EMPLOYMENT TRIBUNALS

Claimants: (1) Mrs M Gunay (2) Mrs S Silva

v

Respondent: Dynamic Cassette International Limited

Heard at: Lincoln Magistrates Court **On:** 28 February, 2 & 3 March 2022

Before: Employment Judge Fredericks

Appearances
For the claimant: Mrs S Bewley (Counsel)
For the respondent: Mr R Capek (Litigation Consultant)

JUDGMENT

The claimants' claims for unfair dismissal and wrongful dismissal are not well founded and are dismissed.

REASONS

Introduction

1. In this case, the claimants were dismissed following the second claimant giving the first claimant a lift home from work. This, the respondent said, constituted gross misconduct as it breached a no car sharing rule implemented for health and safety reasons in response to the Covid-19 pandemic. It is a striking feature of the pandemic and industry's response to it that the claimants were dismissed for something that would ordinarily seem so innocuous.

2. These written reasons are produced at the claimants' request after I dismissed their claims in an oral decision with reasons delivered on 3 March 2022, on the final afternoon of the three day hearing.

3. The claimants were represented by Mr R Capek, a consultant, and gave sworn evidence themselves in support of their claims. The respondent was represented by Mrs S Bewley of counsel. The respondent's sworn witnesses were: Amanda Crowley (HR Manager at the respondent); Angela Butler (Senior Accounts Assistant at the respondent); Fiona Elliot (Head of Purchasing at the respondent); and Tammy Studholme (Executive Director at the respondent).

4. The claimants were employed by the respondent, an ink cartridge and laser toner remanufacturing company, until their dismissal. Mrs Gunay was employed as a Production Operative from 16 November 2003 to 2 July 2020 (her effective date of termination). Ms Silva was employed as a Production Operative from 14 November 2005 to 1 July 2020 (her effective date of termination).

5. The respondent asserts that the claimants were dismissed fairly for the potentially fair reason relating to conduct, and further that the claimants were dismissed for gross misconduct. The respondent says that that this was in breach of clearly communicated and displayed Covid-19 response policies relating to the Covid-19 pandemic. It relies on the claimants admitting the acts of gross misconduct as justification for a fair dismissal despite a shortened and acknowledged imperfect dismissal process.

6. The claimants' claims are broadly that their dismissals were unfair under s98 of the Employment Rights Act 1996 because they were dismissed under a policy which (1) did not or should not have applied to them and/or (2) which was not liable to disciplinary action. This was said to be because the respondent's staff handbook, including disciplinary and health and safety policies and procedures, were contractually incorporated and were not therefore amendable without consent of the workforce. It follows, Mr Capek said, that the claimants were not bound by the policy or instruction that they went on to breach prior to their dismissal.

7. Further, Mr Capek argued that the dismissals were rendered unfair due to, he said, significant procedural failings relating to the investigation and dismissal. He argued that the decision to dismiss was unfair because it did not fall within the band of reasonable responses open to a reasonable employer in the circumstances.

8. I also had access to an agreed bundle of documents which ran to some 124 pages. Page references in this document refer to the pages of that bundle.

Issues to be decided

9. There was a discussion at the outset about the relevant issues. Mr Capek had produced a list of issues which were granular in detail and focused partly upon whether or not the Covid-19 policies and health and safety instructions were properly applicable to the claimants depending on their contractual position, and partly upon the usual issues you would expect to find in conduct dismissals. Mrs Bewley noted that the respondent's case had not been prepared on the basis that the contractual position, of the policies was going to be an issue. She did, though, deal with it in the course of the case and closing submissions.

10. The issues adopted for the hearing were:

a. *Did the respondent's Covid-19 policy apply to the claimants and their conduct when deciding to car share?*

b. ***Unfair dismissal –***
   i. *Were either or both claimants dismissed for the potentially fair reason of their conduct?*
   ii. *Did the respondent act reasonably in treating that reason as a sufficient reason for dismissing either or both claimants?*
      1. *Did the respondent form a genuine belief of the claimants' misconduct?*
      2. *Did the respondent have reasonable grounds for the belief?*
      3. *Was the respondent's belief based on a reasonable investigation in all the circumstances?*
   iii. *Did the respondent follow a fair procedure when dismissing the claimants?*
   iv. *Was the dismissal of either or both claimants within the range of reasonable responses in all the circumstances?*

c. ***Wrongful dismissal –***
   i. *Did either or both claimants commit a repudiatory breach of contract entitling the respondent to dismiss them?*

d. ***Remedy –***
   i. *To what sums, if any, are the claimants entitled?*
      1. *Should any award be reduced to reflect any culpable or blameworthy conduct which contributed to their dismissal?*
      2. *If the respondent failed to follow a fair procedure, should any reduction to the compensatory award be made to reflect the chance that the claimants would have been dismissed in any event following a fair process?*
      3. *Did either party unreasonably fail to follow an ACAS Code of Practice with the result that any award should be increased or reduced by up to 25%?*
      4. *Are either or both claimants entitled to notice pay?*
      5. *Have either or both claimants mitigated their losses?*

Findings of fact

11. The relevant facts are as follows. Where I have had to resolve any conflict of evidence, I indicate how I have done so at the material point. In general, I will note that I found the claimants' witness statements to be difficult documents to navigate. It is clear that Mr Capek has written them and inserted notes and legal arguments relating to matters he included in his list of issues. There is even inclusion of the wording *"Mr Capek will say that…"* in Ms Silva's statement. This is plainly not her factual evidence.

12. I have no doubt that the claimants would struggle to answer questions, if asked, about some of the points in their own statements. Unusually, the claimants' witness

statements also refer to the witness statements supplied by the respondent and appear to attempt to counter some of those points, potentially putting the evidence in chief offered by the respondent at a disadvantage. I have kept these points in mind when considering the written evidence, although naturally the live evidence elicited at the hearing was helpful and instructive. The claimants were able to give their oral evidence freely and so I was able to consider their case properly at the hearing.

The respondent's response to the Covid-19 pandemic

13. By March 2020, the respondent was conscious that it needed to take steps to limit the spread of the Covid-19 virus. Given that the respondent operates a production facility which requires operatives on site, it decided to implement measures and strategies to try to avoid the virus spreading through the workforce. The grounds of resistance outline at page 28 some of the measures put in place, including the removal of tea towels, the banning of business travel, only allowing one member of staff to sit at a table in the canteen, and removal of shared items/areas such as pens and the smoking area. Staff members were also required to have temperature checks at arrival and exit. Ms Crowley's witness statement also described how light switches were removed and motion sensors installed.

14. From 16 March 2020, the respondent decided to introduce a 'no car sharing policy' which prohibited employees from sharing a car to or from work, unless they lived together. A general health and safety risk assessment record was completed (pages 74 to 76) to consider Covid-19 response, and a prohibition of car sharing was confirmed as a health and safety response (page 75).

15. The respondent's evidence is that a notice advising of the ban on car sharing was placed in the canteen and the staff notice board. A copy of that notice is at page 78. The claimants queried whether they should have been aware of this notice, which was undated. Both suggested that they had not seen it or had not checked the notice board. It seems more likely than not, to me, that such a notice was indeed placed in areas to be seen by employees in order to advertise the policy, and so I find that the notice was indeed placed for the attention of employees in an area which should have been noticed by the employees on site. This was before the full Covid-19 policy was introduced, and pre-dated the national 'lockdown restrictions' which were announced the following week.

16. The notice at page 78 says -

*"**Car Sharing***

Employees must adhere to social distancing rules by keeping 2-metres apart at all times. For this reason, please note that car sharing is prohibited.

The company is enforcing all precautions to ensure the safety of employees but we also have a duty of care to each other.

Thank you".

17. Following the 'lockdown' announcement, the respondent was aware that it should keep in close communication with employees. On 23 March 2020, Ms Crowley sent a form for employees to return contact details along with the monthly pay slips. Ms Crowley says that the claimants were sent a copy of the information and notice at page 99 with this correspondence. The notice requested the claimants, and all employees, return the form with contact information. In relation to the car sharing rule, the notice at page 99 says -

    *"**Car sharing***

    It has come to my attention that employees are still car sharing to and from work.

    This is not acceptable and must stop immediately. If you are unable to travel safely to work, do not come in.

    The company is enforcing all precautions to ensure the safety of employees but we also have a duty of care to each other.

    Thank you".

18. Neither claimant denied receiving this notice in particularly strident terms. Again, the lack of date was queried, but both confirmed that they had responded to the correspondence by providing their contact details. Mrs Gunay acknowledges that she saw a notice with pay slips in her disciplinary meeting (page 106). The respondent witnesses were not challenged on the point, either, and it seems to have been accepted that the notices were sent. In the circumstances, I find that the notices were sent with those pay slip packages and represented the second time in writing that the claimants were or should have been aware of the no car sharing policy.

19. On 1 April 2020, Ms Silva signed a new statement of terms and conditions of employment between her and the respondent (pages 37 to 38). That contract referred to a disciplinary procedure, and advised that Mrs Silva should *"refer to the Staff Handbook where these are outlined"*. That handbook was produced at pages 49 to 73. On page 50, the handbook contains a notice which says -

    "***Variation or amendments to the handbook***

    The company reserves the right to amend its terms and conditions of employment and policies/procedures from time to time, for example where working systems or techniques change, or when new employment regulations come into effect.

    Any major changes will be notified in writing to all employees, and employees will receive replacement pages to this handbook.

    Employees may be notified of minor changes of detail by way of a general notice on the company's notice boards.

    The company's rules and regulations contained within this handbook, the Health and Safety Policy and the rights conferred by statute, taken together with your

statement of terms and conditions of employment, form the basis of your employment with the company and in general apply to all employees".

20. Page 52 relates to health and safety at the respondent. The handbook makes clear that all employees are required to observe the policy. It also advises that the *"company's health and safety (H&S) manager will convey any revisions of the said policy to the employee as and when necessary. Minor changes will be displayed on the notice board"*. Page 70 advises that serious infringement of health and safety rules would normally be considered as a gross misconduct offence. As described above, I find that the Covid-19 no car sharing policy was placed on the notice board and sent to employees with clear notice that the measure was for the safety of all employees.

21. It is clear that the respondent intended the claimants and all employees to be bound by the policies contained within the staff handbook and that it expected its employees to follow the Covid-19 policies, also. The Covid-19 policies, including the no car sharing rule, also represented management instructions in relation to the ways in which the challenges posed by Covid-19 should be tackled.

22. On 6 April 2020, Ms Silva was placed on to furlough and did not attend the respondent site until her return on 18 May 2020. On 17 April 2020, Mrs Gunay also signed revised statement of terms and particulars of employment which were identical to the one described as applying to Mrs Silva above. The same staff handbook applied.

The warnings about car sharing and the claimants' car sharing

23. Mrs Silva would drive Mrs Gunay to and from work prior to the Covid-19 pandemic. They are close friends. Ms Crowley recalls that, at the instigation of the no car sharing rule, she spoke to both claimants, prior to Ms Silva's furlough, to explain that they could not car share because of the new policy to ensure that they understood it and would follow it. She knew the claimants' arrangements well enough for this to be a concern. The claimants told Mr Crowley that they were not car sharing at this point. In her appeal meeting, Mrs Gunay acknowledged that the claimants were specifically spoken to by Ms Crowley (page 123).

24. Ms Crowley also recalls Ms Silva asking her whether the claimants could car share. Ms Crowley could not recall the exact date, but indicated that this was after Mrs Gunay had returned from furlough in May 2020. Ms Crowley recalls that Mrs Silva suggested that car sharing was no different to sharing a taxi, which Mrs Gunay was using to get to and from work on occasion. Ms Crowley says that she refused the request on the grounds of the policy, and considered that a taxi was a safer form of travel because the taxi firms would have their own social distancing and disinfection procedures to limit transition. Again, this point was not challenged and Ms Silva seemed to accept that she had asked about car sharing and that she had been refused.

25. On 13 June 2020, the claimants were able to form a 'support bubble' by the change in government 'lockdown' restrictions. This allowed them to be in each other's houses and travel together as if they lived together. An explanatory note about support bubbles was provided at pages 97 to 98, although this appears to post-

date the events in question. I am satisfied that the claimants were able to create a support bubble and in practice did so, although I note the phrase is absent from any meeting notes between the claimants and the respondent. I am equally satisfied that the respondent did not change their health and safety policies to authorise car sharing for those in a bubble and so the claimants remained subject to a ban on car sharing whilst travelling to and from work.

26. The claimants shared a car on two occasions from work in late June 2020. Ms Silva drove Mrs Gunay home. The last occasion was on 30 June 2020. Ms Silva saw Mrs Gunay walking as she left the factory premises. Mrs Gunay was said to be in pain due to arthritis, and I consider that this is true having heard the claimants speak about it. The claimants were seen by a colleague.

Other employees' actions and consequences in relation to the respondent's Covid-19 policies

27. During the hearing and during the claimants' appeal stage, reference was made to the conduct of other members of staff. It is clear that the claimants and respondent were aware of one other instance of claimed car sharing in particular which took place after the no car sharing rule was implemented but prior to the claimants car sharing. The claimants say that two sisters shared a car to and from work. The sisters worked together but did not live together, and so this was in breach of the no car sharing rule. The claimants say that the respondent's management was informed about the car sharing and spoke to the sisters, but they only received a warning about car sharing and were not subject to any disciplinary action. The claimants say that the sisters were open with friends about the car sharing.

28. The respondent's evidence is that the sisters were spoken to about car sharing, but did not admit to car sharing in that conversation and that they denied it. Rather than escalate matters and start a formal investigation and disciplinary procedure, the respondent elected to warn the sisters about the car sharing ban and remind them that if they car shared then they were committing an act which would be considered as gross misconduct. It is clear to me that the parties' positions are not mutually exclusive. The sisters may well have car shared, the respondent spoke to them, they denied it, and so the respondent did not escalate their suspicion. If the sisters did car share, then they may well choose to be open about that and say that they were warned.

29. I also heard about a holiday two employees took to the Lincolnshire coast and Skegness, which was said to be in breach of the Covid-19 policy. The claimants say that the two individuals were suspended for two weeks following their return, a sanction short of dismissal, to ensure that they did not bring the virus to the respondent's site. The respondent's evidence is that the two individuals sought permission to go on their holiday prior to going, and did not breach a policy or try to hide a breach. They agreed to have two weeks' unpaid leave (or use holiday) in order to go on their trip. I have no reason to doubt that this instance was authorised by the respondent, and that the employees knew they would need to isolate as was envisaged by the relevant part of the Covid-19 policy. The respondent witnesses, on oath, informed me this was the case. The claimants, not in the same positions of management, were simply not in the same position to know the truth of the matter.

30. Finally, the claimants told of a picture on facebook of other employees hugging when they should have been social distancing. That picture was at page 114, and is dated 20 June 2020. No evidence was presented about the way in which these individuals were treated by the respondent, although it is alleged that the respondent did nothing because it was considered to be a private matter. In any case, the respondent was not made aware of this photograph until after the claimants were dismissed during the appeal stage.

The claimants' summary dismissals

31. The claimants' car sharing on 30 June 2020 was reported to the respondent. Ms Silva was working on 1 July 2020 but Mrs Gunay was on holiday. Ms Silva was asked about the car sharing by another supervisor and she confirmed that it had happened. She was told that this was a disciplinary offence.

32. On 1 July 2020, Ms Silva was called to a meeting with Ms Crowley at 10.50am. Ms Butler was also present as a note taker. Those notes are at pages 103 to 104 and their accuracy was not challenged, Ms Crowley told Ms Silva that she had had reports of car sharing, and Ms Silva immediately confirmed that she had picked Mrs Gunay up from outside the factory. In the short conversation that followed, Ms Silva argued that the car sharing happened off the respondent's site and she was told that the rule applied to travel to and from work. Ms Crowley reminded Ms Silva that the policy was expressed as a health and safety policy and that breach of it would be considered as gross misconduct. Ms Silva explained that Mrs Gunay had an issue with her legs, and was told that this did not excuse the banned car sharing. Ms Crowley then confirmed that Ms Silva was summarily dismissed. Ms Silva told Mrs Gunay what had happened to her before Mrs Gunay returned to work the following day.

33. On 2 July 2020, Mrs Gunay returned to work and was called to a meeting with Ms Butler at 7.50am. Ms Michelle Baker took the notes which were at pages 106 to 107. Their accuracy was not challenged. Ms Gunay says that her desk space and belongings had already been cleared prior to the meeting as if the respondent had decided she would be summarily dismissed. The respondent denies this, and says that personal items would have been cleared away in any event due to the Covid-19 policies in operation at the time. In the meeting, Mrs Gunay confirmed that she had car shared in breach of the policy. She queried the treatment of other people she considered to have broken Covid-19 rules (outlined above), but Ms Crowley would not be drawn on other people's cases. Mrs Gunay said that she thought lockdown had finished and that the guidance allowed a reduction to 1m social distancing and so it was fine to car share. Ms Butler told Mrs Gunay that she was summarily dismissed at the end of what must have been a short conversation.

34. It is perhaps relevant to note that the '1m+' social distancing rule mentioned by Mrs Gunay did not come into effect until 4 July 2020 and so, whilst the claimants might have been aware of it, it was not actually operative at the time of the dismissals. In any event, and of more relevance, the respondent had not updated and changed its rules and policies either.

35. On 3 July 2020, Ms Crowley wrote to Ms Silva to confirm her dismissal for gross misconduct. The letter (page 105) explains that this is for breach of the Covid-19 policy by car sharing. The letter contains some inflammatory language, telling Ms Silva that she *"showed absolutely no respect for the company or [her] work colleagues"*. The letter also says that Ms Silva *"continued to cheat & ignore"* by dropping Mrs Gunay off outside of the factory. Mrs Gunay was sent much the same letter on the same date, save that her role when continuing to *"cheat & ignore"* was in being dropped off.

36. Ms Crowley wrote to both claimants again on 8 July 2020 to clarify that Ms Silva had collected Mrs Gunay and driven her home rather than bringing her into work and dropping her off outside (page 108 and page 109). This mistake was explained as a typographical error. It seems like a significant detail to get wrong, but I am satisfied from the notes of the disciplinary meetings that the respondent was aware that the car sharing occurred at the end of the day when making its decisions to dismiss the claimants.

The claimants' appeals

37. The claimants appealed against their dismissals by almost identical letters on 8 July 2020. Mrs Gunay's appeal letter is typed and said she had 17 years' loyal service (page 110). Ms Silva's appeal letter is handwritten and said she had 15 years' loyal service (pages 111 to 112). Each appeal was made on six identical grounds –

    a. Dismissal without notice should only take place after a proper investigation and disciplinary hearing;
    b. That the conduct did not amount to gross misconduct;
    c. Some employees did the same conduct but were only given a warning and not summarily dismissed;
    d. Neither claimant had signed anything to agree to the Covid-19 policy;
    e. There was no evidence presented about the accusations of misconduct made; and
    f. Neither claimant was able to present their case at the point of dismissal.

38. Ms Elliot conducted the appeals. She met with the claimants on 16 July 2020; with Ms Silva at 2.30pm, and Mrs Gunay at 3.45pm. The notes of Ms Silva's appeal were at pages 118 to 120, and the notes of Mrs Gunay's appeal were at pages 122 to 213. The accuracy of these notes were not challenged.

39. In Ms Silva's meeting, Ms Elliot explained the justification for the summary dismissal and asked what further investigations it was felt the respondent should have done prior to the disciplinary decision being taken. Ms Silva explained that she car shared because she understood the social distancing rules had been relaxed to allow people to be within 1m of each other so long as they wore masks. She produced the photograph from facebook seen at page 114 and asked why she was being treated differently to others who were not adhering to social distancing rules. Ms Elliot said she would consider everything that she had been told but that she would not be drawn on issues relating to other people. Ms Silva was asked if there was anything else she wished to raise, but she had nothing else.

40. In Mrs Gunay's meeting, Ms Elliot explained why Mrs Gunay had been dismissed. Mrs Gunay explained that lockdown had ended and that, as a result of the 1m+ rule, it was now possible to car share. Mrs Gunay also cited the actions of other people who had not been summarily dismissed. Mrs Gunay denied in the meeting that she had seen or received written notice of the lack of car sharing, but did acknowledge that Ms Crowley had told them not to car share previously. Mrs Gunay was asked if she had anything else to say and she said she did not.

41. As noted above, the social distancing rules had not changed by this point of the claimants' dismissal and appeal process, and so the claimants were mistaken in their belief that the 2m social distancing rule had been withdrawn by the Government. Any investigation conducted by the respondent into whether social distancing rules were relaxed to the point where the claimants' conduct was excused would have discovered that the rules had not been relaxed. Neither claimant raised their being in a support bubble with each other on appeal, and so I cannot criticise that Ms Elliot did not take this into account.

42. Ms Elliot wrote to the claimants with identical letters on 21 July 2020 to confirm that she was upholding the decision to dismiss both of them for gross misconduct. The letter explains that Ms Elliot did her own investigation where necessary and gave full consideration to the case. At the hearing, Ms Elliot explained that she had spoken to Ms Crowley about the previous interactions with the claimants and had reviewed all of the documentation that the claimants had either been sent or ought to have seen. She reflected upon the admissions from the claimants and noted that the claimants could not articulate any further investigation that they felt should have been explored prior to their dismissal. She says, and I accept, that she did consider whether there was any evidence which would allow her to reinstate the claimants but that unfortunately she could find none.

Relevant law

Unfair dismissal

43. Under *s98(1) of the Employment Rights Act 1996*, it is for the employer to show the reason for the dismissal and that it is either for a reason falling with *section 98(2)* or for some other substantial reason of a kind such as to justify the dismissal of the employee. The respondent asserts that the claimant was dismissed by reason of the claimant's conduct. Dismissal for conduct is a potentially fair reason falling within *section 98(2)*.

44. Where the employer has shown a reason for the dismissal and that it is for a potentially fair reason, *section 98(4) of the Employment Rights Act 1996* states that the determination of the question whether the dismissal was fair or unfair depends on whether, in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and must be determined in accordance with the equity and substantial merits of the case.

45. In *Iceland Frozen Foods v Jones [1982] IRLR 439*, it was held that, when considering s98(4), the tribunal should consider the reasonableness of the employer's conduct and not simply whether the dismissal is fair. In doing so, the

tribunal should not substitute its view about what the employer should have done. The case also outlined that there is a range of responses open to a reasonable employer; although different employers could come to different decisions in the same circumstances, all might be reasonable.

46. Consequently, the tribunal must consider whether, in the particular circumstances of the case, the decision to dismiss the employee fell within the reasonable range of responses which a reasonable employer might have adopted. If a dismissal falls outside that band, then it is unfair. In other words, it does not matter if I think I would have dismissed or not dismissed in the same circumstances, and my judgment does not reflect any position on that. The tribunal should consider the whole dismissal process, including any appeal stage, when determining fairness (*Taylor v OCS Group Ltd [2006] ICR 1602*).

47. When considering cases of alleged issues of conduct, it is important to consider the case of *British Home Stores v Burchell [1980] ICR 303*. This case establishes a three stage test for dismissals:

    a. the employer must establish that it believed that the misconduct had occurred;

    b. the employer had in its mind reasonable grounds upon which to sustain that belief; and

    c. when the belief in the misconduct was formed, the employer had carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

48. The band of reasonable responses test applies as much as much to the respondent's investigation as it does to the decision to dismiss (*Sainsbury's Supermarkets v Hitt [2003] IRLR 23*). The tribunal must focus on whether the employer's investigation was reasonable in all the circumstances (*London Ambulance NHS Trust v Small [2009] IRLR 563*).

49. There is helpful case law to assist with determining what sort of investigation might be reasonable in all the circumstances of the case as envisaged in *Burchell*. In *W Weddel & Co Ltd v Tepper [1980] IRLR 96*, Stephenson LJ said that employers -

    "must make reasonable inquiries appropriate to the circumstances. If they form their belief hastily and act hastily upon it, without making the appropriate inquiries or giving the employee a fair opportunity to explain himself, their belief is not based on reasonable grounds and they are certainly not acting reasonably".

50. However, those reasonable inquiries may be minimal where the employee admits to the misconduct alleged. Stopping an investigation at that point is likely to be reasonable where the employee confirms that a conduct issue has occurred, a fact which the investigation would aim to uncover (*RSPB v Croucher [1984] IRLR 425).* The tribunal should not consider what further investigation would be reasonable based on the facts before it at a hearing. It must consider whether the employer

was unreasonable in simply accepting the admission based on what it knew at the time (*CRO Ports Ltd v Wiltshire [2015] UKEAT/344/14)*.

Wrongful dismissal

51. An employer is entitled to summarily dismiss an employee (dismiss without notice) where the employee has committed a repudiatory breach of contract such that the employer's trust and confidence in the employee is so damaged that the employer should not be expected to continue with the employee's employment (*Briscoe v Lubrizol Ltd [2002] IRLR 607*). The tribunal is to decide the degree of misconduct necessary for the employee's behaviour to amount to a repudiatory breach of contract. Whether or not the employer is entitled to dismiss summarily is an objective point for the tribunal to decide bearing in mind what the employee actually did or did not do, as a factual finding, on the balance of probabilities. Where a tribunal finds that the employee did not commit the misconduct alleged, then it follows that there was no entitlement to summarily dismiss. Conversely, a tribunal may conclude that an act of misconduct was in fact gross misconduct even where the respondent would not automatically describe it as such in their own policies and procedures.

Discussion and conclusions

Unfair dismissal

52. First, it is clear to me that the claimants were bound by the Covid-19 policy. The handbook, referred to in the claimants' employment contracts, is liable to adjustment by the respondent. The health and safety policy in the handbook specifically envisages that health and safety practices may be adjusted. There is no requirement for the claimants to agree to any such alteration in writing to be caught by a change in policy. Even if I am wrong on that, then it is plainly clear that a ban on car sharing is an appropriate management instruction in the circumstances we were all faced with for most of 2020.

53. Part of the claimants' case is based on a perceived difference in the treatment between the claimants on the one part, and three other purported instances of Covid-19 policy breaches on the other. Mr Capek raised the argument within the context of arguing that because the two other instances did not result in any dismissals, so the dismissal of the claimants must be caused by the respondent acting unreasonably. Mr Capek made no submissions about the law relating to how the treatment of others may impact the decision to dismiss the claimants, but in any case I consider that the different treatment is adequately explained by the differing facts of those cases.

54. The two sisters who apparently car shared did not admit their misconduct when challenged, meaning that the respondent was required to decide whether an investigation was necessary. In the face of those denials, and with only the word of the reporting person to counter them, it was not considered proportionate to take the matter further and the sisters were warned not to car share and told that it is a gross misconduct offence again. This was something that the respondent was entitled to do. The reason why the claimants were dismissed is because they

admitted their misconduct, and from that point the respondent did not need to weigh up whether an investigation was a proportionate step because the matter which would be investigated had been admitted.

55. The employees who went on holiday to Skegness during the period raised it with the respondent prior to their going away. The respondent looked to the policy, which outlined that in such cases the employees would be required to self isolate unpaid for fourteen days, and this is what happened. It is entirely different to the claimants' case where the claimants breached the policy without obtaining approval from the respondent or arriving at a workable solution in consultation with the respondent.

56. On the claimants' own case, the facebook photograph showing other employees embracing was raised with the respondent after the claimants' dismissal and so it rightly could not affect how the claimants were treated. Ms Elliot did not consider it relevant because the individuals were not subject to any disciplinary action at the time. It might be that the respondent dealt with that issue separately after the claimants' appeal, but that would fall outside of the issues to be decided in this case.

57. The procedure followed by the claimant was imperfect and I consider that the claimants are correct to feel aggrieved from it. Ms Silva was dismissed essentially immediately upon the respondent discovering that she had given Mrs Gunay a lift home. She was not warned of allegations against her and was given no realistic time to prepare for the meeting where she was eventually dismissed. The wording of the letter confirming her dismissal reads harshly and I do not consider that its tone is appropriate in the circumstances; Ms Crowley appears to be writing in anger or disdain.

58. Mrs Gunay's dismissal was similar in nature. The respondent gave no warning for the meeting or the nature of it. Mrs Gunay was challenged about the reported car sharing and was dismissed almost immediately upon confirming that it was true. The letter sent to her following her dismissal contained the same unfortunate phrases as the one sent to Ms Silva. I consider that the wording in those letters exacerbated the claimants' sense of upset and mistreatment, which would have encouraged them to bring these claims. If there is any learning for the respondent from this case, then it is about this.

59. However, as the authorities demonstrate, I must consider the fairness of the whole of the process in the circumstances. It is inescapable that the claimants both admitted their car sharing immediately upon being asked about it. This is in contrast to the other employees who were reported as car sharing, where the respondent was able to decide that the reports were not worthy of investigation. In the claimants' case, the misconduct was immediately confirmed. In my judgment, applying *Croucher* and *Wiltshire*, it was not unreasonable for the respondent to accept the admissions in place of conducting a formal investigation. The claimants were very candid about what they had done and had no reason to lie about having admitted the misconduct.

60. I do not consider that the claimants were caught entirely cold by the disciplinary meetings which dismissed them. They were, as I have found, aware of the car

sharing ban for some months prior to their dismissal. They knew that they were car sharing in defiance of that instruction and the health and safety policy. Ms Silva had had a prior conversation on the morning of 1 July 2020 where she was reminded that it was a serious disciplinary matter. She would have been aware, when called to the meeting, that it was for that reason. She had also resolved, clearly, to admit to the car sharing. I conclude that the outcome of the meeting would have been the same regardless of the procedure adopted.

61. When Mrs Gunay attended work on the following day, she knew what had happened to Ms Silva and would have been aware that she would be subjected to the same process. The respondent had additional evidence against Mrs Gunay in that they had the admission from Ms Silva which implicated Mrs Gunay as well. Again, Mrs Gunay decided to admit her conduct. Similarly, I conclude that the outcome of Mrs Gunay's meeting would have been the same regardless of the procedure adopted.

62. Considering the points outlined in the ***Burchell*** test, in my judgment –

    a. the respondent formed a belief that the claimants had committed the misconduct because they admitted that they did;
    b. those admissions naturally meant that the respondent had reasonable grounds to have formed that belief; and
    c. following ***Croucher*** and ***Wiltshire***, that belief was formed following an investigation which was reasonable in all the circumstances in that there were clear admissions which meant that further investigation into the conduct was unnecessary.

63. Even if unfairness had occurred as a result of those first meetings, I consider that the respondent's actions at the appeal stage of the process would have corrected them. At appeal stage, each claimant had the opportunity to raise any issues they had with the decision to dismiss them, and indeed did so. Various mitigating factors were advanced by the claimants relating to the change in social distancing regulations (even if erroneous) and the perceived unequal treatment compared to others (even if founded on misunderstanding). Other matters raised included Mrs Gunay's leg problems which made walking difficult. Each claimant was asked to confirm they had raised all that they wished to at the end of their appeal meetings.

64. The letters from Ms Elliot confirming the outcome of the appeal meetings are clear, if short, and explain that despite consideration of all points made, the claimants had admitted to an offence which they knew was a serious health and safety breach which could result in dismissal. Ms Elliot's evidence was measured and clear and I am satisfied that she conducted an appropriate and thorough appeal investigation and consideration in the circumstances. I consider that Ms Elliot gave the claimants the opportunity to make their case and would have addressed any unfairness detected as a result.

65. Consequently, I find that the overall procedure adopted by the respondent for each of the claimants' dismissals did fall within the band of reasonable responses. I do not think that many reasonable employers would write to the claimants as Ms Crowley did, but this does not mean that the procedure as a whole was unfair. In my view, the procedure is very much rescued by Ms Elliot's conduct of the appeal

stage in the event there was any lingering doubt about whether the claimants should have been given more time to prepare for the disciplinary meetings they attended.

66. In terms of whether or not the decision to dismiss the claimants fell within the band of reasonable responses, I find that it did. The claimants deliberately broke a health and safety policy designed to limit the risk of infection of the Covid-19 virus at the respondent's site. This is a deadly virus, and particularly worrying at the time in question from March 2020 to July 2020. The respondent acted reasonably in its response to it and reasonably expected its staff to follow it. Upon discovering that the claimants had breached that policy knowingly, it was reasonable for the respondent to have dismissed them as a consequence.

67. As a result of the above, the claimants' complaints of unfair dismissal fall to be dismissed.

Wrongful dismissal

68. The claimants contend that their actions were not gross misconduct such that the respondent was entitled to dismiss them. If I find that the misconduct committed did not amount to a repudiatory breach of contract that allowed summary dismissal, then the claimants would be owed notice pay even if they had been fairly dismissed. In this case, the claimants deliberately breached a health and safety instruction and policy which was implemented to protect the whole workforce. The policy was clearly important to the respondent as it took several steps to make the workforce aware of it and reminded them of it. The claimants were warned of the seriousness of it because the notice at page 77 says that failure to comply with the Covid-19 policy may result in summary dismissal. Serious health and safety breaches is also listed as a gross misconduct offence in the staff handbook.

69. Taking into account the circumstances at the time and the conduct of the claimants, even though admitted, I consider that it would not have been reasonable to have expected the respondent to continue to employ the claimants. They had broken the implied term of trust and confidence that the respondent was entitled to have in them and so the respondent was able to terminate their employment contracts immediately as a result.

70. It follows that the claimants' claims for wrongful dismissal also fail and fall to be dismissed.

Employment Judge Fredericks
23 May 2022