Case Number**: 1300936/2021**

EMPLOYMENT TRIBUNALS

Claimant Respondent

Mrs R Hutchinson **v** **Avery Homes Hanford Limited**

JUDGMENT

The Claimant's application dated 4th February 2022 for reconsideration of the Judgment sent to the parties on 2nd February 2022 is dismissed.

REASONS

1. There is no reasonable prospect of the original decision being varied or revoked for the reasons set out below.

2. The Claimant was employed as an acting senior care assistant at the Respondent's premises at Hanford Court Care Home in Stoke on Trent. She was dismissed on the grounds of conduct and brought proceedings in the Employment Tribunal complaining that her dismissal was unfair (and also in breach of her contractual right to notice). These Claims were considered at a hearing on 27th and 28th January at which both parties were represented by lay representatives.

3. At the conclusion of the hearing, I gave detailed oral reasons. I accepted that, as at the point of the decision to dismiss being made, the investigation and procedure adopted had been within the band of reasonable responses and the Respondent had reasonable grounds to believe that the Claimant was guilty of the conduct alleged, which was that of not wearing her face mask properly so that it covered her nose and mouth. My oral reasons had considered the question of whether the dismissal was too harsh. In this regard, I stated that I accepted the evidence of the Respondent as to the reasons for, and importance of, the PPE requirements in place and I was satisfied that it was within the band of reasonable responses to treat the breach as a very serious matter which amounted to gross misconduct and to decide to dismiss. As such I also dismissed the Claim for breach of contract. However, I decided that the Claimant had been unfairly dismissed because of the failure to deal with her appeal against dismissal.

4. The Respondent was ordered to pay to the Claimant compensation for unfair dismissal in the sum of £1,204.33. In arriving at this figure, (1) the basic award was reduced on the basis that the conduct of the Claimant before the dismissal was such that it would be just and equitable to reduce the sum calculated of £1,517.30 by 85%, and (2) the compensatory award was reduced on the basis of being (a) subject to a reduction of 85% under the principles in Polkey v A E Dayton Services Limited [1988] ICR 142; (b) subject to an increase of 15% by reason of the Respondent's failure to comply with the ACAS Code of Practice on disciplinary procedures; and (c) subject to a further reduction of 10% as being just and equitable in respect of the dismissal having been caused or contributed to by any action of the Claimant.

5. The Claimant, through her lay representative, Ms Sharon Walters, has applied for this Judgment to be reconsidered (the "Application"). Given that the Judgment was in the Claimant's favour in so far as it was held that she had been unfairly dismissed, the part of the Judgment which the Tribunal is effectively being asked to reconsider is that of the reduction in compensation, with the Application specifically stating that the "*evidence provided shows there should be no reduction in compensation and it was the conduct of Avery that should have been questioned*".

6. It is to be noted that the conduct of the Respondent was taken into account through the award being subject to an increase of 15% by reason of the Respondent's failure to comply with the ACAS Code of Practice on disciplinary procedures as described above.

7. In terms of the grounds relied upon in support of the Application, the Claimant makes three main points as set out below.

   (1) "*It was common practice for staff to sit at the care station and take advantage of a drink (even in covid times). The Respondent Louise Moran denied this happened and this was judged acceptable*" (Ground 1).

   (2) "*The investigation was conducted by a witness Deputy Manager Louise Moran not someone unconnected to the incident to give an unbiased view. This was judged acceptable but said "this could have been investigated further". It should have been investigated further*" (Ground 2).

   (3) "*The discipline was too harsh for the incident a clear resolution from management of staffing levels to enable drinks to be taken on a break and not a working break would have allowed Mrs Hutchinson not to have the need to removed her mask*" (Ground 3).

8. These three grounds are then expanded upon in more detail over the rest of the Application.

9. Under rule 70 of the Employment Tribunals Rules of Procedure 2013, a Judgment will only be reconsidered where it is "*necessary in the interests of justice to do so*". This requires that the Tribunal dealing with the question of reconsideration must seek to give effect to the overriding objective (in rule 2) to deal with cases "*fairly and justly*". The discretion must be exercised judicially, having regard not only to the interests of the party seeking the reconsideration, but also to the interests of the other party to the litigation and to the public interest requirement that there should, so far as possible, be finality of litigation.

10. Rule 72 requires the Employment Judge, in considering an application for reconsideration of a decision, to consider first whether there is any reasonable prospect of the original

decision being varied or revoked, and, if not, the application shall be refused. If there held to be any such prospects, then a hearing would be needed to consider the Application.

11. Applying the above considerations, and for the reasons set out below, I am not satisfied it is necessary in the interests of justice for the decision to be reconsidered or that there is any reasonable prospect of the original decision being varied or revoked.

12. Essentially, the various points being made are all points which were either made as part of the Claimant's case which was considered at the hearing or could have been made as part of the Claimant's case at the hearing.

13. The Claimant's ET1 Form of Claim had sought to contend that it was a common practice for staff members to remove their mask whilst sat at the computer having a drink. This is the same point as Ground 1 above. However, the evidence of Louise Moran, which I accepted, was that this ceased with the restrictions brought in as a result of the pandemic. I also noted in the reasons given orally that the issue of other members of staff being in breach of PPE requirements was not raised by the Claimant at the investigatory interview or disciplinary hearing and had not otherwise been substantiated. There was evidence of disciplinary action being taken against two other individuals resulting either in dismissal or resignation. There was no evidence of any other such breaches being reported or brought to the attention of the Respondent's management. On the evidence of the Respondent's managers, which I accepted, they were not aware of other breaches.

14. The Application further raises an issue regarding Louise Moran having suggested in her oral evidence that the Claimant could have used the café that was opposite the nursing station but which residents had stopped using during the pandemic. The point being made on behalf of the Claimant is that reference to using the café does not appear in other documents. However, the point being made by Louise Moran in her evidence was that if the Claimant needed a break or a drink, then she knew that she needed to go to a separate area rather than doing so at a nursing station which was in a communal area where residents could walk past.

15. The Claimant's ET1 Form of Claim also sought to contend that the investigation should not have been carried out by Louise Moran as she was involved in the case. This is the same point as Ground 2 above. In any event, Ground 2 relates to the issue as to whether the dismissal was procedurally fair rather than that of whether the Claimant's conduct was such that dismissal was not within the band of reasonable responses and / or was such that there should have been no reduction in compensation. The evidence of Louise Moran was that the pandemic had the effect of restricting people coming into the home so that it would have been difficult to get someone else to undertake the investigation. She sought advice and was advised that she could complete the investigation. I found that it was far from ideal that the main witness undertook the investigation. However, I also found that it was within the band of reasonable responses given (a) she was the manager in situ (b) the reason given for not having got someone else to undertake it, (c) she was not the decision maker and employment law effectively places responsibility on the decision maker for a reasonably thorough investigation having been carried out at the point in time of the decision, and (d) I was satisfied that the investigation, as at the point when Nicola Doughty made her decision, was within the band of reasonable responses. The reference made in the oral reasons to a fresh set of eyes was in relation to the appeal, in that I stated that the whole

point of an appeal is that it involves a fresh set of eyes with the possibility of a different decision.

16. The Claimant's Statement of Evidence sought to suggest that, on the morning concerned, "*we were very short staffed … so whilst I sat at the care station to ring a GP for a resident and sorted the duty for Louise Moran, I had a sip of my drink I pulled down my mask very briefly*", which is a similar point to that being made in Ground 3. The adequacy of the arrangements for breaks was explored in cross-examination with the Respondent's witnesses. The position of Louise Moran is set out above, namely that arrangements could be made for the Claimant to have a break if needed and any drink should have been consumed in a separate area.

17. In conclusion, the Application seeks to pursue points which were either made as part of the Claimant's case which was considered at the hearing or could have been made as part of the Claimant's case at the hearing. The points being made are either points which were considered as part of my oral reasons or would not cause me to arrive at a different outcome. Allowing the Claimant, a second opportunity to pursue these points would be contrary to the principle in respect of finality of litigation. The Application is refused.

Signed electronically by me
Employment Judge Kenward
Dated 30th March 2022