Case Number: 2200207/2021

EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Mr P Hegarty **v** **London Borough of Hammersmith and Fulham**

Heard at: London Central (by CVP) **On**: 25 and 26 August 2021

Before: Employment Judge A James

Representation

For the Claimant: Mr C Wallis, counsel

For the Respondent: Mr S Harding, counsel

JUDGMENT

(1) The claim for unfair dismissal (s.98 Employment Rights Act 1996) is upheld.

(2) The claim for wrongful dismissal (Employment Tribunals (Extension of Jurisdiction) Order 1994) is upheld.

(3) The claim for holiday pay has been withdrawn and is dismissed on withdrawal.

(4) Bearing in mind the conclusions below about the extent to which the conduct of the claimant caused or contributed towards his dismissal, it is just and equitable to reduce the compensatory award by 10 per cent (S.123(6) Employment Rights Act 1996).

REASONS

The proceedings

1 The claim form was submitted on 14 January 2021, following Acas early conciliation between 17 November and 17 December 2020.

2 The claim form raised complaints of unfair dismissal, wrongful dismissal, and holiday pay. The holiday pay claim has been withdrawn and is formally dismissed.

3 The tribunal heard evidence from the claimant. For the respondent, the tribunal heard evidence from David Penna, Day Opportunity Manager at the Imperial Wharf Resource Centre and the claimant's line manager at the time of the events giving rise to the claim; Jo Baty, Assistant Director of Mental Health, Learning Disability and Provided Services in the respondent's Social Care Directorate who conducted the claimant's disciplinary hearing; and Christopher Nicklin, Assistant Director of Quality Standards and Performance in the respondent's Adult Social Care Directorate who heard the claimant's appeal against dismissal.

4 The hearing took place over two days. Evidence and submissions on liability were dealt with on the two days allotted to the hearing. Deliberations have been concluded in private as time has allowed following the hearing. Judgment was reserved.

Findings of fact

The claimant's role

5 The claimant was employed by the respondent local authority from 29 July 1991 until his dismissal. Initially he was employed as a Centre Worker.

6 On 25 July 2011, he transferred to the role of Day Opportunities Worker in the Imperial Wharf Resource Centre team. He was one of six such workers employed at the Centre. Imperial Wharf Resource Centre provides a day care service for vulnerable adults in the London Borough of Hammersmith and Fulham with physical or mental disabilities or who are otherwise vulnerable. A seven day service is provided.

7 All of the roles the claimant carried out involved working with a client group that had either physical disabilities or learning/social difficulties. The claimant's role as a Day Opportunities Worker required the provision of personal care and support to clients of the Centre.

8 The claimant alleged that he was bullied by his line manager David Penna at Imperial Wharf and took sick leave in March 2015. On his return to work he asked to be transferred to a different department. It was agreed that he would transfer to the Community Access Team under the management of Jon Cooke in 2015. In April 2019 the claimant returned to his previous job due to the funding coming to an end for the CAT team.

9 In August 2019, one of the claimant's closest friends committed suicide, along with another person they connected with online for the purpose of ending their lives. The claimant was distressed by this and needed bereavement counselling and therapy which continues to date. At the subsequent inquest, he met the mother of the other person who committed suicide and she requested that he keep in touch. He subsequently wrote a letter to her which

he typed and saved in his computer at work, since he had no computer at home, in a folder marked 'personal'. He believed he had saved this document in a private area but it was saved inadvertently in a shared area instead.

Lockdown restrictions

10 As a result of the lockdown restrictions imposed during the Covid-19 pandemic, from 19 March 2020 the claimant and his colleagues were required to visit vulnerable clients in their homes to provide support, instead of at the day care centre. Clients of the service being elderly and or in poor health, were at a higher risk of becoming severely ill or dying if they contacted coronavirus. Visits were therefore to be kept to a minimum, only as scheduled, and Personal Protective Equipment (PPE) was to be worn. Visits outside of the schedule were only to be made in an emergency or special request, and were coordinated by the Centre Manager.

11 The claimant and his colleagues were instructed in the use of PPE. In particular, they were informed of the requirement to wear a mask, and to clean and sanitise their hands before seeing a client in their home.

12 On the morning of 24 March 2020, a staff meeting was held at the Centre. The meeting was coordinated and chaired by Jon Cooke, who was Acting Manager at the Centre for two weeks, during Mr Penna's absence on sick leave. The claimant was at this meeting.

Visit to MB - 24 March 2020

13 The claimant was meant to visit a client, AW on 24 March after the staff meeting. Instead, the claimant visited a different day care client, MB. He called Mr Cooke to report that there were other professionals in attendance and that MB had already had his lunch, assisted by a carer. Mr Cooke informed the claimant that he was required to visit client AW not MB. There is a dispute as to whether the claimant entered the service user's flat, or just the communal entrance area. This is discussed further below, in relation to what was said in the various hearings during the disciplinary investigation, hearing and appeal, by the claimant and various witnesses.

14 The claimant's explanation for visiting the wrong client on the wrong day was that the rota was usually set for the period Monday to Sunday. The rota he had been given on 24 March was for the period Tuesday to Monday. He had looked at the second day of the rota, assuming that was the Tuesday but which was in fact Wednesday 25 March, by mistake.

Staff visits rota - 31 March to 6 April 2020

15 A further staff meeting took place on 31 March 2020 at which staff were reminded of the Covid-19 guidelines in relation to work with vulnerable clients. The minutes record that staff were told that home visits were to be minimised to:

> *essential visits only in respect to physical and mental health; all staff to ensure they followed government guidelines on keeping client and self*

safe; PPE to be used for all visits according to latest government guidelines.

The home visit schedule was discussed at the team meeting and staff were told that if there were any changes, they would be contacted by the manager individually.

16 The claimant was scheduled to visit the client KM on 1 April 2020. There appears to be no suggestion that this visit did not happen. For reasons which will become apparent below, the planned visit for KM on Friday, April 3 was crossed out, as was the visit to KM on Monday 6 April.

17 A WhatsApp message was sent by Mr Penna to the claimant on Friday 3 April 2020, which contained the home visit schedule for the weekend of 4/5 April 2020. The claimant confirmed receipt of this message and the rota was discussed in a subsequent phone call that day. The message stated:

Sunday. Your planned visits are Myra & Michael. (Denise will check Centre phone messages).

Visit to KM – 1 or 5 April 2020?

18 Mr Penna contacted the family of the respondent's client KM on 2 April 2020 to discuss her care. It was agreed that because another agency was providing daily care visits, the centre would terminate visits to KM from that date.

19 On 5 April 2020, the claimant is alleged to have visited the home of the vulnerable client KM. He is alleged to have informed his manager of the home visit on 6 April 2020.

20 A log entry was completed by the claimant following his visit. This is dated 5 April 2020 and it is not in dispute that it was completed by the claimant on 6 April 2020 when he was next in the Centre. Logs could not be completed remotely at that stage and were therefore completed after the event. The record completed by the claimant confirms:

Visited [KM] at 2pm today [KM] had lunch sandwich half eaten and tea/yoghurt. Made a fresh cup of tea and chat but [KM] was sleepy and dropped off to sleep. Centre has decided to stop visits to [KM] due to minimal social contact as [KM] was considered not a priority visit to prevent the spread of Covid-19.

21 This log entry was not subsequently included in the appendices to the disciplinary investigation conducted by Mr Penna. Further, although it was mentioned, as we will see below, at the disciplinary hearing, a copy was not provided to Ms Baty or Mr Nicklin.

Discussion with Mr Penna – 6 April 2020

22 At the staff meeting on Monday 6 April 2020, the claimant saw Mr Penna for the first time since the lockdown. Mr Penna stated that no further home visit would be required for KM. The claimant recalls saying something to the effect that this would be appropriate, as when he had last visited KM, he felt that KM

had too many visits by professionals already. The claimant was subsequently accused of making an unauthorised home visit to KM on 5 April 2020.

23 Mr Penna subsequently made a diary entry on 6 April 2020 that the claimant had visited KM on 5 April. His note states:

> *Peter called in error - as had not been instructed to do so.*

The claimant did not accept he had called in error; that was Mr Penna's view. On the claimant's account, he had been instructed to visit KM by Jon Cooke. The staff meting note for that day does not record any admission by the claimant that he visited KM in error on 5 April 2020.

24 From 7 April 2020 there was no immediate need for the claimant to work at the centre so he was reassigned to carry out other duties relating to the pandemic. Due to the ongoing investigation and disciplinary process, he continued to do so until his dismissal.

Initial disciplinary investigation meeting

25 A decision was taken by Mr Penna to investigate the unscheduled visits to vulnerable clients. These were classed as unauthorised home visits. The investigation also considered allegations that the claimant failed to observe Covid-19 guidelines.

26 A telephone call took place between the claimant and Mr Penna on 23 April 2020. The relevant parts of the note read:

> *Home visit to KM 05/04/20.*
>
> *I asked why Peter made this visit.*
>
> *Reply: Repeatedly said Jon (Cooke) told him to.*
>
> *I advised that I had planned for that weekends visits and that I had messaged Peter with instructions.*
>
> *Reply was that he hadn't looked at message.*
>
> *I reminded Peter that I had also spoke to him on the phone on 3rd April and verbally discussed schedule.*
>
> *Reply. You hadn't told me not to visit KM*
>
> *2. Home visit to MB on Tuesday 24th March. Why was this visit.*
>
> *Reply. Mistake, anyone can make mistakes*

27 The claimant was also asked about a letter that had been found on a shared drive. As noted above, the claimant thought he had saved the letter elsewhere and that it was marked 'personal'. The claimant was extremely upset that the letter had been read, and his distress and anger about that was evident during the call. The call was therefore terminated by Mr Penna. The issue regarding that personal letter was not investigated further and no further findings are necessary in relation to it.

28 Around this time, Mr Penna asked the claimant to visit the home of a very vulnerable client with severe disabilities. The claimant declined to do so on the basis that he did not have experience of dealing with the kind of disabilities the client had.

29 The claimant worked initially with Park Support and then with the Foodbank for the rest of his employment with the respondent. During that period the team the claimant was working within was nominated to be recognised on the council's website as one of the council's Covid team heroes for working throughout the pandemic. The claimant worked sometimes six or seven days a week during this period.

Formal disciplinary investigation

30 Following the phone call on 23 April 2020, a decision was taken by Mr Penna to instigate a formal disciplinary investigation. On 4 May 2020 a letter was sent to the claimant, to inform him that he was temporarily removed from the Centre, due to a preliminary disciplinary investigation into allegations that he had made '*2 unscheduled and unauthorised visits to two vulnerable clients*' homes on Tuesday 24th March 2020 (MB) and on Sunday 5th April 2020 (KM) respectively'. The claimant was informed that the investigation was to be put on hold due to the pandemic.

31 On 12 June 2020 the claimant was informed that an investigation was to be conducted into allegations of misconduct against him. Mr Penna was advised by the respondent's HR department that the allegations related to conduct, so the disciplinary procedure should be used. The allegations were that:

31.1 On 24/03/20 and 05/04/20 Peter made unscheduled and unauthorized visits to two vulnerable adults constituted serious acts of insubordination. [sic]

31.2 On 24/03/20 and 05/04/20 the unscheduled and unauthorized visits to two vulnerable adults constituting a serious lack of care towards the clients, placing them at unnecessary risk of harm. Covid-19 guidelines were not observed.

31.3 In not complying with the planned rota schedule on these dates, Peter refused to obey a reasonable management instruction (i.e. to visit only those clients you were authorized and scheduled to visit by management).

32 The respondent's disciplinary policy includes as an example of misconduct: '*Refusal to obey a reasonable management instruction'.* Examples of gross misconduct are set out on the next page and include: *'Serious acts of insubordination';* and '*Serious lack of care towards clients'.*

Formal disciplinary investigation meeting - 24 June 2020

33 A formal disciplinary investigation meeting took place via Microsoft Teams on 24 June 2020. It was conducted by Mr Penna. Joan Senior (JS) attended as

HR Advisor and notetaker. The claimant was not asked about the use of PPE during this meeting.

34 During the meeting the claimant stated, in relation to the unscheduled visit to MB:

> *I was off sick prior to the meeting on 24/3/2020 and returned on the Tuesday. I got my days mixed up because I was off on the Monday and mistook the Tuesday for the Wednesday. When I arrived at MB's home, there were people already there and thought I wouldn't go inside due to social distancing. Whilst I was outside the carer turned up. I didn't need to go inside and did not want to put anyone in any danger. I called JC when I arrived and informed him, I was outside MB's home. However, by then I realised I had got the wrong day and went on to do my visit to [AW]. JC called me later that day and I said to him, I did realise I had made a mistake. During the lockdown, the days sometimes became confusing as I was not working my regular schedules. I am surprised that it has come to an investigation, as I did not put anyone in danger.*

35 The claimant was then asked about the visit to KM. Mr Penna noted:

> *On the morning of Monday 6/4/2020, I held a staff meeting and PH questioned why we were still visiting KM. When I asked why, PH informed he had visited KM the day before and stated he did not think it was necessary for […] us to keep on visiting.*

36 The notes continue:

> *JS – you have confirmed you are unable to see DP's message. However, you said JC had asked you to keep visiting KM.*
>
> *PH – Yes, that was 2 weeks before, whilst DP was off, during a team meeting JC had given me a rota and I saw KM's name on there. When I questioned him about it, I was told that the family had requested the visits and that I had to keep on visiting until the family asked for the visits to be stopped. When I went to see KM, she wasn't interactive. She was sleeping and all I could do was make her a cup of tea and put the tv on until the carer came to give her lunch. She was not getting any benefit from my visits, plus with social distancing, we were putting her at risk. ….*
>
> *JS: … On 5/4/2020, you were given 2 people to visit and you had a 3rd person (KM) in mind, but did not say anything to DP about that?*
>
> *PH – No, it didn't cross my mind. I don't know why. Maybe, I felt I would be undermining JC. In hindsight, maybe I should have asked DP, but I thought JC would have discussed this with DP. I don't think I was specifically told not to see KM. If I was told not to see her, I wouldn't have gone. I thought DP might not have known I was going to see KM.*
>
> *JS – Wouldn't that be more reason for you to say something to DP, because you thought DP may not have known about JC's instruction to you. Why not let him know?*

PH – I had been doing the visits for 2 weeks and thought it was discussed between DP and JC. This wasn't a colleague's request, but a management request. At the time, I did ask why and was told because the family had requested it and I should continue the visits until told not to. I thought DP must know.

Interviews with Centre staff

37 Following that interview, Mr Penna interviewed other team members. On 9 July 2020 a statement was taken from Novi Reid which stated that during the staff meeting on Wednesday 25 March:

… Peter informed us that the previous day, he had got the days mixed up and that he had called into MB by mistake. Peter said that the flat was very smoky and stuffy, and once he saw there were several people already visiting including, MB's carer and pest control, he left and called Jon Cooke.

38 Ms Reid did not say whether the claimant had mentioned not wearing PPE during the visit to MB. It is not clear whether Ms Reid was asked whether the claimant had mentioned not wearing PPE during his visit. Although the interview notes were in the bundle for the interview with Ms O'Connor – see below – they were not in the bundle for the interview with Ms Reid. Further, Ms Reid was not asked whether the claimant admitted at the staff meeting on 5 April 2020 that he visited KM on 5 April 2020. Mr Penna accepted in cross examination that the claimant could have seen that the flat was smoky and stuffy from the doorway into it.

39 On 13 July 2020 Jon Cooke sent an email to Mr Penna which confirmed that the claimant did not say he entered the premises. The email stated:

1. When Peter advised me that he had mistakenly gone to MB's he didn't mention actually entering the property I believe he saw the carer outside the flat who advised him that MB had already had lunch at which point PH left & called me.

2. At no point did PH or anyone else mention to me that he had forgot his PPE, we didn't actually meet physically as a team after Tuesday March 24th as I had set up the WhatsApp group and asked staff to avoid coming into IW but to confirm attendance at work & that their daily visits had been completed via the app rather than meeting in person due to Covid-19 concerns.

40 The email was not referred to in the body of Mr Penna's report, although it was attached as an Appendix. Mr Penna told the tribunal that he did not think he should draw attention to it in the report.

41 Mr Cooke also clarified his original statement by adding the underlined words below. Again, Mr Penna did not draw attention to that in his report:

I did not issue any allocations for scheduled visits for any resident/client beyond Monday 30th March. I Advised staff to continue with the rota until further notice or until advised otherwise by David upon … his return. [underlined words added to original statement]

42 Philomena O'Connor was interviewed on 14 July 2020 and her statement says that at the staff meeting on 25 March 2020:

Peter informed me and colleagues of the following. That he had gone to MB's home the day before by mistake, that he had got his days mixed up. When he entered MB's flat there were other people there. He said he hadn't put on his PPE, and that when he saw the other people he left immediately.

43 As with Mr Reid, Ms O'Connor was not asked whether the claimant admitted during the meeting on 6 April 2020 that he visited KM on 5 April 2020.

Conclusion of investigation

44 The investigation concluded that the claimant had a case to answer and that a disciplinary hearing should take place. Mr Penna's conclusion was that:

The evidence clearly shows that PH was not instructed to make either of the two visits.

Peter's reason for the visit to MB on March 24th was that he had got confused over which day it was. Peter states that he did not enter the premises. Witness statement from PO'C & NR contradicts this. Peter named others as being in MB's flat and NR witness account alleges Peter had said the flat was stuffy and smoky, I question how he would know this without have had (sic) entered the flat? Regardless of how far in he entered the flat it was certainly Peter's intention to conduct a regular call and was only stalled by others already being on the premises. The statement from PO'C that Peter was not using PPE is particularly alarming. (Note: witness statement 3 from JC is unable to verify this, however witness statements from PO'C and DH state that JC was not at the morning briefing/meeting on Wednesday 25th March when Peter disclosed this information).

Peters explanation for visit to KM was that he instructed to do so by JC. JC has confirmed no such instruction was given. Clients were only being visited on days they formally attended the Centre. KM did not attend at weekends. There was no president (sic) of KM ever being visited on Saturday or Sunday. The visit to KM required an apology and explanation from me to the family on behalf of Peter who, by his role was representing the council. This is certainly not how I wish to present Imperial Wharf Resource Centre, and particularly not during these very cautious times.

Considering PO'C statement it would be reasonable to question whether PPE was used as instructed on other visits. Also, it would seem reasonable to question whether other unscheduled/unauthorized visits had been made.

Peter has demonstrated a complete breach of trust and confidence in his ability to carry out his role as Day Opportunities Worker. And his actions show a real disregard for the provision of a quality safe service for vulnerable adults.

45 The claimant was informed of the result of the investigation on 15 July 2020 by email. The report was attached.

46 A letter was subsequently emailed to the claimant on 21 July 2020. This again informed the claimant that the investigation report had concluded that he had a case to answer. The investigation report was attached. This was the first time the claimant had been the subject of disciplinary proceedings during his 29 years' service. The letter informed the claimant that a disciplinary hearing would take place on 11 August 2020. The letter went on:

The disciplinary hearing will consider the following allegations.

1. On 24/03/20 and 05/04/20 your unscheduled and unauthorised visits to two vulnerable adults constituted serious acts of insubordination.

2. On 24/03/20 and 05/04/20 your unscheduled and unauthorised visits to two vulnerable adults constituted a serious lack of care towards the clients, placing them at unnecessary risk of harm. You did not observe current C-19 guidelines.

3. In not complying with the planned rota schedule on these dates, you refused to obey a reasonable management instruction (i.e. to visit only those clients you were authorised and scheduled to visit by management).

47 The claimant was warned in the letter that the allegations constituted gross misconduct and his employment could be terminated if they were substantiated.

Disciplinary Hearing - 11 August 2020

48 The disciplinary hearing took place on 11 August as planned. It was conducted by Ms Baty using Microsoft Teams. Mr Penna presented his investigation report. The report had been reviewed by Ms Baty prior to the hearing. Dominic Ward-Horner, Acting HR Business Partner for Social Care, attended to provide procedural advice on the Respondent's disciplinary policy. The claimant was assisted by a GMB representative, Mr D Davies.

49 Section 15, of the disciplinary policy confirms, in relation to the disciplinary hearing that the employee will be entitled to:

Question the evidence of the management witnesses

(Exceptionally, in cases where a management witness has stated in writing that s/he does not wish to attend the hearing and/or have their identity disclosed to the employee subject to disciplinary action because of genuine fear of reprisal/intimidation, or at the Hearing Manager's discretion in other special circumstances; the employee and/or their representative may not be permitted to directly ask questions of a particular witness or

witnesses. In such cases the Hearing Manager may hear that witness's evidence in the absence of the employee and their representative, but they will normally have the opportunity to test the evidence, either through a shuttle system of written questions and answers or via video link).

50 Ms O'Connor, Mr Cooke and Ms Reid were all available to clarify their evidence if needed. They were not asked to do so, by the claimant or Ms Baty.

51 The notes of the meeting record that the claimant denied the charges as put to him. He stated: "*I don't accept them at all*". He stated that the visit to MB was an error, as set out above. He also confirmed:

That he poked his head around the door and saw a workman (possibly from 'Rentokil') carrying out his duties at the end of the hallway. PH stated that he didn't see MB but decided that he'd wait outside until the professionals were finished.

When PH approached and looked into the property, he said that he didn't have his full PPE on, but did have a hand gel dispenser on his belt. ….

As a means of describing how he would normally operate, PH described [his] authorised visit to AW: that he does not put on full PPE until he is inside the property (as this avoids cross-contamination from outside / bringing this into the property); he put his mask and gloves on as he entered AW's property (even though AW described him as 'looking like a bandit'; that he rang the agency for the key pad number to her door as he didn't want her to come to the door and expose herself to the risk of a fall or of catching Covid-19. PH sought to demonstrate that he normally would show due attention to the pandemic guidelines and safe working principles. PH used this example to demonstrate that the allegation inferring that he does not observe the Covid-19 was false. …

JB asked PH why he had not worn his mask and gloves when going in to visit MB. PH responded that he already had gel on his hands, but that to avoid contamination from outside he'd put his mask and gloves on as he went in to see the client. PH mentioned that he saw the workman inside and decided not to enter.

52 Mr Davies mentioned the claimant being nominated for an award for good service.

53 In relation to the visit to KM, the claimant stated:

PH responded that there had been some confusion around his visit to KM. PH explained that he had taken Thursday 2nd April and Friday 3rd April 2020 as annual leave (note – this is not recorded on SAP but is recorded in the diary). Instead PH mentioned working on the Sunday 5th, but stated that he couldn't remember visiting KM on this day. PH stated that he had a meeting scheduled with KM on Monday 30th March and was informed that the scheduled meeting for KM had been cancelled (for which her family were glad, as she wasn't very responsive); that instead, PH saw her on Wednesday 1st April 2020. PH asserted that he did not tell DP that he

visited her on Sunday 5th April, but instead had said "when I last went to see her" (which was Wednesday 1st April).

54 Later on the claimant reiterated in relation to the alleged visit to KM on 5 April 2020:

… that he honestly couldn't remember visiting KM on this day. PH added that if he had recorded this visit as occurring on this date on KM's case file then it must have been an error on his part. PH couldn't explain why he had recorded this date for the visit on file.

55 In relation to the allegation regarding PPE the claimant maintained:

… that he had not put anyone at risk of harm; that he was carrying more PPE on his visits than any of his colleagues, which made him feel guilty.

56 In relation to the third allegation the claimant stated:

In responding to this allegation, PH admitted to making errors. He stated that this was not deliberate, and that he didn't defy DP's instructions.

PH added that following the allegations he was transferred to JC's team for three months where he worked under very difficult circumstances packing masks, delivering food, and voluntarily working in parks at the weekends where he was out and about enforcing strict Covid-19 guidelines by helping to disperse gatherings and ensure social distancing. PH asserted that he shouldn't have been diverted to these duties if he was considered a liability.

Dismissal letter – 27 August 2020

57 Ms Baty concluded that the claimant had committed gross misconduct as alleged. The claimant was informed of this at the conclusion of the hearing. A letter was sent to the claimant by email on 27 August 2020, informing him that he was to be dismissed from 31 August 2020. The letter quoted extensively from the notes of the hearing. Amongst things the letter stated:

Your reasons for making the visit to MB's home were that you were confused by the displacement of the shift by one day; that you didn't fully enter the premises of MB.

However, I am gravely concerned by this response as there is evidence to suggest that you did enter the premises and at least two witnesses have confirmed that you mentioned doing this on the day after the first visit.

They also have evidenced that you mentioned to them about entering the property whilst not wearing PPE, whereas here you contest that you were wearing PPE (or at least, you state that you withdrew from the door of the property upon seeing other professionals within the property of MB). ….

At the beginning of the hearing, you were asked whether you accepted the allegations, and you denied them, stating categorically that you "didn't accept them at all". However, throughout the hearing you have not provided a coherent response to challenge the allegations levelled at you. Having listened to your responses, I would have expected you to have

either accepted the allegations in part or in whole, or to have denied the allegations and provided a compelling and persuasive case supported by solid evidence. However, instead you have changed your mind throughout and have then sought to plead a case for mitigation. You have accepted that you had made errors with regards to your visit to MB's property on 24th March and finally conceded that you must have recorded the incorrect date of 5th April on KM's case file for your visit to her residence (whilst still denying that you paid her a visit on that day). In short, you have sought to contest the allegations whilst explaining the allegations away as human errors on your part.

Your response to the allegations has been shifting, confused and at times incoherent. This has reflected upon the credibility of your response to a large degree. The first unauthorised visit to MB's residence could have been excused as an unacceptable error had you initially accepted the allegations and pleaded a case of mitigation. Similarly for the second visit, to initially argue in your response that you visited KM on a scheduled day (Wednesday 1st April), then to be prompted by management that you had written in the case file that you conducted the visit on the unscheduled day (Sunday 5th April); to state the next day in front of colleagues that you had visited KM the previous day; then, to state to me that you must have made an error in recording this date is implausible. As you denied the allegations then sought to plead mitigation, I can only construe from this that both visits were at best acts of human failing and negligence and at worst acts of insubordination against rigid and necessary management instructions. It also raises the question of whether you have sought to mislead this hearing, and I am disappointed to add that this is my belief.

It is my belief that to retain you in your role as a Day Opportunities Worker during the Covid-19 pandemic is an unacceptable risk to service users and staff. Accordingly, I find the three allegations levelled against you by management proven.

Appeal against dismissal

58 The claimant appealed the decision to dismiss him on 11 August 2020. He set out the following reasons for his appeal:

My visit to MB on the 24/03/20 was a genuine human error and I had practiced due diligence with regards to the governments guidelines regarding Health and Safety policy around the C19 pandemic when visiting vulnerable clients. I wore a mask as appropriate when entering MB property, and I also used hand sanitizer at the time I was at the premises.

Upon arriving at the clients shared front door, I noticed it was open. I entered the foyer area and further noticed that the client's door was ajar, I pointed my head around the door and saw a man in the hall who identified himself as a workman from Pest Control. In accordance with the Government Health and Safety policy I told the workman I would wait

outside to make sure I was not in violation of the 2-meter social-distances guidelines. I was wearing a mask at the time. I would like to point out, at no point did I come into contact with the client MB on the 24/03/20. I therefore deny the allegation that I put him at risk.

Furthermore, I refute the allegation that I challenged my Mangers DP, direct instructions and carried out an unscheduled visited to KM on the 05/04/20. My last scheduled visit to the client KM was in fact on Wednesday 01/04/20 as scheduled on the rota. I was off the following 2 days and not due back at the centre until the 06/04/20 when I logged my visit to the client KM and it was possible that I may have made an admin error. However, I have not seen any evidence to indicate I logged the visit to KM for the Sunday 05/04/20. I would also like to state that I have always followed the weeks rota and followed other additional requests when required.

As I have a unblemished record having worked for LBHF for 28 years I feel the decision is very harsh as it was a human error which I have never tried to deny. I have never refused to follow any instructions by any manager on duty and always worked to the set work rota. At no point in time did I intentionally put any client at risk of C19.

59 The respondent's disciplinary procedure provides, in relation to appeals:

The appeal will examine the grounds of appeal. It will not normally constitute a full rehearing and will be on one or more of the following grounds:

***Procedure** – failure to follow procedure had a material effect on the decision*

***The facts of the case** – the decision is unreasonable based on the facts presented to the Hearing Manager*

***Sanction** – no reasonable Hearing Manager would have come to such a harsh decision given the circumstances of the case*

***New evidence** – Only new evidence that could not reasonably have been raised at the disciplinary hearing and the absence of which had a material effect on the disciplinary decision, can be considered. The appeal is not to be used to re-argue the case with different evidence.*

60 Following receipt of the appeal, Mr D Ward-Horner of HR emailed Ms Baty to inform her of the appeal. The email stated, amongst other things, regarding the call of 23 April 2020:

There were no other witnesses to this call, but is Peter suggesting that this record attached is false? It would be best to obtain a copy of the diary entry from David to confirm that Peter logged his own visit to KM on Sunday 5th April.

4. In his interview, Peter doesn't deny visiting KM's home on Sunday 5th April either. This said, what are we to now make of Peter flatly denying that

he visited the property on that day in his appeal letter? Why didn't he deny this at his interview? (Is he seeking to mislead the Chair of the appeal hearing?).

61 The appeal hearing took place on 22 October 2020, again via Microsoft Teams (because of the pandemic). It was chaired by Mr Nicklin. Mr Nicklin confirmed that he did not conduct a rehearing of the case. He focussed on the grounds of appeal raised by the claimant. In that context however, he did undertake a review of the evidence.

62 The claimant attended with his TU representative, Mr Dave Davies. Advice on the procedure was provided by Pat Draper of the respondent's HR department. Ms Baty also attended, as the dismissing officer. The following is recorded in the notes of the hearing.

The allegation I didn't wear face mask or gloves, I admit I said that at the time but on reflection I was wrong, I did have a mask on as I had to take it off to phone John. I remember that now. At no time did I see MB, I just took a few steps inside and spoke to workman so no way did I put him at risk. As the Carer arrived I realised I had got the wrong day and I rang John Cooke, he said the visit should be the next day so I apologised for my error, I was looking at the wrong day. It was my silly mistake looking at the rota. John Cooke accepted that and I said I would revisit tomorrow.

63 In relation to the visits to MB the claimant stated:

… [I]t was a genuine silly mistake by me when looking at the rota. It was human error and John made no fuss about it, I said sorry, I did not carry out the visit anyway as workmen were there.

64 In relation to the visit to KM he stated:

The second allegation regarding KH. The 5/4/20 was a Sunday and I had visited on the previous Wednesday the 29/3, she had dementia and I realised she did not need a visit, it was a brief meeting. I had PPE on and she was fine, the family requested I visit. I was off then David Penna came back and gave me an instruction about visits and she was not on the list. At the Monday team meeting I saw the record and realised she was not on it and said "that is good as she had not needed a visit". Dave asked me why I had visited. I had mistakenly put the Sunday date down and not the Wednesday and I did not realise that. Dave rang me and said "you have gone and visited over the weekend and should not have and I have proof of this Sunday visit". I couldn't remember and got confused, I had put the wrong date in the book. I never went to see her.

65 Mr Nicklin took time to consider the representations made before reaching his decision. He decided that the appeal should be refused, for reasons set out in a letter sent to the claimant on 3 November 2020. He dealt with the points of the appeal as follows.

b) deny putting clients at risk; d) believe evidence considered at the disciplinary hearing was based on hearsay; f) wore PPE on your visits

66 Mr Nicklin concluded:

I do not accept your evidence that you now remember wearing a mask on the 24th March and I believe the evidence given by Philomena and Novi about your conversation with them the day after your visit is credible and supports allegation 2 above.

Your evidence on this crucial issue of protecting vulnerable clients during this pandemic is not credible.

You stated at the appeal their evidence is "hearsay" but it was direct evidence given by them to the investigating officer during the investigatory process. I do not regard this as hearsay.

I note there is no evidence in the investigation report regarding PPE not being worn on the visit on the 5th April 2020.

a) deny you were insubordinate; e) emphasise your visit to a client on the 24th March 2020 visit was a genuine error; g) refute you disobeyed instructions regarding the visit on 5th April 2020; h) made an administrative error on recording that date

67 Mr Nicklin concluded:

You are now saying that when you had a discussion with David Penna on Monday 6th April that referred to a meeting with a client the day before, i.e. Sunday 5th April you were actually referring to your prior visit on Wednesday 1st April and you were confused, yet you logged Sunday 5th April in the case file.

Again, I do not believe your evidence is credible. I understand that Management accepted your first visit on the 24th March 2020 was an error on your part, however you were present at a meeting where the importance of wearing PPE and only making scheduled meetings was reinforced by your manager. Therefore, on the balance of probabilities I am satisfied that allegation 3 is upheld.

c) apologise for rambling at the disciplinary hearing;

68 Mr Nicklin concluded:

Although you say you were "rambling" at the disciplinary hearing it is quite clear Jo Baty felt you were trying to mislead her.

i) would like your 28 years unblemished service to be taken into account; j) believe the sanction of gross misconduct was too harsh in the circumstances

69 Mr Nicklin concluded:

I have taken this into account in my deliberations and I agree that you were displaying a similar behaviour at the appeal hearing seeking to 'explain away' your responsibilities by your confusion and lack of memory of events, which I note, you now recall several weeks after the disciplinary hearing. I find your evidence in relation to this not credible.

70 Mr Nicklin's overall conclusions were as follows:

In summary I believe that for your visit to a client on the 24th March 2020 allegation 2 is substantiated but not 1 and 3. For your visit on the 5th April 2020 allegations 1 and 3 are substantiated but not allegation 2.

However, I am very concerned about your conduct throughout the investigation and disciplinary process. Your original response to the allegations and your changing evidence since then reflects detrimentally on your credibility and trustworthiness.

You had a responsible role visiting very vulnerable clients during this pandemic. It is clear to me that the use of PPE and the adherence to scheduled visits was paramount. You ignored both issues and tried to cover up your actions.

You have shown that it is inconceivable you can be trusted to carry out those important duties in the future hence my endorsement of Jo Baty's decision to dismiss you.

Relevant law

Unfair dismissal

71 The legal issues in an unfair dismissal case are derived from section 98 of the Employment Rights Act 1996. Section 98(1) provides that it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal, and that it is either a reason falling within subsection (2), e.g. conduct, or capability or for some other substantial reason.

72 For the purposes of s 98(1) and (2) ERA 1996, the reason for dismissal can be other than the reason given to the employee by the decision-maker. In *The Royal Mail Group Ltd v Jhuti [2019] UKSC 55*) the Supreme Court held:

> *if a person in the hierarchy of responsibility above the employee determines that she (or he) should be dismissed for a reason but hides it behind an invented reason which the decision-maker adopts, the reason for the dismissal is the hidden reason rather than the invented reason.*

This is referred to in the conclusions section below as 'The Jhuti principle'.

73 Section 98(4) provides:

> *… the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) 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 shall be determined in accordance with equity and the substantial merits of the case*.

74 The reasonableness of the dismissal must be considered in accordance with s.98(4). Tribunals have been given guidance by the EAT in *British Home Stores v Burchell [1978] IRLR 379; [1980] ICR 303*. There are three stages in a conduct dismissal:

74.1 did the respondent genuinely believe the claimant was guilty of the alleged misconduct?

74.2 did they hold that belief on reasonable grounds?

74.3 did they carry out a proper and adequate investigation?

75 Whereas the burden of proving the reason for dismissal lies on the respondent, the second and third stages of *Burchell* are neutral as to burden of proof and the onus is not on the respondent (*Boys and Girls Welfare Society v McDonald [1996] IRLR 129, [1997] ICR 693*).

76 In deciding whether it was reasonable for the respondent to dismiss the claimant for that reason, case law has determined that the question is whether the dismissal was within the so-called 'band [or range] of reasonable responses ('the range'). 'The range' does not equate to a perversity test. See *Iceland Frozen Foods Ltd v Jones [1982] IRLR 439, [1983] ICR 17 at 24-25*; *Foley v Post Office [2000] ICR 1283 at 1292D – 1293C*, per Mummery LJ, with whom Nourse and Rix LJJ agreed.) The Employment Tribunal must not simply consider whether they think that the dismissal was fair and thereby substitute their decision as to what was the right course to adopt for that of the employer. Instead, the Tribunal must determine whether the decision of the employer to dismiss the employee fell within the band of reasonable responses which '*a reasonable employer might have adopted'*. An ET must focus its attention on the fairness of the conduct of the employer at the time of the investigation and dismissal (or any internal appeal process (*West Midlands Co-operative Society Ltd v Tipton* [1986] 1 AC 536)) and not on whether in fact the employee has suffered an injustice. (The logical conclusion of which is that a Tribunal might consider that the dismissal was unjust, but was nevertheless 'fair'.

77 The range of reasonable responses test applies as much to the question of whether an investigation into suspected misconduct was reasonable in all the circumstances as it does to other procedural and substantive aspects of the decision to dismiss a person from their employment for a conduct reason. The objective standards of a reasonable employer must be applied to all aspects of the question whether an employee was fairly and reasonably dismissed, including the investigation (*Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23, CA*).

78 In *Strouthos v London Underground Ltd [2004] IRLR 636* at para 38 the Court of Appeal held (per LJ Pill):

> *it does appear to me to be basic to legal procedures, whether criminal or disciplinary, that a defendant or employee should be found guilty, if he is found guilty at all, only of a charge which is put to him.*

79 In reaching their decision, tribunals must also take into account the Acas Code on Disciplinary and Grievance Procedures. By virtue of section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992, the Code is admissible in evidence and if any provision of the Code appears to the tribunal to be relevant to any question arising in the proceedings, it shall be taken into account in determining that question. A failure by any person to follow a provision of the Code does not however in itself render them liable to any proceedings.

80 For misconduct or where there are capability issues, it may be appropriate to give employees warnings and opportunities to improve their behaviour. See the Acas guidelines at para 19:

Where misconduct is confirmed or the employee is found to be performing unsatisfactorily it is usual to give the employee a written warning. A further act of misconduct or failure to improve performance within a set period would normally result in a final written warning.

81 See also the obiter comments of Lord Denning in *Retarded Children's Aid Society v Day [1978] IRLR 128*:

It is good sense and reasonable that in the ordinary way for a first offence you should not dismiss a man on the instant without any warning or giving him a further chance.

Lord Denning explained the exception was an employee

who is determined to go on in his own way.

82 There was a brief discussion during submissions about the comments by Lady Hale in *Reilly v Sandwell Metropolitan Borough Council [2018] UKSC, IRLR 558.* Lady Hale provided a separate opinion, paragraphs 32 to 34 of which state:

33 Nor have we heard any argument on whether the approach to be taken by a tribunal to an employer's decisions, both as to the facts under s 98(1)–(3) of the Employment Rights Act 1996 and as to whether the decision to dismiss was reasonable or unreasonable under s 98(4), first laid down by the Employment Appeal Tribunal in British Home Stores Ltd v Burchell ***[****1978] IRLR 379 and definitively endorsed by the Court of Appeal in* Post Office v Foley, HSBC Bank plc (formerly Midland Bank plc) v Madden *[2000] IRLR 827, is correct. As Lord Wilson points out, in para [20] above, the three requirements set out in* Burchell *are directed to the first part of the inquiry, under s 98(1)–(3), and do not fit well into the inquiry mandated by s 98(4). The meaning of s 98(4) was rightly described by Sedley LJ, in* Orr v Milton Keynes Council *[2011] EWCA Civ 62**,** [2011] IRLR 317, at para [11], as 'both problematical and contentious'. He referred to the 'cogently reasoned' decision of the Employment Appeal Tribunal (Morison J presiding) in* Haddon v Van den Burgh Foods Ltd *[1999] IRLR 672, which was overruled by the Court of Appeal in* Foley*. Even in relation to the first part of the inquiry, as to the reason for the dismissal, the* Burchell *approach can lead to dismissals which were in fact fair being treated as unfair and dismissals which were in fact unfair being treated as fair. Once again, it is not difficult to think of arguments on either side of this question but we have not heard them.*

34 There may be very good reasons why no-one has challenged the Burchell *test before us. First, it has been applied by employment tribunals, in the thousands of cases which come before them, for 40 years now. It remains binding upon them and on the Employment Appeal Tribunal and Court of Appeal. Destabilising the position without a very good reason would be irresponsible. Second, Parliament has had the opportunity to clarify the approach which is intended, should it consider that* Burchell *is wrong, and it has not done so. Third, those who are experienced in the field, whether acting for employees or employers, may consider that the approach is correct and does not lead to injustice in practice.*

> *35 It follows that the law remains as it has been for the last 40 years and I express no view about whether that is correct.*

83 There is a thought-provoking article in the Industrial Law Journal Volume 50 Number 2, June 2021, at page 226 in which the above passages are considered and the potential pitfalls with the range of reasonable test are set out. Whilst I have noted with interest the arguments set out there, I have reminded myself that unless and until the issue reaches the Supreme Court, the law remains as it has for decades and that is the law I have applied in this judgment.

Wrongful dismissal

84 In a wrongful dismissal claim, the sole question is whether the employee committed a repudiatory breach, entitling the employer to dismiss them without notice. An act of gross misconduct is a repudiatory breach. In the case of *West London Mental Health NHS Trust v Chhabra [2014 IRLR 227*, para. 13.4.1 of the Trust's disciplinary policy described gross misconduct in the following terms: *'Some instances of misconduct/poor performance will be so serious as to potentially make any further relationship and trust between the Trust and the employee impossible*'. In finding that the facts of the case did not support a finding of gross misconduct under that clause, Lord Hodge concluded at 35:

> *… I do not think that the findings of fact and evidence, which Dr Taylor recorded, were capable when taken at their highest of supporting a charge of gross misconduct. Paragraph 13.4.1 of policy D4 speaks of conduct so serious 'as to potentially make any further relationship and trust between the trust and the employee impossible.' This language describes conduct which could involve a repudiatory breach of contract:* Dunn v AAH Ltd *[2010] IRLR 709, paragraph 6;* Wilson v Racher *[1974] IRLR 114. There is no material in Dr Taylor's report to support the view that the breaches of confidentiality which she recorded, including the former secretary's allegations, were wilful in the sense that they were deliberate breaches of that duty. In my view they were qualitatively different from a deliberate breach of confidentiality such as speaking to the media about a patient. [emphasis added]*

Conclusions

85 This judgment deals first with the unfair dismissal claim, and secondly with the wrongful dismissal claim.

Unfair dismissal

86 In an unfair dismissal claim, the first question is whether or not the employer has proved a potentially fair reason for the dismissal. The second question is whether or not the dismissal was reasonable or unreasonable in all the circumstances. Those two issues will be dealt with in turn.

(1) Reason for dismissal

87 Just before the hearing, the claimant submitted a supplementary witness statement, alleging that the real reason that Mr Penna begin an investigation against him, was unreasonable bias or antagonism towards him. This was the first time in the proceedings that such an allegation had been made.

88 Mr Penna was cross-examined in relation to that witness statement, and I am satisfied from his responses that he did not instigate the investigation because of bias or antagonism towards the claimant. At its highest, it appears that there were occasions when Mr Penna and the claimant did not enjoy an easy working relationship. I am however satisfied that Mr Penna instigated the disciplinary process because he considered that the claimant was guilty of gross misconduct. This is not therefore a case on which, on ***Jhuti*** principles, it would be reasonable to conclude that the real reason for the dismissal was any alleged antagonism by Mr Penna towards the claimant, rather than the claimant's alleged conduct. The circumstances in which The Jhuti Principle is likely to come into play are likely to be rare. The claimant has not in my judgment come close to establishing the facts necessary to invoke that principle.

89 Further, I am satisfied that both Ms Baty and Mr Nicklin considered that the claimant was guilty of gross misconduct. That is the reason Ms Baty dismissed him, and why Mr Nicklin rejected the claimant's appeal. (Although he concluded in relation to allegations 1 and 3 that they were not made out in relation to the visit to MB on 24 March 2020. Whereas, in relation to KM, allegations 1 and 3 were made out but not allegation 2 – see paragraph 70 above).

(2) Reasonableness

90 Having concluded that the reason for the claimant's dismissal was conduct, the reasonableness of the dismissal for that reason falls to be considered, applying the principles set out above. For shorthand, when referring to the range of reasonable responses below, I will simply refer to 'the range'.

(a) Genuine belief

91 Having considered the witness evidence of Ms Baty and Mr Nicklin, and heard live evidence from them, I have no difficulty in concluding that they did have a genuine belief that the misconduct alleged, had occurred (save that Mr Nicklin took a narrower view, as set out at paragraph 70 above).

(b) Reasonableness of the investigation

92 I conclude that the investigation was not within the range. Sufficient investigation was not carried out, bearing in mind the potential seriousness of the charges and the impact of the dismissal on the claimant, an employee with 29 years' service. One of the significant flaws in the investigation was the failure by Mr Penna to include the 5 April 2020 record made by the claimant of the visit to KM in his report. Similarly, there was a failure to gather and consider other records of visits by the claimant to other service users during w/c Tuesday 31 March 2020. The failure to do so brought the investigation outside the range.

93 In particular, those records would have shown whether or not the claimant carried out the other visits he was due to carry out that week, on the days in question (subject to any mistakes in the dates, given that such records were

being completed retrospectively). Were there to be a record for a visit to KM on 1 April, as well as on 5 April, that would suggest that the claimant had indeed carried out two visits to KM that week, rather than the one visit which was authorised to take place on 1 April. If there was only the one record, that would suggest only one visit actually took place. Further, if there were records of other visits to the other two service users the claimant was due to visit on 5 April, that would suggest that the claimant had indeed carried out appropriate visits to them on the day he was required to do so. In my judgment, Mr Penna's failure to carry out such investigation is another significant flaw.

94 The investigation was also flawed because Mr Penna simply referred in his conclusions to those parts of the evidence which supported his view that there was a case to answer. There was no attempt by Mr Penna to put forward a more nuanced and balanced report by referring to parts of the evidence which did not in fact support that conclusion. In particular, the supplementary statement/email of 13 July 2020 from Jon Cooke to Mr Penna, which provided some support for the claimant's argument that his visit to KM was authorised; and that the claimant did not mention to Mr Cooke that he had been inside MB's property. Nor were Ms O'Connor or Ms Reid asked whether the claimant, on 6 April 2020, admitted visiting KM on 5 April. Yet further, the interview notes with Ms Reid do not appear to have been included in the disciplinary hearing pack – they were in any event not included in the tribunal bundle. Finally, the allegation into the failure to use PPE was not part of the original allegation but was included in the disciplinary hearing allegations, without the claimant having been given the opportunity to comment further.

95 Taken together, these flaws bring the investigation outside the range. In my judgment, the failure to obtain and include with the disciplinary investigation report, the records by the claimant of visits to clients in week commencing 31 March 2020 bring the investigation outside the range, even without the other matters being considered. When the other flaws are taken into account, that is even more the case.

96 It was also submitted on the claimant's behalf that the length of the investigation, which took approximately three months to conclude, after the matters which led to the charges being laid, was too long. In the circumstances of the pandemic however, I do not consider that the investigation did take too long. However, the fact that witnesses, and in particular, Ms Reid and Ms O'Connor were not asked about the matters until some three months or so after they had occurred, was relevant, and shall be considered further below, when looking at the reasonableness of the decision.

97 In relation to the disciplinary hearing itself, there was a failure by Ms Baty to ask any of the witnesses any questions at the disciplinary hearing, despite the confusion as to whether the claimant entered MB's flat or not; and what he said about not wearing PPE. It should have been appreciated by Ms Baty that the witness statements were brief, potentially ambiguous, and had been taken over three months after the events being considered.

98 For example, Ms Reid's statement simply said:

Peter said that the flat was very smoky and stuffy, and once he saw there were several people already visiting including, MB's carer and pest control, he left and called Jon Cooke.

99 The decision-makers relied on the reference to the flat being smoky and stuffy as evidence that the claimant had indeed entered MB's flat. It was important, given what the claimant said about that visit, to clarify the context in which that statement was made and ask the witness for further details.

100 Ms O'Connor's statement simply says:

When he entered MB's flat there were other people there. He said he hadn't put on his PPE, and that when he saw the other people he left immediately.

101 Again that appears to have been taken by the decision-makers as direct evidence that the claimant entered MB's flat; whereas the brief evidence the statement contained could be equally consistent with the claimant just entering the communal area. Given that the claimant's employment was at stake, such matters should have been clarified with the witnesses concerned and the claimant given the chance to comment further. It would have been very simple to do so when the witnesses were available by video link and would have taken little time.

102 Further, it was stated during the disciplinary hearing by the claimant's union representative that the claimant had been nominated as a Covid hero on the Council website. There was no checking of that by Ms Baty.

103 Taken together with the other flaws identified above in Mr Penna's investigation, these matters take the whole of the investigation outside the range.

104 Lastly, but by no means least, the way the charges were put to the claimant meant that the investigation was outside the range. This is a significant matter which will be discussed at greater length, in relation to the reasonable grounds for belief question. That issue is considered next.

(c) Reasonable grounds for belief

105 In concluding that the respondent did not have reasonable grounds for belief in the misconduct which the claimant was charged with, I have taken particular account of the way that the charges were put to the claimant. The 11 August 2020 invite to disciplinary hearing letter states:

The disciplinary hearing will consider the following allegations.

1. On 24/03/20 and 05/04/20 your unscheduled and unauthorised visits to two vulnerable adults constituted serious acts of insubordination.

2. On 24/03/20 and 05/04/20 your unscheduled and unauthorised visits to two vulnerable adults constituted a serious lack of care towards the clients, placing them at unnecessary risk of harm. You did not observe current C-19 guidelines.

3. In not complying with the planned rota schedule on these dates, you refused to obey a reasonable management instruction (i.e. to visit only those clients you were authorised and scheduled to visit by management).

106 It should have been clear on the basis of the disciplinary investigation meeting and disciplinary hearing, and it does not in fact appear to be in dispute, that the claimant's visit to MB on 24 March 2020 was a mistake. As a result, the investigation in relation to that matter was fundamentally flawed from the outset. Whilst the range does not impose a perversity test, I conclude in any event that no reasonable employer could reach the view that mistakenly visiting MB on 24 March was an act of insubordination or amounted to a refusal to obey a reasonable management instruction. Mr Nicklin held as much on the appeal. The belief of Ms Baty that those particular charges were made out in relation to the visit to MB on 24 March 2020 was perverse.

107 When questioned about this issue at the hearing of this claim, Mr Penna argued that not listening to an instruction could be insubordination. That was not however the way that the charge was put to the claimant. Similarly, Mr Penna argued that if the claimant had not paid proper attention to a management instruction, then he was disregarding that instruction. Again, that was not the way the charge was put. Mr Penna therefore proceeded on a fundamental flawed premise in relation to the MW allegation.

108 The situation is more nuanced in relation to the alleged visit to KM on 5 April 2020, but again at worst, if the claimant visited KM at all on that day (as to which see further below) this was on the claimant's account a mistake by him because he thought JC had instructed him to do so. When asked about the alleged visit during a telephone call on 23 April, nearly three weeks' later, no reference was made to the notes of any visits during that week or to the rota for that week. The interview proceeded on the basis that Mr Penna's recollection of what the claimant allegedly told him on 6 April (i.e. that he had visited KM the day before) must be true.

109 That blinkered approach was compounded by the approach of Ms Baty and Mr Nicklin. I have referred above to the failure to obtain, consider and put to the claimant the notes of other visits made by him to clients w/c 31 March, in conjunction with the rota. If necessary and relevant, such further evidence can be considered at the remedy hearing in relation to any ***Polkey*** arguments. For example, if there are notes of visits to KM on both 1 April and 5 April, then it is open to the respondent to argue that any such further investigation would have made no difference to the outcome.

110 Without considering such evidence, the belief of Ms Baty and Mr Nicklin that the misconduct had occurred in relation to the KM visit had alleged was within the range. The only evidence was what Mr Penna had reported that the claimant had said; and the note made by the claimant which on his account at the disciplinary hearing and the appeal he had wrongly dated, but which was not before the disciplinary panel. By the date of the disciplinary hearing, the claimant's position was clear – that he visited KM on 1 April as instructed, not on 5 April instead/in addition. But that position was not checked against the other notes made by the claimant on 6 April in relation to the visits he was requested to make during w/c Tuesday 31 March, both to KM on 1 April and to the two service users he was scheduled to visit on 5 April.

111 Ms Baty's overall conclusion – see paragraph 57 above – was to the effect that the claimant should have admitted the charges and pleaded mitigation or put forward solid evidence forward to refute them. The dismissal letter states:

> *Having listened to your responses, I would have expected you to have either accepted the allegations in part or in whole, or to have denied the allegations and provided a compelling and persuasive case supported by solid evidence. However, instead you have changed your mind throughout and have then sought to plead a case for mitigation. … Similarly for the second visit, to initially argue in your response that you visited KM on a scheduled day (Wednesday 1st April), then to be prompted by management that you had written in the case file that you conducted the visit on the unscheduled day (Sunday 5th April); to state the next day in front of colleagues that you had visited KM the previous day; then, to state to me that you must have made an error in recording this date is implausible. … As you denied the allegations then sought to plead mitigation, I can only construe from this that both visits were at best acts of human failing and negligence and at worst acts of insubordination against rigid and necessary management instructions. It also raises the question of whether you have sought to mislead this hearing, and I am disappointed to add that this is my belief.*

112 During cross examination of Ms Baty the following exchanges took place:

> Q. *Do you think people can be insubordinate consciously or sub-consciously? A. You had to ensure people were operating according to the code of conduct and following rules.*
>
> Q. *Can a person make a mistake and be insubordinate. A. Yes.*
>
> Q *He said it was a mistake the 24 March visit?* A. *At first he denied, then he said it was a mistake. [Ms Baty maintained that if a person made a mistake with the rota, that is insubordinate.]*
>
> [Regarding the alleged visit to KM on 5 April] Q. The o*nly evidence before you indicated it happened by mistake? A. Yes think he did make a mistake but once again, magnitude of that mistake was extremely serious. He was given guidance what to do what not to do, failed to operate within that duty of care.*
>
> *Q Could it not be, the claimant took responsibility for actions he did take whilst maintaining that allegations were wrong? A. Perhaps.*
>
> *Q. That he admitted to mistakes, but not insubordination? A. Possibly.*

113 There is a fundamental inconsistency in Ms Baty insisting that the claimant should have admitted the charges, whilst accepting that both the 24 March and 5 April visits were mistakes. It is clear from the decision letter that this fact weighed heavily in Ms Baty's mind, in coming to the decision to dismiss. Since it was based on an unreasonable premise, the belief that the misconduct had occurred was not a reasonable one; it was outside the range.

114 As for the appeal, during cross examination Mr Nicklin stated regarding the visit to KM:

> *Q. You found that allegations 1 and 3 were true, regarding the visit to KM on 5 April – that they were serious acts of insubordination/refusal to obey reasonable management instruction? A. Correct and I found that on the facts before me. [Note Mr Nicklin was satisfied that the claimant carried out the visit to KM on 5 April 2020 not 1 April 2020 - see his witness statement at #10]. …*

Q. *The claimant would not make an entry in the log if he was deliberately defying the rules? A. I suppose not.*

Q. If the claimant carried out the visit under the belief JC told him to, then he was not deliberately disobeying management instructions? A. Possibly not.

Q. *If the claimant thought the client [KM] was allocated a visit then he was not deliberately disobeying? A. Not necessarily, no.*

Q. If someone says they were making a visit they thought J Cooke told them about, [they are] not deliberately disobeying? A. No.

Q. So no evidence to suggest it was made deliberately? A. Well, he went there.

115 These exchanges further support the view that the belief by Ms Baty and Mr Nicklin that charges one and three were made out in relation to the visit to KM on 5 April 2020, if indeed the visit took place at all on that day, were outside the range.

116 Further, the content of the note made by the claimant, which was not apparently considered by Ms Baty or Mr Nicklin, shows that the claimant agreed with Mr Penna that visits to KM were not necessary. The note states:

Centre has decided to stop visits to [KM] due to minimal social contact as [KM] was considered not a priority visit to prevent the spread of Covid-19'.

Further, the note of the disciplinary investigation meeting confirms:

'*She [KM] was not getting any benefit from my visits, <u>plus with social distancing, we were putting her at risk.</u> ….* [Emphasis added]

117 That does not suggest that the claimant was a maverick, determined to go his own way, as Ms Baty suggested during the hearing. Rather, such comments confirm that the claimant understood why the decision to stop visits to the service user KM had been made – that is, to minimise the risk to her during the pandemic. For Ms Baty to believe otherwise in those circumstances was unreasonable. Had such documents been put before the disciplinary hearing, which in my judgment they should have been, the conclusion in relation to these two charges may well have been different.

118 The failure to properly frame the charges to the claimant arising out of the alleged facts meant that the investigation was fundamentally flawed from the outset because it proceeded on a false premise. This appeared to result from the respondent trying to fit the allegations into the list of misconduct/gross misconduct in the disciplinary policy instead of properly considering the facts and framing the charges correctly. This was compounded by the failure to separate out the charges relating to MB and KM which further exacerbated the unfair way that the hearing proceeded.

<u>Failure to wear PPE on 24 March 2020</u>

119 The claimant gave clear evidence at the disciplinary hearing regarding his use of PPE during the visit to AW. The dismissal letter records the claimant's evidence in this regard as follows:

As a means of describing how you would normally operate, you described this authorised visit to AW: that you do not put on your full PPE until you

are inside the property (as this avoids cross-contamination from outside / bringing this into the property); you put your mask and gloves on as you entered AW's property (even though AW described you as 'looking like a bandit'; that you rang the agency for the key pad number to her door as you didn't want her to come to the door and expose herself to the risk of a fall or of catching Covid-19. You sought to demonstrate that you normally would show due attention to the pandemic guidelines and safe working principles. You used this example to demonstrate that the allegation inferring that you do not observe the Covid-19 is false.

That evidence was not disputed. There was no evidence to suggest that the claimant was not wearing PPE on any other visits. There was only ever one allegation in that regard.

120 It was put to Ms Baty during cross examination that this was strong evidence that the claimant was complying with PPE requirements when visiting vulnerable service users. Ms Baty replied to the effect that it did, but he gave different evidence in the investigation.

121 As also note above, in relation to the alleged failure to wear PPE:

[T]here is evidence to suggest that you did enter the premises and at least two witnesses have confirmed that you mentioned doing this on the day after the first visit.

They also have evidenced that you mentioned to them about entering the property whilst not wearing PPE, whereas here you contest that you were wearing PPE (or at least, you state that you withdrew from the door of the property upon seeing other professionals within the property of MB).

122 Ms Baty reached no specific conclusion as to whether the claimant fully entered MB's flat, just entered the communal entrance area, or just put his head around the door of MB's flat. Further, only one witness gave evidence that the claimant had said that he was not wearing PPE when he entered the flat, not two. That statement was signed on 14 July 2020, nearly 4 months after the events referred to and was hearsay evidence. It was accepted by Ms Baty as the truth (presumably partly because of her incorrect conclusion that two witnesses were saying it, not one).

123 Taking the foregoing paragraphs into account, I conclude that Ms Baty's belief that this allegation was proven was outside the range. In coming to that conclusion, I have reminded myself that I must not fall into 'the substitution mindset' and that in some circumstances it would be all too easy to decide this issue on the basis of what I would have decided, having heard the evidence, rather than carrying out the appropriate review of the employer's decision, on the basis of the ***Burchell*** test. I am satisfied that it is the latter that I am doing in the circumstances, not the former. Further, I am not reaching my conclusion on this matter by looking at this issue on its own, but by considering all of the flaws in the investigation, and the other reasons set out above as to why the belief in the misconduct alleged was not reasonable. All of those errors only served to compound the flaws in the decision making on this issue too. Ms Baty's conclusion that the claimant's evidence was not credible cannot be divorced from her unreasonable conclusion that he should have admitted the disciplinary allegations, which I have concluded were fundamentally flawed from the outset for the reasons set out above.

124 Mr Nicklin's conclusion in relation to this matter is more understandable, given the claimant's change of position, between the disciplinary hearing and the appeal hearing that he did have a mask on when he entered the premises. Mr Nicklin's appeal proceeded by way of review however, rather than a complete re-hearing. Given the fundamental flaws identified above in relation to both the investigation and as to whether there were reasonable grounds for the belief, Mr Nicklin's review did not remedy the unfairness already identified above.

125 Mr Nicklin also repeated the mistake of Ms Baty that both Ms Reid and Ms O'Connor confirmed that the claimant had admitted not wearing PPE, not just Ms O'Connor. He unreasonably concluded that Ms O'Connor's evidence was not hearsay – it clearly was, in relation to the question as to whether the claimant wore PPE on the visit itself. Mr Nicklin failed to consider the other evidence regarding the visit to AW which was evidence that the claimant did understand the importance of wearing PPE. He failed to consider whether the claimant fully entered the flat or just put his head around the door of MB's flat etc – see below. For all those reasons, Mr Nicklin did not have reasonable grounds for his belief that this allegation was made out; it was outside the range.

126 Yet further, neither Ms Baty nor Mr Nicklin appear to have reached any conclusion in relation to the claimant's evidence that he put PPE on when as he formally entered a service user's property, particularly the mask. At this stage of the pandemic, it was open to reasonable debate whether to put on a mask when in a car travelling to a service user's flat; the garden leading to a residence; the front entrance to a communal building; the shared hallway; or the entrance to the flat. It was reasonable for the claimant to come to his own conclusion on that matter in the absence of clear guidance about it. The attitude taken appeared to be that the claimant should have known the correct answer to those questions, without any further guidance.

127 The case was put for the respondent, on the basis that these are highly uncertain times, that the safety of clients was paramount, and that any breach of the guidance given was unacceptable. I will consider that further in relation to the question as to whether or not the dismissal itself was within the range.

128 To conclude this section, for all of the reasons given above, it is my view that the belief of Ms Baty and Mr Nicklin that the disciplinary allegations were made out, on the balance of probabilities, was outside the range.

The range of reasonable responses

129 Given the above conclusions in relation to the investigation, and the grounds for belief, the question as to whether or not the dismissal for the reason given by the respondent was within the range of reasonable responses does not strictly speaking arise. For all of the reasons above, I would have concluded in any event that dismissal was outside the range.

Wrongful dismissal

130 I uphold the claimant's claim for wrongful dismissal, on the basis that his actions did not amount to gross misconduct.

131 I find that, on the balance of probabilities, the claimant put his head around the door of service user MB's flat on 24 March 2020, without a mask on. In so

doing, the claimant did not commit an act of gross misconduct. At that stage in the pandemic, there was a reasonable debate to be had as to when staff should put their masks on.

132 Further, the claimant's attendance at MB's flat on 24 March 2020 was due to a genuine error on his part; it was not deliberate. Again, in the light of that finding, I do not consider that it amounted to misconduct at all, let alone gross misconduct.

133 In relation to the visit to KM, I find on the balance of probabilities that the claimant visited KM on 1 April 2020, in line with the rota. In light of the note made by the claimant about that visit, which I find was wrongly dated 5 April 2020, it was clear that the claimant agreed with the decision that visits to KM should cease, since they were not needed, and therefore created an unnecessary risk for her. Carrying out a visit to a service user on the date instructed in line with the rota is not an act of misconduct at all, let alone gross misconduct.

Contribution

134 Mr Harding argued that the claimant contributed to his dismissal because of the following.

134.1 Attending MB's flat on 24 March 2020 without PPE or with a mask around his chin.

134.2 He changed his evidence afterwards about wearing a mask.

134.3 He wrongly dated the log on 5 April, about the visit to KM. If he had not mis-dated the log, he would not have been in such difficulties;

134.4 The claimant's evidence was incoherent contradictory and imprecise;

134.5 He did not tell Jon Cooke afterwards about the mask;

134.6 Even at the hearing, the claimant was unwilling to accept the gravity of entering the foyer without a mask over his nose and mouth.

135 On the basis of the above, Mr Harding argued that the claimant significantly contributed to his own dismissal by 80 to 90 per cent. He was, it was argued, entirely the architect of his own downfall.

136 Langstaff P, as he then was, in *Steen v ASP Packaging Ltd [2014] ICR 56, EAT* advised tribunals (in relation to reductions of both basic and compensatory awards) to address in their deliberations and their judgment four questions - (1) what was the conduct in question? (2) was it blameworthy? (3) (in relation to the compensatory award) did it cause or contribute to the dismissal? (4) to what extent should the award be reduced?

137 I conclude that the first three matters relied on by Mr Harding above did happen and that such conduct was, to a minor extent, blameworthy. As for the fourth, the claimant himself was faced with allegations which were inherently contradictory and he could not understand in the circumstances why his job was on the line. It was in the circumstances understandable that his evidence appeared contradictory; further, the conclusion that the evidence was contradictory was partly based on the charges being improperly framed. As for the fifth, the claimant did not tell Jon Cooke about not wearing a mask as he did not see it as an issue and I do not consider that to be blameworthy.

As for the sixth, I do not consider that is blameworthy either. I refer to my conclusion above at paragraph 126, in relation to the wrongful dismissal claim above, where I conclude that there was a reasonable debate to be had as to when to put a mask on. In any event, what the claimant said at the hearing cannot have contributed to his dismissal.

138 As to the extent to which the award should be reduced, I refer to my findings above the relation to the wrongful dismissal claim, and to the findings I make in relation to the seriousness of the conduct. Whilst I accept that since there was some blameworthy conduct which contributed to the claimant's dismissal, some reduction should be imposed, I consider that only a small reduction is appropriate in the circumstances of this case. I therefore limit the reduction in compensation to ten per cent.

Employment Judge A James
London Central Region

Dated 19 October 2021

Sent to the parties on:

19/10/2021.

For the Tribunals Office