



EMPLOYMENT TRIBUNALS

Claimant: N Wood

Respondent: Securitas Security Services (UK) Ltd

RESERVED JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD REMOTELY: London Central

On: 15 & 16 December 2021

Employment Judge: Employment Judge Henderson (sitting alone)

Appearances

For the claimant: Mr R Jones (Counsel)

For the respondent: Ms J Young (In-house Counsel)

JUDGMENT

The case number 2200893/2021 is a duplicate and should be removed from the Tribunal system.

The claimant's claims for unfair dismissal and wrongful dismissal are unsuccessful and are dismissed.

The date of 18 February 2022 which was provisionally agreed for a remedy hearing is not required and should be vacated.

REASONS

Background

1. This was an unfair dismissal case (ET1 lodged on 24 February 2021) pursuant to sections 94 and 98 of the Employment Rights Act 1996 (ERA). The claimant had worked as a security officer at the National Gallery from 24 June 2010 until her summary dismissal on 25 January 2021. She had initially been employed by the Trustees of the National Gallery but her contract of employment had

transferred to the respondent under the Transfer of Undertakings (Protection of Employment) Regulations (TUPE) on 1 November 2015.

Claimant's amendment application

2. At the commencement of the hearing Mr Jones raised on the appellant's behalf, a preliminary issue concerning a formal amendment of her claim to include a wrongful dismissal claim. Mr Jones noted that the claimant had not been legally represented when she submitted her ET 1.
3. I asked why the claim for notice pay (11 weeks), which Mr Jones said was the reason for the amendment, could not be included in the compensation for the statutory unfair dismissal claim. Mr Jones said that on the current schedule of loss figures, if the wrongful dismissal claim was not included, the statutory cap on compensation of 12 months' salary, would potentially deprive the claimant of some £800.
4. The application to amend was opposed by the respondent. Other than the potential for claiming £800 more, I asked Ms Young what prejudice/hardship the respondent would suffer if I allowed the amendment. Ms Young initially said that she had not prepared the evidence to defend a wrongful dismissal claim. However, upon closer examination she accepted that the substance of the evidence of the witnesses would cover the question of whether the claimant had committed a repudiatory breach of the contract of employment.
5. Applying the overarching principles in **Vaughan v Modality Partnership** UKEAT/0147/20, I decided to allow the amendment as the balance of hardship would go against the claimant if the amendment were not allowed.

The Issues

6. Following the amendment application, it was confirmed with the parties' representatives that the issues between the parties were as follows:
 - the claimant had been summarily dismissed on 25 January 2021. The respondent says that this was for gross misconduct as the claimant had failed to follow the respondent's health and safety procedures and had attended for work on 18 December 2020 with symptoms of Covid-19. The claimant denied such misconduct;
 - as regards the unfair dismissal claim, the issues are as set out in the case of **BHS v Burchell**, namely: did the respondent carry out a reasonable investigation into the alleged misconduct? if so, on the basis of such investigation did the respondent form a genuine belief in the misconduct? if so was dismissal a fair sanction, within the reasonable range of responses open to an employer?
 - The claimant said that the investigation was irregular and should not been carried out by Mr Ismail; she also complained that two witnesses (Mr Berko and Ms Galinska) who she had requested him to speak to had not been interviewed by Mr Ismail and were only contacted as part of the disciplinary process; the claimant also complained that despite her requests, the

- respondent refused to view any relevant CCTV footage, which she says would show that she was not coughing on 17 or 18 September 2020;
- as regards the wrongful dismissal claim, was the claimant in repudiatory breach of a fundamental term in the contract of employment? The respondent says that the breach was of the duty of trust and confidence by the claimant attending work with Covid-19 symptoms, thereby putting colleagues and members of the public at risk;
 - the respondent also raised an argument under the **Polkey** principle namely, if there were any procedural flaws, the respondent maintained that the claimant would in any event have been dismissed and the appropriate reduction would have been 100%;
 - the respondent also sought to argue contributory fault at 100% with regard to any compensation for unfair dismissal, if the claim succeeded
 - the claimant also alleged that the respondent had not provided her with an amended statement of terms and conditions following the TUPE transfer and so was in breach of section 4 ERA, which would in turn have consequences, if the claimant succeeded in all or any of her other claims (section 38 ERA).

Conduct of the Hearing

7. The hearing was conducted remotely using the Cloud Video Platform (CVP) over two days.
8. The Tribunal heard evidence from the claimant and on behalf the respondent from Abdinasir Ismail (Security Duty Manager- who carried out the investigation); Oliver Connelly (Duty Manager-who heard the disciplinary meeting and was the decision maker on dismissal) and Huseyin Taskin (Head of Sales and Development-who heard the claimant's appeal against her dismissal). The witnesses all adopted their written statements as their evidence in chief.
9. The Tribunal was also presented with two electronic bundles: an agreed bundle of documents totalling 323 pages and a bundle of witness statements, together with an exhibit to the claimant's witness statement (59 pages in total). Page references in these reasons are to the agreed bundle of documents unless otherwise specified.
10. On Day 1, the Tribunal spent the morning clarifying the issues, hearing the claimant's application to amend and reading the witness statements and key documents. The afternoon was spent hearing Mr Ismail's evidence and part of Mr Connelly's evidence.
11. On Day 2, the Tribunal heard the remainder of Mr Connelly's evidence and Mr Taskin's and the claimant's evidence. The Tribunal heard oral submissions from both representatives. Ms Young presented written submissions (of 25 pages) shortly after the conclusion of the claimant's evidence; however, Mr Jones confirmed he did not need further time to consider these before making his oral submissions. As the hearing concluded at 4:15 PM, the Tribunal reserved its judgment.

12. A provisional date of 18 February 2022 was agreed with the parties for a one day remedy hearing if required.

Findings of Fact

13. The Tribunal heard detailed evidence (in particular during cross-examination of the respondent's witnesses by Mr Jones) on several peripheral matters. However, the Tribunal will only make such findings of fact as are relevant to determine the agreed issues as set out above.

Overall Sequence of Events

14. The key factual issue in this case is what symptoms (if any) of Covid-19 the claimant had, and of which she was aware, when she attended work on 18 September 2020?
15. It is agreed by both parties that during the course of the day on 18 September 2020 the claimant began to feel seriously unwell, her line/senior managers (Mr Ismail and Angela Stathopoulou (Angela)) were notified and she was taken to the First-aid room where she was seen by Mehmet Jemal (MJ) (the respondent's first-aid officer) and also by an external, female paramedic (who was attending another case on site). As a result of these examinations, the claimant was sent home and subsequently tested positive for Covid-19 and self-isolated, until 27 September 2020.
16. On 18 September 2020 Mr Ismail completed an incident/accident report form (page 206). The form noted that the claimant had said that she felt unwell; had a temperature; "is coughing" and has back pain. The claimant disputed the accuracy of this description, especially as regards the reference to her coughing
17. Mr Ismail also completed a Covid-19 Notification Form (page 204-5) for the claimant, which stated that the date and time of the onset of fever was 17 September 2020. The date on which Mr Ismail completed the form is unclear but it must have been after 19 September 2020 as he cites this as the date of the claimant's antigen test. He said he had taken this information from Angela telling him that she had heard the claimant tell the paramedic that her (the claimant's) fever started on 17 September 2020.
18. Based on the Covid-19 notification form, the respondent's audit and compliance team requested an investigation on 1 October 2020 (p 134) to clarify why the claimant had come to work on 17 and 18 September 2020 when her fever may have commenced as early as 17 September 2020. Mr Ismail conducted an investigation in October 2020 (further details below).
19. The respondent concluded, following the investigation carried out by Mr Ismail (Investigation Summary dated 26 October 2020 – pages 311-314), that the claimant had been aware that she had Covid-19 symptoms when she attended work on 18 September and had such symptoms the night before on 17/18 September 2020. Such conduct would have been in breach of the respondent's

health and safety policy and contrary to the instructions given to employees for managing risks relating to Covid-19, following the re-opening of the National Gallery after the lockdown which began in March 2020.

20. These instructions were contained in an email dated 31 July 2020 from Emma Ward to staff (including the claimant). The email stated that if staff had symptoms of Covid-19 they should arrange for a test. There was also a "Track and Trace Flow Chart" sent on 3 August 2020. This stated the symptoms which were then known for Covid-19 as "*a high temperature; a new, continuous cough-this means coughing a lot for more than an hour or 3 or more coughing episodes in 24 hours; or a loss or change to the sense of smell or taste*". The respondent's witnesses also referred to the Health and Safety Policy dated June 2020 which reminded employees of their legal responsibilities to "*ensure the health and safety of themselves and of any other persons who may be affected by their acts or omissions at work*".
21. The claimant accepted in cross-examination that she had seen the Health & Safety Risk Assessment dated 1 June 2020 (page 64-87) and had acknowledged receipt by signing the confirmation sheet (page 88). The claimant had also seen Ms Ward's emails of (i) 31 July 2020 noting the changes in Government guidance on self-isolation in cases of suspected Covid-19 and (ii) 3 August 2020 flagging that relevant documents were available on the company employee portal.
22. The claimant accepted in her oral evidence that it would be serious misconduct for an employee to attend work with Covid-19 symptoms as this would put others at risk. She also confirmed that she understood what the key symptoms were (at the relevant time) namely: a high fever; continuous coughing and loss of taste and smell.
23. The claimant denied that she had any symptoms which could be identified as Covid- 19 symptoms when she attended work at 7.30am on 18 September 2020 – she had woken up with a sore back but she says that was her only symptom. The claimant said she believed that the witnesses to whom Mr Ismail spoke during his investigation had "ganged up" against her. She also believed that Mr Ismail wanted her out of the respondent's business and that the respondent was seeking to remove /offer redundancies to all employees who had transferred under TUPE because they had more advantageous contractual terms and conditions.
24. The claimant was invited on 9 November 2020 (page 155/6) to a disciplinary hearing to be held by Mr Connelly. There were two allegations made against her: 1) misconduct: failure to observe the respondent's rules or procedures. This related to an incident in August 2020 when the claimant failed to organise a Covid-19 test for her mother who was displaying Covid 19 symptoms; and 2) gross misconduct: failure to comply with or breach of health and safety policies, procedures or regulations affecting the safety of others which related to the incident on 18 September 2020.

25. The disciplinary meeting was held on 13 November, but was adjourned (in order for Mr Connelly to take statements from Mr Berko (NB) and Ms Galinska (KG)) and was reconvened on 16 January 2021. The claimant acknowledged in her oral evidence that she had been absent due to illness from 14 November 2020 until 9 January 2021. Therefore, the timing of the reconvened disciplinary hearing was not unreasonable in the circumstances. The claimant was accompanied at both disciplinary hearings by Mr Ian Hall, her union representative.
26. On 25 January 2021 (pages 232-235) Mr Connelly confirmed to the claimant that the first allegation of misconduct concerning her failure to organise a test for her mother was not proven against her. However, the second allegation of gross misconduct relating to the incident on 18 September 2020 was found to be proven and the claimant was summarily dismissed. Mr Connelly did set out in some detail the information on which he based his decision. The claimant had the right to appeal against the decision to dismiss, which she duly did by an email on 28 January 2021 (page 237) with detailed grounds of appeal sent on 30 January 2021 (pages 322/3).
27. The claimant's appeal was heard on 4 February 2021 by Mr Taskin (meeting notes at pages 246-248). The claimant was again accompanied by Mr Hall. On 18 February 2021 Mr Taskin confirmed that the appeal was not upheld (page 254-258).

The Investigation

28. Following the claimant's return to work after her self-isolation, Mr Ismail conducted a fact-finding interview with her on 12 October 2020 (page 142-148). At that meeting Mr Ismail asked how the claimant was feeling when she had left for work on 18 September 2020. She replied that she was "feeling ok, not very well and was feeling pain on my back and dry throat cough". When Mr Ismail sought further detail about the nature of her coughing, the claimant replied that she was not coughing. When Mr Ismail sought to confirm this, the claimant stated "I was coughing a little, like experiencing dry throat". This suggests that the claimant was coughing (even if not continuously).
29. In her witness statement, the claimant said that she had "repeatedly" said that she was not coughing. The interview note of 12 October 2020 does not support this assertion. The claimant confirmed in her oral evidence that she had signed each page of the interview notes to confirm their accuracy, which she had done at the end of the interview. In her oral evidence, the claimant said that she felt she was confused and was being harassed by Mr Ismail. However, the interview note does not show the claimant making any such observations nor did the claimant make any such allegations at either the second fact-finding meeting with Mr Ismail, the disciplinary or the appeal meetings (at which she was accompanied by her union representative), or in her witness statement.
30. Given the inconsistency between the 12 October 2020 interview note and the claimant's witness statement and her oral evidence, I prefer (on a balance of probabilities) the evidence contained in the interview note of 12 October 2020

(which was the first time the claimant was asked about her symptoms) namely that the claimant accepted that she was coughing a little and had a dry throat when she attended for work on 18 September 2020.

31. In the interview note of 12 October 2020, the claimant confirmed that she had been in the control room with her colleagues Vincent Ramlugon (VR) and Michael Charalambous (MC). In the interview note, the claimant says that she told MC to inform Mr Ismail and Angela, the Duty Manager) that she was feeling unwell. In her oral evidence, the claimant said that she had been intending to contact Mr Ismail herself but that MC had pre-empted her and had called him first. This demonstrates another inconsistency between the information the claimant gave Mr Ismail and the information she gave the Tribunal. In her witness statement the claimant said that she asked Mr Ismail if she could go home but he refused and forced her to go to the first-aid room. This is a further inconsistency in the claimant's evidence.
32. Mr Ismail then contacted Angela, VR and MC to ask them for their versions of what had happened on 18 September 2020.
33. Angela said (at pages 136-137 in an email of 12 October 2020) that MC had called her at approximately 2pm to say that the claimant was feeling unwell. Angela said that she then went to the control room but the claimant said that she did not want to say that she felt unwell because she "didn't want to be in trouble again as before". This was presumably a reference to the incident in August 2020 concerning her mother's Covid-19 test.
34. Angela said that the claimant was "coughing a lot". MC had also mentioned to Angela that the claimant was coughing all day. Angela had asked the claimant how long she had been feeling unwell and the claimant told her since the morning of 18 September 2020.
35. Angela then called for a first- aider (MJ) and took the claimant to the first-aid room in the Sainsbury Wing of the gallery. Coincidentally, there were two paramedics in the Gallery and Angela asked one of them (female) to carry out some checks on the claimant. Angela reported that when the paramedic asked the claimant how long she had had the symptoms, the claimant had said from the previous day (i.e. 17 September 2020). As the paramedic recorded that the claimant had a high temperature she was requested to go home and order a test, which subsequently was positive.
36. MC said (at page 138 in an email of 12 October 2020) that he had advised the claimant on 18 September 2020 to speak to either Angela or Mr Ismail. He said the claimant was coughing without wearing a mask whilst in the control room and at times was coughing across him. He said the claimant looked ill which is why he advised her to contact the managers to seek medical attention. MC said that he had suggested to the claimant that she may have coronavirus but she assured him that she had a cold several times and was used to it. MC says that "later that evening" the claimant came back to the control room following her break and told both him and VR that she felt ill and they then contacted

management. Angela then came to the control room and took the claimant to the first-aid room.

37. VR said (at page 139 in an email dated 12 October 2020) that he had been in the control room with MC and the claimant. When the claimant came into the control room she complained that she was tired and feeling weak. At that point the claimant started to cough. VR asked her if she was okay and she said that she had some phlegm in her throat but was otherwise okay. He noted that she was not wearing her mask, especially as she was “coughing everywhere” but he could not remember her response. VR suggested that the claimant go and see management as she was clearly feeling unwell but she said she would be okay. Both VR and MC had suggested that the claimant contact management but she did not want to see anyone. When MC returned from his break to relieve VR, the claimant decided that she would contact management and called Angela.
38. Mr Ismail also had a note of a meeting (undated) with MJ (pages 140-141). MJ explained that he had received a radio call from Angela asking to meet her and the claimant in the main control room. The claimant said that she was feeling unwell and that she had pain in her back and stomach and was feeling very hot. When asked when she had begun to feel unwell, MJ reported that the claimant said that this had “started the night before, coughing and with pains”. The claimant was then taken to the first-aid room in the Sainsbury’s Wing as the nearer first aid room was already occupied. MJ noted that the claimant kept taking her facemask off and saying that she could not breathe and had to be reminded to replace it. Angela found a paramedic from the London ambulance service who was on site who came to examine the claimant. MJ and Mr Ismail left the claimant, the female paramedic and Angela in the room in case the claimant needed privacy. MJ said they could hear the claimant coughing. The paramedic then advised that the claimant go home and have a test as soon as possible. The test was positive.
39. Mr Ismail carried out a second fact-finding meeting with the claimant on 21 October 2020 (pages 149-153). In this meeting the claimant denied that she had been coughing on 18 September 2020. She said that MC had called the Duty Manager and that she had not asked him to do so. This is inconsistent with the first investigation note of 12 October 2020, when the claimant said she had asked for the Duty Manager to be called. The claimant agreed that she had not been wearing a mask but this was because she was socially distanced from her colleagues in the control room. The claimant also signed each page of the meeting notes to confirm their accuracy; however, she did not raise any concerns that she had been harassed or had been confused at the meeting on 12 October 2020.
40. Mr Ismail’s summarised his conclusions based on his investigation in a note dated 26 October 2020 (pages 311-314). Given the inconsistencies within the claimant’s own account and the clear inconsistencies between her account and those of her colleagues as to when she began to experience Covid-19 symptoms (especially fever and coughing), Mr Ismail concluded that there was sufficient evidence that the claimant failed to follow Health and Safety

procedures/regulations which affected the safety of others. This could be classed as Gross Misconduct.

41. The claimant complained that although she had mentioned NB and GK as potential witness who would confirm that she was not unwell, Mr Ismail had not taken any statements from them. Mr Ismail said that this was because the claimant had minimal contact with NB and GK during handovers lasting around 15 minutes, whereas she had been in the control room with her other colleagues for much longer periods of time.
42. On the basis of the findings of fact set out above, I find that Mr Ismail had carried out a reasonable investigation in the circumstances by seeking information from the claimant and the colleagues who had been in more continuous contact with her on 18 September 2020.
43. I find that given the inconsistencies in the information presented to him by the claimant, it was reasonable for him to form a genuine belief that she may have had (and may have been aware of) potential symptoms of Covid-19 when she attended work on 18 September 2020.

Disciplinary process

44. This was conducted by Mr Connelly on 13 November 2020 (meeting notes at pages 185-93) but was adjourned and reconvened on 16 January 2021 (meeting notes at pages 220-222), so that he could speak to the two witnesses which the claimant had specifically requested (NB and KG) but who had not been questioned by Mr Ismail.
45. At the first disciplinary hearing, the claimant denied that she had been coughing on 18 September 2020, other than once or twice to clear her throat. The claimant denied that she was not wearing a mask due to her constant coughing, but said it was because she and her colleagues were able to socially distance in the control room and the procedures stated that in such circumstances masks need not be worn. This was not accepted by Mr Ismail in his oral evidence. The claimant insisted that NB and KG would confirm that she had not been coughing on 18 September.
46. The claimant said that the statements of her other colleagues that she had been coughing were untrue and that they were “ganging up” on her. The claimant asked that the CCTV footage should be checked for the control room and when she was speaking to Angela near the water fountain.
47. At the second disciplinary hearing Mr Connelly reported back on the information he had obtained from NB and GK who both confirmed that when they had met the claimant on 18 September she appeared healthy and had not been coughing. Mr Connelly observed that he had asked a general question about the claimant’s health but that NB had specifically made reference to coughing, which Mr Connelly believed indicated that NB may have been discussing the matter with the claimant.

48. Mr Hall repeated on the claimant's behalf a request that the CCTV footage be viewed for the relevant periods. Mr Connelly made a comment to the effect that he did not have time to go through all the CCTV footage. He accepted in his witness statement and oral evidence that this was an inappropriate comment and that he had not chosen his words carefully.
49. The respondent's witnesses said in their oral evidence that there was no CCTV in the control room or in the first-aid room and that the remaining CCTV footage for the gallery site was deleted after 30 days unless there was any specific reason to retain it. This evidence was not challenged. Given the length of time between the incident on 18 September 2020 and the disciplinary hearings in November 2020 and January 2021, any relevant CCTV footage for that period was deleted.
50. The claimant accepted in her oral evidence that the only CCTV footage which could have been obtained was for the 15 minutes or so she spent with Angela at the water fountain on 18 September 2020. On this basis I find that the failure to produce such CCTV footage does not have any significant impact on the overall assessment of the evidence obtained by the respondent in the investigation of the claimant's misconduct. Failure to obtain the CCTV footage (as identified by the claimant) does not, of itself, render the investigation or the disciplinary process unfair.
51. Mr Connelly confirmed in his oral evidence that he had taken into account the claimant's denial that she had any Covid-19 symptoms when she attended for work on the 18 September 2020. He had weighed this against the statements of the colleagues who had been with her in the control room and the first-aid room. He had considered the accounts given by NB and GK but had decided that given the longer periods of time spent with Angela, MC and VR, their statements should carry greater weight. Based on their statements and the remaining investigation carried out by Mr Ismail Mr Connelly decided that the second allegation of gross misconduct had been proven.
52. He said that he had considered with the HR representative whether an alternative lesser sanction should be implemented but had decided that given the seriousness of the pandemic and the level of risk to the claimant's colleagues that summary dismissal was the appropriate sanction.

The appeal

53. The claimant's further grounds of appeal contained in her email of 30 January was based on procedural errors (essentially Mr Connelly's failure/refusal to view the CCTV footage) which she said, had rendered the hearing unfair.
54. The claimant also noted that the witnesses who supported her namely NB and GK had effectively been ignored and the respondent's reliance on witness evidence was selective. This meant that the hearing was "unbalanced one-sided and unfair".

55. Further, the claimant said that given her length of service and previously clean disciplinary record, the sanction of summary dismissal was excessive.
56. The appeal hearing was carried out by Mr Taskin on 4 February 2021. The claimant was accompanied by Mr Hall. The claimant repeated what she had said in her appeal letter namely that she did not know why her colleagues were ganging up against her and saying that she had come to work with Covid-19 symptoms. She repeated that she only had back pain and no other symptoms.
57. The claimant raised one other matter which was not contained in her appeal letter namely that on her last day at work (24 January 2021) Mr Ismail threatened her saying “your days are numbered” and “your game is over”. There were no witnesses who overheard these comments.
58. The claimant also made reference to the fact that Mr Ismail had told her that “big things are coming and there will be positions scrapped”. This was put to Mr Ismail in cross-examination. He did not recall any specific comments but he said that his own position had been put at risk of redundancy/restructuring and it was possible that he could have been discussing this with the claimant.
59. Mr Taskin confirmed in his evidence that the respondent had never made any attempts to dismiss the employees who had transferred under TUPE; he also confirmed that the claimant’s position had never been at risk of redundancy. This was, in fact, confirmed by the claimant in her own oral evidence and she also confirmed that there had never been any attempt by the respondent to amend her (more favourable) terms and conditions.
60. Mr Taskin was unclear as to the exact nature of the appeal. He said that it was a review of Mr Connelly’s decision but he did refer in the appeal notes to looking into all the evidence in front of him, which could be a re-hearing. He accepted that Mr Connelly’s wording with regard to not wishing to sit through hours of CCTV recording was ill-advised and he understood why the claimant would object to such phraseology. However, he reiterated that CCTV was always deleted after 30 days and there was no CCTV in the control room or first-aid room.
61. Mr Taskin also sought further information from Angela (email of 9 February 2021 page 249) concerning the fire alarm incident on 18 September 2020. She said that she had been in the control room for 20-30 minutes with Mr Ismail. The claimant had also been present but on the other side of the room. Angela said that as this was an emergency she was not paying attention to whether the claimant was coughing but was concentrating on the situation at hand. She was informed after the fire alarm incident had been resolved by MC that the claimant was feeling unwell which is when she took claimant to the first-aid room. The remainder of the statement was the same as the information given to Mr Ismail during his investigation in October 2020.

62. On 18 February 2021, Mr Taskin wrote to the claimant with the outcome of the appeal (pages 254-258). He considered each of the points raised by the claimant in her appeal, but upheld the decision to summarily dismiss. Mr Taskin's conclusion was that the evidence from her own investigation note on 12 October 2020 and her colleagues was that she attended work on 18 September 2020 with a cough (although this may not have been continuous) and possibly with fever symptoms.
63. In the light of the emails sent by the respondent urging staff to self-isolate immediately if they experienced any Covid 19 symptoms and in the light of the seriousness of the pandemic, the claimant had placed her colleagues at risk by not following the government guidance and the respondent's instructions. Mr Taskin noted that the claimant would have been paid for her absence from the first day of sickness and, therefore, should have had no financial concerns in not attending work.
64. In the light of this conduct, he considered that summary dismissal was the appropriate sanction. He said in his oral evidence that he had considered lesser sanctions and the claimant's length of service, but at that time the vaccination programme had not begun and that the claimant was putting others at risk by her conduct.

The claimant's credibility

65. I did not find the claimant to be a credible witness.
66. The claimant stated clearly in her witness statement that she did not have any Covid-19 symptoms when she attended work on 18 September 2020: she only had a sore back. She said that she became unwell during her shift and despite repeatedly asking Angela and Mr Ismail for permission to go home, she was forced by her managers to stay and to have first aid administered.
67. This is not consistent with what the claimant said in her investigation interviews with Mr Ismail; nor in her disciplinary or appeal meetings. The claimant also repeated in her oral evidence, her assertion that MC took it upon himself ("poked his nose in") to call Angela to say that she was unwell – the claimant said that she had not asked him to do so. This is yet another inconsistency in the claimant's own evidence/account of events.
68. The claimant was asked in cross-examination about the discrepancies in the note of the investigation meeting on 12 October 2020. She accepted that she had signed each page; she initially said that she had been forced to do so by Mr Ismail, but then appeared to back-track, saying that she had been harassed and confused by all the various meetings and the questions.
69. In response to question from me, the claimant also said that she had told her union representative, Mr Hall (who had accompanied her at the disciplinary and appeal meetings) that she felt confused and tense at the various meetings, but that he told her to "go with the flow" and she believed that he did not want to

help her. This evidence was not mentioned previously by the claimant, not even in her witness statement. I did not find the claimant's oral evidence to be plausible on this point.

70. Further, the claimant could offer no explanation as to why four of her colleagues (Angela, MC, VR and MJ (who was from a different section, namely first-aid)) would all make false statements against her. She said that she had previously had a good working relationship with Mr Ismail and could offer no explanation as to why he might wish to be rid of her. Again she could not explain why MJ would fabricate the statement that she had told him the symptoms started on 17 September.
71. The only suggestion the claimant could make was that the respondent wanted to remove all employees who had TUPE'd to the respondent as they had more favourable terms and conditions. The claimant said that she believed she had raised this point at her appeal meeting with Mr Taskin, but on re-reading the note of the appeal meeting, accepted that this was not contained in that note. She then said that she believed the respondent had omitted this from the note. The note of the appeal meeting (at which Mr Hall was present) ends with Mr Taskin confirming that the minutes were read out to all parties on the call and were agreed. This does not support the claimant's account of her raising the TUPE issue at that meeting.
72. Further, in response to a question from me, the claimant confirmed in her oral evidence that she had never been told that she was at risk of redundancy and that the respondent had never attempted to change her terms and conditions of employment. This appears to contradict the claimant's belief that the respondent wished to terminate her employment because of the TUPE transfer.
73. The claimant said that she had not changed her story but that she had been confused by all the various meetings and the harassment from the respondent's managers. This is plausible, but she could not explain why neither she nor Mr Hall ever specifically raised this problem at either of the disciplinary hearings or at the appeal hearing. She could also not explain why she had never previously raised the inaccuracies which she now alleged in the investigation note of 12 October 2020.
74. Given the considerable inconsistencies in the claimant's evidence and in her inability to offer any explanation as to why all her colleagues (other than NB and GK) should fabricate the accounts of what she had told them or what her symptoms were on 18 September, I find that I can place little reliance on the claimant's evidence.
75. I also find on the basis of the claimant's own oral evidence that the claimant has not shown on the balance of probabilities that the respondent was seeking to remove employees who had transferred to them under TUPE. This removes yet another possible reason for her employees fabricating stories against her.

Conclusions

76. As this case involves both unfair and wrongful dismissal claims, I am mindful of the distinction between the two claims. This distinction was explained (in the specific context of constructive dismissal) in **Rawson v Robert Norman Associates Ltd UKEAT/0199/13, [2014] All ER (D) 154 (Apr)** as follows: *"There is a vital distinction between the facts which underlie a claim for unfair dismissal, in particular where that dismissal is for conduct reasons, where the dismissal itself is admitted, and the Tribunal's approach where it is considering questions of contributory conduct or whether the employee is himself in breach of his contract. Unfair dismissal requires an Employment Tribunal to evaluate the employer's conduct. In a conduct dismissal it examines the employer's view of the employee's behaviour. It is not concerned with whether that behaviour actually occurred, only whether, on the facts, the employer reasonably might conclude after a reasonable investigation that it did. When it comes to look at questions of whether the claimant has been guilty of contributory conduct, in a claim in which the claimant succeeds, it is not concerned any more with what the employer thinks the employee did. It is concerned with what he actually did. The same is true if there is any question of wrongful dismissal which involves looking at whether the employee himself was in breach of contract. Many claims for wrongful dismissal or constructive dismissal involve an assertion that it was the employee and not the employer who, in the circumstances, was in breach of contract. In such a case, what is relevant is not what the employer thought had happened, however reasonable that might be. It is what actually happened. A Tribunal needs to know, and say why it takes the view that it does, that the conduct happened as alleged or did not."*

Unfair Dismissal

77. Based on the findings of fact set out above, I have found that Mr Ismail did conduct a reasonable investigation. He carried out two fact-finding interviews with the claimant and sought information from all her colleagues in the control room, the duty manager, Angela and MJ, the first-aider, with whom she came into contact on 18 September 2020. He did not seek information from NB and GK as requested by the claimant; however, this omission was rectified by Mr Connelly when he adjourned the disciplinary hearing and so their evidence was considered in reaching the dismissal decision.
78. Mr Jones made submissions to the effect that the respondent did not seek to obtain evidence from the external paramedic who had attended the claimant. However, I find that this was not necessary for a reasonable investigation. The respondent is not required to investigate every possible angle or interview every possible witness.
79. I have also found that the failure to view the 15 minutes of CCTV footage between the claimant and Angela at the water fountain did not render the investigation unreasonable or unfair. I also accept as reasonable, the explanation of Mr Connelly and Mr Taskin as to why they gave greater weight to the statements of Angela, MC, VR and MJ as against those of NB and GK, as

the latter witnesses had spent much briefer periods with the claimant on 18 September.

80. Based on the evidence collated and also taking into account the discrepancies between the information given by the claimant on 12 October 2020 and the information given by her subsequently, I find that the respondent (via its officers) did form a genuine belief that the claimant had attended work on 18 September 2020 with some Covid-19 symptoms, namely a cough. This was not necessarily a continuous cough, such that the claimant was coughing every minute; however, the description given by the claimant's colleagues suggested that it fell within the definition of symptoms in the government guidance namely "*this means coughing a lot for more than an hour or 3 or more coughing episodes in 24 hours*".
81. The respondent was also reasonable in forming a genuine belief (based on the available evidence) that the claimant had been aware of having Covid-19 symptoms, albeit in a mild form, on the night of 17/18 September 2020. This would place the claimant in breach of the government guidelines and the respondent's instructions. Such a breach fell within the definition of gross misconduct and summary dismissal was an appropriate sanction.
82. Given the factual matrix, and in particular the severity of the pandemic and its consequences, I find that the decision to summarily dismiss the claimant was within the reasonable range of responses open to an employer. The respondent acknowledged the claimant's length of service and her previously clean disciplinary record. These may well have been factors which could influence them to invoke a lesser sanction, for example a final written warning.
83. However, I am mindful that the Tribunal must not substitute its own decision for that of the employer. Therefore, I find that the dismissal was fair in all the circumstances. The claim for unfair dismissal does not succeed.

Wrongful Dismissal

84. In considering the claim for wrongful dismissal, I need to decide whether the claimant was in breach of contract. In order to do so, I must assess the evidence before me based on the balance of probabilities.
85. I have found (for the reasons set out above) that the claimant was not a credible witness and that I can place little reliance on her evidence. The claimant's initial response on 12 October 2020 suggested that she did have a cough and possibly also a fever when she attended work on 18 September 2020. This evidence was supported by the evidence of four colleagues who were in contact with the claimant on 18 September namely Angela, MC, VR and MJ.
86. As the investigation and disciplinary process continued, the claimant subsequently denied that she had been coughing at all on 18 September 2020. However, she was unable to provide any plausible explanation as to why she had told Mr Ismail on 12 October that she had a dry cough and was clearing her

throat. She was also unable to explain why four of her colleagues should fabricate statements against her and in particular, why MJ should say that the claimant had told him she was feeling unwell the night before (ie 17 September 2020).

87. The claimant's own oral evidence did not substantiate her allegations that the respondent had fabricated evidence against her because they wished to remove all employees who had transferred under TUPE.
88. For those reasons I find on a balance of probabilities, that the claimant did attend work on 18 September 2020 with some, albeit mild at that stage, symptoms of Covid-19. I have no reason to find that this was malicious on her part, it may well have been that the claimant genuinely hoped the symptoms would clear up. I accept the claimant's evidence that she would not wish to put her family at risk if she had Covid-19.
89. However, given the situation concerning the pandemic at the relevant time, this was a breach of the respondent's health and safety procedures (of which the claimant acknowledged she was aware). It was also a cavalier approach to take with regard to the safety of her colleagues and potentially members of the public. It was a breach of trust and confidence in the employer/employee relationship.
90. Therefore, the claimant was in breach of contract and her claim for wrongful dismissal fails.
91. As the claimant has not succeeded in either of the claims I do not have to decide whether the respondent was in breach of section 4 ERA with regard to providing written statement concerning the change of employer upon the TUPE transfer. However, I note that during the course of her oral evidence the claimant accepted that it was possible that she had received a letter notifying her of the change of employer.
92. The claims for unfair and wrongful dismissal are dismissed. The provisional hearing date scheduled for 18 February 2022 is not required and should be removed from the Tribunal lists.

Employment Judge Henderson

JUDGMENT SIGNED ON: 7 January 2022

**JUDGMENT SENT TO THE PARTIES ON
7 January 2022**

FOR THE SECRETARY OF THE TRIBUNALS