EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4109705/2021

Heard by CVP on 4 and 5 October 2021

Employment Judge J D Young

Mr David Lewis	**Claimant** **Represented by** **Mr Mark Allison,** **Advocate** **Instructed by** **Ms M Gribbon,** **Solicitor**
The Benriach Distillery Company Limited	**Respondent** **Represented by** **Mr Gavin McQueen,** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the claimant was unfairly dismissed in terms of Section 98 of the Employment Rights Act 1996 and the Employment Tribunal orders that the respondent shall pay to the claimant a monetary award of £23,978.19 by way of compensation. (The prescribed element is £11,426.34 and relates to the period 25 February 2021 to 9 November 2021. The monetary ward exceeds the prescribed element by £12,551.85).

REASONS

Introduction

1. The claimant presented a claim to the Employment Tribunal complaining that he had been unfairly dismissed by the respondent and separately that he was wrongfully dismissed and was thus due notice pay. The respondent admitted dismissal but denied it was unfair. They maintained that the claimant was guilty of gross misconduct in that his attendance at work on 8 February 2021 breached the Scottish Government's and the respondent's COVID guidance on self isolation. On account of that breach no notice pay was due. It was maintained that all appropriate procedures had been followed in the dismissal and even if that was not the case the claimant would have been dismissed in any event and no award of compensation should be made.

2. The issues for the Tribunal were:-

    (i) What was the reason for dismissal?

    (ii) Was that a potentially fair reason for dismissal?

    (iii) If misconduct did the respondent believe the claimant guilty of misconduct; had in mind reasonable grounds to sustain that belief, and carried as much investigation into the matter as was reasonable?

    (iv) If so, was dismissal for that reason within the band of reasonable responses?

    (v) Was there procedural unfairness?

    (vi) If the claimant succeeds was there contributory conduct?

    (vii) If the claimant succeeds on either substantive or procedural unfairness what compensation should be awarded in respect of the unfair dismissal?

    (viii) Was the claimant wrongfully dismissed?

    (ix) If so, what sums should be awarded by way of damages?

Documentation

3. For the hearing the parties had helpfully liaised in providing a joint Inventory of Productions paginated 5/163 (J5/163).

The hearing

4. A preliminary issue for the hearing related to the application for the claimant that he be allowed to give his evidence in chief by way of a witness statement. No order had been made for use of witness statements in the case.

5. By application of 20 September 2021 permission was sought for the claimant's evidence in chief to be presented by witness statement. The respondent objected to that application and after further comment from the claimant's representative the application was refused as on the grounds advanced it was not considered that the interests of justice required use of a witness statement. However it was directed that the claimant's representative may renew the application and if so be determined at the hearing. In the event further application was to be made then a witness statement required to be lodged with the Tribunal and intimated to the respondent's representative no later than 4pm on 30 September 2021 together with any medical certificate supporting the application. Those directions were complied with.

6. At the hearing submission was made that the claimant's evidence in chief should be allowed by way of the witness statement which had been lodged. This was to ensure an effective contribution by the claimant who had been certified as unfit for work from 4 March 2021 by reason of "anxiety". Reference was made to the medical certificates (J139/142) and a further medical certificate produced dated 17 September 2021. The claimant had been prescribed medication for his condition which he was taking and was extremely anxious about these proceedings. He had attended counselling sessions. It was not considered that there was any particular dispute on the facts in the case but more on interpretation of events. It was important that the claimant be able to give a clear account of his position and he would be prejudiced were he required to give evidence orally. There was some advantage to the respondent in having

advance notice of the evidence of the claimant. In the objection made the respondent had not identified that there would be any prejudice but simply that there should be consistency amongst the witnesses in the presentation of evidence.

7. In response the respondent maintained their objection on the basis that this was an inconsistent way of proceeding. The claimant's anxiety could be dealt with by more frequent breaks and it was a matter of fairness that all witnesses were treated the same.

8. I acceded to the request that the claimant provide his evidence in chief by means of a witness statement. I considered that enough had been produced to establish that the claimant did suffer from anxiety having been signed as unfit for work for that reason for over a lengthy period. While all witnesses would be anxious about giving evidence it was a more pronounced matter where an individual had been certified as unfit for work by his GP. It was important that the claimant gave an effective contribution. No prejudice had been identified by the respondent. The claimant would still be cross examined. The respondent did have advance notice of the claimant's evidence in chief and were aware of any factual disputes and it was not claimed that use of a statement might advantage the claimant in that respect The overriding objective advises that a Tribunal should deal with a case fairly and justly including so far as practicable "*avoiding unnecessary formality and seeking flexibility of the proceedings".* I considered this was an example of allowing that flexibility in approach.

9. At the hearing evidence was given by Laura Grew who held the position of Strategic Planning and Procurement Manager with the respondent since May 2019; Lucas Avery who held the position of Production Operations Director with the respondent since approximately September 2018; and the claimant who adopted as true and accurate his witness statement dated 22 September 2021 and which statement extended to 15 pages. He also answered questions in cross examination. From the relevant evidence led, admissions made and documents produced I was able to make findings in fact on the issues.

Findings in fact

10. The respondent produces and sells Scotch Whisky employing around 118 employees at sites across Scotland. The claimant was employed as a Fork Lift Truck Driver in the respondent's dry goods warehouse in Newbridge. He had continuous employment with the respondent in the period between 5 January 1998 and 25 February 2021.

Disciplinary Policy

11. In terms of the respondent's disciplinary policy (J71/74) examples of gross misconduct which may render an employee liable to summary dismissal included:-

    "Serious breach of health and safety policies/processes"

12. The policy reserved the right to the respondent to suspend an employee on full pay at any stage during a disciplinary procedure if that was considered necessary to allow matters to be investigated. The purpose of the investigation was stated to be to establish a "*fair and balanced view of the facts relating to any disciplinary allegations"* against an employee before deciding whether to proceed with a disciplinary hearing. The investigation may involve interviewing and taking statements from the employee and any witnesses. It was usual for the Human Resource department to appoint an Investigating Officer to carry out such investigation. Any disciplinary action would require to await the outcome of a disciplinary hearing.

13. If following investigation a disciplinary hearing was necessary then the employee would be advised of the date and time of the meeting; nature of the allegations made; details of the investigation carried out with the relevant findings and the option of bringing a companion to the meeting. At that hearing the employee would be given an opportunity to explain their case with the outcome being communicated in writing. If there was a finding of gross misconduct then the respondent may terminate an employee's employment without notice or payment in lieu of notice.

14. An employee had the right of appeal against a disciplinary decision. The appeal should be lodged with the HR department who would arrange for

a more senior level of management to the person that took the original disciplinary decision to hear the appeal. The purpose of the appeal was stated to be to "*review the original disciplinary decision"* and that may be a *"complete rehearing of the matter, or it may be a review of the fairness of the original decision in light of the procedure that was followed and any new information that may have come to light".*

15. In his 23 years' service the claimant had a clean disciplinary record apart from a warning issued around 17 years ago concerning the scanning of a pallet. He also had an excellent attendance record.

COVID arrangements

16. Matters of health and safety were a priority for the respondent. Since the COVID pandemic the business required to adapt their arrangements to combat infection. A core committee was set up comprising representatives from various departments within the Newbridge site to communicate information and promote guidelines. The respondent made their own sanitiser which was distributed to staff as well as providing face masks and other disposable items of workwear.

17. The respondent business closed for two weeks in March 2020 and completed a risk assessment across its operations to ensure the appropriate measures were in place when a return to operations could take place (J86/95). From time to time information and guidance was updated to employees (J77/81). A *"Stay at Home guidance for households: current guidelines illustrated"* was produced for employees (J75/76).

18. The respondent rules on self isolation follow the Scottish Government guidance. The relevant guidance in respect of the matters of concern in this case were agreed as those contained in the publication by the Scottish Government of 18 February 2021 (J82/85). That guidance advised:-

> "*Who needs to self-isolate?*
> *Everyone who develops symptoms of COVID-19 – a new, continuous cough; fever or loss of, or change in, sense of smell or taste – should*

isolate straight away and arrange a test via www.nhsinform.scot or, if you can't get online by calling 0800 028 2816.

People who live in the same household as a person with symptoms should also isolate straight away."

19. It was agreed that there was nothing in the guidance of February 2021 which indicated a requirement to self-isolate in the event that someone else in the household had taken a test for COVID. The trigger for self-isolation was the person in the same household had *"symptoms"* defined in the guidance as a *"new, continuous cough; fever or loss of, or change in, sense of smell or taste".*

20. In the event an employee required to self isolate and not attend work then they would be paid by the respondent.

21. The claimant *"a few weeks before"* 25 February 2012 had followed the Government Guidance and self isolated and gone for a test when he felt symptoms of Covid. He did not test positive.

Investigation into conduct of claimant

22. The claimant reported to Helen Farmer and she reported a call from the claimant to Simon Briggs of the HR department on 8 February 2021 which prompted an exchange of emails (J102/103). The initiating email from Helen Farmer timed at 18:34 stated:-

"Hi Simon. Got a call tonight from David L who was at work today to tell me his son had a COVID test on Saturday for a cough. He had not received his results so phoned and told up to six days but David was told to isolate tonight by NHS until he got the results back for his son. He told Sharon at 4.50 tonight his son has had a precautionary test as two of his work colleagues tested positive. I thanked him for letting me know, said he would need an isolation number for you. I have told Karen and Sharon of the phone call he had with me as I am on holiday this week."

23. The response from Mr Briggs stated:-

"Hi Helen. Can I just check I've got this right? David's son had a test on Saturday (so therefore must have been showing symptoms) yet David came in to work and did a full shift? If this is what you were saying his actions are highly irresponsible, you could say reckless. Can we speak first thing Tuesday morning?"

24. Further emails were exchanged on the matter between Mr Briggs and Helen Farmer and copied to various parties including Lucas Avery. Laura Grew was also made aware of the terms of these emails.

25. Simon Briggs instigated an investigation into the attendance at work of the claimant on 8 February 2021 and made various notes of his investigation (J104/116). While those notes are undated and do not identify the individuals it was accepted that Mr Briggs spoke to the claimant on 10 February 2021 (J107/108) and with Helen Farmer (J109); Greg Steenson (J110); David Rodden (J111); David Ferguson (J112); Tam Kelly (J113); Sharon Moffat (J114) all on 15 February 2021 and with Joe McCluskey (J115) and Jamie Mackenzie (J116) on 16 February 2021.

26. The investigation notes of the conversation with the claimant confirmed that the claimant's son took his COVID test at 09.30 on Saturday 6 February 2021 and in answer to the question *"why did your son take a COVID test?"* responded:-

"To be honest I didn't think he needed a test. One of his pals was going for a test and he said he had a sore head. I thought he was trying to get off work. Later on he said his head had got really sore and he had booked a test (this was on Friday) I thought it was a pal thing. I gave him some Paracetamol. Then I took him to the testing centre on Saturday. We came back and he went to his room. On the Sunday he didn't get his results. I said there was nothing wrong with him but he said he had a sore head still. On the Sunday night he said he had a cough. I said he didn't have a cough. Then on Monday he said he still had a bit of a cough. On Monday I phoned the number on his letter and they said the result were not back yet. Oh it must have been the Monday I phoned Helen. They said results can take up to

six days. They also told me that I then needed to self-isolate. He says he's lost his sense of smell."

27. The claimant confirmed that he was aware of the regulations regarding self-isolation namely that if a household member was showing symptoms

"They get a test and self-isolate. I need to self-isolate."

He was asked "*why did you come to work on Monday 8 February when a household member was showing symptoms of COVID?"* to which he responded *"He wasn't showing symptoms. He just had a sore head. He booked the test himself."*

28. The claimant was further asked why he waited until 4.50pm to tell Sharon Moffat that "*your son was showing symptoms of COVID?"* to which he responded "*he wasn't showing symptoms – he just had a sore head".*

29. The statement from Helen Farmer recounted her recollection of what the claimant had said to her on the call on Monday 8 February 2021 in stating:-

"He told me that his son had taken a COVID test on Saturday for a cough, but hadn't had his results back. He'd been told on Monday that it can take up to six days to get the results back, and that NHS told him the household must isolate until he got the results back."

She also raised an issue of the claimant being seen not wearing a mask. Her statement indicated that the claimant had stopped colleagues to ask where he could get a mask and one of his colleagues had provided him with a mask.

Suspension of claimant

30. By letter of 17 February 2021 the claimant was advised that a "*serious allegation"* had been brought to the respondent's attention and that they were suspending him with "*full pay with immediate effect pending the results of our ongoing investigation".* The claimant was advised that he would be updated as the investigation continued and that further action may be to invite him to a formal disciplinary hearing. That letter was sent by Mr Briggs (J117/118).

31. By separate letter also of 17 February 2021 Mr Briggs notified the claimant of a disciplinary hearing to take place on 23 February 2021 "*via Google Meet".* The allegations against the claimant were stated as:-

> *"You committed a serious breach of health and safety processes, specifically attending work on Monday 8 February when a household member had informed you they were displaying symptoms of COVID-19 and had booked a COVID-19 test. That household member's test result was positive for COVID-19. You also stated in your Track and Trace interview that you were always wearing a face covering on Monday 8 February but we have evidence to the contrary."*

32. The claimant was provided with copies of the investigation notes and *"track and trace interview notes".* The claimant was advised that any written statement in advance of the hearing should be sent to Laura Grew who would chair the disciplinary hearing and that Simon Briggs "*would also be present to take an attendance note of the hearing".* The claimant was reminded of his right to be accompanied. He was also advised the outcome could result in summary dismissal.

Disciplinary hearing

33. The disciplinary hearing of 23 February 2021 was chaired by Laura Grew. She advised that she had considered the investigation notes and made the decision to go to a disciplinary hearing albeit the letter calling the disciplinary hearing had been sent by Mr Briggs who took notes of the hearing (J121/124). The claimant was accompanied by a relative.

34. At that hearing the claimant advised that his son had never shown symptoms of COVID prior to his attendance at work on Monday 8 February 2021. He advised that on Friday 5 February 2021 his son had said he was *"speaking to his friend on Playstation and said he needed a COVID test. I asked him why – I thought he was at it. I said he didn't have any symptoms and I wasn't taking him. Then half an hour later he said he had booked a test and I fell out with him over that. He was at it. He said the test was on Saturday at 9.00am."*

35. He was asked if he was aware that in order to book a test *"you have to answer yes or no to a series of questions to verify you are displaying symptoms"* and responded *"he said he had a sore head. I said those weren't symptoms. I don't know what he said on the phone to them. Then I had to take him to the test on Saturday at 09.30. He still didn't have any symptoms. I've never had any symptoms at all."* (J121)

36. The claimant took his son to the test centre on Saturday by car. It was a drive through centre and both remained in the car. He received no advice about self-isolation. No results came through on the Sunday. On that day in terms of the disciplinary notes (J121) the claimant said to him *"there's nothing wrong with you. You've not got your results back. You don't have a temperature or a cough. He said he did have a cough. He did a mock cough and started laughing that was the Sunday. He still wasn't showing any symptoms so on the Monday I came in to work and went through the temperature screening – that was fine. On the Monday night when I got home I asked if he had had results and he said no. I phoned up the centre and they said it might take up to six days."* At that time the test centre advised that his son needed to self-isolate and when the claimant advised that he was in the same household was told *"I needed to self-isolate too."* He then phoned Helen Farmer and told her he *"needed to self-isolate."*

37. He was asked about his son "*displaying a cough"* and the claimant advised "*I never said he had a cough. I said he didn't have a cough. He said (mock cough) I have a cough."* He was asked about the mention of a loss of smell and said *"that was on the Monday night. He got some juice but he couldn't smell it."* He advised that results had come on the Tuesday morning. He confirmed that he was aware of the rules regarding self-isolation *"if you or your household are showing symptoms"* and stated *"yes if they are showing symptoms".*

38. It was stated:-

> "*I understand you might not have believed what your son was telling you, but he booked a test answering the questions and then on the Sunday he was displaying a cough."*

39. And responded:-

> *"No he never displayed a cough. He did a mock cough. I gave him a row. He just wanted to get a day off work. He never had symptoms. Just a sore head."(*J122)

40. He was further asked whether *"despite he thought he might not have been telling the truth why didn't you err on the side of caution knowing he had taken a test. You could have called Sharon, Karen, Simon on Monday to get some guidance"* and responded *"in hindsight I should have done that. He was never showing symptoms"* and when asked "*so do you believe you should have erred on the side of caution"* responded *"no he never had any symptoms."*(J122)

41. He explained the position regarding the wearing of a mask in that the elastic tie on the mask he was wearing had given way and he was on his way to getting a replacement and that explanation was accepted. That matter was not taken any further.

42. Ms Grew made a summary of matters (J124) as follows:-

> *"OK – I think we've covered everything. To summarise the key points, your son was complaining of a headache on the Friday night. He booked a test for the Saturday morning. He had the test. You didn't believe he was unwell or showing symptoms. On Sunday he displayed a cough or a mock cough as you put it. Based on this your judgment was that you should come in to work on Monday as normal. You didn't inform anyone of the fact that your son had taken the test. You contacted NHS on the Monday and was then told to isolate. This is when you told Helen Farmer. Then on Tuesday you got confirmation your son was positive."*

which summary was agreed by the claimant. (J124)

43. It was agreed by Ms Grew:-

    (i) That a headache was not a symptom of COVID within the guidance.

(ii) That Helen Farmer's account of matters did not refer to a continuous cough.

(iii) That there was no evidence that the claimant's son had a '*new continuous cough'* or met the definition within the NHS leaflet (J99) meaning '*coughing a lot for more than an hour, or three or more coughing episodes in 24 hours …'* That *'potentially'* she would require to have that information before dismissal or should have investigated if not had that information.

(iv) That the claimant was clear in stating that his son had coughed '*once on Sunday'* which was described by the claimant as a '*mock cough'* and she was clear there was a '*one-off cough on Sunday'.*

(v) That she relied on the claimant's son booking a test for her belief that he must have displayed symptoms as she believed that he would not have been able to book a test without advising that he was displaying symptoms. She accepted that the claimant was not privy to what the son may have advised the test centre.

(vi) She accepted that there was a class of person who may go for a test (for example close contacts) without having symptoms.

44. The claimant's position was that at the disciplinary hearing Mr Briggs intervened on a number of occasions and towards the end of the meeting Mr Briggs became frustrated and intervened to say *"wait a minute did Jayden not have COVID?".* The claimant did not understand the relevance given that he did not know when he attended work on 8 February 2021 that his son had tested positive. Mr Briggs did not give evidence albeit the respondent was aware from the written statement provided to them in advance of the hearing that such allegation was made. Ms Grew had no recollection of the intervention. I did find that the claimant to be credible on these matters and accepted that intervention was made by Mr Briggs as described by the claimant.

Dismissal of claimant

45. By letter of 25 February 2021 the claimant was dismissed without notice with effect from that date (J125). It was stated within the letter that having put specific facts to the claimant at the disciplinary hearing *"it was decided*

that your explanation was not acceptable” and that the respondent was not able to find any “*sufficiently mitigating circumstances”* to do other than dismiss the claimant. It was sated that the gravity of the misconduct was such that the “*company believes the truth and confidence placed in you as its employee has been completely undermined”.* The unacceptable conduct was stated to be:-

“• *You knowingly breached company and Government guidelines regarding self isolation when a household member shows symptoms of COVID-19, specifically by coming in to work on Monday 8 February. Your son had notified you he was experiencing symptoms on the prior weekend and you took him to get a COVID test on Saturday 6 February. He was notified of a COVID-19 positive test result on Tuesday 9 February.*
• *During the hearing you made it clear that you understood the company and Government guidelines yet stated that you did not put any of your colleagues at risk by your actions. I believe this action to be reckless and a serious breach of health and safety.”*

Appeal

46. The claimant exercised his right of appeal by email of 2 March 202. He was advised by letter of 3 March 2021 (J131) that the appeal would be heard by Lucas Avery; that he could submit a written statement in advance; and that he was entitled to be accompanied at the hearing. The date of the appeal hearing was set for 11 March 2021. At this time the claimant attended with his sister. Wendy Ellen of the respondent attended to take notes.

47. Mr Avery advised that he had received the email exchanges between Simon Briggs and others of 8 February (J102/103). He advised that the appeal was not a complete re-hearing of the matter but a *“review of the fairness of the original decision in light of the procedure that was followed and any new information that may have come to light”* under the options within the disciplinary procedure (J74).

48. The appeal notes (J133/136) were agreed as an accurate account of the meeting. The claimant reiterated that his son had no symptoms of Covid

and he would not have come into work had he displayed such symptoms over the weekend 6/7 February 2021. The only cough his son gave was a "mock cough" as a response to claimant had stating that he did not have a cough. The claimant again reiterated that he did not know what his son had been asked by the test centre and had no knowledge of what his son had told the test centre when booking a test.

49. The claimant advised that he would never "*knowingly come into work with symptoms – and my son didn't have symptoms"* and that there was "*no deliberate act"* and his *"genuine belief was that I didn't think I had done anything wrong".* The claimant wished dismissal reconsidered indicating *"on the noticeboard it says don't come in if there are any symptoms in the household – I didn't have any and neither did my son. I don't feel I put anyone at risk – nothing was deliberate."* The claimant confirmed that he knew he would be paid if he had remained off work because he required to self-isolate.

50. The claimant advised that he had taken his son to the test centre and that *"he was in the back of the car and wearing a mask with the window down".*

51. By letter of 15 March 2021 the claimant was advised that his appeal was not upheld. Mr Avery in his letter advised:-

> *"In considering my decision I have taken into account that you knew the rules of isolation if household members develop symptoms of COVID. You were worrying enough to have chased your son's result on Monday evening and following the advice you were given on that call to isolate – although you had already attended work on Monday. The rules on isolation while household members await test results – whether you think they will be positive or not – are that you must isolate yourself. This is our company rule, but it is also the government rules. Your son did indeed test positive and got the result on the Tuesday. You did not ask for any advice from any supervisor or manager. You also knew that you would be paid if you had isolated yourself from day one."*

52. Mr Avery emphasised the potential danger in coming in to work to others. He advised that he had taken into account the claimant's long service and

clean disciplinary record and that if the claimant was *"not sure of the right course of action all he had to do was call a member of the team to ask for advice and they would have told you to stay home."*

53. The position of Mr Avery was that he considered that the claimant was seeking to cover up for a mistake he had made in coming in to work. He did *"not believe that he (the claimant) did not believe son did not have symptoms"* of COVID. He *"took it that (the claimant's) son had symptoms and (the claimant) needed to isolate"* and *"believed son had symptoms".* He placed reliance on the fact that his son had booked a test and would not have been able to obtain a test unless he had said he had symptoms; that the claimant had taken his son to the test centre with his son in the back of the car wearing a mask with the window open; and that test had proved positive.

54. Mr Avery agreed that there was no guidance from the Scottish Government or the company to indicate that an individual required to isolate if awaiting the result of a test. The important thing was symptoms.

55. The claimant's position in evidence on travel to the test centre was that he considered his son was not displaying symptoms and that he only wanted a day off work on the Saturday. In order to *"teach him a lesson"* he indicated that he would "*do this properly"* and made him as uncomfortable in the car journey as possible by having him sitting in the back with a mask and the windows open.

Events since termination

56. The claimant had produced a schedule of loss (J162). It was agreed that his gross weekly wage with the respondent at date of termination amounted to £484.69 with the net amount £375.11. With the addition of a weekly dental and medical benefit the net weekly wage totalled £382.68. A weekly pension contribution was made by the respondent of £29.08.

57. Immediately after dismissal the claimant became unwell. He frequently broke down in front of others and lost sleep and concentration. He became concerned about his mental health. He had a telephone consultation with his GP on 24 February and 4 March 2021 wherein "anxiety" was

diagnosed. He was prescribed Propranalol. Some advice was given as to how to deal with the anxiety and Statements of Fitness for Work dated 4 March 2021 and 5 April 2021 certified that the claimant was unfit for work to end April 2021 (medical report at J143 and statements J139/140). In May 2021 he obtained temporary work with a bottling company and in the period 1-18 May 2021 earned £820.94 net (J154/157). He required to stop work due to continuing and worsening anxiety issues. He was then in receipt of further Statements of Fitness for Work in the period between 1 June 2021 and the date of hearing (J141/142 and statement produced at hearing).

58. He states he is still unable to face people as he feels embarrassed that he has been dismissed and continues to break down in front of family and friends, remains concerned for his mental health, and concentration is poor which affects interviewing procedure. He continues to take medication daily.

59. He made application for work until mid July 2021 (J158/160). He considered that he may be able to seek return to work *"in a month or so".* He considered that the job market was good with his skills as a fork lift operator and that he could command around the same rate of pay as with the respondent.

Submissions

60. I was grateful for the full submissions made. No disrespect is intended in making a summary.

For the respondent

61. The well-known test in *"Burchell"* had been passed by the respondent in this case who believed that the claimant had been guilty of gross misconduct; they had reasonable grounds upon which to base that belief and had carried out as much investigation as was necessary. The Tribunal could not substitute their own view and dismissal was within the band of reasonable responses.

62. There was no dispute that the claimant was aware of the rules and guidance on self-isolation. He had told Helen Farmer that his son had

gone for a test for a cough. This was not described by her as a mock cough in the email (J109) and it was only a matter disclosed at the disciplinary hearing.

63. The claimant had chased up the result of the COVID test and it was reasonable for the respondent to believe that he was aware of his son's symptoms.

64. Appropriate investigation had been conducted with any potential witness; there had been ample opportunity given to the claimant to explain his case. In the whole circumstances the respondent was entitled to consider that the claimant's son had been displaying symptoms which was a reason for his attendance at the test. There was no mention of the claimant wishing to teach his son a lesson in the way he had taken him to the test in the car. That had not been raised when the matter came up in at appeal.

65. There was nothing in the appeal to suggest there was any difference in the circumstances from the disciplinary hearing and so the appeal was not upheld.

66. Neither was there any basis for suggesting improper influence from Mr Briggs in HR. He did not overstep his role as distinct from the circumstances in *Ramphal v Department of Transport UKEAT/0352/14/DA*.

67. The decision on dismissal was taken by Ms Grew and on appeal by Mr Avery without intervention.

68. The whole claim should be dismissed including that of wrongful dismissal. The claimant had knowingly breached the rules when his son was showing symptoms of COVID and had repudiated the contract by that conduct.

69. In the event that the dismissal was found to be procedurally unfair it was submitted that under *Polkey* there should be a reduction to the basic and compensatory award to nil. A clear breach of health and safety had been committed with the worse outcome being death.

70. Also in the event that the unfair dismissal claim succeeded there should be a reduction in compensatory award for contributory fault.

71. Also it was submitted that the claimant had failed to mitigate his loss. The schedule of loss was considered excessive in that there had been ample opportunity for the claimant to seek and obtain employment in a buoyant job market.

For the claimant

72. It was contended for the claimant that the decision to find the claimant guilty of misconduct was irrational or separately one which no reasonable employer could have arrived at standing the concession made by the respondent's witnesses regarding the "symptoms" of the claimant's son.

73. In any event if there was misconduct it lacked the character of gross misconduct because it was neither intentional nor gross negligence.

74. To the extent that the respondent could conclude a breach of policy was deliberate no reasonable employer could have reached that view in the circumstances.

75. Further, the dismissal was unfair given the involvement of Simon Briggs throughout the proceedings; his prejudgment of the claimant's conduct; and availability of those views to dismissal and appeal managers.

76. Separately it was contended that the dismissal was procedurally unfair as the claimant had not been notified that he was being accused of deliberately breaching policy/procedure and there was a failure to identify and or produce that policy/procedure.

77. The claimant had been consistent about his account of matters. Reliance was being placed on the brief email from Ms Farmer (J109). That email was an account of a very brief conversation with the claimant and by that stage the claimant had been aware of the one "mock cough" and Ms Farmer may have misunderstood the position. In any event there was no account there of any continuous cough.

78. It was submitted there was a real difficulty in identifying the reason for dismissal in this case. The disciplinary invite, dismissal and appeal outcome letters all set out different assertions. From the evidence, it would appear the reason for dismissal was the claimant's alleged failure

to follow the Scottish Government's self-isolation guidance (J82/83) by failing to self-isolate following his son displaying apparent COVID symptoms on Sunday 7 February 2021. The purported symptoms were on the evidence the one-off "mock cough". On that basis the case fell. A COVD symptom was a continuous cough. The NHS had described a meaning to that (J99). Both the respondent's witnesses accepted that there was no evidence of a continuous cough.

79. In realisation of that position Ms Grew suggested that the headache was a COVID symptom but then retracted. Mr Avery made various claims about the duty to self-isolate by virtue of the claimant's son awaiting test results as suggested in his letter dismissing the appeal. However there was no such stricture in government policy or put forward as a policy by the respondent.

80. The reason given for the dismissal could not be potentially fair if it is misconceived in principle. On the evidence the claimant's son did not have a qualifying COVID symptom and so the claimant was never under a duty to self-isolate.

81. In any event the decision was unfair on its substantial merits. The conduct in question was not capable of amounting to gross misconduct (*Sandwell and West Birmingham Hospital NHS Trust v Westwood [2009] UKEAT/0032/09 at paragraph 109*). In general terms gross misconduct must either be intentional wrongdoing or gross negligence. The evidence did not support that position. At best the purported breach was a consequence of an interpretation the claimant placed upon his son's cough as being a "mock cough" and therefore not a qualifying symptom. Even if mistaken that was a genuinely held belief and nothing in the guidance dealt with that situation.

82. It would seem that Laura Grew took the word "knowingly" to refer to the claimant being aware of the guidance rather than that he knew his actings were in breach of that guidance. If that were the case then it undermined the case of gross misconduct.

83. The involvement of Simon Briggs was a procedural irregularity in him being involved in both investigatory and disciplinary stages. He expressed

a clear view of the claimant's conduct prior to any investigation. He then attended the disciplinary hearing and according to the claimant's evidence participated. Investigation and disciplinary should be carried out by different persons unless impractical. It was not impractical in this case.

84. It was also a concern that there was no precision in the case against the claimant (*Boyd v Renfrewshire Council [2008] SCLR 578 and Strouthos v London Underground Ltd [2005] IRLR 636*). The invitation letter to disciplinary hearing set out the allegations in a different way than in the dismissal letter. The dismissal letter for the first time introduced an allegation that the claimant *"knowingly breached COVID guidelines".* There was no fair notice that the complaint was that he "*knowingly"* breached guidance. Neither was the guidance produced.

85. The case of wrongful dismissal should also be upheld. The issue was whether or not the conduct would "*poison the relationship"* as a deliberate act or "*be grave and weighty"* if gross negligence.

86. On mitigation the claimant could not be criticised for seeking to return early to work in May 2021 when he could have simply relied upon his doctor's certification of unfitness. Effectively the claimant was signed off until the end of October 2021. Criticism of the number of job applications was a red herring as a failure to mitigate cannot arise where an individual is certified as unfit for work by a medical practitioner. The onus is on a respondent to substantiate a failure to mitigate and no evidence had been produced in that respect.

87. So far as contributory fault was concerned it was submitted the issue was circular as it depended upon blameworthy conduct in the first instance. If the Tribunal considered that the conduct in question was misconceived no question of contributory fault could arise. If the Tribunal concluded the claimant did breach policy/procedure but nevertheless this was a genuine misunderstanding then that is not conduct which is sufficiently blameworthy to give rise to contributory fault.

88. It was also submitted that in the claim of wrongful dismissal "long notice" was a reasonable remedy given the length of service of the claimant.

Discussion

Relevant Law

89. 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 treated 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."*

90. 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.

91. 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. 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*.

92. 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.

93. 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."*

94. 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. In that respect the Tribunal should be mindful that it should not put themselves in the position of the employer and consider what it would have done but determine the matter in the way in which a reasonable employer in those circumstances in that line of business would have behaved.

95. If satisfied on the employer's fair conduct of a dismissal in those respects, the Tribunal then has to decide whether the dismissal of the employee was a reasonable response to the misconduct. 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.

96. 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*.

97. 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.*

98. 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 hit [2003] ICR 111.*

99. 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."*

100. 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

Issues in the evidence

101. There was little dispute between the parties in relation to the facts. The two issues which were disputed were (1) the intervention of Mr Briggs within the disciplinary hearing. I have already made comment on that matter wherein I accepted that he had made an intervention. (2) whether the claimant had said to Helen Farmer as she had indicated in her email (J1090 that his son had a "cough". He denied saying that to her on the evening of 8 February 2021. She also stated in the investigation meeting with Mr Briggs that the claimant had said that his son had a "cough". I did find the claimant credible in his evidence. There was no evidence given by Helen Farmer so she was not able to be questioned on that particular issue. Given the consistency of the claimant in his position through investigation, disciplinary and appeal on the issue of his son's symptoms and his general credibility in the evidence given I was not of the view that her recording of the conversation with the claimant could be taken to be an accurate recollection. However for reasons after explained I did not

consider that to be a matter that was appropriate for a finding on fact for the Tribunal.

Reason for dismissal

102. The reason for dismissal in this case was given as conduct being one of the potentially fair reason. The issue was what conduct was relied upon. The letter of dismissal of 25 February 2021 (J125/126) states that the aspects of the claimant's conduct which were found to be unacceptable and led to summary dismissal were:-

"• *You knowingly breached the company and government guidelines regarding self-isolation when a household member shows symptoms of COVID-19, specifically by coming in to work on Monday 8 February. Your son had notified you he was experiencing symptoms on the prior weekend and you took him to get a COVID test on Saturday 6 February. He was notified of a COVID-19 positive test result on Tuesday 9 February.*
• *During the hearing you made it clear that you understood the company and government guidelines yet stated you did not put any of your colleagues at risk by your actions. I believe this action to be reckless and a serious breach of health and safety."*

103. The letter indicates that having put matters to the claimant for comment at the disciplinary hearing "*it was decided that your explanation was not acceptable".* The explanation given was that his son was not displaying symptoms of COVID which would necessitate him taking a test and he thought he was *"at it"* to avoid going to work on the Saturday 6 February 2021. No reason is given within the letter as to why it was that the explanation given by the claimant was found to be unacceptable.

104. It was conceded by both Ms Grew and Mr Avery that there was no evidence found of the claimant's son developing COVID symptoms in line with the Government guidance (adopted by the respondent) being a *"new continuous cough; fever or loss of, or change in, sense or smell or taste".* In line with the guidance only if a person had such COVID symptoms then "*people who live in the same household as a person with symptoms should also isolate straight away"* (J82/83)

105. The reason given makes it clear that the respondent believed that the claimant well knew what he was doing in that he knew he should be self isolating but deliberately breached the guidance. The word *"Knowingly…"* conveys that meaning. Ms Grew tried to suggest the word referred to the claimant knowing the guidance on self isolation and so the offence was not necessarily committed "knowingly" but that (1) offends the plain meaning of the sentence; (2) is undermined by the statement in the letter that the claimant's son had *"notified you that he was experiencing symptoms…."* in that if that was the belief then it could only have been a knowing act by the claimant to attend work; (3) did not square with the respondent finding the claimant's explanation unacceptable given that his explanation was that his son was not displaying symptoms: and (4) did not square with the evidence which was that the respondent believed that the claimant had come into work knowing that his son had COVID symptoms.

106. The letter of 15 March 2021 dismissing the appeal is confusing on the reason for dismissal in its statement that:

"The rules on isolation while household members await test results – whether you think they are positive or not – are that you must isolate yourself . This is our company rule, but it is also the government rules"

However it does not appear that is either a Company rule or a Government rule. If it is a Company rule no such rule was shown to exist. It was initially stated that the Company flow chart contained that rule (J95) as did Government guidance (J82/84) but then Mr Avery conceded that in each case self isolation depended on a member of the household displaying symptoms. If the reason for dismissal was breach of a rule that a member of a household must self isolate while awaiting a test result then that was misconceived.

107. However Mr Avery then indicated that notwithstanding what was said in the letter he *"worked on the basis that son had symptoms".* As indicated previously he also advised that he did not believe that the claimant did not believe his son did not have symptoms.

108. While there was some confusion I accepted that the reason for dismissal was that given in the letter of dismissal. It is necessary that the respondent

has to believe the claimant was guilty of that misconduct and identifying breach of an apparently non existent rule at appeal does not aid the respondent in that respect. However looking to the respondent evidence overall I consider that the reason for dismissal was the respondent's belief that the claimant had attended work knowing that his son had symptoms of COVID in breach of the Government guidance (adopted by the respondent) and knowing that in these circumstances he should have self isolated.

Were there reasonable grounds for that belief and when that belief formed had there been as much investigation as was reasonable.

109. Given the respondent position that they had no evidence of the son having symptoms of COVID as identified in the Government guidance (J82 and 99) and which they adopted they could only have reasonable grounds for their belief if they did not believe the claimant's position. If they believed the claimant that his son was not displaying symptoms of COVID then there was nothing within the guidance issued by the Scottish Government (adopted by the respondent) (J94/95) which would indicate a requirement on the claimant to self-isolate and not attend work.

110. In an assessment of whether the claimant could be believed or was being untruthful the reasonable employer would have in mind (1) that the claimant had 23 year's service with an excellent record and nothing to suggest that he was one who would breach of company rules and guidelines or attempt to mislead; (2) that in respect of the COVID guidance he had complied with the guidance only a short period prior this incident and (3) there was no advantage to him in attending work or disadvantage in not attending work as he would paid in either case and there was no motive to attend work in breach of guidelines; and (5) that he had been very consistent in his position since first challenged. These factors for the reasonable employer could not be regarded as being definitive that they were being told the truth but for the reasonable employer would be in favour of employee in that assessment.

111. The issue then is against that background what were the reasonable grounds that the respondent had to disbelieve the claimant and believe that his son was displaying symptoms of COVID.

112. At the hearing certain reliance was placed on the email from Helen Farmer (J102) and statement on investigation (J109) maintaining that she had been told the claimant's son had attended a test for "a cough" and this was evidence of a symptom of COVID. But it is not clear that reliance was placed on that matter in the decision to dismiss. This was not mentioned within the letter of dismissal as a reason why the respondent found the claimant's explanation to be unacceptable; neither was it put to the claimant in the note of the investigation meeting with him (J107/108); neither was it put to him in the disciplinary hearing (J121/124); neither was it mentioned in the note of the appeal hearing (J133/136); neither was it mentioned in the appeal outcome letter((J137/138). So at no point in the procedure was there evidence that the respondent had relied on this matter in the decision to believe the claimant's son had been displaying symptoms against what they were being told by the claimant that he was not.

113. If it was a factor relied upon then the reasonable employer would have put that to the claimant to get his response in the investigation and disciplinary/appeal procedure. Also if it was a factor that she stated she had been told the claimant's son had a "*cough"* that did not indicate a symptom which required to be a "*continuous cough"* which was further refined within the NHS guidance as "*coughing a lot for more than an hour, or three or more coughing episodes in 24 hours".* In assessing if an employee should be dismissed in these circumstances the reasonable employer would wish to be informed of the symptoms which require self isolation in terms of the Government guidance (which was adopted) and the reasonable employer would see that guidance specified a *"continuous cough"* as further defined in the NHS Guidance; and it was acknowledged by Ms Grew and Mr Avery that there was no evidence of a continuous cough from any enquiry that they had made.

114. Even if the reasonable employer could take the email/statement as an indication of a symptom there was no particular enquiry of Ms Farmer as

to the nature of this *"cough".* In particular if reliance was being placed on this issue then after the disciplinary hearing, when the claimant denied his son had a cough at all, the reasonable employer would have sought further information from Ms Farmer on what she was told to assess whether what she was told was a symptom and the claimant was aware of his son having symptoms. No such enquiry was made.

115. In those circumstances it was not considered that the respondent had relied on this issue; even if they did it was not evidence of a symptom of COVID ; even if it could suggest a symptom for the reasonable employer it had not carried out as much investigation as was reasonable in the circumstances to form a belief that the claimant's son had symptoms of COVID.

116. The evidence of Ms Grew placed reliance on the fact that the claimant "*had taken son to test – to book test needed to have symptoms and so as had symptoms he not follow self-isolation and come into work on Monday".*

117. The position of Mr Avery at appeal on the issue of why the claimant was not to be believed and was "*covering for a mistake"* was that the claimant's son had booked a test; that the claimant had taken his son to the test; and that his son was put in the back of the car wearing a mask with the windows open.

118. There was expressed a view that the claimant's son would only be able to book a COVID test on advising the test centre that he was displaying symptoms.

119. However (1) there was no evidence produced which would confirm that position as at February 2021. The guidance has changed throughout this pandemic and if it was the case that an individual booking a test required to advise the test centre that there were symptoms of COVID then that is not information that was available at the hearing. (2) It was acknowledged that there was a class of persons namely "close contacts" who could be tested without displaying symptoms and it was the son's position that he had been in contact with friend who had tested positive. The respondent had no information what the claimant's son had told the test centre when he booked his test. (3) In any event even if the reasonable employer

considered that the claimant's son required to tell the test centre he had symptoms the claimant had no knowledge of what his son had told the test centre. Indeed even if he did know that his son had told the test centre that he had symptoms and required to book a COVID test that did not detract from the claimant's position. His son telling the test centre that he had symptoms was not inconsistent with the claimant's position that his son was "*at it"* and was only booking a test so that he did not need to go to work on the Saturday because he was attending a COVID test. The reasonable employer in the circumstances would not conclude that the claimant was being untruthful and well knew that his son had symptoms of COVID because he had booked a test.

120. An adverse inference was also stated by Mr Avery to be taken from the claimant taking his son to the test centre. It was not explained why that should be an adverse inference given that he knew his son had booked a COVID test. The fact that the claimant took his son to the test did not seem to advance matters in determining that the claimant was not telling the truth and that his son was not in fact displaying symptoms in terms of the guidelines. It may have been that Mr Avery considered the booking of a test and the claimant taking his son to a test was significant given his belief that there was a company rule or Government guidance that self isolation was required if a household member awaited the result of a test but as indicated that was misconceived.

121. It was also stated that the way in which the claimant's son was taken to the test centre raised an adverse inference on the claimant's credibility. That was not a matter that was put to the claimant in the appeal hearing namely that the reason he would ask his son to wear a mask and put him in the back seat with the window open was because he knew that his son had symptoms. There was no opportunity for the claimant to explain the position at that time. Neither of course did the claimant give any explanation but it was not clear why he would consider he needed to give an explanation given he was unaware this would draw an adverse inference. He appeared to be quite open about the way in which his son had been taken to the test centre. His explanation at the hearing was consistent with his position all along namely that he was angry with his

son who he considered was simply trying to get time off from work and he wanted to make him as uncomfortable as possible.

122. There was also of course the intervention by Mr Briggs into the disciplinary hearing which would suggest that the positive test meant that the claimant should be disbelieved. However, again at the time the claimant came to work on Monday 8 February 2021 no positive test had been returned. It was not the case that the claimant went to work in the knowledge that there was a positive test which would have been an entirely different matter. The adverse inference would appear to be that the claimant's son must have been displaying symptoms if he had a positive test. No evidence was produced to demonstrate that to be the case. It seemed to be driven by an assumption rather than any examination of evidence about the virus and positive testing. The reasonable employer would wish to be aware that it is not possible for to be a period of time between becoming infected by exposure to the virus and developing symptoms before coming to a conclusion that symptoms must precede a positive test and there was no evidence of any such enquiry.

123. In any event, it would not appear that either Ms Grew or Mr Avery relied on the fact that the test had proved positive as a reason for drawing an adverse inference on the claimant's position. Ms Grew did not rely on that matter in the evidence that she gave and the letter of dismissal gives no indication that was an issue. Mr Avery in cross examination specifically indicated that he had not considered that to be a relevant matter in the appeal given the fact that the test result was not known to the claimant until late Monday evening after he had attended work. So the positive test was not a basis for the decision made.

124. In terms of the *Burchell* test it is necessary for there to be a belief in the misconduct. That belief has to be based upon reasonable grounds after reasonable investigation. The reasonable employer in the circumstances here would not consider there were grounds for the belief that the claimant had knowingly breached guidelines on self-isolation issued by the Scottish Government and adopted by the respondent. The claimant had been consistent in his position. It was acknowledged that the respondent had no direct knowledge of the son displaying COVID symptoms as those are

defined. For the claimant to be in breach of the guidance it was necessary for his son to be displaying symptoms of COVID. Otherwise he was free to attend work. The issue then is whether there were reasonable grounds to disbelieve the claimant and for the reasons stated that was not the case.

125. In terms of the investigation conducted that investigation did not disclose that the son was displaying symptoms of COVID. As indicated even if reliance was placed on the statement from Helen Farmer in the investigation that only indicated that the claimant had "*a cough"* As indicated a *"cough*" to be a symptom of COVID required to be a "*continuous cough".* Given what the claimant said in the course of the disciplinary hearing there could have been further investigation with Helen Farmer as to what the claimant had said. The claimant's position was that a "*mock cough"* had been given by his son as a pretext for the need for COVID test. If reliance was being placed on this aspect of matters then the reasonable employer would have wished further investigation to establish whether Helen Farmer was indeed being given information that the claimant's son had a symptom of COVID.

126. In addition before concluding that anyone testing positive for COVID must display symptoms there was no enquiry and it would not be in the band of reasonable responses in respect of investigation to assume that to be the case before reaching a conclusion that the claimant was being untruthful.

127. One further matter related to the appeal reasons wherein it was stated by Mr Avery that the claimant had never asked for any advice from the respondent HR personnel or otherwise and would have been told to stay away had that advice been taken.

128. In so far as seeking advice was concerned that was not the reason for dismissing the claimant. The reason for dismissal was knowingly breaching the Scottish Government guidelines on self-isolation which guidelines were adopted by the respondent. Being dismissed for not taking advice on the matter would have brought into account entirely different considerations. Mr Avery's position was that he was not conducting a re-hearing of the matter but simply reviewing what had occurred and identifying any new information which might overturn the

original decision. The review was of the reason given for dismissal and not to substitute some other reason.

129. The COVID pandemic has quite naturally heightened anxiety regarding issues around self-isolation and testing. The pandemic does not alter the test that has to be applied on claims of unfair dismissal. Those tests have not been ameliorated. The understandable anxiety by employers on the possibility of infection becoming apparent in the workplace does not override the tests that are required to be applied by a Tribunal in the dismissal of employees In this case I find that, for reasons explained, the respondent did not have reasonable grounds for their belief in the misconduct of the claimant as that is expressed in their reason for dismissal. In those circumstances dismissal was outwith the band of reasonable responses of the reasonable employer. The reasonable employer requires to have reasonable grounds for their belief in the misconduct which led to dismissal and absent those grounds dismissal is outwith the band.

Contributory conduct

130. Section 123(6) of ERA states that *"where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."*

131. This ground for making a reduction is commonly referred to as *"contributory conduct*" or "*contributory fault".*

132. There is an equivalent provision for reduction of the basic award contained in section 122(2) and it has been held (*Optikinetics Ltd v Whooley [1999] ICR 984*) that section 122(2) gives Tribunals a wide discretion whether or not to reduce the basic award on the ground of any kind of conduct on the employee's part that occurred prior to the dismissal and that this discretion allowed a Tribunal to choose, in an appropriate case, to make no reduction at all. That contrasts with the position under section 123(6) where to justify any reduction at all on account of an employee's conduct, the conduct in question must be shown to have caused or contributed to the employee's

dismissal. In that sense the capacity to make reductions to the compensatory award is more restrictive than in respect of the basic award.

133. Under *Nelson v BBC (No. 2) [1980] ICR 110* the Court of Appeal said that three factors must be satisfied if a Tribunal is to find contributory conduct.

- The relevant action must be culpable or blameworthy. In that respect the Court said that was not necessarily conduct amounting to a breach of contract or illegal but could include conduct which was "*perverse or foolish",* "*bloody minded"* or merely "*unreasonable in all the circumstance"*
- It must have actually caused or contributed to the dismissal
- It must be just and equitable to reduce the award by the proportion as specified.

134. I accepted from the evidence that the claimant was credible in stating that he did not believe his son had symptoms of COVID and so was not under a stricture to self isolate.

135. However I consider that here was blameworthy conduct in the claimant proceeding to work on Monday 8 February 2021 knowing that, albeit his son displayed no symptoms and he thought he was *"at it",* his son had booked and taken a test for COVID. It was not blameworthy in the sense that he was breaching any guideline on self-isolation because his son showed no symptoms and symptoms are a necessary trigger to self isolation. However given the heightened anxiety over this virus the fact his son had booked and taken a test should have given him cause to consider whether it was sensible to go to work before receiving the result of that test. That in my view could be characterised as "foolish" or "unreasonable in all the circumstances" In the disciplinary hearing it was put to him that "*despite you thought he might not have been telling the truth, why didn't you err on the side of caution, knowing he had taken a test. You could have called Sharon, Karen, Simon on Monday to get some guidance"* to which he responded *"In hindsight I should have done that. He was never showing any symptoms."*

136. The charge against the claimant and reason for dismissal was not of course the claimant failing to *"err on the side of caution"* which would have

entailed entirely different considerations. But I consider that there is some blameworthy conduct on the part of the claimant in him going in to work against the possibility that a test might prove positive albeit his son was not displaying any symptoms. In that respect it is relevant he took no advice and he acknowledged that was a step that albeit "*in hindsight*" could have been taken.

137. I consider this contributed to the dismissal of the claimant. It was evident from the evidence that the respondent were exercised by the fact that the claimant's son had taken a test and yet the claimant had attended work. That brought about the investigation and subsequent dismissal. Albeit there would not be reasonable grounds for a belief that the claimant knew his son had symptoms and that he should self isolate but regardless attended work, the act of attending when a test had been taken did contribute.

138. That would justify reduction in both compensatory and basic awards under the relevant sections. I do not consider that contributory action to mean that dismissal was in any way inevitable as a consequence. A charge of failing to err on the side of caution is very different from the deliberate and knowing breach maintained by the respondent. I would consider it just and equitable to reduce compensatory and basic awards by 25%.

Procedural matters

139. It was maintained that the dismissal was tainted by procedural irregularity due to the involvement of Mr Briggs in investigatory and disciplinary matters. He led the investigation after expressing a view on the claimant's conduct (J102) to other managers involved; and he then attended the disciplinary hearing and participated. The ACAS Code points out that there should be where possible a separation between individuals who lead investigation and disciplinary matters.

140. It is true that there was a continued involvement by Mr Briggs. He had expressed a view of the claimant's conduct when learning that he had been in work after his son had attended a test. His assumption at that time was that his son would be displaying symptoms and so coming in to work was a breach of self-isolation guidelines. That was prior to any

investigation or enquiry into the circumstances and before any hearing had been arranged with the claimant to understand his position. That view was clearly communicated both to Ms Grew and to Mr Avery who may well have been influenced. It may be thought of some significance that the behaviour of the claimant in Mr Briggs' email of 8 February 2021 was described as "*reckless*" being the same word used in the dismissal letter drafted by him albeit approved by Ms Grew.

141. It was maintained that he attended the disciplinary hearing as a note taker rather than as an active decision maker. As indicated I accepted that he did intervene in the disciplinary hearing. Effectively this procedural issue was that the matter was pre judged by Mr Briggs and he was the "*eminence grise*" behind the decision making.

142. It can be understood why that view was held but I did not consider that there had been procedurally irregularity. I accepted from Ms Grew that she made her own decision on the matter albeit Mr Briggs had been at the disciplinary hearing and she was aware of his views. The fact that he drafted the dismissal letter would add to the feeling of unease about his position but I accepted Ms Grew's evidence that she was the person who made the decision and did not feel she had to make that decision due to his influence.

143. Also Mr Briggs had no apparent part to play in the assessment of matters by Mr Avery who had come to his own conclusion.

144. In that respect therefore I did not accept that Mr Briggs was the controlling influence and dictated what should happen. So I would reject any issue of procedural irregularity on account of his involvement. Otherwise, the respondent did carry out an investigation and gave the claimant opportunity to be heard at both disciplinary hearing and appeal.

Wrongful dismissal

145. Had I not found it to be unfair I would have found the dismissal to be wrongful. The test in this aspect of matters is different. Essentially the issue is whether or not there was a repudiation of the contract by the

conduct of the claimant and the standard of proof would be the balance of probability.

146. That would entail a finding that the claimant had knowingly breached the Scottish Government guidance as adopted by the respondent on self-isolation. I would not find that to be the case.

147. I found the claimant to be credible. There was no background motive to the claimant requiring to come in to work on 8 February 2021. He would have been paid if he had stayed at home so he did not have to pretend that his son did not have COVID symptoms so there was no need for him to self-isolate. He was aware of the guidelines and knew that if there were symptoms then he should have self-isolated. I accepted his position that if he had thought his son was suffering from COVID symptoms he would not have attended work.

148. The issue was whether or not he was to be believed in that. His position was that he did not display those symptoms and I did not consider that there was evidence to suggest otherwise.

149. I did not consider that there was a deliberate act to attend work when he knew his son was displaying symptoms of COVID and that he should have self-isolated. I did not consider there was a repudiation of the contract to breach trust and confidence. Neither did I consider that there was gross negligence on his part in not seeking advice or being sufficiently cautious when he was aware of his son taking a test against a background of his son not displaying symptoms to "*poison the contract".*

150. Accordingly, even if the finding was of a fair dismissal I would have considered that the case of wrongful dismissal was made out sufficient to entitle the claimant to notice pay whether in terms of the statute or "long notice" at common law.

Mitigation

151. I consider that it was significant as submitted that the claimant had continued to be certified as unfit for work in the period since termination. He had attempted to find work but required to stop due to his anxiety issues. I did not consider I could or should go behind the medical evidence

provided in the Statements of Fitness to Work stating that the claimant was unfit to work.

152. However it was a matter of agreement with the claimant that the job market for fork lift drivers was buoyant and that he should be able to find work soon. I consider that with this case behind him he will be able to do that quickly. he considered the pay rate would be comparable with that enjoyed with the respondent at termination.

Compensation

153. Compensation is made up of a basic award and a compensatory award under sections 118(1)(a) and (b) of ERA. The basic award essentially is equivalent to a statutory redundancy payment.

154. Compensatory award is intended to reflect the actual losses that an employee suffers as a consequence of being unfairly dismissed and to that end Tribunals are directed to award *“such amount as the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action take by the employer”* (s.123(1) ERA).

155. The schedule of loss (J162) helpfully identifies the basic award on the gross weekly wage of £484.69 at £13,571.32. As indicated that should be reduced by 25% in respect of contributory conduct making that award the sum of £10,178.49.

156. The compensatory award in respect of past wage loss from the effective date of termination of 25 February 2021 to the date of hearing amounts to 31.5 weeks × £382.68 = £12,054.42. That includes any notice period. The past pension loss is accepted from the Schedule of Loss at £901.48. That means the total loss to date of hearing is £12,955.90 less the amount earned in the temporary employment with Broxburn Bottlers of £820.94 leaving the amount at £12,134.96.

157. In respect of future loss I would consider that the claimant with this decision should be able to find work reasonably quickly with the source of anxiety removed. I would therefore consider that he should be able to find

employment by 14 January 2022 being 14 weeks × £382.68 = £5357.52 with the addition of pension loss of 14 weeks × £29.08 = £5764.64.

158. I accept the loss of statutory rights in the sum of £500 is appropriate.

159. That means that the total compensatory award amounts to £ 18,399.60 and is subject to a 25% reduction for contributory fault making the award £13799.70.

160. That is below the limit of a sum equivalent to one year's salary (52 week's pay = £19,899.36).

161. The total award being the addition of basic award and compensatory award is £23,978.19.

162. The Employment Protection (Recoupment of Benefits) Regulations 1996 applies to the award as the claimant was in receipt of ESA. In that respect for these purposes the total monetary award is £23,978.19. The prescribed element is £11,426.34 being that part of the monetary award covering the employee's compensatory loss up to 9 November 2021 (taking into account contributory fault). The period to which the prescribed element relates is the period from 25 February 2021 to 9 November 2021. Accordingly, the amount by which the total monetary award exceeds the prescribed element is £12,551.85.

Employment Judge: Jim Young
Date of Judgment: 08 November 2021
Entered in register: 12 November 2021
and copied to parties