EMPLOYMENT TRIBUNALS

Claimant: Mr Paul McNabb

Respondent: Denholm UK Logistics Limited

HELD AT: Liverpool (CVP) **ON:** 20, 21 January & 4 February 2022 (in chambers)

BEFORE: Employment Judge Shotter

REPRESENTATION:

Claimant: Mr D Black (Counsel)
Respondent: Ms K Graydon (Solicitor)

The JUDGMENT of the Tribunal is:

1. The claim for holiday pay brought under the Wages Act 1986 is dismissed on withdrawal..

2. The claimant was not unfairly dismissed and his claim for unfair dismissal is not well-founded and is dismissed.

3. The claimant was not wrongfully dismissed, he was in repudiatory breach of contract and his claim for notice pay is dismissed.

REASONS

Preamble

1. In a claim form received on the 14 January 2021 following ACAS Early Conciliation that took place on 21 December 2021 the claimant, who was employed has brought complaints of unfair dismissal, holiday pay and wrongful dismissal. The holiday pay claim was not proceeded with and is dismissed.

Evidence

2. I heard evidence from the claimant on his own behalf, who was not found to have given credible evidence on a number of matters. I also heard from John Graves, a previous employee of the respondent who had worked with the claimant and gave evidence on his behalf. The claimant also relied on the witness evidence of James Garrett, Craig Hughes, Paul Maloney, Emma Stanton, Lee Pilkington, Adrian Gillen and Jamie Fox who all provided written statements with a date range between 22 October 2020 to 30 January 2021. None of the statements were in the required format; they were unsigned emails and there was no statement of truth. The witnesses did not give oral evidence despite, for example, Mr Gillen stating "I'm willing to stand up in court if needed." Their evidence is disputed by the respondent, and as the witnesses gave no oral evidence under oath today, the veracity of their evidence cannot be explored under cross-examination. No weight was given to the claimant's witnesses' evidence, apart from John Graves who provided the email sent on 22 October 2020 in addition to his formal witness statement prepared by the claimant's lawyers.

3. In the bundle the claimant produced a photograph taken on the 10 November 2020 at 00.54 showing 5/6 men who were not social distancing as evidence that the respondent did not take its own Covid-19 rules seriously and there were many breaches. I took the view that all the photograph showed was 5-men working together in a small space, and there was no evidence concerning how this state of affairs came about on that day and whether or not they were knowingly breaching the respondent's Covid-19 rules. It is also notable that the photograph was taken after the effective date of termination and it was not evidence before the dismissing officer, Andrew Sankey, and appeal officer, Andrew Vaughton. I took the view that this evidence was an attempt at deflecting the claimant's own misconduct.

4. On behalf of the respondent I heard from Andrew Sankey, site manager for Port Warrington depot and the dismissing officer, and Andrew Vaughton, head of warehousing and the appeal officer. When it came to their evidence I found it to be more credible and believable than that given by the claimant when it came to the conflicts, on the balance of probabilities, for the reasons stated below.

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Agreed issues

5. The issues were agreed between the parties, the claimant no longer proceedings with any holiday pay claim, as follows:

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

1.1.1 The respondent genuinely believe the claimant had committed misconduct; was the Claimant dismissed for breaching covid-19 rules or was the Respondent looking for a way to get rid of the Claimant?

1.1.2 Was the investigation reasonable? Was the Claimant grossly negligent? Was there a culture of compliance with covid-19 rules at the Respondent? Were there reasonable grounds for that belief;

1.1.3 At the time the belief was formed had the respondent carried out a reasonable investigation.

1.1.4 Had the respondent followed a reasonably fair procedure; was the Claimant treated consistently with others in being dismissed for breach of the rules?

1.1.5 Was the dismissal fair? Did the dismissal fall within the band of reasonable responses?

1.1.6 Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed?

1.1.7 If the claimant was unfairly dismissed, did he cause or contribute to dismissal by blameworthy conduct? Would it be just and equitable to reduce the basic and compensatory award because of any conduct of the claimant before the dismissal? If so, to what extent?

Wrongful dismissal / Notice pay

1.1.8 What was the claimant's notice period?

1.1.9 Was the claimant paid for that notice period?

1.1.10 If not, can the respondent prove that the claimant was guilty of gross misconduct which meant that the respondent was entitled to dismiss without notice?

6. After hearing oral closing submissions and the case law referred to, I noted that the Employment Appeal Tribunal decision in Hope v British Medical Association EAT 0003/21 may be relevant to the claimant's argument that conduct amounting to misconduct justifying dismissal must undermine the trust and confidence which is inherent in the contract of employment. On the 25 January 2022 I asked both parties to comment on that decision and I am grateful for the claimant's written submissions prepared by Mr Black dated 28 January 2022 and the respondent's additional submissions prepared by Ms Graydon. I have attempted to resolve the differences between the parties in this area of law in my conclusions below.

7. The Tribunal was referred to an agreed bundle of documents totalling 160-pages, together with additional documents, case law and an agreed chronology. Having considered the oral and written evidence and oral and written submissions presented by the parties (the Tribunal does not intend to repeat all of the oral submissions, but has attempted to incorporate the points made by the parties within the body of this judgment with reasons), I have made the following findings of the

relevant facts having resolved conflicts in the evidence on the balance of probabilities.

Facts

8. The respondent is in the business of storage and distribution depots and UK wide logistics. It has three depots in the North West including the Port Warrington depot and Seaforth docks depot in Liverpool. Andrew Sankey, the dismissing officer , was site manager at Port Warrington during the relevant period. Andrew Vaughton, the appeal officer, was head of warehousing for all of the warehouses and to whom Andrew Sankey reports. The respondent employed approximately 250 employees across the UK sites in addition to 40 to 50 agency workers per day.

9. The claimant's employment commenced on the 11 May 2005. Following a TUPE transfer the claimant was provided with a written contract of employment with the job title warehouse team leader dated 1 January 2017. A second contract of employment was issued on 1 July 2019 and the third and final contract on 17 August 2020. The claimant's job title remained team leader throughout and he was not and never has been a warehouse manager as pleaded in the Grounds of Complaint. The claimant's evidence that a contract had been issued describing him as team leader/warehouse manager was confused and I was not taken to any supporting evidence, preferring to rely on the contracts themselves rather than the claimant's oral evidence.

Policies & Procedures

10. The respondent issued a number of polices and procedures and some of these are referred to in the contracts of employment, for example, the non-contractual Staff Handbook and a Policies and Procures Handbook that included the rules on discipline and dismissal together with a link on the shared drive where they could be downloaded by the claimant. Part of the respondent's handbook was in the bundle, together with various documents relating to the respondent's response to the Coronavirus pandemic including "Respondent's Coronavirus (Covid 19) FAQ and Guidance, a record of a monthly meeting, DUKL HSQE Monthly Summary, record of a Toolbox Talk – Covid-19 Risk assessment, "Staying Covid Secure-Compliance", Covid-19 Response Plan and examples of signage displayed on all sites concerning Covid-19 risks and how to avoid catching Covid. I was also taken to a health and safety result produced from an online staff survey. The undisputed evidence was that staff were concerned with catching Covid at work, and there were instances of some men being very upset about the pandemic, being required to work fearful for their own and their families health. I preferred the evidence given on behalf of the respondent by Mr Sankey and Mr Vaughton that the respondent was mindful of the concerns expressed by employees, and took the Covid19 pandemic seriously by complying with government guidelines and regulations that was monitored by a health and safety officer whose role it was to go between sites keeping checks on them. I did not accept the claimant's evidence that the warehouse on the Seaforth docks was rogue and did not comply with the Covid heath and safety measures put into force.

11. On the 8 April 2020 the claimant and other employees had access to a Health and safety report produced by the respondent. In the summary the first bullet point stated "Covid-19 is now affecting all sites and the way we conduct business….key controls are not in place…all staff need to continue to be vigilant…" Reference was made to Safety hub online training and a Covid 19 course attended by employees. I am satisfied the claimant was trained in the respondent's Covid19 safety procedures.

12. By August 2020 lockdown measures had been in force throughout England and Wales, there were well publicised travel restrictions to some countries and nobody had been inoculated. The media on a daily basis covered the measures to be taken by individuals under the government regulations including self-isolating when returning from a holiday abroad. Many people cancelled holidays and those who went abroad on holiday were expected to abide by the law and self-isolate if instructed to do so. It was the claimant's personal responsibility to ensure he complied, and it was open to him to ask either at the airport on his return, seek assistance from the government help line or as a last resort, the respondent's HR department, if he was unsure as to whether or not he needed to self-isolate, given its very high importance especially after foreign travel.

13. There is an issue whether the claimant knew and had access to the Coronavirus (Covid-19) FAQ & Guidance document version 6 dated 7 August 2020. The claimant's evidence is that he did not "have sight of them" until the disciplinary hearing. The notes of the disciplinary hearing (signed by Andrew Sankey and the claimant on each page) refers to the respondent's Covid Policy and records the claimant stating he had never seen the policy, which neither Andrew Sankey nor Andrew Vaughton (who understood the claimant had been provide with a copy by HR) accepted. Both held a reasonable belief that the claimant, in his supervisory capacity as warehouse team leader, had access to the various documents online and would have been aware of the respondent's guidance on Covid-19.

14. The evidence of Andrew Vaughton was that he spent approximately 75% of his time at the claimant's site, and this was accepted by the claimant who gave evidence on cross-examination that this was because the site was "poorly run" which had not been put to Andrew Vaughton in cross-examination. In direct contrast to Andrew Sankey, who had little if no experience in the running of the warehouse where the claimant worked, Andrew Vaughton did. On the balance of probabilities I preferred the evidence of Andrew Vaughton on this issue to that given by the claimant, who was a less than credible witness on occasions, that the respondent's "biggest concern…the first and foremost issue" was health and safety.

15. Andrew Vaughton's undisputed evidence was that the health and safety manager walked around all sites, including the warehouse based in Seaforth, regularly checking for compliance and monitoring standards, briefing employees, carrying out Covid-19 risk assessments made available to employees, and producing the documents referred to above. The picture painted by the claimant and John Graves of a dysfunctional warehouse, the only one out of five, that did not comply with Covid-19 health and safety guidelines was not persuasive evidence bearing in mind the uncontroversial facts relating to the respondent's protection of its business and staff during the Pandemic. The respondent put in place via the health and safety manager a forum consisting of employees to give feedback on the

respondent's health and safety provisions, changes were made to the site layout and shift patterns to reduce the number of employees working together, on-line Covid-19 training for employees were undertaken and completed, and signage erected around the site explaining the Covid-19 safety rules, which the claimant in his capacity as team leader was instrumental in putting in place. Employees were also provided with home testing kits and the claimant's evidence that he was provided with a mask once a week and shared hand-gels undermined evidence that there was no PPE, hand gel or washing facilities which I found was found not credible. The claimant unsuccessfully sought to defect from the fact that he had failed to comply with Covid-19 regulations and policies by blaming the respondent, which was not borne out by any of the contemporaneous documentation in which the claimant raised no issue with the respondent's Covd-19 safety measures until he was suspended and subjected to disciplinary proceedings.

16. I found on the balance of probabilities the claimant was fully aware of all the steps the respondent had taken to protect employees from a global pandemic, he was aware of the Coronavirus (Covid-19) FAQ & Guidance document version 6 dated 7 August 2020 which included detailed information concerning Covid-19 including the incubation period of 14-days (paragraph 7) and at paragraph 13 the rules and "significant risk" of internation travel with business travel being undertaken only with the approval of the group chairman or group managing director "forthcoming…in exceptional circumstances." Staff were encouraged not to travel overseas on holiday, provided a link to the "current government advice" on travel and warned at paragraph 14 "**If under the government guidelines you should or must self-isolate, the Group expects you to self-isolate. If you appear on company premises during the period when you should be self-isolating, you are putting your fellow employees at risk and in the absence of extenuating circumstances will be summarily dismissed for Gross Misconduct due to breaching the Health and Safety protocols. If you should be isolating under the government guidelines**, you should inform your line manager as soon as possible" [the Tribunal's emphasis]. Employees required to self-isolate in this way would be moved on to half-pay for the period of isolation or could use part of their holiday allowance.

<u>The claimant's act of misconduct</u>

17. On the 17 August 2020 the claimant flew to Dubai on holiday with his family. There was confusion as to the date he was due to return to work as one warehouse manager had extended the date of return to 1 September 2020 without the knowledge of another warehouse manager, who made contact with the claimant about this. The claimant believes that he should have been told by the warehouse manager not to return to work. It is uncontroversial the claimant did not ask for clarification from management or HR as to whether he should be self-isolating upon his return from Dubai, either before or after his holiday and nor did he take any advise from other sources, including government helplines. The claimant's evidence before this Tribunal and the respondent at the disciplinary and appeal hearings was that he researched the internet and believed he did not need to quarantine.

18. Part-way through this liability hearing leave was sought and granted to bring into evidence by the claimant a screen shot of the claimant's phone showing the

information provided via the government website that "you will need to self-isolate if you visited or made a transit stop in a country, territory or region that is not on the list in the 14 days before you arrive in England." It is accepted by the parties Dubai or the UAE were not on the list and therefore the claimant should have self-isolated immediately upon his return to the UK. The claimant did not, and his explanation for this was that he had misread the guidance and made a mistake. The claimant had tested negative for Coronovirus-19 and he believed as Dubai was not on the list he could return to work without self-isolating.

19. In oral evidence on cross-examination the claimant explained that he had learning difficulties, was not well educated and had misunderstood the guidance. I explored this evidence with the claimant in light of the provisions set out within the Equal Treatment Benchbook to ensure the claimant fully understood the documents he was taken to, and was given enough time to read them, and/or had them read out. The claimant explained that he was "very illiterate and struggling here today," referred to being dyslexic with learning difficulties and raising this at the disciplinary hearing. The claimant gave evidence that "I can't read or write" and then contradicted himself by stating he can read, but not fast, "like a 10-year old." Later in oral evidence the claimant referred to a grievance he had written and amended but not sent to the respondent alleging in his witness statement that he had raised a grievance about a manager, and that manager was instrumental in his dismissal. The claimant's evidence was contradictory, he could read and write, he had not raised a grievance because his written grievance had not been sent to the respondent and his evidence could not be relied upon. It is notable that the claimant has self-diagnosed dyslexia and learning difficulties, he has not been tested and I find that at no stage during his employment did he inform the respondent of his dyslexia/learning difficulties. At the disciplinary hearing the claimant described himself as "not being the cleverest person". I have commented further on this below.

20. On the 1 September 2021 the claimant returned to work as normal, where he remained mixing with other employees carrying out his duties until on the 3 September 2020 when he was told to go home due to need to self-isolate. The claimant's evidence that managers should have known beforehand and told him to self-isolate does not assist him; he was the only person responsible for his travel movements and the steps to be taken upon his return to the UK in respect of self-isolation and compliance of government regulations. The responsibility was the claimant's alone, and not that of the respondent's managers.

21. On a number of occasions during this hearing the claimant justified his actions by referring to breaches of the Covid-19 self-isolation requirements by "the government;" which did not assist him as there was no connection between the claimant's obligations to his employer and the actions of any individual or organisation outside the employee employer relationship.

<u>The disciplinary process</u>

22. On the 15 September 2020 the claimant was invited to go to investigation hearing for 17 September 2020, which he failed to attend. He was invited to second investigation meeting set for 21 September which he failed to attend and on 29 September 2020 a third investigation meeting was to take place on 1 October 2020

which he failed to attend, and it was held in his absence. Attendance was to be by telephone given the claimant was self-isolating as by this stage he had tested positive for Covid-19.

23. The outcome of the investigation unsurprisingly was brief, and the investigating officer recorded the history of the claimant returning to work from Dubai putting his fellow employees at risk when he should have been self-isolating and breaking government guidelines and health and safety guidelines.

24. The claimant was invited to a disciplinary hearing on 2 October 2020. The letter complied with the ACAS Code. The claimant was made aware the allegations was "extremely serious and if proven, may be considered gross misconduct, for which the disciplinary sanction may be summary dismissal." The hearing was rescheduled at the claimant's request.

25. On 2 October 2020 the claimant was sent a letter of suspension, with immediate effect.

<u>Disciplinary hearing</u>

26. The disciplinary hearing finally took place on for 15 October 2020 after two postponements. before Andrew Sankey. Notes were taken and signed by the claimant and Andrew Sankey at the bottom of each page. There was a suggestion the respondent refused the claimant union representation by the claimant when he gave oral evidence, and I find the respondent refused the claimant could be accompanied by a solicitor only, and there was no evidence that the claimant was denied a union representative. The claimant chose to attend the hearing unaccompanied and from the outset invited Andrew Sankey to dismiss him, an indication that he was fully aware of the seriousness of his action.

27. The notes reflect the claimant stating he had looked on the internet and did not need to isolate, and before being sent home on the 3 September had checked the rules with his line manager (who was not called to give evidence) who said he was unclear about the rules. The claimant admitted he had made "an error, misjudgement…I put my family at risk" with no reference to putting his colleagues at risk. The claimant maintained he had spoken to HR about salary before his return to work after the holiday and he had not been advised he should self-isolate; "it was very confusing…I am not the cleverest person." The claimant in oral evidence stated he had referred to him being dyslexic and having reading problems at the disciplinary hearing, evidence which I do not find to be credible and to which there was no such reference in the contemporaneous notes signed by the claimant.

28. I find on the balance of probabilities the claimant made no mention of dyslexia and nor did he suggest or mention any alleged learning difficulties, in direct contrast to the arguments put forward at this liability hearing. Making a "genuine mistake" because "I am not the brightest" cannot be equated with learning difficulties or dyslexia, which in the claimant's case were apparently self-diagnosed as confirmed in oral evidence on cross-examination.

29. On the balance of probabilities I find Andrew Sankey was not put on notice the claimant was or may be dyslexic, had learning difficulties, had a reading age of 10 and/or could not read at all and he was entitled to make the decision he did without reasonable adjustments being put in place, an argument put forward by Mr Black in submissions, taking into account the fact the claimant had progressed to a team leader and there was no suggestion he had any reading difficulties when carrying out his work.

30. The claimant also explained he had not attended the 17 September 2019 investigation because he had taken sleeping tablets "as unwell…and…had a confirmed positive Covid test." He confirmed he had not attended the 1 October 2020 because "I had to go to the dentist" despite being made aware the hearing would be conducted in his absence if he failed to attend a third time.

31. Finally, the claimant alleged he was being "victimised" by another manager, and had statements from staff members, which he did not produce. This was not explored at the disciplinary hearing as Andrew Sankey rightly took the view the allegation was irrelevant to the issue facing the claimant, which had no connection with the manager in question and Andrew Sankey had no dealings with the manager or the claimant previously.

32. The disciplinary hearing was adjourned for 1 hour whilst Andrew Sankey went away to consider the matter. In direct contrast to the claimant's evidence he was not left waiting for 3-hours, and nor was he informed at the end that he was to be dismissed without notice, and the claimant's evidence in this regard did not reflect the truth and undermined his credibility.

33. After a one-hour adjournment the claimant was informed Andrew Sankey needed more time and intended to re-read the respondent's Coronavirus Guidance, the government guidelines and the points raised by the claimant. The hearing ended without any decision being made.

34. Andrew Sankey took the view the claimant was "presenting a lot of smoke to detract from the actual offence that had taken place…he did not accept that it was his responsibility to know what the rules said and what rules applied to him…you would be cast iron sure of the implications when you return…he worked on site with 30-40 staff; it was not the manager's responsibility to check the holiday destination of staff. It is the individual's responsibility." He referred to the respondent's Guidance that confirmed this, and took the view the claimant's allegations of victimisation had nothing to do with the reason for the disciplinary; "this was solely because of the claimant's actions" and the manager in question "had not conducted the investigation or disciplinary," and so the Tribunal found with the proviso that the manager in question was at the investigation meeting taking notes but nothing hangs on this as the claimant did not object and nor did he attend that meeting.

35. I am satisfied Andrew Sankey carried out his own objective and balanced investigation that fell well within the band of reasonableness, giving the claimant an unfettered full opportunity to put forward his case, which the claimant did.

36. Andrew Sankey did not accept the claimant's explanation that the rules were unclear; there were a list of approved countries and as Dubai was not on that list the claimant should have self-isolated for 14-days and had potentially "endangered people's lives. There is nothing more serious in a work context." He did not accept the claimant had not seen the respondent's Coronavirus guidance and was aware it had been made available to all staff, it was on sharefile and the claimant, as a team leader, should have been aware of its contents and setting an example. I find Andrew Sankey conclusion that it was down to the claimant, and not anybody else including a manager, to uphold the requirement to quarantine which the claimant was aware of, fell well within the band of reasonable responses and dismissal without notice was an appropriate sanction.

37. We explored at the liability hearing whether Andrew Sankey took into account the claimant's long service and good employment record, ignoring absences, and I find he did although he was unaware of the full extent of the claimant's continuous employment as he had only taken into account the years post transfer and for this Andrew Sankey can be criticised as he did not appreciate the claimant had been employed for 16-years with a good record. Andrew Sankey took the view that even though the claimant had stated a mistake was made, and only the claimant could state 100 percent whether it was a mistake or not, he knew the risks and should have been 100 percent clear about what those rules were, even if it meant checking the rules until he was 100 percent. Andrew Sankey was aware there was no similar breach by any other members of staff and there were no extenuating circumstances to justify action falling short of dismissal because the mistake was a "extremely serious" putting colleagues at risk.

38. The claimant and Mr Black on his behalf assert Andrew Sankey should have issued a final written warning. Mr Black submitted that Andrew Sankey had not lost trust in the claimant and therefore a finding of gross misconduct was not appropriate. I have revisited my notes and it is apparent Andrew Sankey's response was that he had never mentioned distrusting the claimant and "only the claimant knows if he really knew the rule." When it was put to him it was not the sort of mistake to undermine trust and confidence in the claimant Andrew Sankey responded it was an "extremely serous mistake. 18 months ago is different from today." He was aware, through personal experience, of male employees coming to him in tears because they believed their presence at work was putting families at risk, and yet the claimant thought it was acceptable to come into work after flying to and from Dubai on a family holiday. When asked whether the claimant would do it again, Andrew Sankey responded "Can't comment." I did not accept Mr Black's submission that in order to fairly dismiss the claimant Andrew Sankey should have lost trust in him for the reasons set out below.

<u>Disciplinary outcome</u>

39. In a letter dated 16 October 2020 sent to the claimant by Andrew Sankey he was informed for the first time of the outcome of the disciplinary which was summary dismissal for failing to comply with government guidance. Andrew Sankey confirmed; "Although I believe this was not a deliberate act, you did not take appropriate responsibility to properly check the self-isolation rules prior to leaving and when returning from overseas **to follow the guidance set by the Government regarding**

isolation…" [my emphasis], a finding he was entitled to reach. I am satisfied Andrew Sankey at the time when he came to his decision held a genuine belief the claimant was guilty of misconduct based upon reasonable grounds after a fair hearing, objectively listening to what the claimant had to say and taking his time in thinking about what the outcome could following his investigation with the claimant. The decision to summarily dismiss fell well within the band of reason responses.

Appeal

40. In a letter dated 20 October 2020 the claimant appealed, setting out his grounds in a 1-page document that included "Grant Shapps recently gave misinformation as to when the quarantine on a certain country started…Our own government has admitted getting the guidance in travel and quarantine incorrect, has admitted the rules are confusing, but you deem it adequate grounds to end my 19-year term of employment…I have learning difficulties that I made you aware of…I feel you are taking advantage of my learning difficulties to remove me from me position, which is clear discrimination…my solicitor has given me a high prospect of success…" The claimant did not produce any of the witness statements he now relies upon at this liability hearing. It is also clear he believed he was dismissed "for being unable to follow rules that are ever changing and uncemented…these guidelines are not law but temporary guidelines punishable by fine or a harsh letter, not loss of employment."

The appeal hearing

41. After two postponements at the claimant's request the appeal hearing took place before Andrew Vaughton, head of warehousing for the respondent, who spent a substantial (75 percent) of his time based in the warehouse the claimant had worked, and he was aware of how it was run. Andrew Vaughton was experienced, and had dealt with approximately 250 disciplinaries before he heard the claimant's appeal.

42. The appeal hearing took place on the 2 November 2020 before Andrew Vaughton. Notes were taken which were not disputed by the claimant in which he referred to having "reading difficulties" and "I have mis-read the situation…I'm not saying I can't read or write I easily misread things. I don't have any qualifications. I misread something. I'm not perfect but I'm not dumb. MP's are making mistakes and they aren't getting fired for it…It could have been a final because it was a big mistake but I genuinely believed its wrong to be gross misconduct. "

43. The claimant's grounds of appeal were explored in full by Andrew Vaughton; the claimant was given the opportunity to expand, which he did for example, in respect of the manager who allegedly victimised him maintaining that he had raised a grievance which had not been sent in writing.

44. With reference to the respondent's Covid procedures and in response to Andrew Aughton's comment that "some people could have advised you but the responsibility is on the individual travelling" the claimant stated "its guidelines. Paul said I was to be in. Dubai wasn't on the list…10 people said the guidelines are unclear the company need to educate the staff on their rules. I have never seen the

policy. Tasha [HR] **gave it out at the very start….I am not perfect maybe I should have read the procedures**. I felt victimised to be here…at worst it could have been a final warning for misconduct. But for my length of service it was a harsh decision" [the Tribunal's emphasis].

45. Andrew Vaughton took the view the claimant had been provided with the respondent's Covid-19 procedures by HR, as admitted by the claimant and he was aware from his own experience inside and outside the warehouse in which the claimant had worked, the steps taken by the respondent to protect the health and safety of employees referred to above. Andrew Vaughton raised the fact that the claimant had tested positive for coronavirus 3 days after he was told to leave site, to which the claimant responded, "you can't fire me for that…not one person has the virus from me." The claimant accused the respondent of breaching his duty of care; "Tony the worm sending Rob to post letters at my house. Where is my duty of care…he could have brought it back into work…you have sacked me for something when you don't have perfect covid procedures" and referred to a lack of hand sanitisers, masks and social distancing."

46. Andrew Vaughton adjourned having carried out a fair appeal process in compliance with the ACAS Code which fell into the band of reasonable responses, before making his mind upholding the original decision in a letter dated 3 November 2020 dealing paragraph by paragraph his response to the claimant's grounds of appeal, which I do not intend to repeat having found the dismissal to be fair, and there being no requirement for the appeal to put right any substantial or procedural unfairness.

47. Andrew Vaughton was entitled to find the position adopted by the claimant inconsistent in that "despite his claim of being confused and unsure as to whether he needed to isolate he never sought advice at the time, even when speaking to HR about a pay inquiry, when asked he then said that he was 'certain' that he didn't have to isolate having looked at the list of exempt countries on the government website and believing that to be a list of countries you have to isolate form. This is a completely inconsistent position." Under cross examination Andrew Vaughton confirmed the claimant had told him he was "certain" he did not have to isolate from Dubai, and Mr Black is correct that there is no reference to this in the appeal notes. I took the view that nothing hangs on the use of the word "certain" taking into account the claimant's stated position as set out above.

48. The effective date of termination was 16 October 2020 when the claimant received the disciplinary outcome letter of that date.

<u>Law</u>

49. Section 94(1) of the Employment Rights Act 1996 ("the 1996 Act") provides that an employee has the right not to be unfairly dismissed by her employer. Section 98(1) of the 1996 Act provides that in determining whether the dismissal is fair or unfair, it is for the employer to show the reasons for the dismissal, and that it is a reason falling within section 98 (2) of the 1996 Act. Section 98(2) includes conduct of the employee as being a potentially fair reason for dismissal.

50. Section 98(4) provides that where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal if fair or unfair (having regard to the reasons shown by the employer) depends on whether in the circumstances (including the size and administrative resources of the respondent's undertaking) the employer acted unreasonable or reasonably in treating it as a sufficient reason, and this shall be determined in accordance with equity and the substantial merits of the case.

51. Where the reason for dismissal is based upon the employee's conduct, the employer must show that this conduct was the reason for dismissal. For a dismissal to be procedurally fair in a case where the alleged reason for dismissal is misconduct, Lord Bridge in Polkey –v- A E Dayton Services Limited [1981] ICR (142) HL said that the procedural steps necessary in the great majority of cases of misconduct is a full investigation of the conduct and a fair hearing to hear what the employee has to say in explanation or mitigation. It is the employer who must show that misconduct was the reason for the dismissal, and must establish a genuine belief based upon reasonable grounds after a reasonable investigation that the employee was guilty of misconduct – British Home Stores Ltd v Birchell [1980] CA affirmed in Post Office v Foley [2000] ICR 1283 and J Sainsbury v Hitt [2003] C111. I took the view that the well-known tests for unfair dismissal did not include a requirement that in order to fall within the range of reasonable responses the employer must have "lost trust" in the claimant. In short, the Tribunal is required to conduct an objective assessment of the entire dismissal process, including the investigation, without substituting itself for the employer.

52. The Court of Appeal in British Leyland (UK) Ltd v Swift [1981] IRLR 91 set out the correct approach: "If no reasonable employer would have dismissed him then the dismissal was fair. But is a reasonable employer might reasonably have dismissed him, then the dismissal was fair…in all these cases there is a band of reasonableness, within which one employer might reasonably take one view and another reasonably take a different view.

53. In between extreme cases of misconduct there will be cases where there is room for reasonable disagreement amongst reasonable employers as to whether dismissal for the misconduct is a reasonable or unreasonable response: LJ Mummery in HSBC Bank Plc v Madden [2000] ICT 1283.

54. The question for the Tribunal is the reasonableness of the decision to dismiss in the circumstances of the case, having regard to equity and the substantial merits of the case. The Tribunal will not substitute its own view for that of the respondent. In order for the dismissal to be fair, all that is required is that it falls within the band of reasonable responses open to employer. It is necessary to apply the objective standards of the reasonable employer – the "band of reasonable responses" test – to all aspects of the question of whether the employee had been fairly dismissed, including whether the dismissal of an employee was reasonable in all the circumstances of the case.

55. The test remains whether the dismissal was within the range of reasonable responses and whether a fair procedure was followed. Section 98 (4) provides that where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal if fair or unfair (having regard to

the reasons shown by the employer) depends on whether in the circumstances (including the size and administrative resources of the respondent’s undertaking) the employer acted unreasonable or reasonably in treating it as a sufficient reason, and this shall be determined in accordance with equity and the substantial merits of the case.

Conclusion

56. With reference to the first issue, namely, the respondent can establish that the sole or principal reason for the dismissal was the claimant’s conduct, a potentially fair one in accordance with sections 98(1) and (2) of the ERA, the Tribunal found that the sole reason was conduct. Andrew Sankey and Andrew Vaughton genuinely believed the claimant had committed misconduct; and he was dismissed for breaching Covid-19 rules. The respondent was not looking for a way to get rid of the claimant as argued by the claimant. Any alleged dispute he had with another manager was totally unconnected to the disciplinary process and irrelevant; Andrew Sankey was the sole decision maker and he was unconcerned with any past history of the claimant’s alleged conflicts with another manager that had no impact on the disciplinary outcome.

57. Andrew Sankey took into account the circumstances of the claimant failing to self-isolate on his return from a family holiday in Dubai, and nothing else.

58. With reference to the next issue, namely was the investigation reasonable, I found that it was on the balance of probabilities. The claimant had failed to take part in the three investigations offered to him, and Andrew Sankey mindful of this, explored fully the circumstances surrounding the alleged offence listening objectively to what the claimant had to say in his defence. He was entitled to take the view that if the claimant had made a mistake, as argued by the claimant, he had acted in a grossly negligent way because he had not checked his understanding of the position against a background of a possible serious health and safety risk to other employees that could lead in some circumstances to hospitalisation and death with substantial numbers of both being broadcasted by the media and government at the time. Andrew Sankey personally knew of employees in tears at work worried about catching covid. Without a lot more information it is difficult to find there was a culture of compliance with Covid-19 rules at the respondent as maintained by the claimant and John Graves, his friend. On the face of the evidence before me, the respondent worked hard at changing the way it ran its business ensuring the health and safety of its employees in a very difficult time when PPE was hard to get hold of according to the media. The claimant and John Graves painted a dark picture of the respondent’s health and safety measures ranging from insufficient masks, failure to comply with the 2-meter distance rules and insufficient hand gel, but neither raised this as a health and safety issue with the respondent at the time. It may be that there was insufficient protection in place at times, and if this was the case employees also had a responsibility, for example, not to work with five of their colleagues in a container, but this does not excuse the claimant’s act of misconduct.

59. The claimant’s allegations raised against the respondent are made in the same vein as the complaints he raises against politicians; they are a deflection from the real issue which was the government rules on international travel were clear for anybody to read. 14-days self-isolation was always a possibility and Dubai one of

countries affected by this rule, with the result that had the claimant complied he would immediately have been placed on 50 per cent pay for the 2-week isolation period. On the documentary evidence before me, including the notices, discussions, policies and procedures and training, coupled with the changes made to working practices, the respondent took the Covid-19 pandemic seriously, and the claimant was aware of this. Andrew Sankey had reasonable grounds for the belief that the claimant was negligent, his actions were "extremely serious" when he returned to work putting colleagues at risk, this belief fell well within the band of reasonable responses and at the time the belief was formed the respondent had carried out a reasonable investigation.

60. With reference to the issue, namely, had the respondent followed a reasonably fair procedure; I found on the balance of probabilities that it had. There was no evidence of the claimant being treated inconsistently with others in being dismissed for breach of the rules as he alleges.

61. John Graves gave evidence that he was involved in an incident that "should" have resulted in his dismissal when he was operating a NVA truck without licence and was on the phone when reversing it. He was threatened with dismissal and issued with a final written warning. In cross-examination John Graves confirmed he was on the phone to a family member and this mitigation was taken into account. The ACAS Code confirms similar offices do not always call for the same disciplinary action for them to be fair and each case must be looked at in context of their own individual factors. In the claimant's case there was no similar offence. John Graves being issued with a final written warning given his family circumstances is incomparable to the claimant's offence. As discussed with the parties at the liability hearing, equity is included as a requirement of section 98(4)(b) of the ERA and can be construed as not treating an employee more leniently or harshly than another employee in similar circumstances in addition to other matters taken into account, when deciding whether the conduct was sufficient for dismissal. The problem in the arguments taken up by the claimant is that there is little information given regarding the disciplinary cases he relies upon, and on the face of it there is little evidence that the claimant was allegedly dealt with less leniently. For example, the claimant relies on two employees who drove to work having tested positive for Covid-19 in order to pick up work. No further information has been given. On the face of the information the employees should have been self-isolating, however, no details of the employees were given, the dates, how the work was handed across, there is no suggestion they physically went into the workplace (unlike the claimant) and the respondent denied the incident as described by the claimant took place. The claimant produced no evidence of any incident remotely parallel, "truly similar or sufficiently similar" to his own, and no evidence of other cases which supports the claimant's allegation that he was victimised because of his relationship with a manger unconnected to the disciplinary hearing.

62. I was not referred to any case law dealing with inconsistent treatment, and have reminded myself of the legal principles, including those set out by the Court of Appeal in the well-known case of <u>Securicor Ltd v Smith</u> [1989] IRLR 356 and born in mind the fact that I must be careful not to substitute my own view for that of the respondent. I am satisfied that the claimant, on the balance of probabilities, has not shown the respondent was inconsistent in its treatment of him, and taking into account the fact it had flexibility in deciding whether the alleged incidents relied upon

by the claimant were comparable to the claimant's misconduct, it fell well within the band of reasonable responses for it to determine there was no comparison.

63. With reference to issue, namely, was dismissal fair or unfair in accordance with section 98(4) of the ERA, and, did the respondent in all respects act within the "band of reasonable responses" when it dismissed the claimant, I find that the dismissal in the particular circumstances of this case fell well within the band of reasonable responses. There is a band of reasonableness, within which one employer might reasonably take one view and another reasonably take a different view and I was satisfied the respondent had reasonably concluded the claimant's conduct was so serious dismissal should follow. The fact the claimant believes that the misconduct was sufficiently serious to amount to gross misconduct justifying a final written warning, which was the punishment argued for by the claimant, does not assist his case.

64. The claimant was aware of the serious consequences evidenced by the fact it is undisputed he said to Andrew Sankey "if you are going to sack me, just sack me" prior to the disciplinary hearing, and in oral evidence on cross-examination the claimant confirmed "I realise it was a serious mistake." It was such a serious mistake that under the Coronavirus (Covid-19) FAQ & Guidance document version 6 dated 7 August 2020 employees were warned "If you appear on company premises during the period when you should be self-isolating, you are putting your fellow employees at risk and in the absence of extenuating circumstances will be summarily dismissed for Gross Misconduct due to breaching the Health and Safety protocols."

65. Mr Black submitted with reference to the EAT decision in <u>Sandwell and West Birmingham Hospitals NHS Trust v Westwood</u> EAT 0032/09 and <u>Adesokan v Sainsbury's Supermarkets Ltd</u> [2017] ICR 590, CA I should concentrate on the damage to the employment relationship, and as there was no dishonesty or intention by the claimant to deliberately "poison" the relationship evidenced by there being no breach of the implied term of trust and confidence as conceded by Andrew Vaughton (but notably not the dismissing officer Andrew Sankey) the claimant's act of breaching the Covid-19 regulations could not amount to an act of gross misconduct. I did not agree with Mr black's analysis of the law. However, I will return to these submissions below when considering the complaint of wrongful dismissal, where they are perhaps arguably more applicable.

66. By email after oral closing submissions which I forwarded to the parties referring to the EAT decision in <u>Hope v British Medical Association</u> EAT 0003/21 for comment.

67. Dealing with Mr Black's written submissions first that ran to 6-pages which I do not intend to repeat in full, the key arguments are paraphrased as follows;

67.1 There is a 'legal bar' in my finding that the dismissal was within the range of reasonable responses in this case. The respondent accepts it has not lost trust and confidence in the claimant and as a consequence as "the only basis on which the employer justifies the dismissal is 'gross misconduct', the dismissal is legally precluded from falling within the range of reasonable responses for the purposes of s98(4)." I did not accept there was a legal bar, and refer to the well-trodden cases of <u>Polkey –v- A E Dayton Services Limited</u>**,** <u>British Home Stores</u>

Ltd v Birchell, Post Office v Foley and J Sainsbury v Hitt referred to above, which set out some of the key legal principles.

67.2 Reference was made to the 4 stage test of Langstaff J in JJ Food Service v Kefil [2013] IRLR 850 namely; to ask 'whether the employer had a genuine belief in the misconduct, secondly whether it had reached that belief on reasonable grounds, thirdly whether that was following a reasonable investigation and, fourthly whether the dismissal of the Claimant fell within the range of reasonable responses in the light of that misconduct'; at [26]. There is no 'requirement' in the four-stage analysis to consider whether the conduct amounts to 'gross misconduct', but it is permissible to do so; West v Percy UKEAT/0101/15 affirmed; at [28].

67.3 Sandwell and Westwood (above) is not authority for the proposition that: 'whenever the label "gross misconduct" is used, a contractual analysis as to whether the conduct amounted to wilful contradiction of the contract or gross negligence is required'. Rather it is authority for the proposition that the contractual context is only 'one of the circumstances' to be considered in determining if a dismissal sanction was reasonable in a particular case. I took the view that there was no requirement to conduct a contractual analysis in the case of Mr McNabb when it came to assessing whether or not he had been unfairly dismissed.

67.4 Choudhury J in Hope (above) held it was not a requirement of s98(4) that every time 'gross misconduct' is raised by a Respondent the Tribunal must conduct its reasonableness analysis by reference to the contractual test adumbrated in Westwood; at [29] and [34].

67.5 Hope (above) assists the claimant who in comparison to Mr Hope who was found to be in breach of the implied term of trust and confidence, the claimant's conduct was a solitary incident and Mr Vaughton accepted loss of trust was not the reason for dismissal with no evidence led to contradict that. It is notable that the person who made the decision to dismiss, Mr Sankey, did not hold the same view.

67.6 Unfair dismissal and gross misconduct should be kept distinct; West at [23].

67.7 Westwood involved a contractual basis for dismissal for gross misconduct while no such basis is pleaded in Mr McNabb's case. What is gross misconduct is a 'mixed question of fact and law'. Because of this it is not open to the Tribunal, in circumstances where the respondent's own evidence is that there was no breakdown in the relationship of trust and confidence, to find that there was in fact a breakdown (let alone one of sufficient severity to justify dismissal). I did not agree with this submission.

67.8 There is no evidence whatsoever that the requisite breakdown in trust and confidence occurred – or that trust and confidence was even lost at all. The respondent's witnesses did not say it. The dismissal letter does not record it, the appeal outcome does not state it. The Respondent simply cannot come up to proof on the mixed question of fact and law. Accordingly the dismissal was not

within the range of reasonable responses. The claim must be upheld. I did not agree.

68. I have also taken into account the respondent's additional submissions paraphrased as follows;

68.1 The Tribunal is not required to consider whether there has been gross misconduct as would amount to a repudiatory breach in a contractual setting before concluding there has been a fair dismissal. I agree.

68.2 The Tribunal's role once blameworthy conduct is established is to consider whether dismissal fell within the band of reasonable responses. The Claimant's actions demonstrated gross negligence. I agree.

68.3 The claimant in the present case raised only an unfair dismissal claim, not one of Wrongful Dismissal. Accordingly, there is no requirement for the Tribunal, and indeed it would be after Hope an error of law to consider whether the respondent's labelling as gross misconduct was appropriate, or whether the claimant's misconduct was capable of amounting to gross misconduct. I agree in relation to the unfair dismissal claim, however, there is wrongful dismissal claim which has been considered separately below under different legal principles.

68.4 At Paragraph 32, the reasoning of the President explicitly contradicts the Claimant's argument that whenever the label "gross misconduct" is used there is a requirement for a contractual analysis as to whether the conduct amounted to wilful contradiction of the contract or gross negligence. The President provides clear direction that "*the real question is and remains the statutory one of whether the employer acted reasonably or unreasonably in all the circumstances in treating the conduct as sufficient reason to dismis*s".

68.5 The Respondent did not rely upon a contractually stipulated act as amounting to gross misconduct. As confirmed in the letter of dismissal [Bundle Page 60], the Claimant's actions of returning to work and failing to abide by the 14-day isolation rules amounted to a failure to follow the Government's COVID-19 Guidelines.

68.6 It is not necessary for the Tribunal to determine whether the Claimant's conduct amounted to a "wilful contradiction of the contractual terms" or was "grossly negligent". I agree.

69. It is not necessary for me to determine whether the claimant's actions amounted to gross misconduct or gross negligence in order to decide the fairness or otherwise under the statutory concept of unfair dismissal, in contrast to the concept of a finding of gross misconduct that can merit summary dismissal. Mr Justice Choudhury, President of the EAT, held in Hope (above) that the test for determining whether a dismissal is fair or unfair within the meaning of S.98(4) ERA involves consideration of all the circumstances, which might, in some misconduct cases, include the fact that the conduct relied on involved a breach of contract amounting to gross misconduct. He clarified that Sandwell (above) was not authority for the proposition that whenever the label 'gross misconduct' is used, a contractual

analysis is required as to whether the conduct amounted to wilful contradiction of the contract or gross negligence. The need for the contractual analysis in that case arose only because the misconduct relied upon was said to be in breach of policy, such breach having been contractually stipulated to amount to gross misconduct. Mr Black raised similar arguments in the case of Mr McNabb despite the fact that the misconduct relied upon by the respondent was not in breach of a contractually stipulated policy, but the Government's Policy and a clear warning in the non-contractual Coronavirus (Covid-19) FAQ & Guidance document version 6 dated 7 August 2020 at paragraph 14 "If under the government guidelines you should or must self-isolate, the Group expects you to self-isolate. If you appear on company premises during the period when you should be self-isolating, you are putting your fellow employees at risk and in the absence of extenuating circumstances will be summarily dismissed for Gross Misconduct due to breaching the Health and Safety protocols…"

70. There was no evidence before me that any of the respondent's policies and procedures had a contractual effect, and the employment contract was clear that the Policies and Procedures Handbook including dismissal, "will have a bearing upon the way in which your employment is managed, but do not form part of your contractual terms."

71. Mr Justice Choudhury held in Hope, no contractual analysis was necessary: the claim was not one of wrongful dismissal and the respondent did not seek to rely on any contractually stipulated act as amounting to gross misconduct. The Tribunal had been entitled to find that BMA had acted reasonably in treating the reason for dismissal, namely H's conduct as described, as being a sufficient reason to dismiss in all the circumstances.

72. On the balance of probabilities I find the respondent was entitled to rely on the claimant's misconduct to summarily dismiss him in accordance with the non-contractual disciplinary procedure that included a non-exhaustive list of actions that could amount to gross misconduct justifying summary dismissal including "a serious or wilful breach of health and safety procedures" coupled with the Coronavirus (Covid-19) FAQ & Guidance document breach of which in the absence of extenuating circumstances will be summarily dismissed for Gross Misconduct due to breaching the Health and Safety protocols. The claimant was found guilty of a serious act of misconduct, which in the view of Andrew Sankey alone was a very serious breach of health and safety procedures. The fact the claimant had sixteen years continuous employment and good record does not lay down a rule that a final written warning should have been issued and the dismissal as a consequence did not fall outside the band of reasonable responses taking into account the principles set out in British Home Stores Ltd v Birchell, Post Office v Foley and J Sainsbury v Hitt (all above).

73. Having conducted an objective assessment of the entire dismissal process, including the investigation, without substituting myself for the employer, and having regard to equity and the substantial merits of the case, the dismissal fell well within the band of reasonable responses open to employer in all the circumstances of the case. The misconduct was admitted, the claimant had a fair disciplinary and appeal hearing and could put forward what he wanted to say in explanation and mitigation. In conclusion, having regard to the reasons shown by the respondent (including the

size and administrative resources of its undertaking) it acted reasonably in treating the claimant's misconduct as a sufficient reason.

74. The claimant's claim for unfair dismissal is not well founded and is dismissed.

75. There is no requirement for me to consider contribution having found against the claimant. However, had the claimant succeeded in his claim I would have found it just and equitable to reduce the basic and compensatory award by one hundred percent. The claimant was blameworthy and culpable for all of the reasons I have set out above. The respondent's overarching policies made it clear to the claimant he had a personal responsibility, and I found he was personally responsible for the ultimate breach, namely, coming in to work when he should have been self-isolating after holidaying abroad in a relevant country under the government rules and putting his fellow employees at risk.

Wrongful dismissal / Notice pay

76. With reference to the first and second issue, namely, what was the claimant's notice period it is not disputed it was 12-weeks, and the claimant was not paid for that notice period.

77. With reference to the third issue, namely, can the respondent prove that the claimant was guilty of gross misconduct which meant that the respondent was entitled to dismiss without notice, I found on the balance of probabilities that it had.

78. Mr Black relied on the Court of Appeal's decision in in Neary and anor v Dean of Westminster [1999] IRLR 288*,* Special Commissioner (Westminster Abbey), where Lord Jauncey asserted that the conduct 'must so undermine the trust and confidence which is inherent in the particular contract of employment that the [employer] should no longer be required to retain the [employee] in his employment' submitting that on the respondent's own admission the claimant was not in fundamental breach of the implied term of trust and confidence.

79. I noted that Andrew Sankey, the dismissing officer, on cross-examination as recorded above, confirmed he had never mentioned distrusting the claimant and "only the claimant knows if he really knew the rule." When it was put to him it was not the sort of mistake to undermine trust and confidence in the claimant Andrew Sankey responded it was an "extremely serious mistake. 18 months ago is different from today."

80. I found that objectively assessed the claimant's action amounted to repudiation of the whole contract, whether he intended this or not. I am satisfied that on the balance of probabilities, that there was an actual repudiation of the contract by the claimant when he turned in to work after his holiday in Dubai, whether or not he had misread the government advice or merely returned so as to be paid his salary in full and not suffer a fifty percent reduction in the 2-week self-isolation period. It is not enough for the respondent to prove that it had a reasonable belief that the employee was guilty of gross misconduct, and I do not accept Mr Black's argument that Mr Vaughton's confirmation that there was no breakdown in the relationship of trust and confidence applied to Mr Sankey, who was the dismissing officer, and genuinely held a reasonable belief that the claimant had made a "serious mistake."

The test for a wrongful dismissal claim is a different standard from that required of employers resisting a claim of unfair dismissal, where reasonable belief is necessary as part of the legal test.

81. The question I have to ask myself is whether the claimant was as a matter of fact in breach of contract to the extent that his conduct when he returned to work instead of self-isolating to protect his colleagues and fellow workers from the possibility of contracting a serious illness that could lead to long-term consequences and on occasions, death, was repudiatory. The question was not whether the respondent— reasonably or otherwise — believed that he was in repudiatory breach of contract and/or in breach of the implied term of trust and confidence as argued by Mr Black.

82. Objectively assessed, the claimant was in breach of his employers direct lawful instructions as set out in its policies and procedures, and he was under the express and implied duty of cooperation which included obeying lawful and reasonable orders to the effect that he cannot return to work after foreign travel to a country not on the Government list as safe in a worldwide pandemic. The claimant's act of returning to the workplace amounted to gross negligence, and his defence that it was not dishonest, wilful or deliberate does not protect him due to the potential seriousness of his action. His failure to check via an independent source, for example, at the airport, government helpline or the respondent's HR, whether he had to self-isolate or not, in the light of the claimant's evidence that he could not read and/or was dyslexic and/or had learning difficulties and as a consequence often misinterpreted words when reading, amounted to an act of negligence.

83. As indicated previously, Mr Black referred me to the Court of appeal decision in Adesokan (above) in respect of the unfair dismissal claim, which was concerned with wrongful dismissal. Lord Justice Elias observed that a failure to act, without any intention to contradict or undermine the employer's policies, should not readily be found to be such a grave act of misconduct as to justify summary dismissal. However, in the particular circumstances of this case, it was open to the High Court to conclude that A's failure to act had attained that level of gravity. The critical feature justifying that conclusion was that, as regional operations manager, A was responsible for ensuring the successful implementation of the employee engagement procedure in his region. Once it became known to him that the integrity of the process was being undermined (or at least was at risk of being undermined), it was his duty to ensure that this was remedied. In comparison, via the respondent and other agencies, not least the media, Mr McNabb was fully aware of the UK rules and respondent's procedures dealing with the Covid19 pandemic. The claimant was aware of the importance of self-isolating after foreign travel abroad. A great deal of significance was placed on managing the Covid-19 pandemic in a safe working environment by the respondent, and the claimant in his capacity as team leader was responsible for enforcing this. When he failed to self-isolate and return to work the claimant, despite his argument to the contrary, was not putting his family at risk; he was putting numerous work colleagues and their families at risk, an act that falls under a serious dereliction of duty, which undermined trust and confidence and therefore constituted gross misconduct.

84. Ms Graydon referred the Tribunal to a non-binding first instance decision AAHPharmaceuticals v Carmichael EAT 0325/03 which I have taken note of.

85. In short, the claimant’s actions could have led to a serious illness and loss of life. The fact he had an unblemished long employment history, has no bearing on the gravity and seriousness of his negligence, and in many ways it went against him. The claimant, as a team leader, was sufficiently experienced and expert to comply with the claimant’s policies and procedures, and his failure to do so amounted to a serious act of negligence and gross misconduct.

86. The respondent was not in breach of contract when it summarily dismissed the claimant, and his claim for wrongful dismissal is not well-founded and is dismissed.

Employment Judge Shotter
4.2.22

JUDGEMENT & REASONS SENT TO THE PARTIES ON

15 February 2022

FOR THE SECRETARY OF THE TRIBUNALS