EMPLOYMENT TRIBUNALS

Claimant: **Mr D Fitzgerald**

Respondent: **Bouygues Energies and Services**

Heard at: **London South Employment Tribunal**

On: **11 and 12 October 2022**

Before: **Employment Judge Park**

Representation
Claimant: **Mr R O'Keeffe (counsel)**
Respondent: **Mr S Proffitt (counsel)**

RESERVED JUDGMENT

The Judgment of the Tribunal is that:

1. The claimant's claim for unfair dismissal is well founded and succeeds.

2. The claimant's claim for wrongful dismissal is well founded and succeeds.

3. A reduction of 80% should be made to the compensatory award should be made under ***Polkey v Dayton Services Limited [1988] ICR 142***.

4. A reduction of 50% should be made to both the compensatory award and basic award under section 122(2) and 123(6) Employment Rights Act 1996.

REASONS

Claims and Issues

1. The claimant's claims were for unfair dismissal and wrongful dismissal.

Procedure, documents and evidence heard

2. The parties were both represented by counsel.

3. The hearing had originally been listed for one day in June 2022 but due to connectivity issues had not proceeded. It had also been agreed at that hearing that two days would be required for the full hearing.

4. There had been no previous preliminary hearing for case management but standard directions had been issued. Before this hearing the respondent had prepared a list of issues. While this had not expressly been agreed with the claimant there were no objections to it being used as the list of issues.

5. A bundle of documents had been prepared and was provided.

6. The claimant had prepared a witness statement and was cross examined. Claimant's counsel advised that he wished to ask supplementary questions. This was dealt with at the beginning of cross examination. I allowed supplementary questions in part where they were directly related to alternative work within the claimant's place of work as this had already been discussed at length with the respondent's witnesses. I did not allow other supplementary questions on redeployment which was a new topic. The respondent called three witnesses, Michael Foley, Paul Robinson and Simon Haman. They all gave evidence in person and were cross examined.

7. It was agreed at the outset that if the claimant was successful a separate hearing would be required for remedy. The claimant had indicated before the hearing he was seeking reinstatement. The respondent suggested the claimant had not confirmed this in accordance with earlier orders of the Tribunal. I noted the claimant had previously indicated in his ET1 that he was seeking reinstatement and therefore this was sufficient. The respondent said that if the claimant is seeking reinstatement it would need to obtain further evidence on that issue. Based on the anticipated timetable I agreed it would be unlikely we would be able to deal with remedy in any event so it seemed sensible to deal with remedy in a separate hearing if required.

8. Before the previous hearing both parties had provided to the Tribunal written submissions. Counsel for both parties confirmed these would be relied on in the current hearing, along with further oral submissions.

Findings of fact

9. The claimant was employed by the respondent as a maintenance craftsperson working at Barnet Hospital. His role involved undertaking different types of general repair work around the hospital site. The respondent held a contract with the NHS Trust to undertake the maintenance on site.

10. During 2020 the respondent undertook regular risk assessments at Barnet Hospital to manage the risks associated with the ongoing Coronavirus pandemic. It put in place various arrangements such as social distancing. Over time the steps put in place evolved, such as requiring masks to be worn.

11. During the course of the year the situation was changing rapidly. I heard from Michael Foley, the respondent's Contract Manager at the hospital, about how his priority was managing health and safety. If there was a risk to be managed he would get on and do what he felt he needed to straight away, rather than wait for a formal policy to be put in place. He was clear in his evidence that risk assessments would be updated as needed without waiting. Paul Robinson, the

respondent's General Manager, also confirmed that during this time sometimes the risk assessment would overrule company policies. I have no reason to doubt either of their evidence. I find that that when managing the situation within the hospital during 2020 and early 2021 Mr Foley and Mr Robinson did what they thought was needed and prioritised that over any other policies that may otherwise be in place.

12. I heard evidence from Mr Foley and Mr Robinson about how the various measures were implemented. The main way of communicating these to maintenance staff, including the claimant, were relatively informal in person meetings called Toolbox Talks. These were briefing sessions at the start of a shift. During 2020 these were mainly held outside.

13. I was provided with a couple of attendance sheets from these from June 2020, but keeping attendance records did not seem to have been a routine practice. I heard from the respondent witnesses that there would be ongoing discussions at these meetings about all sorts developments. Both Mr Foley's and Mr Robinson's view was that the maintenance staff would be well informed because of these and tended to know what was going on before anything was made official. However, I also heard from the claimant that as these discussions were outside it wasn't always possible to hear what was being said. He also felt the discussions were quite random in nature.

14. Mr Foley and Mr Robinson both spoke about the claimant's attitude in general to Covid. Mr Foley described the claimant as quite sceptical about Covid and the risk it posed. The claimant did not really dispute this. Both Mr Foley and Mr Robinson described having to speak to the claimant about not following proper precautions, such as mask wearing, at times. On two occasions the claimant was given a record of verbal advice as he had not been wearing a mask. I was not provided with any documentary evidence about this, but it was accepted this happened and it was during informal discussions rather than any type of formal disciplinary action.

15. In the autumn of 2020 clinical staff at the hospital began to test for Covid twice weekly. The Trust did not ask that non-clinical staff tested at this point as there were insufficient tests at that time.

16. According to Mr Foley and Mr Robinson there started to be discussions about testing within the toolbox talks in late 2020. Initially testing was only required if someone had symptoms. Mr Foley said that it was discussed at this time that once testing became available then the respondent's employees would need to do them twice a week. He also said that it was known by everyone that this would be lateral flow tests (LFTs).

17. The claimant could not recall any specific discussion about testing at this point. He agreed that by the end of December he knew some people could test themselves if they wanted. He said he was only aware of the original type of tests, PCRs. He did not know then there were two types of tests. He also said that if there were discussions about testing it just didn't click with him that it was

something that he'd need to do as he understood it to be something people could do if they wanted. He also said he did not think he would need to test as generally he was pretty healthy.

18. I accept that there were probably discussions within toolbox talks about Covid tests in late December. However, I do not accept that this means that the claimant knew or ought to have known that testing would be introduced for the respondent's employees and when this happened it would be a requirement to do so regularly. Whilst the toolbox talks may have been held regularly they were informal. The respondent has not provided any evidence about specific discussions that occurred when it informed the claimant and his colleagues about testing and what would be required. The evidence from both the claimant and Mr Foley and Mr Robinson just indicates that testing became a topic of discussion around this time. From this they assumed that the claimant would know that a testing regime would be introduced. However I do not accept that they can say with any certainty that the claimant would understand this was the case. As the claimant explained he could not always hear and he did not always fully engage with what was being discussed. This is consistent with informal discussions being held outside.

19. At the end of December 2020 Mr Robinson was in contact with the Trust about testing the respondent's employees. He asked if it would be sensible for them to regularly test too. At this point there were still insufficient tests available to distribute to the respondent. On 7 January 2021 the Trust wrote to contractors to say additional tests could be ordered for contractors. In this email the Trust did not include any requests for contractors to start testing their staff, it was just an update. The claimant was not party to any of this correspondence.

20. On 9 January 2021 the claimant was not working. Mr Foley contacted him to advise that another member of his team had tested positive so the claimant should go in to take a test. The claimant declined to take a test. The claimant says that Mr Foley did not press him further. Mr Foley thought he would have done, but could not really recall the conversation exactly. I have seen text messages between Mr Foley, Mr Robinson and others from this time. In this there are discussions about alternative arrangements being made for the claimant for the next working day but no indication that anyone had been putting additional pressure on him to test. I accept the claimant's account on this and that when he refused to test on 9 January no significant pressure was put on him to do so.

21. On 11 January 2021 the claimant went to work. He was told that he would need to work in the plant room cleaning. This is because he needed to be kept separate from his team as he had not tested for Covid. None of the respondent witnesses I heard from had any direct dealings with him on this day. The claimant said he felt that he had just been ignored.

22. The following day the claimant did not attend work as he was suffering from stress and depression. He remained off work until 15 January 2021.

23. On 11 January 2021 the respondent was informed that LFTs would be available for them so their employees could start to test. Mr Robinson and Mr Foley discussed the implementation of regular testing between themselves and with Simon Hayman, the respondent's Regional Director. The risk assessment was updated to reflect this and I have seen emails which indicate that Mr Robinson discussed the plans with the NHS Trust. However, I was not provided with any evidence that indicated there was an express instruction from the Trust that the respondent should start ensuring that its employees regularly. I also note that the updated risk assessment only states that LFTs will be available for staff and lists testing as a control in place. The risk assessment is very detailed on other measures, such as types of masks to be worn, but there is no detail for testing.

24. During the time the claimant was sick another toolbox talk was held with the claimant's colleagues, at which they were informed about tests being available. According to Mr Foley the staff were expressly told that they needed to test twice weekly and specific days were agreed. The evidence on this meeting was limited, but I see no reason to doubt Mr Foley's account. I note though that according to Mr Foley all present were happy to test and agreed with the protocols, so the issue was not contentious.

25. The claimant was not at that meeting as he was sick at the time. Mr Foley said that the intention was to tell him on his return to work. The new policy was not otherwise communicated to him during his absence, for example by email.

26. The claimant returned to work on 18 January 2021. When he arrived at work he met with Mr Foley who held a return to work meeting. Mr Foley asked the claimant to take a Covid test but the claimant refused. Mr Foley told him that he would not be able to work on site if he did not take a test, so he sent the claimant home.

27. According to Mr Foley he thinks he would have told the claimant during this meeting that there was now a requirement to test twice a week, though he could not recall the conversation exactly. No record of the meeting was kept either. The claimant said he was not told in this meeting that he would need to test twice a week from then on or that it was now the policy. He says he was not told the reason why he was told to test that day, so whether it was due to another team member having tested positive or it being part of a routine testing procedure.

28. On this point I find that the claimant was not told in this meeting that there was now a policy that he had to test twice a week. I accept he was told that he had to test on that day. He may also have been told that tests were available for regular testing. However, I do not accept that he was told then it was a mandatory requirement to test twice a week. The meeting itself was not documented and Mr Foley's own recollection was uncertain. I have seen emails from the same day following the meeting, and neither refers to twice weekly testing. The first email is from Mr Foley to Nicola Langley, from the respondent's HR department, reporting on the situation with the claimant. The second is from Ms Langley to the claimant. The content of these emails are

both inconsistent with Mr Foley having told the claimant he now needed to test twice a week.

29. In his email Mr Foley just says that the claimant had been told to go home as he had been unwilling to take a test. Mr Foley then describes the reason for the testing. This is a lengthy paragraph about the number of individuals who had tested positive in the claimant's team. He finally states *"With 50% off with positive for Covid19 the decision has been made to complete the HSL test and isolate until the result is confirmed for the rest of the yellow team"*. From this email I find that Mr Foley asked the claimant to test on 18 January 2021 because of the situation within the team, rather than the implementation of a new policy.

30. Later that day Ms Langley emailed the claimant and informed him that he would not be receiving company sick pay as his absence was self-inflicted. She also advised that it was *"a requirement that all BYes staff have a COVID test (as and when requested).* Attached to the email was a letter informing the claimant he was now suspended and a disciplinary hearing had been arranged for 27 January 2021. The allegations to be discussed were:

    30.1. Repeated refusal to carry out a reasonable company and client instruction of having a COVID test;
    30.2. Acting in a manner that puts your or others' life or health at risk;
    30.3. Actions which could bring the company into disrepute.

    Finally Ms Langley informed the claimant that if he decided to take a test and return to work the suspension would be lifted.

31. I find that this email also corroborates my finding that the claimant had not been informed at this point that there was a policy of twice weekly testing. This email only refers to a requirement to test when asked. The implication of this is that it is on an ad-hoc rather than routine basis. I also accept the claimant's evidence that this was the first time that he was expressly told there was any policy on testing.

32. In terms of the allegations set out in the disciplinary letter, I was not presented with any substantive evidence about why they had been framed in this way. Mr Foley's evidence was that he thought the claimant's refusal to test was potentially gross misconduct as he had not followed his instructions to test. However, I was not provided with any evidence that there was actually a client instruction for the claimant to test at that point, i.e. from the NHS Trust. Neither did the respondent provide at any point during the process any further explanation to the claimant of what was meant by the second and third allegations.

33. The claimant attended the disciplinary hearing 27 January 2021. He was accompanied by his trade union representative. Mr Robinson conducted the hearing. Mr Foley and Ms Langley also attended. The meeting was relatively short. It started at 9.35am. There was an adjournment of a couple of minutes

at 9.46am and another from 9.55am until 10.10am. After that adjournment Mr Robinson made his decision and the hearing ended at 10.15am.

34. Mr Foley started by presenting the case against the claimant. This related to the events earlier in January 2021 when the claimant had declined a test on 9 January, then he was off sick and did not test on 18 January. Mr Foley also stated at this point that it had been decided that staff testing should be twice weekly. The claimant did not dispute that he had not tested earlier in January 2021. His reason was *"it is an invasion of my body, an intrusion of my person"*. He also indicated that he understood the reason why he had been asked to take tests.

35. Mr Robinson then asked if he still refused to take a test. After this there was a discussion about the different types of tests, so PCR and LFT following which there was the 2 minute adjournment. The claimant agreed he would do an LFT test. Mr Foley then said that the tests needed to be taken every Sunday and Wednesday.

36. According to the claimant he had understood that if he took a one-off test the disciplinary would be dropped. He said this was the first time he had been told he was required to take a test twice a week. I accept the claimant's evidence on this. I have already found that the claimant had not been expressly told earlier or on 18 January that twice weekly testing was required. In her email on 18 January, Ms Langley had told the claimant that the suspension would be lifted if he tested at that point but she had not stated that he would be required to test regularly from then on. My conclusion is that this was the first time that anyone had expressly told the claimant of any requirement to test twice a week.

37. The claimant then asked what would happen if he refused to test twice a week. Ms Langley told him that there would be an adjournment while Mr Robinson decided on his decision but this could be dismissal. The claimant confirmed he would not take a weekly test.

38. After the second adjournment Mr Robinson asked the claimant if he would have a test and if he did not then he would have no option but to dismiss. The claimant declined again. Mr Robinson said he upheld the allegations of gross misconduct and the claimant was dismissed.

39. Above are my findings on what happened during the hearing. I also make the following findings of fact about the hearing more generally:

    39.1. The allegations set out in the invitation to the hearing stated that the claimant had refused to carry out a client instruction, i.e. from the NHS Trust. This was not discussed at all at the hearing and the respondent had not provided the claimant with evidence of any instructions from the NHS Trust.

    39.2. The allegations in the letter related to what had occurred previously, i.e. the claimant not testing earlier in January 2021. During the meeting there

was a significant shift in focus, and the meeting was mainly about whether or not the claimant would test then and on a regular basis in the future. There was no detailed discussion about what had happened on 8, 11 or 18 January so what the claimant had actually been asked to do then.

39.3. I have already found, this was the first time that the claimant was expressly informed there was now a policy to test twice weekly. Following this new information the claimant was effectively given an ultimatum, to agree to test regularly or be dismissed.

39.4. No other options but dismissal were considered. As a matter of fact, there were no discussions about alternatives to dismissal.

40. I now turn to Mr Robinson's decision to dismiss the claimant. I have made the following findings about Mr Robinson's decision making process:

40.1. Mr Robinson's focus was on whether or not the claimant would take tests on a regular basis going forward. He made no findings during the meeting about what had happened earlier in January 2021 and whether that warranted any disciplinary sanction.

40.2. Mr Robinson's evidence was that he knew that the claimant was already aware of the requirements to test twice a week. I did not accept this and have already found that the claimant did not know of those requirements. I also find that Mr Robinson had no basis for reaching this conclusion and it was just an assumption. There had been no detailed discussion at the hearing about what the claimant had been told previously. Neither had any investigation been carried out into what actually occurred on 9, 11 or 18 January 2021.

40.3. Mr Robinson agreed in evidence he had not considered any alternatives and he did not undertake any enquiries. He also confirmed during his evidence that he had not looked into any wider company policies that may be relevant under which there may be alternative courses of action that may have been possible. His decision was a binary choice, between dismissal or not dismissing the claimant.

40.4. I also find that Mr Robinson's decision was affected by his knowledge of the claimant. He expressly stated in his evidence that he knew the claimant's general views on Covid that in his opinion the claimant was just *"resisting conforming to Covid protocols"*. I find that this knowledge influenced Mr Robinson's decision as he already thought that the claimant would not test regularly.

41. Mr Robinson wrote to the claimant the same day to confirm the decision and his reasons. My findings on Mr Robinson's decision making are in part based on this letter. The first reason he gives is that the claimant *"continued to decline*

to have COVID tests as required", so was forward looking rather than looking what had happened previously.

42. The claimant appealed the dismissal on 7 February 2021. The claimant set out a number of reasons. The main ones were his general concerns about testing, there was no policy provided to him on testing and no consideration was given to alternatives to dismissal.

43. The respondent invited the claimant to an appeal hearing on 16 February 2021. The claimant did not have time to find a representative. The appeal was postponed until 9 March 2021. The claimant asked if he could bring a friend instead which was refused.

44. Eventually the appeal as held on 17 March 2021. The claimant did not attend as he did not have a representative. Mr Hayman heard the appeal in the claimant's absence. He then wrote to the claimant responding to the various points he had raised.

45. One of the points the claimant had raised in his appeal letter was alternatives to dismissal that could have been considered. During the hearing I heard evidence from the claimant and respondent witnesses on these possibilities. The claimant had suggested he could have worked elsewhere in the hospital where he would not come into contact with others.

46. In respect of this I accept the respondent's evidence that there were no realistic practical alternatives in terms of where the claimant could have worked. I found the claimant's suggestions were limited in scope and quite speculative. Realistically I do not accept it would have been reasonably practical to try and arrange different work for the claimant. At that time it was not known how long testing would continue so any alternative arrangements would need to be feasible for the foreseeable future. However, I also note that during evidence Mr Hayman did accept that during lockdown and the pandemic the respondent company had been flexible in terms of accommodating employees' needs and preferences. This included redeploying some people who did not want to go on furlough. He also explained that there were daily calls between managers where such matters were discussed but the claimant was not discussed at any of these.

47. In relation to events after the dismissal and the claimant's appeal, I also make a finding of fact that at no point during this process did the claimant expressly state to the respondent that he would now engage with the testing regime if the appeal was upheld.

The Law

<u>Human Rights Act</u>

48. The respondent in this case is not a public body so is not directly bound by the provisions of the Human Rights Act 1998 ("the HRA"). However, the provisions of the HRA must be taken into account in tribunal proceedings because of the following:

    48.1. Under section 2 of the HRA courts and tribunals must take into account any judgment, decision or opinion of the relevant institutions that is relevant to the proceedings.

    48.2. Section 3 of the HRA states that:

    So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

    48.3 Section 6 of the HRA states that

    (1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right
    (2) ..
    (3) In this section 'public authority' includes –
    (a) a court or tribunal…

49. The Employment Rights Act 1997 is legislation that is covered by section 3 of the HRA. The Employment Tribunal is a public authority falling under section 6. The Employment Tribunal must not act in a way that is incompatible with the HRA so it must ensure that the Employment Rights Act 1996 is read in a way that is not incompatible with the HRA.

50. Schedule 1 of the HRA incorporates Article 8 of the European Convention on Human Rights ("the Convention"). This states as follows:

    1. *Everyone has the right to respect for his private and family life, his home and his correspondence.*

    2. *There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

51. In **X v Y** [2004] IRLR 625 ("**X v Y**") Mummery said:

    "Article 8 is not confined in its effect to relations between individuals and the state and public authorities. It has been interpreted by the Strasbourg court as imposing a positive obligation on the state to secure the observance and enjoyment of the right between private parties."

52. In relation to unfair dismissal, he held that:

"(2) If the dismissal of the applicant was in circumstances falling within Article 8 and was an interference with the right to respect for private life, it might be necessary for the employment tribunal then to consider whether there was a justification under Article 8(2) for the particular interference. As explained below, Article 8 and Article 14 may have to be considered by tribunals in the case of a private sector employer, as well as in the case of a public authority employer, by virtue of s.3 of the HRA . Justification involves considering whether the interference was necessary in a democratic society, the legitimate aim of the interference, and the proportionality of the interference to the legitimate aim being pursued.

(3) On questions of justification the tribunal should bear in mind the complexity of employment relationships. In addition to the right of the employee under Article 8 and Article 14, the employer, fellow employees and members of the public also have rights and freedoms under the Convention "

53. In **X v Y**, Mummery suggested the following approach to Employment Tribunals when considering human rights dismissals:

"(1) Do the circumstances of the dismissal fall within the ambit of one or more of the Articles of the Convention? If they do not, the Convention right is not engaged and need not be considered.

(2) If they do, does the state have a positive obligation to secure enjoyment of the relevant Convention right between private persons? If it does not, the Convention right is unlikely to affect the outcome of an unfair dismissal claim against a private employer.

(3) If it does, is the interference with the employee's Convention right by dismissal justified? If it is, proceed to (5) below.

(4) If it is not, was there a permissible reason for the dismissal under the ERA, which does not involve unjustified interference with a Convention right? If there was not, the dismissal will be unfair for the absence of a permissible reason to justify it.

(5) If there was, is the dismissal fair, tested by the provisions of s.98 of the ERA, reading and giving effect to them under s.3 of the HRA so as to be compatible with the Convention right?"

<u>Unfair Dismissal</u>

53. The right not to be unfairly dismissed is conferred by Section 94 of the Employment Rights Act 1996. Where, as here, there is no dispute that an employee was dismissed, the question of whether any such dismissal was unfair turns upon the application of the test in Section 98 of the Employment Rights Act 1996. The material parts of that section are as follows:

"98 General.

(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 –

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that Case Number: 3202301/2019 26 of his employer) of a duty or restriction imposed by or under an enactment.

(3) ...

(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.

54. For the purposes of Section 98(2) ERA 1996 'conduct' means actions 'of such a nature whether done in the course of employment or outwith it that reflect in some way upon the employer/employee relationship': **Thomson v Alloa Motor Co Ltd [1983] IRLR 403, EAT**. It is not necessary that the conduct is culpable **JP Morgan Securities plc v Ktorza UKEAT/0311/16.**

55. Where the reason, or principal reason, for the dismissal is established as conduct then it will usually, but not invariably, be necessary to have regard for the guidance set out in **British Home Stores Ltd v Burchell [1978] IRLR 379**, which lays down a three-stage test: (i) the employer must establish that he genuinely did believe that the employee was guilty of the misconduct; (ii) that belief must have been formed on reasonable grounds; and (iii) the employer must have investigated the matter reasonably. Following amendments to the statutory scheme the burden of proof is on the employer on point (i) (which

goes to the reason for the dismissal) but it is neutral on the other two points **Boys and Girls Welfare Society v McDonald [1996] IRLR 129.**

56. The correct test is whether the employer acted reasonably, not whether the tribunal would have come to the same decision itself. In many cases there will be a 'range of reasonable responses', so that, provided that the employer acted as a reasonable employer could have acted, the dismissal will be fair: **Iceland Frozen Foods Ltd v Jones [1982] IRLR 439**. That test recognises that two employers faced with the same circumstances may arrive at different decisions but both of those decisions might be reasonable.

57. The range of reasonable responses test applies as much to any investigation and the procedure followed as it does to the substantive decision to impose dismissal as a penalty **Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23**.

58. In terms of the reasonableness of the investigation and the procedure that was followed, the "relevant circumstances" referred to in Section 98(4) include the gravity of the charge and their potential effect upon the employee **A v B Case Number: 3202301/2019 27 [2003] IRLR 405**. A v B also provides authority for the proposition that a fair investigation requires that the investigator examines not only the evidence that leads to a conclusion that the employee is guilty of misconduct but also that which tends to show that they are not. However, where during any disciplinary process an employee makes admissions a reasonable employer might normally be expected to proceed on the basis of those admissions **CRO Ports London Ltd v Mr P Wiltshire UKEAT/0344/14/DM**.

59. When considering a complaint of unfair dismissal under s.98(4) of the 1996 Act, where the employee has exercised a right of appeal in disciplinary proceedings the tribunal must consider the overall process **Taylor v OCS Group Ltd 2006 ICR 1602, CA**.

<u>Compensation for unfair dismissal</u>

60. Section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992 provides that:

> *"any Code of Practice issued under this Chapter by ACAS shall be admissible in evidence, and any provision of the Code which appears to the tribunal or Committee to be relevant to any question arising in the proceedings shall be taken into account in determining that question."*
>
> The relevant code for present purposes is the ACAS Code of Practice on Disciplinary and Grievance Procedures 2009.

61. Where an employer has dismissed for a substantively fair reason but has failed to follow a fair procedure, the compensatory award may be reduced by up to 100% if it can be shown that a fair procedure would have resulted in dismissal in any event *(**Polkey v AE Dayton Services Ltd*** [1988] ICR 142 HL).

62. Section 122(2) of the Employment Rights Act 1996 provides:

> *"Where the tribunal considers that any conduct of the complainant 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".*

63. Section 123(6) of the Employment Rights Act 1996 provides:

> *"Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."*

Wrongful dismissal

64. A claim for wrongful dismissal is a claim that the Claimant was dismissed in breach of her contract of employment by being dismissed without notice. The Claimant's entitlement to notice will be determined by her contract of employment or the statutory minimum notice set out in the Employment Rights Act 1996. If an employee is otherwise entitled to notice an employer may have a defence to a wrongful dismissal claim if it can show that the employee was in repudiatory breach of their contract of employment, due to their conduct.

65. The test which the Tribunal must apply in a claim for wrongful dismissal is different from that to be applied to the claim for unfair dismissal. The issue is not whether or not the employer acted reasonably. In a claim for wrongful dismissal the Tribunal must make its own findings of fact on whether or not the Claimant had acted in such a way that there was a repudiatory breach of contract.

Discussion and conclusions

Unfair Dismissal

66. I am satisfied that the respondent's reason for dismissing the claimant was his conduct. The disciplinary process in January 2021 was triggered by the claimant's conduct, in that he had declined to take a Covid test on more than one occasion earlier in January 2021. It was undisputed that the claimant had not taken a test on 9 January 2021 and he had also not taken one on returning from a period of sickness absence on 18 January 2021. It was this second occasion that lead to the respondent's decision to suspend the claimant and start the disciplinary process. I did not hear any evidence that indicates there may have been a different reason for dismissal.

Preliminary considerations – the implications of the HRA and reasonable management instructions

67. Broadly, the respondent said that the claimant had repeatedly refused to carry out reasonable management instructions. There is an implied term in every contract of employment that an employee must comply with reasonable

management instructions. An employer may be able to dismiss by reason of conduct if an employee's failure to follow reasonable management instructions is sufficiently serious. However, the underlying instructions must be legitimate. This must be considered in light of the requirements of the HRA.

68. The instructions by the respondent relate to a requirement that the claimant take Covid tests. The claimant says such instructions were an infringement of his rights under Article 8 as testing interferes with his physical integrity. Therefore, he says dismissal for refusing these tests is also an infringement of those rights.

69. The respondent agreed that Article 8 was engaged but argued that testing was reasonably necessary for the protection of the health and safety of its employees and the staff and patients within the hospital.

70. In terms of a general instruction to test for Covid, I find that while it potentially could be an infringement of Article 8 I also accept that such instructions can be justified. There is clearly a legitimate aim, which is the protection of health. The question is whether the requirement to test is necessary in the circumstances. The relevant circumstances are the following:

    70.1. the claimant worked in a hospital and would probably come into contact with vulnerable individuals on a regular basis;

    70.2. there was an ongoing pandemic of a highly infectious disease and it was known there could be asymptomatic transmission;

    70.3. the actual process of testing, while invasive, is transient with any discomfort being short lived and there is no lasting impact on the individual;

    70.4. the testing only reveals whether or not the individual has been infected with Covid and does not reveal anything else about their private life (in contrast with workplace testing for drugs and alcohol); and

    70.5. although I have not seen any evidence of express instructions from the respondent's client on testing, I accept that the respondent understood that the NHS Trust had a strong preference for all those working on site to test regularly.

    In these circumstances I accept that any interference in the claimant's private life, by requiring testing, could be necessary in the circumstances of the case.

71. In summary, I find that although the requirement to take Covid tests does potentially engage Article 8 I am satisfied that such a requirement could be reasonably necessary and therefore an instruction to take such tests can be a legitimate and reasonable management instruction. The consequence of this is I move to limb 5 of the test set out by Mummery in ***X v Y***.

<u>Fairness under section 98 Employment Rights Act 1996</u>

71. The first issue to identify is what was the relevant conduct that was being considered by the respondent in the disciplinary process. The allegations set

out in the letter inviting the claimant to the disciplinary hearing and the dismissal letter are:

71.1. repeated refusal to carry out a reasonable company and client instruction of having a Covid test;

71.2. acting in a manner that puts your or others' life or health at risk; and

71.3. actions which could bring the company into disrepute.

72. I have concluded that the respondent's actual reasons differed slightly from what was set out in the correspondence and this framing was somewhat artificial. I have found that by 27 January 2021 there was no evidence that the respondent's client, the NHS Trust, had given an instruction to the respondent to ensure that its employees were tested on a regular basis. I have also found that there was no further explanation or discussion at any point directly on the second and third allegation. At best those further allegations can be viewed as a way of the respondent explaining why the instructions referred to in the first instruction were 'reasonable'.

73. This leaves the actual conduct that was being considered in the disciplinary as allegations that the claimant had failed to follow reasonable company instructions. This in itself could potentially be sufficient to justify dismissal.

74. The question then is whether Mr Robinson genuinely concluded that the claimant had repeatedly refused to carry out a reasonable instruction and whether it was reasonable for him to reach that conclusion based on the available evidence. I remind myself that I must not substitute my own views on these points for those of the Respondent, the test is whether the Respondent, acting through Mr Robinson who was the decision maker, acted reasonably.

75. As an initial point, I note that there was no separate investigation carried out in this case into what had occurred. Neither was any documentary evidence compiled, such as copies of correspondence to the claimant or statements by others involved in the incidents earlier in January 2021. This meant that the decision making was based just on what was said at the disciplinary hearing by those present and what Mr Robinson already knew or assumed to be the case.

76. The first issue to identify is what Mr Robinson was actually making a decision about. I have found that throughout the process there was a lack of clarity in terms of what was being decided with the focus shifting during the course of the meeting. My conclusion is that there were three distinct allegations that could have been under consideration, but these were not clearly set out or differentiated. These are as follows:

76.1. the claimant had failed to follow instructions by declining a test on 9 January and 18 January 2021 and had then not taking up any opportunity to test between 18 January and 27 January;

76.2. the claimant had already refused to comply with the instructions to take a test twice a week in accordance with a new policy introduced by the

respondent; and

76.3. the claimant would not comply with any ongoing requirement with twice weekly testing in the future.

77. During the disciplinary process, the allegations were not framed this way. Mr Foley briefly referred to the policy of twice weekly testing in his opening statement. However, I have already found that the claimant had not been informed of this specific requirement and this was not set out in the letter inviting the claimant to the disciplinary. During the hearing, the claimant agreed that he had not tested, but this was in response to a description of the outbreak which was the reason for the request on 9 January 2021, i.e. he accepted the allegation as set out in point 76.1 above.

78. As noted in my findings above, during the hearing Mr Robinson did not expressly reach any conclusion on what had actually occurred. This issue was glossed over and the focus of the meeting was on the third issue. My conclusion is that Mr Robinson in effect accepted that the allegation was as set out in 76.2 above without any real discussion or consideration about what had happened. I accept that Mr Robinson's conclusion on this was genuine but I find it was not reasonable to reach that conclusion. He assumed that the claimant knew about the policy of twice weekly testing without engaging on the issue of whether or not that was actually the case. As a result he also assumed that the claimant's refusal to test already related to twice weekly testing. This was not the case and Mr Robinson had no evidence on which to base that conclusion.

79. Having made those assumptions Mr Robinson focused on the third issue. Again, I accept that Mr Robinson genuinely believed that was the case but again I do not accept that was a reasonable conclusion. It was based on an erroneous assumption about what the claimant already knew and what had actually occurred. In addition, he reached that conclusion by relying on what he thought he knew about the claimant's attitude towards Covid and by giving the claimant an ultimatum during the hearing.

80. In summary, I have concluded that it would have been reasonable to uphold allegation made against the claimant as framed at 76.1 above as this was not disputed by the claimant. Mr Robinson made findings on the allegations as framed at 76.2 and 76.3. It was not reasonable to reach those conclusions as there was no evidence to support them, no real discussion of those points and it was only possible to reach those conclusions by Mr Robinson relying on assumptions about what the claimant knew and what the claimant's view was likely to be.

81. I then turn to Mr Robinson's decision to dismiss the claimant at the hearing on 27 January 2021. Again I must not substitute my own conclusions on this point but only decide if dismissal fell within the 'range of reasonable responses' in the circumstances.

82. Before considering the details of this case I will briefly comment on a case

referred to me by the parties, that of ***Allette v Scarsdale Grange Nursing Home Limited (ET 1803699/2021)***. This was a case heard at Leeds Employment Tribunal in November 2021. The claimant had been dismissed for failing to follow a reasonable instruction, namely to have a Covid vaccine. The Tribunal found the dismissal fair. I have already reached conclusions on Mr Robinson's findings on the allegations of misconduct which differ from the conclusions reached in *Allette.* Before considering sanction I first note that my conclusion is that when considering the reasonableness of the sanction, there are differences with the circumstances in *Allette.* These are as follows;

82.1. The respondent businesses in the current case and *Allette* differ significantly. The respondent in *Allette* was a family owned business with just 65 employees working on one site. In the current case the respondent is a large business. I was not provided with detailed evidence on its size but there were frequent references to other contracts the respondent had with different clients and multiple different areas of the business. This provides a very different context to the decision making process, both in terms of the resources available to the respondent and any alternative options.

82.2. I find that the what was being asked of the claimants in each case and the imminent consequences differed significantly. In Ms Allette's case her employer had imposed a requirement to be vaccinated and specifically arranged a date when that could happen. If she refused to be vaccinated on that day then there were only two options, dismiss her or allow her to work unvaccinated. There was no option to allow her to remain employed with a possibility of being vaccinated another day if she changed her mind. In the claimant's case the situation was not the same. The requirement to test was ongoing. It would be a straightforward matter if the claimant were to change his mind as he could take a test the next time he came to work without any difficulty.

83. Turning to whether the decision to dismiss in this case, I am not satisfied that dismissal was reasonable. I accept that dismissal would be within the band of reasonable responses if the respondent had grounds for concluding that the claimant actually had persistently refused to follow an instruction to test twice weekly in accordance with the respondent's policy. However, that would require there being clear instructions in place to do that which the claimant had been informed of and warned that failure to comply with that requirement may lead to dismissal. That point had not been reached by 27 January 2021. My conclusion on this is based on the following findings of facts about the circumstances in this case:

83.1. The testing request on 9 January 2021 was not part of any policy but was a request that the claimant test due to an outbreak.

83.2. The claimant had not been properly informed of a policy to test twice weekly before the hearing on 27 January 2021. He was also only informed of any requirement to test after he had refused on 18 January 2021, when he was suspended.

83.3. After being informed of the new requirement on 27 January 2021 he was given an ultimatum and only 15 minutes to decide what to do.

83.4. When issues had arisen in the past about the claimant's compliance with Covid related health and safety measures, such as mask wearing, it had been dealt with informally with a discussion.

84. Based on these points, and my other findings about Mr Robinson's decision making process set out in paragraphs 39 and 40 above, I have concluded that dismissal on the 27 January 2021 was not reasonable. The decision was premature and unduly hasty.

85. Finally I turn to the procedure. A disciplinary hearing was held and the claimant was informed he was at risk of dismissal beforehand. However, I have found that what was actually being alleged, and the reasons why, were not properly set out by the respondent. The consequences of this is that the whole decision making process was based on assumptions about what the claimant knew or did not know and what he had done that were incorrect.

86. For these reasons I am satisfied the dismissal was unfair in all the circumstances so the claimant's claim for unfair dismissal succeeds.

87. I am also satisfied that the respondent has not shown that the claimant had fundamentally breached his contract of employment and the wrongful dismissal claim also succeeds.

Polkey and contributory fault

88. I have concluded that even though it was not fair to dismiss the claimant on 27 January 2021, it could still potentially have been fair for the respondent to dismiss an employee who persistently refused to comply with a requirement to take Covid tests twice weekly. I have also found that the whole disciplinary process in January 2021 was unduly hasty, with the claimant not being properly informed of what was required of him and the allegations not being properly set out or considered. On this basis I accept this is a case where I accept it is appropriate to consider what would have happened had a fair procedure been followed.

89. I have concluded that in this case there is a high likelihood that the respondent would have probably fairly dismissed the claimant in any event. The reasons for this are as follows:

89.1. The claimant provided no indication during the appeal process that he was actually willing to undergo testing if the appeal was upheld. On the contrary at the time his arguments related to why he did not want to test. The claimant's evidence that I heard was consistent with him not having changed his mind, and he described himself as stubborn.

89.2. If the claimant had continually refused to have undergone testing then

I accept that it could have been reasonable to dismiss for misconduct in any event, rather than consider alternative arrangements. However, I have also accepted the respondent's evidence that there were no realistic practical alternatives, such as arranging for the claimant to work in areas where he did not come into contact with the public.

Based on this I have concluded that under ***Polkey v Dayton Services Limited [1988] ICR 142*** a reduction of 80% should be made to the compensatory award.

90. I have also considered the extent to which the claimant's conduct was such that any reduction should be made under section 122(2) and 123(6) Employment Rights Act 1996. I have concluded that such reductions should be made. As a matter of fact the claimant had declined to take a test on 9 January and 18 January 2021. Also, although I found the giving of an ultimatum in the hearing unreasonable, the claimant had also again refused to test then. A reduction should be made to both the basic award and compensatory award of 50% for this reason.

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Employment Judge Park
Date: 6 February 2023

Sent to the parties on
Date: 7 February 2023