



EMPLOYMENT TRIBUNALS

Claimant: Mr I Anwar

Respondent: Studio Retail Limited

HELD AT: Manchester

ON: 21 and 22 March 2022
and 9 May 2022

BEFORE: Employment Judge Batten

REPRESENTATION:

Claimant: In person

Respondent: J Hale, Solicitor

JUDGMENT having been sent to the parties on 10 May 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. By a claim form presented on 11 January 2021, the claimant pursued complaints of unfair dismissal and unauthorised deductions from wages. The latter complaint was about an inability to work overtime during the COVID pandemic and consequent loss of pay. The unauthorised deductions complaint was withdrawn by the claimant in the course of the final hearing, and the Tribunal heard no evidence about it.
2. On 5 March 2021, the respondent presented its response.
3. On 1 April 2021, the claimant applied to amend his claim to include complaints of sex discrimination and race discrimination. The respondent resisted the application. There was a case management preliminary hearing before Employment Judge Ord on 14 June 2021, at which the claimant's amendment application was heard and refused. On 16 June 2021, the claimant applied

unsuccessfully to set aside the refusal of his amendment application. Written reasons for the original refusal were given on 26 June 2021.

4. The final hearing was listed to take place on 1 and 2 March 2022. Unfortunately, the case documents were not by then in good order. The parties had each prepared separate bundles of a significant size and a number of the documents upon which the claimant intended to rely were not in the respondent's bundle. In the circumstances, Employment Judge Ross converted the hearing to a case management hearing on 1 March 2022 and took the opportunity to refresh the case management orders, re-list the final hearing and to discuss the issues with the parties. A list of issues was then agreed – see paragraph 8 below.

Evidence

5. A bundle of documents comprising 881 pages was presented at the commencement of the final hearing in accordance with the case management Orders. The bundle was agreed after resolving the parties' disputes about the transcripts of internal hearings which had been covertly recorded by the claimant. The claimant also provided the Tribunal with a separate bundle of documents which was not referred to, as all relevant documents were in the agreed bundle. References to page numbers in these Reasons are references to the page numbers in the agreed bundle.
6. The claimant gave evidence himself by reference to a witness statement in an email he sent to the Tribunal on 28 February 2022. He also tendered witness statements from: Mubin Ali – a former work colleague; Nazra Anwar – the claimant's mother; Saira Anwar – the claimant's sister; and Sayeed Nor - a former work colleague. The respondent called two witnesses, being: Adrian Wilson, a contact centre manager and the dismissing officer; and Paul Suffield, a financial operations manager who handled the claimant's appeal.
7. The claimant, Mr Wilson and Mr Suffield all gave evidence in chief by written witness statements and were each subject to cross examination. Ultimately, the claimant did not call any of his supporting witnesses to give oral evidence, despite that it was explained to him at the start of the hearing, and on the occasion of the adjournment on 22 March 2022, that his witnesses' attendance was necessary. The Tribunal had read all the claimant's witness statements and informed the claimant that it could give little weight to such evidence when witnesses do not attend to be challenged by way of cross-examination.

Issues to be determined

8. The Tribunal had an agreed list of issues which was compiled by Employment Judge Ross at the case management preliminary hearing on 1 March 2022. At the outset of the hearing, the Tribunal discussed and clarified the list of issues with the parties. The agreed issues to be determined by the Tribunal were as follows:

Unfair dismissal

- 1.1 The claimant agrees he was dismissed by the respondent.
- 1.2 What was the reason for dismissal? Can the respondent show it was conduct?
- 1.3 If yes:
 - 1.3.1 did the respondent have a genuine belief
 - 1.3.2 based on reasonable grounds
 - 1.3.3 following a reasonable investigation of the claimant's conduct?
- 1.4 Was dismissal within the band of reasonable responses of a reasonable employer?
- 1.5 Was the dismissal procedurally fair?
- 1.6 If the claimant is successful, is the principle in *Polkey v A E Dayton Services* relevant, i.e. if the dismissal was procedurally unfair would the claimant have been dismissed in any event?
- 1.7 Was there any culpable or blameworthy conduct of the claimant which caused or contributed to the dismissal, and if so should compensation be reduced (either the basic award or the compensatory award)?

Findings of Fact

9. The Tribunal made its findings of fact on the basis of the material before it, taking into account contemporaneous documents where they exist and the conduct of those concerned at the time. The Tribunal resolved such conflicts of evidence as arose on the balance of probabilities. The Tribunal has taken into account its assessment of the credibility of witnesses and the consistency of their evidence with surrounding facts. The findings of fact relevant to the issues which have been determined are as follows.
10. The claimant was employed by the respondent from 4 June 2018, as a Sales and Service Support Administrator, under a contract of employment which is in the bundle at pages 61-64.
11. The respondent has a 'Short Term Absence Policy', at page 167 onwards in the bundle. The Short-Term Absence Policy provides that employees who are sick must telephone their manager on the morning of each sick day unless different reporting arrangements are agreed. A failure to comply with the notification requirements, or a misleading or untrue statement about fitness to work, can lead to the withholding or suspension of sick pay
12. The respondent has a 'Disciplinary policy' at page 188 onwards in the bundle. This provides amongst other things that:

- 13.1 electronic recording of disciplinary meetings is forbidden and will be treated as misconduct;
 - 13.2 employees must cooperate fully and promptly with investigations, including by providing the names of relevant witnesses, relevant documents and attending interviews. A failure to cooperate with an investigation will be treated as misconduct; and
 - 13.3 examples of gross misconduct (which may lead to dismissal without notice or notice pay) are listed in the disciplinary policy and include, amongst other things: wilful or persistent refusal to obey a reasonable instruction or comply with company procedures/rules; and persistent unauthorised absence from work.
13. At the end of March 2020, the UK Government introduced a national lockdown in response to the COVID-19 pandemic and enacted a number of measures to ensure compliance including social-distancing, and restrictions on citizens' movements save for limited purposes.
 14. In May 2020, the respondent's managers had cause to speak to the claimant about his lack of adherence to social distancing requirements whilst at work and also his timekeeping. A disciplinary hearing was arranged for 14 May 2020 but the claimant sought to cancel it via HR.
 15. On 25 May 2020, the claimant presented a grievance about the conduct of his managers, Ms Zeitsman and Ms Vaid, towards him including as described in paragraph 14 above (pages 88 - 89 in the bundle). The grievance alleged that the claimant had suffered discrimination, victimisation and bullying.
 16. On 25 August 2020, a grievance meeting took place between the claimant and Colin Callear, the respondent's call centre manager, with the claimant's union representative in attendance. Mr Callear also interviewed the managers named in the grievance. The grievance outcome letter is undated and appears in the bundle at pages 114 – 116. The claimant's grievance was turned down because Mr Callear concluded that the managers had acted appropriately in the circumstances and because the claimant was unable to provide names of witnesses to corroborate his complaints.
 17. In August 2020, the claimant attended a disciplinary investigation meeting with Michael O'Brian which led to the claimant being invited to a disciplinary hearing to take place on 7 September 2020. This was later re-arranged. The allegations faced by the claimant included: a failure to follow a reasonable request from a manager; failure to display the respondent's values; and a failure to follow the respondent's lateness policy. The claimant was provided with the investigation paperwork and was invited to provide his evidence prior to the meeting.
 18. On 15 September 2020, the claimant appealed the grievance outcome. A grievance appeal hearing was arranged for 21 September 2020 but was

postponed because that day the claimant reported that he had a high temperature and so the respondent sent the claimant to get a COVID test. On 1 October 2020, the claimant sent Mr Wilson a brief email to say that he did not wish to go ahead with his grievance appeal and he asked to cancel it. The cancellation email appears in the bundle at page 226.

19. In the meantime, a disciplinary hearing took place on 25 September 2020 and, on 28 September 2020, the claimant received a first written warning which appears at page 224 in the bundle) for not following the respondent's absence reporting procedure on 20 occasions, not chasing up a COVID test when the respondent asked him to and for being late on 4 occasions.
20. On 1 October 2020, which was the day that the claimant cancelled his grievance appeal, he worked for about an hour and then reported that he had a cough and possible COVID symptoms. The respondent sent the claimant to get a COVID test. The next day, 2 October 2020, the claimant reported that he had been for a COVID test and he would get the result on 4 October 2020.
21. On 5 October 2020, the claimant returned to work saying he had had a negative COVID test. The respondent asked to see the test result. The claimant produced a screen print which did not show the date of the test result. The respondent therefore asked the claimant for the NHS email whereby he had been sent the test result. At this, the claimant said the test result had been sent to his sister's email address and that he would have to check if she still had it and provide the email the next day, 6 October 2020.
22. On 6 October 2020, the claimant called the respondent to say that his mother had COVID symptoms and so he could not come to work. The claimant was told to get a COVID test. On 9 October 2020, the claimant produced a negative test result dated 7 October 2020, but he said that his mother, with whom he lived, still had COVID symptoms and that she had not yet had a test and so he could not return to work and would be self-isolating for 14 days.
23. On 17 October 2020, the claimant informed the respondent that he could in fact return to work on 20 October 2020 because his mother no longer had COVID symptoms. The claimant was reminded that he was not scheduled to work until 22 October 2020 because 20 and 21 October 2020 were days which he had booked off as holiday.
24. On 22 October 2020, the claimant did not return to work. Instead, he called the respondent to report that he had been in the company of a neighbour for about 15 – 20 minutes, indoors at his home, during the previous day without wearing any masks and that the neighbour was awaiting a COVID test result. At the time, Lancashire, where the claimant lives, was in Tier 3 of the COVID regulations and Government guidance was strict. In particular, gatherings of 2 or more people not of the same household, indoors, in a private dwelling,

were prohibited¹. The respondent therefore told the claimant that he could not come back to work, that he would need to isolate for 14 days and that he must get a COVID test.

25. On 22 October 2020, the claimant's neighbour tested positive for COVID. This meant that the claimant could not return to work for a further 2 weeks.
26. The respondent reviewed the claimant's attendance history as he had by then had a significant number of absences. The respondent was concerned about the claimant's record, in particular because the claimant had never produced the email relating to the screen shot of the COVID test as requested on 5 October 2020 and it appeared that he had ignored the COVID Tier 3 regulations by meeting a neighbour indoors at his home.
27. On 30 October 2020, Ms Faram, a team leader, commenced an investigation into the claimant's attendance record and interviewed the claimant remotely that day. The claimant told Ms Faram that he was unable to provide the test email requested on 5 October 2020 because his sister had deleted the email and had also deleted it from her deleted items so it was no longer available. The claimant was questioned about why his test screen shot had no date on it when tests sent in by other employees had dates on them. The claimant was unable to explain this. The claimant was asked to send his other COVID test results to the respondent. The claimant was also asked why his neighbour was coming into his house in breach of Tier 3 regulations prohibiting households from mixing. In response, the claimant declared that it was his property and that he was able to do what he wanted, that his mother had left the door open and "that's what neighbours do". The claimant said that it was not his fault and that next time he might not tell the respondent.
28. On 2 November 2020, the claimant emailed Ms Faram to say that outside of work he could do what he wanted and that he did not need her or anyone at work telling him when he could or could not go in his own living room – bundle page 255.
29. Ms Faram's investigation report dated 4 November 2020 appears in the bundle at pages 258-261. As a result of the investigation, the claimant was called to a disciplinary hearing on 10 November 2020. The allegations were set out in the disciplinary invitation letter, in the bundle at pages 262-263, being:
 - 29.1. Abuse of the situation with the COVID-19 pandemic, and regulations leading to persistent and continuous non-attendance at work;
 - 29.2. Knowingly placing himself at risk of contracting COVID by breaching the Tier 3 regulations on mixing of households leading to a further 2-week period of isolation and non-attendance at work;

¹ The Health Protection(Coronavirus, Local COVID-19 Alert Level) (Very High) (England) Regulations 2020, schedule 1, part 1, section 1(1).

- 29.3. Falsifying a test result supplied to the respondent on 5 October 2020 to remove the date to provide a fraudulent negative COVID test result;
- 29.4. Consistently displaying unacceptable behaviours not in line with the respondent's values.
30. On 7 November 2020, the claimant presented a grievance about the handling of his previous grievance against Ms Vaid and alleging that he had been discriminated against over a long period of time and that nobody had taken it seriously and that managers had spoken to him rudely. He also alleged that the second disciplinary process was the result of false allegations, including accusations that he had changed a COVID test and that managers had been asking him questions about isolating in an effort to catch him out. The claimant named several managers including Mr O'Brian, Ms Fletcher and Ms Faram, in his grievance.
31. As a result of the claimant's grievance, Mr Wilson, decided to put the disciplinary process on hold, and to address the claimant's grievance first because its outcome might affect the disciplinary process. That was a reasonable decision to take in the circumstances and taking account of the very serious allegations which the claimant had raised in his grievance.
32. A grievance investigation was conducted by Ms Reanne McGrory, a credit and fraud operations manager at the respondent. An investigation meeting with the claimant took place on 13 November 2020. Ms McGrory interviewed others, including Mr Callear and also reviewed the previous grievance process. Ms McGrory noted in particular that the claimant had withdrawn his appeal against the outcome of the previous grievance and, when asked for the names of witnesses that Ms McGrory might interview, the claimant did not provide any names. In addition, the claimant agreed that there had been no further occasions of bullying or harassment since the previous grievance investigation. The claimant had also made a request to change teams and he was told that this would be discussed with him when he came back to work.
33. On 20 November 2020, the claimant's grievance was turned down. Ms McGrory's outcome letter appears in the bundle at pages 349-351. The claimant did not appeal the outcome of his second grievance.
34. Following the second grievance outcome, the claimant was invited to a reconvened disciplinary hearing which took place on 27 November 2020. This hearing took place remotely because the United Kingdom had entered a short second lockdown period. The claimant was accompanied by his trade union representative from USDAW. At the disciplinary hearing, the claimant admitted that he had not been keeping to the Government COVID guidelines nor to the Tier 3 guidelines, and he stated in clear terms that he might not tell the respondent next time if he had been in contact with other people who had got COVID or who might have COVID. These remarks by the claimant caused Mr Wilson to be concerned. The claimant sought to explain the lack of test results produced as being down to him having 3 or 4 phone numbers and

several devices, such that he was unable to ascertain which number(s) or device he had used to book each of the tests and he also said that he could not find the records on his phone because his phone history only went back a week; at that time this was to 17 November 2020.

35. The claimant also sought to explain his neighbour's attendance at his house by saying that 3 of his neighbours were in a "support bubble" with his mother and were not his guests. The claimant described the "support bubble" as being a support bubble for his mother and comprising at least 3 neighbours who helped her with her medicines and food, despite that, under the regulations, a support bubble is limited to a single adult person living alone or a single parent.² The claimant also said that he was not able to help his mother with her medicines and food because he was self-isolating. When it was pointed out that this contradicted his original admission that he had been in the same room as the neighbour who was visiting his mother, the claimant asked, "where does it say I am not allowed in my own living room?". The claimant contended that the regulations and COVID guidance was not clear and that he had not had time to read the respondent's own emails which had sought to clarify the Government guidance on COVID restrictions for its employees.
36. The disciplinary hearing was adjourned and reconvened on 2 December 2020, when the claimant was told that he was summarily dismissed.
37. On 3 December 2020, Mr Wilson sent the claimant a letter confirming his dismissal, which appears in the bundle at pages 490-492. The claimant was dismissed for his conduct because the respondent concluded that he had abused COVID protocols and regulations relating to COVID-19 which had led to his persistent and continuous non-attendance for work, that the claimant had placed himself at risk of contracting COVID-19 by breaching UK Government Tier 3 regulations and thereby had put others at risk, and displayed unacceptable behaviours which were not in line with the respondent's values. In respect of the allegation that the claimant had falsified a COVID test on 5 October 2020 by removing the date, Mr Wilson said that he was concerned about a lack of credibility in the claimant's explanation but that he was unwilling to reach a decision either way on that allegation.
38. Later on 3 December 2020, the claimant sent an email of complaint to the respondent's managing director which was treated as an appeal. Finally that day, at 23:23 hours, the claimant resigned by an email sent to the respondent in which he said he had been mistreated by management. The claimant also asked to work his notice.
39. On 6 December 2020, the claimant lodged a formal appeal against his dismissal. His appeal appears in the bundle at pages 525a-e. The grounds of

² The Health Protection(Coronavirus, Local COVID-19 Alert Level) (Very High) (England) Regulations 2020, schedule 1, part 1, section 7.

appeal were that: continuous non-attendance at work was not gross misconduct; a family member having a support bubble was not in breach of the Tier 3 regulations; the NHS email and test result matched and was not falsified; when he told Ms Faram that he might not say if he had been exposed to COVID in future he meant only Ms Faram and not the respondent; he had kept to Government guidance whilst the respondent had not; the respondent had not followed company policies; and that the respondent was not allowed to sack him for COVID-related illness.

40. The claimant's appeal was conducted by Mr Suffield, a manager who had had nothing to do with the disciplinary process and who did not know the claimant nor any of the other managers who had been involved up to then . Mr Suffield worked in a separate part of the respondent's business and he came to the appeal with an open mind.
41. On 23 December 2020, an appeal hearing took place. At his appeal, the claimant made an allegation about the conduct of Ms Faram claiming that she had breached his confidentiality by telling the respondent that he had said he might not tell the respondent that he was at risk of COVID in future. The claimant also contended that, when he had said he might not tell, he had meant he might not tell Ms Faram and that he had not meant that he would not tell the respondent. Mr Suffield rejected these explanations because the claimant's statement about not telling in future was in fact made during the disciplinary hearing, to Mr Wilson, and not on a confidential basis. Mr Suffield took the view that the claimant had meant the respondent and was now trying to back track. In addition, Mr Suffield probed the claimant about whether the neighbour was from a single household as required for a "support bubble" under the Tier 3 regulations and he sought further information. Rather than answer Mr Suffield's questions, the claimant declared "You need to prove this" and refused to tell him who the neighbour was or their address, saying it was private and "a violation of her human rights". On a balance of probabilities, Mr Suffield concluded that the claimant had breached COVID regulations and was attempting to deflect matters and further, that he could not be trusted to be open and honest about his situation in future which might in turn put other employees at risk.
42. As a result, Mr Suffield turned down the claimant's appeal. His decision was conveyed by a letter of 7 January 2021, which contains a detailed and reasoned explanation for his decision. In respect of the allegation that the claimant had falsified the test result dated 5 October 2020, Mr Suffield agreed that this was not substantiated but recorded that he was concerned about the claimant's failure to co-operate with a reasonable request for the email and the fact that the claimant had only explained matters at the appeal hearing. The appeal outcome letter appears in the bundle at pages 547 - 550.
43. After the appeal and in the course of these proceedings, the claimant told the respondent that he had covertly recorded some of the meetings because he did not trust the managers concerned. The claimant had not sought, nor

obtained the respondent's permission to do so. Incomplete transcripts of certain hearings appear in the bundle.

The applicable law

44. A concise statement of the applicable law is as follows.

Unfair dismissal

45. Section 98 of the Employment Rights Act 1996 ("ERA") sets out a two-stage test to determine whether an employee has been unfairly dismissed. First, the employer must show the reason for dismissal or the principal reason and that reason must be a potentially fair reason for dismissal. The respondent contends that the reason for dismissal was the claimant's conduct. Conduct is a potentially fair reason for dismissal under Section 98 (2) (b) ERA.
46. If the employer shows a potentially fair reason in law, the Tribunal must then consider the test under section 98 (4) ERA, namely whether, in the circumstances, including the size and administrative resources of the respondent's undertaking, the respondent acted reasonably or unreasonably in treating that reason, i.e. conduct, as a sufficient reason for dismissing the claimant and that the question of whether the dismissal is fair or unfair shall be determined in accordance with equity and the substantial merits of the case.
47. In considering the reasonableness of the dismissal, the Tribunal must have regard to the test laid out in the case of British Home Stores -v- Burchell [1978] IRLR 379 and consider whether the respondent has established a reasonable suspicion amounting to a genuine belief in the claimant's guilt and reasonable grounds to sustain that belief and the Tribunal must also consider whether the respondent carried out as much investigation as was reasonable in the circumstances.
48. The issue of the reasonableness of the dismissal must be looked at in terms of the set of facts known to the employer at the time of the claimant's dismissal, although the dismissal itself can include the appeal; so matters which come to light during the appeal process can also be taken into account: West Midlands Co-operative Society Ltd -v- Tipton [1986] IRLR 112.
49. The Tribunal must also consider whether the decision to dismiss fell within the band of reasonable responses open to a reasonable employer in the circumstances of the case: Iceland frozen Foods Ltd -v- Jones [1982] IRLR 439. The range of reasonable responses' test applies both to the decision to dismiss and to the procedure by which that decision is reached: Sainsbury's Supermarkets Ltd -v- Hitt [2003] IRLR 23.
50. The ACAS Code of Practice on Disciplinary and Grievance Procedures contains guidance on the procedures to be undertaken in relation to a dismissal for conduct. Although compliance with the ACAS Code is not a

statutory requirement, a failure to follow the Code should be taken into account by a Tribunal when determining the reasonableness of a dismissal.

51. Where a Tribunal finds a dismissal to be procedurally unfair, the case of Polkey v A E Dayton Services Limited [1987] IRLR 503 held that a compensatory award for unfair dismissal can be reduced on a just and equitable basis to reflect the likelihood that the claimant would have been fairly dismissed had a proper procedure been followed.
52. Compensation for unfair dismissal may also be reduced by such proportion as the Tribunal considers just and equitable pursuant to sections 122(2) and 1213(6) ERA where a Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the claimant. As to the type of conduct that might give rise to such a reduction, assistance is derived from Nelson v BBC (No 2) [1980] ICR 110 to the effect that some reduction is only just and equitable if the conduct of the claimant was culpable or blameworthy, or in breach of contract and also conduct which, while not amounting to a breach of contract, is nevertheless perverse or foolish.

Submissions

53. At the conclusion of the witness evidence, each party made oral submissions which the Tribunal has considered carefully as follows.
54. The claimant made a number of detailed oral submissions which the Tribunal does not rehearse in full here. In essence it was asserted that:- his employment had passed without incident until he put in his grievance in May 2020 at which point the claimant contended that the respondent's managers had turned against him and that his dismissal was the result; his grievances had not been properly dealt with; the respondent's policies and procedures had not been followed; the respondent made unreasonable demands for evidence from him of COVID test results and contacts with the NHS and for information about his neighbour; the respondent had not proved anything alleged against him; there was no evidence that he had put lives at risk; he was not offered mediation nor support during the lockdowns; that support bubbles were exempt under the Tier 3 restrictions; and that he was unfairly dismissed for an allegation of breaching trust and confidence when he had co-operated and explained everything with evidence.
55. The Solicitor for the respondent also made a number of detailed oral submissions which the Tribunal does not rehearse in full here. In essence it was asserted that: - the claimant was fairly dismissed for gross misconduct after a reasonable procedure in accordance with the ACAS Code of Practice and in light of the evidence and admissions made by the claimant; his grievances were given full consideration and the disciplinary process was reasonably put on hold to allow the claimant's second grievance to be considered by Ms McGrory; the claimant cancelled his appeal against the first grievance outcome and did not appeal the second grievance outcome; hearings were repeatedly postponed and rearranged to suit the claimant to

afford him time to prepare; Mr Wilson genuinely and reasonably believed the claimant to be guilty of the misconduct when he was already subject to a final warning for similar misconduct; the requests for corroborating evidence of the COVID test results were reasonable and had been required of all employees such that the claimant was not singled out as alleged or at all; the respondent accepted that the claimant had shown the COVID test of 4 October 2020 was negative but his delay in providing such evidence and his convoluted explanation about his sister's emails being deleted had raised suspicions; Mr Wilson had rightly concluded that a support bubble in Tier 3 could not consist of more than one adult and the request for details of the neighbour was reasonable; the claimant was uncooperative and obstructive; the fact that the claimant had declared that he would not tell the respondent if he had come into contact with COVID in future was a serious matter which caused the respondent to lose trust in the claimant; the claimant's suggestion, at the appeal, that he did not mean he would not tell the respondent and instead meant only Ms Faram, was not credible; that the claimant had caused or contributed to his dismissal by his conduct, in his failure to co-operate with requests for evidence and information which could have helped his case; and that the covert recordings, which the claimant had never fully disclosed were in breach of the respondent's rules and would likely have led to his dismissal if they had been known of at the material time.

Conclusions (including where appropriate any additional findings of fact)

56. The Tribunal has applied its relevant findings of fact and the applicable law to determine the issues in the following way.

Reason for dismissal

57. First, the Tribunal considered that the respondent has shown that the reason for the claimant's dismissal was misconduct, as set out in Mr Wilson's detailed termination letter at pages 490-492 of the bundle. In essence the claimant was dismissed for matters which amount to gross misconduct under the respondent's disciplinary policy, namely that he had abused COVID protocols and regulations relating to COVID-19 which had led to his persistent and continuous non-attendance at work, that the claimant had placed himself at risk of contracting COVID-19 by breaching UK Government Tier 3 regulations and thereby had put others at risk including the respondent's employees, and that he had displayed unacceptable behaviours which were not in line with the respondent's values.
58. It has been the claimant's case that he was bullied and harassed by the respondent's managers and that, when he raised grievances about this, the respondent made up allegations to get him dismissed. In effect, the claimant contended that he was not dismissed for the misconduct alleged but for an ulterior motive. However, the Tribunal has found no evidence, either from the oral testimony or within the bundle of documents, nor from the conduct of those concerned at the time, to support such a serious allegation. The Tribunal considered that the respondent's personnel, and the witnesses who

handled the disciplinary process and the appeal, acted with integrity. There was no evidence that they were in any way influenced by anything that may have gone before including the claimant's grievances. The only influence which those grievances had was upon the disciplinary process, in that the disciplinary process itself became lengthened because it was put on hold so that the second grievance could be heard first.

Reasonable grounds to believe in misconduct

59. The Tribunal then considered whether the respondent had a genuine belief on reasonable grounds, in the claimant's misconduct. The disciplinary process was instigated because of the claimant's absences and the reasons he gave for them. The respondent considered that the claimant had been absent over a lengthy period, on a significant number of occasions. The respondent had asked for evidence to support the absences and was met with resistance, which itself led to concerns about the claimant's conduct and attitude. The claimant had been given a final written warning, on 28 September 2020, for failure to follow reasonable management instructions and breach of company values with regard to his attendance. It was apparent to the respondent that he had not heeded the warning given.
60. The claimant had admitted to Mr Wilson that he had not been keeping up with Government guidelines and COVID regulations. The circumstances which he described amounted to breaching Tier 3 regulations by meeting a neighbour from another household inside his home. Mr Wilson considered, from what he was told by the claimant, that the claimant had been reckless as to health and safety and had not followed COVID regulations. Mr Wilson was also very concerned that the claimant had declared that he might not tell the respondent in future if he had contact with a COVID situation or a person who tested positive. Whilst the claimant later suggested that he only meant that he would not tell Ms Faram, the investigating officer, he did not say that to Mr Wilson – it was first suggested at the appeal hearing. The claimant only raised his alternative interpretation of his statement on this matter when he has realised that the fact that he had said he might not tell in future became an issue of concern. In any event, the Tribunal considered that it was reasonable, in all the circumstances, for the respondent's appeal officer to reject that suggestion by the claimant. Mr Suffield took it, from the plain meaning of the words used, that the claimant intended not to tell the respondent, and the respondent's officers reasonably considered that to be evidence of the claimant's cavalier or reckless behaviour. In the circumstances of the pandemic, it was appropriate for the respondent to be concerned at such a threat. It follows that the respondent lost trust and confidence in the claimant.
61. Mr Wilson conducted a disciplinary hearing for which there are extensive notes. The claimant was accompanied by his trade union representative. When questioned, the claimant is recorded as having raised his voice and as having talked over people. Mr Wilson adjourned to consider his decision carefully. He had requested information but the claimant did not cooperate. In essence, the fact that the claimant refused to provide evidence requested

counted against him - he could have demonstrated his innocence of the allegations, at least on a balance of probabilities, but he did not seek to do so.

62. The Tribunal was therefore satisfied on the basis of the evidence before it, and the testimony of Mr Wilson, that the respondent has a genuine belief and reasonable grounds to believe that the claimant had committed the misconduct as alleged.

The investigation

63. The Tribunal considered that the investigation itself was reasonable and sufficient. The respondent's enquiries were relevant and appropriate in an effort to get to the facts surrounding the claimant's absences. The respondent met with the claimant to review his record and provide him with an opportunity to explain things. It was entitled to ask the claimant for corroboration of what he had reported about his health and the need to self-isolate. The respondent had made similar requests for the test results of other employees in the same position. There was no evidence to suggest that the manner or conduct of the investigation was intimidating or oppressive. The claimant was uncomfortable about the respondent's questioning but that was because, as he said in evidence, he thought that the respondent didn't believe him. Instead of co-operating and providing information to explain his absence record, the claimant became obstructive and dilatory. He refused to tell Ms Faram the neighbour's name when asked. The Tribunal considered that it was reasonable in the circumstances of the case for the respondent to seek to check on the claimant's compliance with the COVID Tier 3 regulations. Those regulations define a support bubble as being a single person/single parent household joining one other household. The claimant had mentioned 3 neighbours which raised concerns and when he would not elaborate on that, effectively telling the respondent that it was none of its business what he did, the respondent's concerns understandably increased. The claimant did little to allay those concerns despite several opportunities to do so and to explain himself.

Band of reasonable responses

64. The respondent had evidence before it, including what the claimant had admitted, of potential breaches of the COVID regulations which were in place at the material time and an employee whose response to enquiries was to insist that the respondent could not tell him what to do and that all this was none of its business. Indeed, the claimant spent a lot of time during the course of this hearing seeking to persuade the Tribunal that his conduct was acceptable and that the respondent had not proved otherwise. In any event, the respondent does not have to prove that the claimant has breached the Government guidelines; it just has to have a genuine belief on reasonable grounds in such misconduct, and the Tribunal has found that the respondent did have a genuine belief on reasonable grounds in the circumstances of the case. The respondent tried to investigate matters as best they could but the claimant refused to cooperate, for example by talking over the respondent's

officers (which was consistent with the claimant's behaviour during the Tribunal hearing) and refused to provide evidence, or took an inordinately long time to provide certain evidence which raised suspicions even further. This led Mr Wilson to dismiss the claimant in part because he believed the claimant could not be trusted and he felt compelled to conclude that the claimant could put colleagues at risk. The Tribunal considered that such a view was a reasonable view to adopt. The claimant had continued to suggest he would not share information with the respondent if he was in contact with a potentially COVID positive person or in a COVID situation. The implication of that was that he would attend work and not self-isolate in circumstances where he was obliged to do so, where he might be infectious and he would not tell the respondent. The respondent would not therefore be able to keep reasonable control of the health and safety of its employees, which is an absolute duty for the respondent, and a duty that the respondent and its employees share.

65. For all the above reasons, the Tribunal considered that the dismissal of the claimant fell squarely within the band of reasonable responses, available to the respondent employer in the circumstances of this case. The Tribunal also considered that any reasonable employer could have dismissed for those reasons, not just because of the attendance factors but because, at the material time in 2020, the UK was under lockdown(s) and/or subject to significant COVID restrictions and regulations. Life was restricted and difficult and people were very concerned to control the spread of COVID. In light of the circumstances of the pandemic, the Tribunal considered that the respondent was entitled to conclude that the claimant was not being careful, that he had not demonstrated an awareness of or an adherence to the COVID regulations and that his lack of care could affect the respondent's other employees. The respondent decided that dismissal was appropriate given the perception of risk to their business and it was within the band of reasonable responses.

Polkey and contributory fault

66. The Tribunal has found the claimant to have been fairly dismissed. Even if the dismissal had been procedurally unfair (which the Tribunal does not find it was) the Tribunal considered that the claimant would have been dismissed in any event if a fair procedure had been followed, because of the way he responded to the allegations and his failure to cooperate or provide the evidence which the respondent reasonably asked of him. The claimant failed to provide what was requested in a reasonable period of time, and some tests were simply never provided at all. In terms of contributory conduct, the Tribunal accepted the submissions of the Solicitor for the respondent, that the claimant's unwillingness to provide additional information sought by Mr Wilson and also to respond to Mr Suffield's enquiries about the neighbour was conduct which contributed to the decision to dismiss.
67. Further, it was the respondent's case that, if the claimant had not in fact been dismissed, and the covert recordings of the disciplinary hearings had been

discovered thereafter, this would have caused the respondent to institute further disciplinary action against the claimant which may well have resulted in his dismissal. The respondent's disciplinary procedures state that covert or unauthorised recording of proceedings is forbidden and will be treated as misconduct. In the circumstances, the Tribunal considered that the claimant may well have been dismissed for the covert recordings, as a further breach of trust.

68. In light of the above conclusions and all the circumstances of the case, the Tribunal concluded that the claimant's claim of unfair dismissal is not well-founded and is dismissed.
69. It is right to record that the claimant's behaviour during the hearing was challenging and he refused to accept what the respondent's witnesses said and often raised his voice. He sought to debate my oral judgment as it was being delivered and then raised his middle finger to me, witnessed by my clerk, when the outcome of the hearing was plain.

Employment Judge Batten
Date: 21 June 2022

REASONS SENT TO THE PARTIES ON:
23 June 2022

FOR THE TRIBUNAL OFFICE

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