside Bankfoot House without notifying the manager so that this can be risk assessed".

96. At that disciplinary meeting the claimant presented the statement she had put into the investigation meeting which accepted that she had not disclosed she was "undertaking a few hours work outside Bankfoot" and she thought she

could do this work as it did not involve personal care and due to her financial situation it was necessary to earn "extra money".

97. So far as working for others was concerned the claimant at the disciplinary hearing advised that she had visited a householder, (Ms C) on 10 October 2020 to assess her request for cleaning work to be undertaken and at that time had undertaken some cleaning work and had received £10. After considering the matter she decided not to take up any continuing work with Ms C.

98. There was also reference to a further visit to a Ms A for cleaning work but the claimant's position was that happened before she made a return to work at Bankfoot. In the notes of the disciplinary hearing (J84/89) it was noted that the claimant said she had "visited Ms A in October and had undertaken some cleaning for her on that visit". She conceded that she should have told her manager about those visits.

99. There was then no dispute that some cleaning had been carried out by the claimant for Ms C on 10 October 2020. It was also stated by the claimant that she had carried out some work for Ms A in October 2020. That did not square with her suggestion that this work was done prior to her return to work at Bankfoot on 21 September 2020. In the evidence the claimant was asked about this matter and whether the notes were accurate and stated that she "probably did say October", and "may well have said October" as she wasn't thinking straight having been under stress and anxiety.

100. The extent of an investigation and the form that it takes will vary according to the particular circumstances of the case. There is no hard and fast rule as to the level of enquiry an employer should conduct into an employee's suspected misconduct in order to satisfy the *Burchell* test. That depends on the particular circumstances including the nature and gravity of the case and the state of the evidence.

101. Where the facts are not essentially in dispute then the need for full investigation is much less. In this case in the investigation and the disciplinary

hearing the claimant had admitted to cleaning work for two separate individuals. There was no dispute about the working for Ms C on 10 October 2020. At the disciplinary hearing the claimant indicated that she had worked for Ms A "in October". The note was accurate in that respect. So the respondent was faced with evidence from the claimant that work had been conducted in October for these two individuals which was at a time when she had returned to work at Bankfoot.

102. Given the statement from the claimant on the essential issues it did seem unnecessary to involve the two householders in the enquiry particularly given that they appear to be elderly and vulnerable. It would appear that the respondent had sufficient information from the claimant in the enquiry they had made without the need to make further enquiry of the particular householders.

103. It was made clear by the claimant that she considered the visits to these households was only for the purposes of assessment and having assessed the position did not wish to continue with the work. It was difficult to understand why the assessment could not have been initially formulated by telephone and then the manager advised for risk assessment before any visit was made and in particular before any work was carried out.

104. There had been sufficient investigation undertaken to identify the facts and a hearing to elicit the claimant's position. There was no suggestion by the claimant in those meetings that further investigation needed to be conducted with other personnel. It had been suggested by the claimant that the complaint was personal and malicious. At the same time the respondent was dealing with admitted factual position namely that work had been carried out for individuals in October 2020 against measures which indicated that risk assessment was required for any work to be conducted outwith the care home.

105. In those circumstances I considered that the respondent did have reasonable grounds upon which to sustain their belief that the claimant had been guilty of

misconduct namely carrying out cleaning work for two individuals whilst working at the care home without having that work risk assessed.

106. At the appeal there was no real change in the claimant's position. Indeed in her statement which was produced for the appeal panel she "did go and see Ms A (if this is relevant as not mentioned during the investigation meeting?) during October while I was off sick. Due to my financial circumstances and not undertaking any work at Bankfoot at that time then I believed by doing a light role it would at least let me generate some income. However after my visit this turned out to be too much for me and I did not return". Again she indicates that she did this work in "October" which was consistent with her previous position at the disciplinary hearing albeit indicating that she was not at work with Bankfoot at the time.

107. An internal appeal is part of the dismissal process. In this case the appeal panel admittedly took into account the wrong interpretation of the statement made by the claimant on 29 October 2020 in suggesting that there was an admission within that statement that she had conducted cleaning for two individuals. The statement did not identify that position. However it did indicate that the claimant had not disclosed that she was "undertaking a few hours work outside Bankfoot" as she thought this work did not involve personal care and due to her financial situation she required extra money. So there was evidence that work had been conducted within the statement of 29 October 2020. The error in the finding of the appeal panel did not affect the nub of the decision and I do not find that lapse affected the dismissal process.

108. There was a suggestion that the whole matter had been prejudged and that it would not matter what the claimant had said but she was going to be dismissed. That suggestion was stated to be reinforced by the comment made to the claimant on completion of the disciplinary hearing. I accepted that the claimant may have considered that the comment made by Ms Tildesley led her to believe the matter was a foregone conclusion before the panel had time to consider the issue. However I am not satisfied that any comment by Ms Tildesley was necessarily supportive of that position

109. The investigation into the matter by Ms Young and the report prepared was detailed and did not bear the hallmarks of a prejudged position. Additionally the disciplinary hearing seemed to be carefully taken with the claimant having an opportunity to express her position.

110. I did not consider that the process was a sham and the issue had been prejudged on the basis that either (1) the respondent wished rid of the claimant (as she might believe) or (2) that once the respondent was aware of an allegation of working elsewhere that there was an intent to dismiss. The process did appear to be conducted with balance and consideration.

111. The final issue was then whether or not the dismissal was a reasonable response to the misconduct.

112. It was in the favour of the claimant that she had been employed for approximately 11 years with the respondent.

113. Also there was limited contact with the households in question but at the same time limited contact is all that is necessary to allow transmission of the virus and taking that into the care home environment was a very serious issue. The rules in place identified that if work was to be carried out elsewhere than Bankfoot then there needed to be a risk assessment. The claimant was aware of that procedure but for some reason in this case did not take the necessary steps to have the work assessed. It did appear that steps could have been taken to have any cleaning work risk assessed prior to any contact with the household.

114. Rarely will previous warnings be irrelevant where an employer is considering dismissal. In deciding the fairness of a dismissal tribunals take into account previous warnings issued even if such warnings relate to different kinds of conduct for which the employee is ultimately dismissed. Where a final warning is clearly unreasonable then that would be a factor in an assessment of whether a dismissal was unfair but here there was no evidential basis to consider that the previous warning given to the claimant was unreasonable or

in bad faith. There was nothing to suggest that the warning was issued for an oblique motive or that it was manifestly in appropriate.

115. Accordingly that final warning of 29 January 2020 did require to be taken into account in an assessment of whether dismissal was a reasonable response to the misconduct.

116. The question is whether dismissal was outwith the reasonable responses of a reasonable employer. The repercussions in the event of transmission of Covid into the care home would be extremely severe. The disciplinary procedure indicated that gross misconduct included "a serious breach of the company's rules, policies and procedures" and the misconduct in this case could be seen to fit that category. Additionally there was a reputational risk to the respondent in the community if there was a Covid outbreak in the care home

117. In all the circumstances therefore it could not be said that the response was outwith the band of reasonable responses and so the dismissal was not unfair under section 98 of ERA.

Employment Judge: Jim Young
Date of Judgment: 10 June 2021
Entered in register: 11 June 2021
and copied to parties