Case No: 2302322/2021

EMPLOYMENT TRIBUNALS

Claimant: Mr A Young

Respondent: Profile Security Services Limited

Heard at: **London South (CVP)** **On:** **14-15 July 2022**

Before: **Employment Judge Kumar**

Representation
Claimant: Mr D Panton
Respondent: Ms N Ling

RESERVED JUDGMENT

1. The claimant was unfairly dismissed.
2. A 60% reduction to the compensatory award for unfair dismissal will be made under the principles in **Polkey v A E Dayton Services Limited 1998 ICR 142**.
3. The claimant did not contribute to his dismissal through culpable conduct and no deduction is made.
4. The claimant was wrongfully dismissed. The respondent was in breach of contract by dismissing the claimant without the full period of notice to which he was entitled and the respondent is ordered to pay the claimant damages.
5. The matter is to be listed for a further hearing to determine remedy.

REASONS

Introduction

1. The claimant, Mr Anthony Young, was employed by the respondent, Profile Security Services Limited, as a security officer, until his dismissal without notice on 29 March 2021.

2. The claimant claims his dismissal was unfair within section 98 of the Employment Rights Act 1996 and further that that the respondent breached

his contract of employment by failing to give him the required notice of termination of employment.

3. The respondent contests the claim. It states that the claimant was fairly dismissed for gross misconduct, specifically for attending work with Covid-19 symptoms when he should have been self-isolating. The respondent asserts it was therefore entitled to terminate the claimant's employment without notice.

4. The claimant was represented by Mr Panton and the respondent by Ms Ling.

5. An application for a witness order that was made by the claimant on 6 June 2022 was withdrawn in an opening statement prepared by Mr Panton received prior to the hearing.

6. I heard evidence from Mr P Ely, formerly a regional manager at Profile Security, on behalf of the respondent. This was followed by evidence from the claimant. Both the claimant and Mr Ely had provided written statements as evidence in chief. During the hearing I was referred to documents contained within an agreed bundle and supplemental bundle which ran in total to 593 pages.

7. The hearing took place over two days.

8. No reasonable adjustments were requested.

List of Issues

9. An agreed list of issues was provided by the parties which I adopted. In summary the issues I had to determine were as follows:

    1) What was the reason, or principal reason, for the dismissal? The respondent says the reason was misconduct.
    2) Did the respondent act reasonably in treating the reason as sufficient reason to dismiss the claimant? In particular:
        a) Did the dismissing officer have a genuine belief the claimant was guilty of the misconduct alleged?
        b) Was the belief based upon reasonable grounds?
        c) Did the respondent conduct as much investigation as was reasonable in the all the circumstances of the case?
    3) Was the decision to dismiss within the range of responses of a reasonable employer?
    4) If the respondent's disciplinary procedure was defective, did the respondent remedy any defects during the appeal investigation and/or appeal hearing?
    5) Was the respondent entitled to terminate the claimant's contract of employment without notice?

10. Although Polkey and contributory conduct issues concerned remedy and would only arise if the claimant's claim for unfair dismissal succeeded, I agreed with the representatives that I would consider them at this stage, as well as any uplift for failure to comply with the ACAS Code.

Findings of Fact

11. In making my decision I find the following:

12. The respondent is a company providing security services to business and individuals. The ET3 response form does not confirm the number of people employed by the respondent but the Grounds of Resistance makes reference to the respondent operating at many sites across the United Kingdom and I therefore find it more likely than not that Profile Security is an employer on a relatively large scale. The claimant was employed as a security officer by the respondent at a site, the Thames Barrier, operated by one of its clients, the Environment Agency. The claimant's employment was transferred under the Transfer of Undertakings (Protection of Employment) Regulations 2006 on 15 December 2018 when the respondent took over the contract for that site. The claimant's start date with his previous employer was 13 March 2007.

13. The claimant had no disciplinary issues over the course of his employment.

14. On 6 January 2021 the claimant received a notification that he had tested positive for Covid-19. He had taken a PCR test on 4 January 2021 and attended work subsequent to taking the test. The circumstances leading to the claimant taking the test are in dispute and I address my specific findings in relation to this at paragraphs 22-28. The findings that I make are only relevant to determining whether the claimant was wrongfully dismissed or, if the claimant was unfairly dismissed, the issue of contributory fault. In short the claimant asserts that he did not take the test because he was suffering from Covid-19 symptoms but rather because he sought peace of mind that he did not have Covid-19 at the time. The respondent disputes this.

15. Following his positive Covid-19 test, the claimant was due to return to work on 27 January 2021after a period of self-isolation and annual leave. The claimant was informed by the respondent that he had been deallocated from his shifts on 25 January 2021. By letter of the same date, but received by email on 29 January 2021, he was invited to an investigation meeting '*in order to discuss allegations in regards to a breach of Covid-19 isolation regulations'*. The meeting took place on 2 February 2021 on a video platform and the attendees were Steve Marsters, Customer Services Manager and the claimant. Mr Marsters produced a handwritten note of the meeting which appeared in the bundle. The note was produced on a proforma document with each page indicating a space for the signatures of manager and the employee. The note had been signed on each page by Mr Marsters but not by the claimant. The claimant asserted that there were some inaccuracies in the note of the meeting but agreed that the notes recorded the main thrust of the meeting.

16. On 10 March 2021 the claimant was invited to a disciplinary meeting and was advised that disciplinary action would be considered '*in regards to your breach of Covid-19 isolation regulations*". The disciplinary meeting took place on 16 March 2021 by video platform. The meeting was chaired by Eugene Jonas, Regional Manager, and was attended by the claimant, Mr Marsters (attending as "Managers Witness") and Ita Waller (attending as "Employee Witness"). The notes of the meeting appeared within the bundle. They were typed on a proforma document which had spaces on each page

for the manager and the employee to sign the notes. The version of the notes within the bundle was unsigned.

17. On 29 March 2021 the claimant was dismissed by letter for gross misconduct with findings made that he had i) seriously undermined the relationship between the respondent and the Environment Agency and ii) seriously breached health and safety standards.

18. An appeal investigation was undertaken, with three meetings taking place on 6 May 2021, 20 May 2021 and 28 May 2021. Within the appeal it was accepted that there were failings in the original investigation and disciplinary procedure. The respondent's case was that the failings were remedied upon appeal.

The circumstances leading to disciplinary proceedings

19. On 4 January 2021 the claimant attended for work. Earlier that afternoon he had undergone a PCR test for Covid-19. He booked the test by telephone and attended at an NHS operated testing site in Tottenham.

20. The claimant proceeded to work his shift. Over the course of his shift the claimant felt unwell with a headache, coughing and tiredness. At the end of his shift the claimant spoke to his supervisor and requested cover for his next two shifts.

21. On 6 January 2021 the claimant received a notification confirming that his test was positive. The notification informed him that by law he had to self-isolate. The claimant telephoned his line manager, Mr Nelson Quintal, and informed him that he had tested positive for Covid-19.

What were the circumstances that led to the claimant taking the PCR test? (relevant to wrongful dismissal and contributory fault)

22. The claimant booked his PCR test by telephone on 4 January 2021. The claimant's evidence, which was rejected by the respondent in the disciplinary process, was that when asked by the telephone operative if he had any of the recognised Covid-19 symptoms, namely a high temperature, a new, continuous cough or a loss of smell and taste, he informed them that he did not but insisted on taking a test anyway for peace of mind and was booked in for a test despite not having the recognised symptoms. The respondent's position was that the claimant would not have been permitted to book a test in these circumstances and the only reason he would have booked a test was because he was already suffering from Covid-19 symptoms. Moreover the respondent's position was that the only reason the claimant would have been offered a test by Test and Trace was because he had informed the telephone operative that he had Covid-19 symptoms.

23. I accept the claimant's evidence that he informed the telephone operative that he did not have symptoms but that he wanted to take a test anyway. In doing so I take into account that the claimant gave a largely consistent account of the telephone conversation at the investigatory meeting, as recorded in Mr Marsters' notes, at the disciplinary meeting, at the appeal hearing and within his evidence before the tribunal. The claimant has produced a letter from his GP, Dr Youssef, which appeared within the

bundle. Dr Youssef stated within his letter that '*Although the government recommendation is to only have PCR if having symptoms of Covid, I am aware that many people attended for PCR due to anxiety and worry caused by the mainstream media and the anecdotal stories on social media*'. I accept Dr Youssef's observation that PCR tests were being undertaken for these reasons.

24. Moreover I take into account the following:

- at the time the claimant took the test, Coronavirus numbers were rising rapidly and that on the same day the claimant took the test a national lockdown was announced (which came into force the following day).
- The London Borough of Enfield, the local authority within which the claimant lived, had a particular high incidence of Coronavirus cases.
- There were various factors that made the claimant at high risk of serious illness were he to contract the virus, specifically that he was over 50, had a relevant underlying health condition in that he suffered from high blood pressure, was black (it having been identified that serious complications from Covid-19 were a greater risk for those from a BAME background) and that he was working in the security industry so unable to work from home. I note from the bundle that a news article had been circulated on the respondent's WhatsApp group on 11 May 2020 with a headline that male security guards, chefs and tax drivers were among the most likely to die from Covid-19.
- Two colleagues of the claimant at the Thames Barrier site had contracted Covid-19.
- The government through Test and Trace was testing asymptomatic people working in high-risk settings and had recently announced that it would be expanding asymptomatic testing by way of community testing in high incidence local authorities (the government's policy papers released on 23 December 2020 were included in the bundle).

25. In all of those circumstances, I find that the claimant was understandably anxious about catching the virus and it was for this reason that he booked a PCR test. On behalf of the respondent it was argued that given that the claimant would be returning to a high risk environment there was nothing to be gained by way of peace of mind by him taking a test at this time. Ongoing potential exposure to the virus would apply to any precautionary tests undertaken during the pandemic and I reject this argument.

26. I find it more likely than not that the claimant relayed to the telephone operator who booked the test the circumstances in which he found himself and the reasons he was high risk.

27. The respondent pointed to the absence in the notes of the investigation meeting and disciplinary meetings of any reference by the claimant to telling the Test and Trace operative that one of his concerns in relation to risk was that he worked in the security industry. The claimant's oral evidence was that he had referred to this but it had not been written down in the meeting notes. Having considered the notes of the meetings I do find that Mr Marsters' note-taking of the meetings was limited. This is particularly the

case in respect of the investigation meeting (unsurprising given that Mr Marsters was conducting the meeting as well as taking a note). I do not make a finding as to whether the claimant told the Test and Trace telephone operative that he worked in the security industry. I do find that, whether or not it was specifically mentioned to the telephone operative, it was one of the factors that weighed in the claimant's mind and contributed to his anxiety about catching Covid-19 and his insistence that he be permitted to take a test.

28. I accept the claimant's account moreover that he was told by the telephone operative that he could continue to attend work. This was consistent with him informing Test and Trace that he did not have the recognised symptoms of Coronavirus. I do not agree with Mr Ely's evidence '*that Mr Young was either lying, or had encountered the worst advice ever by the test & trace booker*.' This appears to be based upon an inaccurate interpretation of government guidance that it was a requirement to self-isolate after taking a PCR test in all circumstances. I will address this further below.

Was the claimant suffering from Covid-19 symptoms when he took the test? (relevant to wrongful dismissal and contributory fault)

29. It was common ground that as at the time of the claimant's PCR test the recognised symptoms of Covid-19 which required someone both to undergo a PCR test and self-isolate, were as set out in government guidance from December 2020 which was included in the bundle. It stated:

 "***Symptoms***

 The most important symptoms of COVID-19 are recent onset of any of the following:

 - *a new continuous cough*
 - *a high temperature*
 - *a loss of, or change in, your normal sense of taste or smell (anosmia)*

 For most people, COVID-19 will be a mild illness. However, if you have any of the symptoms above, stay at home and arrange to have a test

 There are several other symptoms linked with COVID-19. These other symptoms may have another cause and are not on their own a reason to have a COVID-19 test. If you are concerned about your symptoms, seek medical advice."

30. It was an uncontested fact that a person suffering from any of the 'most important symptoms' identified in the government guidance was required to undergo a PCR-test and self-isolate.

31. The claimant's case was that he did not have any of the 'most important symptoms'. He acknowledged that he did have a cough but said this had been an ongoing issue for him over the past 8 years and was a side effect of the medication he took for hypertension. His cough according to the claimant was neither new nor continuous. The claimant also acknowledged

that he had a mild headache and felt tired but that he frequently suffered from these symptoms which were further side effects of his medication.

32. The respondent rejected the claimant's account that his cough was caused by his medication. It relied upon the fact that a cough was not identified as a possible side effect in the leaflet that accompanied the claimant's medication (except in the context of an allergic reaction to the medication affecting the lungs). The leaflet recorded that a dry mouth and feeling thirsty were possible side effects. The leaflet moreover advised reporting side effects to a medical professional, including any possible side effects not listed in the leaflet. The respondent's position was that the leaflet accompanying the medication did not support the claimant's assertion that coughing was a side-effect of his medication.

33. The letter produced by the claimant from his GP records, stated "*Mr Young is on Bendroflumethiazide for high blood pressure. This medication can cause thirst and dry mouth. Mr Young tells me that he gets a cough from this medication which can be explained by the dryness of the mouth*". The respondent did not consider the letter supported the claimant's assertion that coughing was a side-effect of his medication because the claimant had self-reported the symptom of a cough to his GP.

34. Of the three 'most important symptoms' it has not been asserted that the claimant was suffering from a high temperature or from anosmia. The question therefore is whether the claimant was suffering from the 'recent onset' of a 'new and continuous cough'.

35. I find that the claimant had a cough at the time of taking the PCR test but that it was not a <u>new</u> or <u>continuous</u> cough and that did not have a <u>recent onset</u>.

36. I find it more likely than not that the claimant would find himself coughing on a regular basis as a result of having a dry mouth and thirst, caused by his medication. I note that this is what he reported to his GP. I note Bendroflumethiazide is a diuretic and for this reason it causes a dry mouth and thirst. It is in my view self-evident that a dry mouth and thirst could result in coughing.

37. Within the bundle were screenshots and links to medical websites, some of which identified coughing as a symptom of Bendroflumethiazide. These were provided by the claimant within these proceedings and not during the disciplinary procedure and so did not form part of the decision maker's assessment.

The disciplinary process

38. The disciplinary meeting took place on 16 March 2021. The minutes of the meeting record that the claimant's friend in attendance was Ita Waller, HR Manager from Unlimited Group, who was stated to have '*no legal experience*'. I note from the correspondence within the bundle that the claimant had asked to be accompanied at the meeting by a family friend and the respondent had agreed this on the basis that they confirm *'that they are not a solicitor, or legally trained advisor."*

39. It is apparent from correspondence that took place between the claimant's daughter and Ms Waller that she charged a modest fee to the claimant to assist with written correspondence and emails and to attend the hearing. The claimant also confirmed in his oral evidence that Ms Waller had a degree in Employment Law. Ms Ling, on behalf of the respondent, argued that the claimant's representation of Ms Waller as a family friend to the respondent, when she was a HR professional with employment law knowledge and that he had paid her to attend was willfully misleading and should be a factor taken into account when assessing his credibility as a witness. The claimant explained to the tribunal in his oral evidence that Ms Waller was a friend of the mother of his daughter and that he was on good terms with his daughter's mother and accordingly the description of Ms Waller as a family friend was accurate. I consider that the description of Ms Waller as a family friend was rather strained. The claimant explained in his oral evidence that he was unable to be accompanied to the disciplinary hearing by his trade union representative and would otherwise have been 'stranded'. Mr Panton in his submissions said that Ms Waller's involvement at the disciplinary and appeal hearings was akin to that of a trade union representative. I note that the respondent was aware that she was an HR director from the outset of the disciplinary hearing and did not prevent her from attending on learning this. I can understand why the claimant would have wanted to be accompanied to the hearings by someone with knowledge of the disciplinary process and whilst the description of Ms Waller as a family friend was rather strained, I do not find that this point does significant damage to his credibility.

40. It was acknowledged by the respondent that both the original investigation and disciplinary process were not thorough. It accepted that it was not shown that the claimant had brought the respondent into disrepute as stated in his dismissal letter and that it had not identified what health and safety standards the claimant was alleged to have breached. The respondent said that this had been cured by the appeal process.

41. I find that the original disciplinary process was insufficiently thorough and flawed. I highlight the following further defects:

    - The claimant was not provided with the information upon which the respondent relied and was not given an opportunity to respond.
    - The respondent in its dismissal letter relied on a Covid-19 Health & Safety update. The claimant had signed to confirm he had read and understood the document on 8 October 2020. The respondent did not provide him with a copy of the document prior to his dismissal. Once produced within the appeal process it was apparent that the guidance within the document was in respect of social distancing and handwashing. Neither it nor any subsequent Covid-19 updates made reference to requirements for self-isolation.
    - The respondent did not interview or take statements from the claimant's colleagues who had seen him on 4 January 2021.

42. Additionally the respondent approached the disciplinary process as though the facts of the alleged gross misconduct were a foregone conclusion. This is evident from contemporaneous emails.

43. On 22 January 2021, Andrew Foley, the Operations Manager sent an email to Sue Ferguson, the respondent's HR adviser as follows.

“*Good morning Sue,*

We have an issue at Thames Barrier whereby an officer, who was displaying COVID symptoms went for a test on the Monday morning, however rather than wait for the results continued to work a further two shifts. The test subsequently returned positive. Problem we have by continuing to work, against all government guidelines, he not only endangered his colleagues but also the well-being of other site users (Environment Agency) and staff.

We have a really problem, as does the client, with the complete disregard and blatant failure to comply with regulations.

Site have regular update bulletins displayed which clearly states the steps to be taken if you display symptoms, or have come into contact with a positive case therefore no excuse really.

He has been off 7th Jan with a combination of isolation and annual leave, due to return 27th however we certainly need to go down a disciplinary route for which, I would suggest is gross misconduct. He TUPE'd in to us Dec 2018 with further long service on the site.

Can you advise where we can go with this.

Many thanks

Andrew Foley”

44. Following the investigation meeting Mr Foley sent a further email on 3 February 2021 copied to several managers circulating the notes of the meeting as follows:

“*Madeleine,*
Attached are the notes form yesterday's investigatory meeting which is now progressing to next stage.

He claims he did not know the government guidelines after being tested for COVID. These are published on site with regular updates given.
He also claimed he did not have symptoms, which he clearly had.

Can he be invited to a disciplinary Via zoom/ teams (I will liaise with Peter to organise) on Friday? If that is to early then Monday 10:00 hrs.

I've attacked a letter as an example from another site with the same issue recently and also Sue's email received relating to this matter.

I will ask Imran to attend as a note taker

Many thanks

Andrew Foley"

45. These emails originating from Mr Foley are of particular significance as it was intended that Mr Foley would be carrying out the disciplinary meeting. This was confirmed in the letter inviting the claimant to a disciplinary meeting which was dated 9 February 2021 which stated that Mr Foley would be conduct the meeting.

46. Mr Foley's email of 3 February 2021 was copied to Peter Lewis, Operations Manager.

47. Subsequent email correspondence shows that Mr Foley was unavailable on the date of the rearranged disciplinary meeting. On 8 March 2021 he sent an email to Mr Lewis as follows:

    "Just discussed with Sue and she suggests Thursday at the earliest.
    I can't do Thursday .... Peter are you available.to carry out the disciplinary?"

48. On 9 March 2021, Mr Lewis sent an email to Eugene Jonas, who would eventually carry out the disciplinary meeting, as follows:

    "Hello Eugene
    Can you hold the disciplinary hearing on Thursday, I will do the appeal.
    Andrew please share everything with Eugene.
    Let me know what time and I will set up the zoom call for you, please ask Steve or Imran to take notes.
    Kind regards
    Peter"

49. The email chain demonstrates the respondent's cavalier regard disregard for the fairness of the disciplinary process. Mr Foley clearly expressed his foregone conclusions on the facts in dispute and yet still considered himself to be an appropriate person to carry out the disciplinary hearing. He further considered it appropriate to share his views with Mr Lewis and for Mr Lewis to then carry out the appeal. I have no doubt that Mr Foley followed Mr Lewis' instruction 'to share everything with Eugene' [Mr Jonas] and provided him with the same email chain.

50. None of the participants in the disciplinary process appear to have approached it from a position of impartiality.

51. Mr Jonas confirmed in the letter of dismissal that he had found the symptoms the claimant had were not related to side effects of the claimant's medication. It is not clear either from the notes of the disciplinary meeting, nor from the dismissal letter, how he reached this finding. He was not in possession of the leaflet accompanying the claimant's medication (although the claimant read out a selective part of the leaflet during the meeting) or the letter from the claimant's GP which was produced subsequently.

The appeal

52. The respondent asserts that the appeal investigation cured the defects in the disciplinary process.

53. Mr Ely, who conducted the appeal, was not employed by the respondent at the time of the disciplinary process and the respondent argued that he came to his investigation with a fresh mind, untainted by what had occurred before. Mr Ely gave evidence of his extensive prior experience of dealing with disciplinary matters in his previous employment.

54. It is certainly the case that his investigation was more thorough. He further conceded some of the deficiencies in the original investigation.

55. Mr Ely did not explicitly find that coughing was not a side-effect of the claimant's medication but did in the appeal summary comment that the claimant's GP letter and the medication leaflet did not support his account that coughing was a side effect of the medication. He further commented on the information that the claimant had provided in support in his appeal hearing report as follows:

"*AY Doctors letter Confirms that dry mouth is a symptom of AY's medicine which may lead to a cough, but AY informed GP that it caused cough not the other way round"*

"Information leaflet for Blood pressure medication Coughing is not a side effect of taking the medication"

56. It was apparent from the GP's letter that the claimant had reported his symptom of coughing as a side-effect of his medication to his GP, rather than the GP independently identifying coughing to be a known side-effect. Notwithstanding the finding I have made in relation to this at paragraph 36, I do consider Mr Ely's conclusion reached on the side-effects of the medication was a reasonable conclusion for him to reach and one that others might also have reached presented with the same information.

57. Within his witness statement for these proceedings Mr Ely stated that he found that the claimant 'had a *new* cough'. This finding is not set out in the notes of the appeal hearing or Mr Ely's appeal summary and seems to be a development.

58. Mr Ely placed considerable reliance upon the fact that the claimant had taken a PCR test as evidence that he had symptoms. The fact that the claimant took a PCR test did not lead me to the conclusion that he had symptoms and was required to self-isolate as I set out in paragraph 62 below.

59. Mr Ely explained the basis upon which he reached his conclusions in his witness statement and oral evidence. He relied on the following evidence:

- Information provided to him by a relative who works in healthcare that i) you could not attend a test centre unless you had symptoms of Covid-19, and ii) that if you had a test you had to self-isolate until you received your results
- His own knowledge of government guidance which accorded with the information provided by his relative

- Statements provided by two security officers who interacted with the claimant during his shift on 4 January 2021
- The fact that the claimant acknowledged that his GP had said that coughing was not a listed side-effect of his medication in the medical journal
- A phone call he made to NHS Test and Trace trying to replicate the call the claimant had in which he was informed by the operative that i) that no one could go to a test centre without having symptoms and ii) the advice given to all people was to self-isolate until the results of the test came back

60. I remind myself that the role of the tribunal is not to substitute its own view and I must therefore consider whether it was within a range of reasonable conclusions for Mr Ely to reach based upon what was before him.

61. The evidence upon which Mr Ely relied as to why he reached that conclusion presented some difficulties.

62. Firstly from the contemporaneous government guidance within the bundle (upon which both parties relied) it was clear that there were circumstances other than having symptoms which qualified someone to receive a free NHS test. These specifically were if you had been asked to get a test by a local council, you were taking part in a government pilot project, or if you had been asked to get a test to confirm a positive result. Secondly the guidance stated that you should self-isolate until you received your result *if* you had Covid-19 symptoms. The self-isolation guidance did not apply to some of the other scenarios which qualified someone for a free NHS test. Whilst these scenarios did not apply to the claimant, it remains the case Mr Ely's asserted understanding of the guidance and his conclusion that you could only attend a test centre if you had symptoms and that you were advised to isolate if you took a test was clearly wrong.

63. The real difficulty for the respondent in assessing whether Mr Ely's conclusion was within a reasonable range arises from his account relying on the fact that both his relative working in healthcare and the Test and Trace operative he spoke to when he tried to replicate the claimant's call also misunderstood/misinterpreted the guidance, in exactly same way and to the exact same extent that he had. This seems to me unlikely.

64. There are further difficulties with Mr Ely's account of his call to Test and Trace. At the time Mr Ely sought to replicate the claimant's call to Test and Trace in May 2021, the government's Community Testing Programme, using LFT tests for asymptomatic testing had been rolled out. It seems remarkable that the Test and Trace operative did not direct Mr Ely to that programme if he truly did replicate the claimant's call providing the same information the claimant stated he had provided to the telephone operative. Mr Ely accepted in his oral evidence that as it was not recorded in the notes from the appeal (which it was not) he did not inform the claimant that he had made this telephone call as part of his appeal investigation. Again I find it unlikely that he would omit to mention this during the appeal hearing if the call had taken place in the matter he describes. Under cross-examination it was put to Mr Ely that when he made the call, as part of the appeal investigation he would have kept a note of whom he had spoken to. His

response to this was that he had asked the telephone operative's name but they would not give it to him. He did not provide the date upon which the call was made, beyond that it was in May 2021 and that the call was made after the initial appeal meeting. I find that Mr Ely did not replicate the claimant's call to Test and Trace in the way that he claims and that on the balance of probabilities this call did not take place. The conclusion I reach is that Mr Ely was not being truthful when he said he called Test and Trace as part of his investigation. This is of particular significance as Mr Ely accepted in his oral evidence that the telephone call was a crucial bit of evidence in the appeal process.

65. Further difficulties arise in relation to Mr Ely's evidence about the statements from the claimant's colleagues upon which Mr Ely relied. Two statements have been produced, one from Mark Sheehan and one from Iain Burton. However it is apparent from the appeal summary that Mr Ely took statements from other colleagues, specifically from A Sibiliev, N Quintal and W Forster (in fact Mr Renwick-Foster), but, in his words '*discarded them*'. There are discrepancies in Mr Ely's accounts given at different times as to why he did not take these statements into account as part of his investigation. In respect of Mr Sibiliev's statement, Mr Ely states in the appeal summary that he discarded Mr Sibiliev's statement because he had said he worked with the claimant on 3 January 2021 and the the payroll system indicated this was incorrect. He gave no indication of what information had been provided by Mr Sibiliev or why the discrepancy with the payroll system in relation to 3 January 2021 impacted upon the relevance of his statement. As to Mr Quintal's statement in the appeal summary Mr Ely stated that he discarded that statement as it '*was emotive as opposed to factual'* whereas in Mr Ely's witness statement he states that '*Mr Quintal was off with Covid at the time of the incident and so could not add any useful evidence'*. In cross-examination Mr Ely was referred to an email that Mr Quintal had sent to the claimant's daughter on 6 January 2021 and he was challenged on the assertion that Mr Quintal was off with Covid-19. He said from his recollection Mr Quintal was off for the whole of December and some of January. Mr Ely then went on to say he had not started working for the respondent at the time and so could not say whether Mr Quintal was working or not but that he did speak to him and his statement was not factual so he did not consider it in the appeal outcome. I am led to the conclusion that Mr Ely was not giving an accurate account of taking a statement from Mr Quintal.

66. Moreover in the appeal summary Mr Ely said he had discarded Mr Renwick-Foster's statement as Mr Renwick-Foster asked that anything that may hurt the claimant's defence be removed from his statement. In his witness statement he said Mr Renwick-Forster '*said he did not remember anything, that he did not want to get involved and that he was unwilling to commit anything in writing.'* When challenged on the discrepancy in this account, Mr Ely pointed to the passage of time and the fact that his statement had been written much later. Whilst I acknowledge that over time it would have been more difficult for Mr Ely to recollect events, I am concerned that in his oral evidence, as in his written statement, he expressed himself with an air of certainty about specific details which when challenged on he was not so sure (the fact that Mr Quintal had been off work for example). It calls into question how reliable Mr Ely's recollection of events was and the extent to

which his account was embellished so as to support the outcome of his decision-making process.

67. A further issue arises in respect of the discarded statements in that the claimant sought disclosure of these statements within proceedings. The response via the respondent's representative was that Mr Ely spoke to the two guards rather than took a formal statement from them. A further response from the respondent's representative to the follow up request asking the respondent to provide either the statements or Mr Ely's handwritten notes of the conversation was '*I have taken further instructions. In relation to the witness statement, I understand that Mr Ely typed up a statement from Mr Renwick-Foster as he spoke to him for Mr Renwick-Foster to approve following their conversation, but Mr Renwick-Foster was unwilling to commit to anything in writing and the statement was never used. In any event he simply said he could not remember anything and his statement was not taken into account. As you are aware, Mr Ely has since left Profile's employment and believes that a copy of that statement was on his Profile computer when he left. However, Profile have been unable to locate a copy.'*

68. Two further issues with the statements arise.

69. Firstly the statements of Mr Sheehan and Mr Burton are remarkably similar. The statement of Mr Sheehan stated *'[the claimant] was wearing a mask which was unusual and he sounded "rough*". The statement of Mr Burton stated "*I noticed that AY was wearing a mask and as this was unusual"* and "*Looking at Anthony I thought that he "looked rough" and I recollect him saying that he "felt rough"".*

70. It seems unlikely to me that Mr Sheehan and Mr Burton used such similar wording when providing their statements and given my concerns about Mr Ely embellishing evidence in the appeal process to bolster the reasons for the dismissal decision I find it more likely than not that they did not.

71. Secondly whilst an email chain was in the bundle showing that Mr Sheehan approved his statement there was no response within the bundle from Mr Burton to an email asking him to approve his statement. If such an email existed I have no doubt it would have been included by the respondent in the bundle and I find on the balance of probabilities that Mr Burton did not approve his statement. This is of significance as Mr Ely confirmed in his oral evidence that Mr Burton's statement was an important factor in the decision to dismiss the claimant and important corroboration of the allegations against the claimant. Whereas Mr Sheehan had seen the claimant at the end of his shift, at a time when the claimant himself acknowledged he had started to feel unwell, Mr Burton had seen the claimant at the start of his shift.

72. The claimant's case is that the appeal investigation was conducted with the purpose of bolstering the case against him, rather than providing a fair and impartial assessment of the evidence. I can see no other reason for Mr Ely to embellish the evidence against the claimant in the manner that I find that he did.

73. I turn finally to the claimant's submissions that the respondent failed to set out the charge the claimant faced adequately. I agree with Ms Ling's submissions on this point. Whilst the respondent did not specifically identify what aspect of health and safety guidelines had been breached, this was not a case which required precise framing of the allegation (or indeed the citing of the relevant regulation or guidance). The claimant knew that the allegation was that he had attended work with Covid-19 symptoms putting his colleagues' health and safety at risk. I do not find that the respondent's failure to frame the allegation precisely gave rise to a material unfairness in the procedure such as to have made it unreasonable for the respondent to dismiss in all the circumstances.

Relevant Law and Conclusions

Unfair dismissal

74. Section 98 of the Employment Rights Act 1996 contains the applicable law as follows:

    " (1)In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
    (a)the reason (or, if more than one, the principal reason) for the dismissal, and (b)that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

    (2)A reason falls within this subsection if it— … (b)relates to the conduct of the employee, …

    (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

    (a)depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and (b)shall be determined in accordance with equity and the substantial merits of the case."

75. In a misconduct dismissal guidance is set out on fairness within section 98(4) in the decisions in **Burchell 1978 IRLR 379** and **Post Office v Foley 2000 IRLR 827**. The tribunal must decide whether the employer had a genuine belief in the employee's guilt. Then the tribunal must decide whether the employer held such genuine belief on reasonable grounds and after carrying out a reasonable investigation. In all aspects of the case, including the investigation, the grounds for belief, the penalty imposed, and the procedure followed, in deciding whether the employer acted reasonably or unreasonably within section 98(4), the tribunal must decide whether the employer acted within the band or range of reasonable responses open to an employer in the circumstances. The Court of Appeal in **Sainsbury's Supermarket Ltd v Hitt 2003 IRLR 23 CA** confirmed that the reasonable range of responses test applies to the whole disciplinary process and not just the decision to dismiss.

76. It is immaterial how the tribunal would have handled the events or what decision it would have made, and the tribunal must not substitute its view for that of the reasonable employer (**Iceland Frozen Foods Limited v**

Jones 1982 IRLR 439, **Sainsbury's Supermarkets Limited v Hitt 2003 IRLR 23**, and **London Ambulance Service NHS Trust v Small 2009 IRLR 563**).

77. Where there is a flaw in the original investigation or decision to dismiss, the tribunal should approach the conduct of an appeal to determine whether the overall process was fair, notwithstanding any deficiencies at an early stage: **Taylor v OCS Group Limited [2006] ICR 1602**

78. In **Khan v Stripestar UKEATS/0022/15** it was said that there was no limit to the nature and extent of deficiencies in a disciplinary hearing that could be cured by a thorough and effective internal appeal.

Conclusions on unfair dismissal

79. Reminding myself once again that it is not my role to substitute my views of what was reasonable and focusing on the range of reasonable responses open to a reasonable employer in the particular circumstances I conclude that the respondent did not act reasonably in treating the reason as sufficient reason to dismiss the claimant. Whilst it may have had a genuine belief that the claimant of was guilty of the misconduct alleged, the belief was not based upon reasonable grounds. In light of my findings set out in paragraphs 40 and 41 in respect of the investigation and disciplinary meeting I have found that it was not sufficiently thorough and was flawed. Having made the findings that I have in paragraphs 42 to 51 I further conclude that the claimant's guilt was treated as a foregone conclusion during the process.

80. Whilst some of the deficiencies in the disciplinary hearing were cured by the appeal, overall, as is evident from my findings in paragraphs 57 and 62-73 the appeal investigation compounded the defects. The original investigation started from a foregone conclusion that the claimant was guilty of the gross misconduct alleged and the appeal process followed that foregone conclusion. Evidence was embellished in order to fortify the basis upon which the claimant was dismissed. The grounds upon which the respondent based its belief in the claimant's misconduct did were not reasonable.

81. Overall I conclude that the quality of the investigation was not adequate to constitute a reasonable investigation upon which the respondent could found a reasonable belief that the claimant had committed the wrongdoing alleged.

82. For these reasons the claim of unfair dismissal succeeds.

Polkey

83. Following **Polkey v AE Dayton Services Ltd [1987] UKHL 8**, in a procedurally unfair dismissal, a tribunal must consider whether the respondent could and would have dismissed the claimant fairly if it had followed a fair procedure.

84. I was further assisted by the Employment Appeal Tribunal's judgment in **Software 2000 Ltd v Andrews 2007 IRLR 568 EAT** which outlined the five possible outcomes (prior to the repeal of S98A(2) ERA 1996) and allowed

for the possibility that a tribunal may decide that employment would have continued indefinitely because the evidence that it might have terminated earlier is so scant that it can be effectively ignored.

85. I find that if the respondent had not premised the disciplinary and appeal investigations on a foregone conclusion that the claimant was guilty of gross misconduct and then sought to fortify the basis of the decision by embellishing evidence, there is still a substantial chance that it would have dismissed the claimant. I do not regard it as inevitable that it would have dismissed him but I find it quite likely. It is possible that the respondent would have imposed a lesser sanction such as a final written warning. I do not limit the award to a precise period as the eventual outcome was uncertain. I consider that there is a 60% chance that the claimant would have still been dismissed and such a dismissal would have been with the range of reasonable responses.

Contributory Fault

86. The tribunal may reduce the basic or compensatory awards for culpable conduct in the slightly different circumstances set out in sections 122(2) and 123(6) of the Employment Rights Act of 1996.

87. Section 122(2) provides as follows: "Where the tribunal considers that any conduct of the complaint before the dismissal (or where the dismissal was with notice before the notice was given), was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly".

88. Section 123(6) then provides as follows: "Where the tribunal finds the dismissal was to any extent caused or contributed to by any action of the claimant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding".

89. In approaching the question of contributory fault, the principles laid down by the Court of Appeal in **Nelson v BBC (No.2) 1979 IRLR 346 CA** are that

   i) there must be a finding that there was conduct on the part of the employee in connection with his unfair dismissal which was culpable or blameworthy;
   ii) there must be a finding that the matters to which the complaint relates were caused or contributed to, to some extent, by action that was culpable or blameworthy; and
   iii) there must be a finding that it is just and equitable to reduce the assessment of the complainant's loss to a specified extent.

90. This applies to the compensatory award but a similar approach is to be taken in respect of the basic award as outlined by the EAT in **Steen v ASP Packaging Ltd 2014 ICR 56**.

91. Given the findings I have made as to whether the claimant was required to self-isolate I do not conclude that the claimant was culpable or blameworthy

in his actions and I therefore make no reduction in the claimant's award for his contributory fault.

Breach of contract

92. The claimant was dismissed without notice. He brings a breach of contract claim in respect of his entitlement to notice. The respondent says it was entitled to dismiss the claimant without notice owing to gross misconduct.

93. I therefore must decide if the claimant committed an act of gross misconduct entitling the respondent to dismiss the claimant without notice.

94. I have set out my findings about the claimant's actions above. It follows from my findings that the respondent is in breach of contract and the claimant was wrongfully dismissed.

ACAS uplift

95. The tribunal has the ability to increase an award by up to 25% in the event of unreasonable failure by the respondent to comply with an ACAS Code. In this case the applicable Code is the ACAS Code of Practice on Disciplinary and Grievance Procedures.

96. S.207A of the Trade Union and Labour Relations (Consolidation) Act 1992 ("s.207A"), states at subsection (2):

    If, in the case of proceedings to which this section applies, it appears to the employment tribunal that
    (a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,
    (b) the employer has failed to comply with that Code in relation to that matter, and
    (c) that failure was unreasonable, the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25 per cent.

97. **Acetrip v Dogra UKEAT/0016/20/VP** HHJ Auerbach in the EAT set out at paragraph 103:

    "*There is, inevitably it seems to me, a punitive element to an adjustment award under these provisions, because the Tribunal is not simply compensating a claimant for some additional readily identifiable or quantifiable loss that he has suffered. The adjustment is bound, to a degree, to be reflective of what the Tribunal considers to be the seriousness and degree of the failure to comply with the ACAS Code on the employer's part.*"

98. In **Slade v Biggs 2022 IRLR 216**, the EAT confirmed that the discretion given to a tribunal by s207A is very broad, both as to whether there should be an uplift at all, and as to the amount of any uplift. While the top of the range of 25% should undoubtedly be applied only to the most serious cases, the statute does not state that such cases should necessarily have to be classified, additionally, as exceptional.

99. In Slade, the EAT suggested that a Tribunal in applying s207A

    "might choose to apply a four-stage test:

a. Is the case such as to make it just and equitable to award any ACAS uplift?
b. If so, what does the Tribunal consider a just and equitable percentage, not exceeding although possibly equalling, 25%?
c. Does the uplift overlap, or potentially overlap, with other general awards, such as injury to feelings; and, if so, what in the Tribunal's judgment is the appropriate adjustment, if any, to the percentage of those awards in order to avoid double-counting?
d. Applying a final sense-check, is the sum of money represented by the application of the percentage uplift arrived at by the Tribunal disproportionate in absolute terms and, if so, what further adjustment needs to be made?"

100. An uplift does not automatically follow an award and the question is whether the respondent unreasonably failed to comply with the Code.

101. It is under the Code relevant to consider:

i) The requirement to carry out necessary investigations in potential disciplinary matters;
ii) To notify the employee of the problem;
iii) To allow the employee reasonable time to prepare their case;
iv) To allow the employee to be accompanied; and
v) To provide the employee with an opportunity to appeal.

102. In all the circumstances, my findings on the deficiencies of the disciplinary and appeal investigations relate to the quality of the procedure rather than a failure on the part of the respondent to comply fully with the Code. I do not in all the circumstances consider it to be just and equitable for there to be an uplift.

Remedy

103. By 23 September 2022, the claimant is to send to the respondent 1) a revised schedule of loss, 2) a witness statement dealing with mitigation, his efforts to find work after his dismissal and any earnings he has received since and 3) copies of any documentary evidence, eg offer letters, contracts, payslips.

104. By 7 October 2022, the respondent will send to the claimant any counter schedule and/or witness statements and documents for the hearing.

105. By 14 October 2022, the respondent will send to the claimant the bundle of documents for the remedy hearing.

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Employment Judge Kumar
Date 5 September 2022