EMPLOYMENT TRIBUNALS

Claimant: **Miss Gemma Batty**

Respondent: **The Woof Inn Limited**

Heard at: **Leeds (by Cloud Video Platform)** **On:** **5, 6 and 7 July 2021**

Before: **Employment Judge Bright**
Mrs V Griggs
Mr M Elwen

Representation
Claimant: Herself
Respondent: Mr L Bronze (Counsel)

RESERVED JUDGMENT

1. The claimant was unfairly dismissed.

2. The claimant's claim of indirect sex discrimination fails and is dismissed.

3. A remedy hearing will be listed.

REASONS

The complaints

1. The claimant, Miss Batty, presented her claim on 14 September 2020, complaining of unfair dismissal and indirect sex discrimination. She clarified at this hearing that she did not pursue a complaint of direct sex discrimination.

2. Early conciliation took place from 10 August 2020 to 7 September 2020, when the certificate was issued. The respondent presented its response to the claim on 11 December 2020, defending the claim. A case management hearing took place by telephone on 26 January 2021.

3. The respondent clarified at this hearing that it did not dispute liability for unfair dismissal, in that it accepted that it had not followed any procedure in dismissing the claimant.

The issues

4. It was agreed at the start of this hearing that the issues for the Tribunal to decide were:

Unfair dismissal

5. What was the reason or principal reason for the claimant's dismissal? Was it one of the potentially fair reasons set out in sections 98(1) or (2) of the Employment Rights Act 1996 ("ERA")? The responded relied upon capability and/or conduct.

6. Did the respondent act reasonably or unreasonably in all the circumstances in treating that reason as sufficient to dismiss the claimant? The respondent accepted that it did not adopt a fair procedure and therefore dismissed the claimant unfairly.

7. Would it be just and equitable to reduce the basic award because of any conduct of the claimant before dismissal?

8. If there is a compensatory award, is there a chance that the claimant would have been fairly dismissed anyway, if a fair procedure had been followed, or for some other reason?

9. Did the claimant cause or contribute to her dismissal by blameworthy conduct?

Indirect sex discrimination

10. The respondent accepted that it had the following provisions, criteria or practices ("PCPs") and applied (or would apply) them to the claimant and other employees (including men):

    10.1. Requiring employees to return to work off furlough leave from 1 June 2020 (the "**return to work PCP**");

    10.2. Not allowing children in the workplace from June 2020 onwards (the "**children in the workplace PCP**");

    10.3. Not allowing block booking of annual leave during the school summer holidays (the "**holidays PCP**").

11. Did the PCPs put women at a particular disadvantage when compared with men, in that:

    11.1. Women typically bear primary responsibility for childcare and are therefore more likely to need to cover childcare during periods of school closure owing to the Covid 19 pandemic? The respondent accepts this group disadvantage.

11.2. Women typically bear primary responsibility for childcare and are therefore more likely to need to bring children into the workplace for childcare purposes? The respondent accepts this group disadvantage.

11.3. Women, because more of them are single parents, have a greater need to block book annual leave during school summer holidays for childcare than co-parents/men?

12. Did the PCPs put the claimant at that disadvantage?

13. Were each of the PCPs a proportionate means of achieving a legitimate aim? The respondent says that its aims were:

13.1. To reopen the business;

13.2. To follow the Government's advice around Covid 19 and restrictions in the workplace;

13.3. To ensure members of staff were able to book annual leave during the summer months, particularly July and August and that there was sufficient staff cover in adherence with licensing requirements for the business.

14. The Tribunal will decide in particular:

14.1. Were the PCPs an appropriate and reasonably necessary way to achieve those aims?

14.2. Could something less discriminatory have been done instead?

14.3. How should the needs of the claimant and the respondent be balanced?

The evidence

15. The claimant gave evidence on her own behalf from a written statement and called no further witnesses. She referred to a short written statement of Miss S Glascott. It was explained to the claimant that, as Miss Glascott was not present at the hearing for her evidence to be tested in cross examination, it was a matter for the Tribunal of how much weight to attach to it.

16. The respondent called on its behalf:
    16.1. Miss Georgina Martin, Director;
    16.2. Mr Martin Yeates, Day Care Staff;
    16.3. Miss Lauren Fletcher, Day Care Staff.

17. The parties presented an agreed file of documents of 231 pages, to which additional pages were added by the claimant (pages 232 and 233) and the respondent (pages 234 to 240) during the course of the hearing, by consent.

Submissions

18. Mr Bronze made written and oral submissions on behalf of the respondent, which we have considered with care but do not rehearse here in full. In essence, it was submitted that:

18.1. The reason for the claimant's dismissal was capability or some other substantial reason (even though the latter was not pleaded, it is open to the Tribunal to categorise the reason for dismissal as it sees fit). The respondent accepts that it did not follow any procedure and is therefore liable for unfair dismissal, but contends that, had it followed a proper procedure, the outcome would have been no different. The claimant became entrenched in her erroneous position that she had the right to be placed on furlough. Despite the respondent's sympathy, understanding and reasonableness throughout (offering the claimant extra time and a number of different options) the claimant would not come back to work.

18.2. Various of the claimant's actions, cumulatively or singly, could have lead to dismissal, including: swearing about the manager and sending abusive text messages, behaving in a way which made the team uncomfortable and reluctant to work alongside her, and working elsewhere when she had said she was unable to work. The respondent dealt with the claimant's grievance and appeal fairly, given its size. Had the respondent followed a fair procedure, it would have been a matter of a couple of weeks for the procedure to be followed and it was inevitable that the claimant would have been dismissed. There should be a reduction made to her compensation to reflect the inevitability of dismissal within a short time. There should also be a reduction to reflect the claimant's conduct.

18.3. In requiring employees to return to work from furlough the respondent was pursuing the legitimate aim of reopening the business. The claimant accepts there was no other aim. The respondent acted proportionately in that the measures taken were reasonably necessary.

18.4. The respondent does not accept that the children in the workplace PCP put the claimant at a disadvantage because she did not want to bring her daughter into the workplace in any event. The policy came about, at least in part, because she was "disgusted" by the idea of bringing her child into work. The case of **Keane v Investigo and others** UKEAT/0389/09 is relevant.

18.5. The claimant has not shown group disadvantage in relation to the holidays PCP. The claimant cannot rely upon judicial notice of the fact that women carrying the lion's share of childcare responsibilities extends to putting women at a particular disadvantage in respect of summer holidays and/or for single parents. The reason is that judicial notice amounts to facts that "*are so notorious or so well established to the knowledge of the court that they may be accepted without further enquiry*" (**Phipson on Evidence** (19th Edition)). In this case, it is not enough to simply assert childcare responsibility, there has to be a relationship with the PCP and that needs careful analysis. The case of **Dobson v North**

Cumbria Integrated Care NHS Foundation Trust UK EAT/0220/19 does not help the claimant.

18.6. The claimant has not explained why the holidays PCP put her at particular disadvantage. She does not say she is entitled to 6 weeks' summer holiday and has not explained why she would be disadvantaged by half weeks or another pattern. Her only argument is that she has had it before.

19. The claimant made briefer oral submissions on her own behalf, which we have considered with equal care but do not rehearse here in full. In essence it was submitted that:

19.1. In dismissing her, the respondent took no account of her mental health, impeccable work record and impeccable conduct and disciplinary records. The respondent could have kept her on furlough leave.

19.2. The respondent relied on personal messages, which did not warrant dismissal. If there had been proper investigation and procedure, her conduct would not have been found to be gross misconduct and she would not have been dismissed.

19.3. The case of **Dobson** supports her complaint of indirect discrimination. 85% of lone parents are women, as shown by the Office of National Statistics in 2021, which limits women's abilities to work certain hours. In *Dobson* judicial notice was taken of the fact that women were less likely than men to be able to accommodate flexible working without further enquiry and judicial notice should be taken in this case. She had previously been allowed to bring her daughter into the office and to book the holidays she wanted in the summer holidays. There was no good reason for the changes and the respondent could have kept her on furlough leave for childcare reasons.

The facts

20. It was agreed that:

20.1. The claimant was originally employed by The Dog House Limited from 1 November 2014 and was promoted to Day Care Manager from 1 September 2019. Around April 2019 the claimant's employment transferred to the respondent. At the time of her dismissal the claimant had continuous employment from 1 November 2014.

20.2. The claimant's contract of employment did not expressly prevent her working elsewhere during the duration of her contract with the respondent, the only restriction being a restrictive covenant following termination of employment.

20.3. The respondent is a small business, consisting of Miss Martin, the sole Director, the claimant as Day Care Manager, Miss L Fletcher and Mr M Yeates as Day Care Staff. The business is engaged in dog day care, including the collecting and walking of clients' dogs.

20.4. The claimant was placed on furlough leave from 20 March 2020 due to the national Covid-19 lockdown, under a contract which agreed that furlough leave would end when work at the company resumed, and that the resumption may be at short notice (page 61). On 10 May 2020 the Government announced that those who could not work from home could return to work. The respondent informed its employees via group message that it planned to re-open the business on 20 May 2020 and staff would be required to return to work on 18 May 2020 in readiness for the reopening. It was not disputed that, as at 18 May 2020, and in fact until the commencement of the school summer holidays, school children the age of the claimant's daughter were not able to attend school, as schooling was taking place from home.

21. We made the following unanimous findings of fact. Where there was a dispute on the facts we resolved it on the balance of probabilities on the evidence before us, in accordance with the findings below.

21.1. The claimant and Miss Martin had been friends for over 10 years and obviously worked closely together. However, the claimant did not want to return to work on 18 May 2020 and her WhatsApp messages on 10 May 2020 to Miss Fletcher ("**the May Messages**") show that she disagreed with Miss Martin's decision to reopen the business at that stage: "*George really doesn't need to open yet. She paid rent to your dad until the end of June with the grant she got. (Unless that was a lie). Had money to buy uniform etc so guessing she got the 10 grand grant so would have kept her a float living. It maybe her business but it's only my job. I think she's been greedy and not safe*" (page 198) and, ""*I'm not going back to just work a few days if I can stay of furlough. I really couldn't afford that. Not worth it to have to pass kc about to be looked after and me deal with the public but yet you still can't mix with anyone but your household. Doesn't make sense to open just yet*" (page 199).

21.2. On 10 May 2020, when the claimant expressed concerns to her about returning to work, Miss Martin offered to leave the claimant on furlough in the short term (page 122). She explained to the claimant that she did not want her to feel forced back to work, and explained why she needed to re-open. On 12 May 2020, after making further enquiries, Miss Martin reassured the claimant about the safety of returning to work, offered to keep her on furlough for a further 10 days, but explained that she was unable to do so after that, as she would have to employ someone to cover the claimant's hours (page 122). She also offered the claimant a choice of coming back full time, part time or staying at home on unpaid leave thereafter. We find that the tone of Miss Martin's messages was positive and supportive and that Miss Martin appeared to be doing all she reasonably could to encourage the claimant back to work and to accommodate the claimant's concerns about returning to work.

21.3. We had a great deal of sympathy for both parties, as it was clear that both were placed in an extremely difficult position by the exceptional circumstances of the pandemic, the government's requirements for lockdown and the terms of HMRC's guidance on the Coronavirus Job Retention Scheme ("**CJRS**").

21.4. The claimant was in a difficult position because she had a primary school aged child who was at home because of school closures. The claimant was a single parent who could not rely on other adults in her household for childcare and was prevented by government restrictions from mixing with other households for childcare. She clearly could not leave her child alone at home to go to work. We accepted that she genuinely believed, from her online and other enquiries (www.gov.uk, Martin Lewis moneysaving expert, ACAS and her MP), that the respondent could place her on furlough and claim a grant to cover her wages under the CJRS because she could not work owing to childcare. We find that she genuinely believed Miss Martin was wrong to say that the CJRS did not help in this situation.

21.5. The respondent was also placed in an extremely difficult position. We accepted Miss Martin's evidence (supported by her messages to the claimant at pages 122 – 123) that she needed to re-open the business to make sure it remained viable. She was concerned that if the business remained closed, clients would take their pets elsewhere. We accepted that she therefore genuinely required the business to be fully staffed from 18 May 2020. We accepted that the business was exceptionally busy during the months of June, July and August 2020.

21.6. We accepted that, in such a small business, the absence of any member of staff would be difficult, but the absence of the claimant, who worked full time and was the only other level 3 qualified member of staff for licensing purposes, was particularly problematic. We accepted that the respondent did not have the funds to put the claimant on paid leave while paying another staff member to cover her hours. Even with the claimant on unpaid leave, because of the licensing requirements, the respondent had to pay two level 2 employees to cover the claimant's role, so expenditure was increased.

21.7. We also accepted that the advice Miss Martin received from HMRC and her accountant was that, although staff could be placed on furlough leave if they could not come into work because of childcare problems, if the employer was paying other staff to cover the work of the absent employee, the employer could be found to be making a fraudulent claim under the CJRS and fined. Miss Martin repeatedly checked the position with her accountant and HMRC and explained the advice she received to the claimant. We accepted her evidence that she called HMRC eight or nine times, spoke to her accountant and logged 38 calls to her insurance HR helpline looking for information and guidance after the claimant disagreed with her. However, she did not provide evidence of that advice to the claimant and the fact that her communication with the claimant was mainly via WhatsApp, rather than telephone or in person, cannot have helped the parties understand each other's position. The claimant clearly did not believe Miss Martin and continued to believe she was entitled to furlough leave.

21.8. Miss Martin undertook to review the situation at the end of the claimant's extended furlough leave. On 27 May 2020 she offered the claimant the option of using annual leave to extend her paid absence from work. The claimant refused and, owing to their difference of opinion

about furlough, she and Miss Martin began to fall out. Miss Martin wrote to the claimant (page 63), explaining that her furlough leave would end on 31 May 2020 and she would be expected back in work from 1 June 2020. The claimant was asked to respond by 29 May 2020 and inform the respondent if she would prefer to take up one of the alternatives offered, namely to work part time hours, or reduced days rather than her full time hours, use holidays from her holiday allowance or take unpaid leave. Another option was for the claimant to bring her daughter into work on the proviso that her daughter stayed within the 'sofa area'. The claimant rejected that offer on the grounds that it would be 'disgusting' for her child to be in the workplace during the pandemic. The claimant opted to take four weeks' unpaid parental leave from 1 June 2020.

21.9. From the WhatsApp messages at pages 122 – 129 between the claimant and Miss Martin ("**the June Messages**"), we find that by 4 June 2020 the dispute had started to feel personal to both of them and disagreements about payment for bank holidays and car use ensued. The bank holiday disagreement was resolved, but what began as a misunderstanding about what insurance the claimant had and/or required on her personal vehicle and an unfortunate side-effect of lock down (her vehicle had become unroadworthy) snowballed into a bitter quarrel about whether the claimant should or would continue to use her own car for work.

21.10. By 24 June 2020, when the claimant put in a holiday request for annual leave during the school holidays, the parties' positions had become entrenched and, we find, the relationship between them had entirely broken down. Miss Martin refused some, but not all, of the days requested by the claimant on the grounds that there was no cover. The claimant believed Miss Martin's refusal was gratuitous. The claimant had always previously been able to take her holiday in blocks to cover childcare and she felt the refusal was personal. However, we accepted Miss Martin's evidence that block booking of annual leave in the summer holidays would not be granted automatically because she needed to ensure Miss Fletcher, Mr Yeates and herself could also book annual leave during the summer months, while still ensuring there was sufficient staff cover to comply with licensing requirements.

21.11. We accepted that Miss Martin was trying to be even handed and checked with Miss Fletcher whether she could cover the claimant's holiday before responding. However, Miss Martin's message to the claimant merely said, "*I cannot authorise all those days as I do not have cover"* (page 133). That contrasts with her later account to the claimant in the grievance outcome letter: *"Georgina asked Lauren if she was able to change any of her working days, and her response was 'maybe, however I cannot commit to anything until I have worked out what my plans are for the summer'. With this in mind, Georgina responded immediately to you with the dates that were approved, the ones that were on hold (sept/oct) and those that were not available at this point"* (page 85). Miss Martin acknowledged in the grievance outcome (page 85) that "*Georgina is aware that her text could have carried more explanation and depth to it than it did, which would have helped you understand why the decision was made"*. We agreed that Miss Martin's response was peremptory but

we accepted that she had checked with Miss Fletcher and was intending to explore further whether cover could be provided, as illustrated by the respondent's offer of further annual leave days on 23/24 July 2021.

21.12. The claimant submitted a grievance on 27 June 2020, raising a number of concerns, including: not being allowed to stay on furlough leave due to not having childcare; not being granted all of the annual leave requested; and having to use her own transport to conduct dog walks (pages 72 – 74).

21.13. A grievance hearing was arranged on Zoom on 1 July 2020. It was attended by the claimant, Miss Martin and an external witness, Ms Claire Thorpe. The claimant objected to Miss Martin hearing the grievance on grounds that she would not be impartial. We agreed that hearing a grievance about one's own behavior in the context of the breakdown of a long-standing working relationship and friendship is to be avoided. However, we also accepted that this was a tiny business and Miss Martin was the only director and manager. Miss Martin brought in Ms Claire Thorpe as an independent witness. We accepted Miss Martin's evidence that it would not have been appropriate to put Ms Thorpe in the position of deciding the grievance as she knew both the claimant and Miss Martin and did not work for the respondent. We accepted Miss Martin's evidence that the business could not afford to pay for external human resources services to attend to hear the grievance, although she had access to an advisory service through her insurance.

21.14. We have scrutinized Miss Martin's the evidence relating to the grievance hearing, including the grievance decision and summary (pages 83 – 92). We find that Miss Martin went through a formal procedure, including ensuring that the notes were taken by Ms Thorpe. Miss Martin acknowledged failings in her own handling of their communication ("*Your frustration and misunderstanding is understandable…"* (page 85) and, "*This was a management failure, and for that Georgina apologises…she may have mistakenly led you to believe that you were in some way entitled to a work car, rather than a van, and this is a mistake that has been learnt from and steps have been put in place to rectify"* (page 88). While Miss Martin did not uphold the grievance, we find that she gave it her careful attention, listened to the claimant's concerns, examined her own behavior in response and gave clear explanations to the claimant for her actions. The grievance decision letter sent to the claimant on 3 July 2020 (pages 81 – 92) is clearly reasoned and appears to be a fair-minded consideration of the claimant's concerns.

21.15. The claimant returned to work on 6 July 2020, the first day on which household mixing was permitted and childcare could therefore be obtained for her daughter. Both parties agreed that the day did not go as they had hoped. There were heated discussions during the day regarding the claimant's return to work. The claimant did not deny that she called Miss Martin a 'bitch' and it was clear from the evidence that, by this stage, the relationship had deteriorated so far that it was unsalvageable. The claimant accepted in cross examination that "I was hurting and I bit" and that her behavior was not appropriate. We accepted Miss Fletcher's evidence that her behavior made the other staff extremely uncomfortable.

21.16. There was a conflict of evidence as to how the day ended. The claimant says she and Miss Martin had a meeting at which it was agreed that they would 'draw a line under' the day and move on. Miss Martin says, and we accepted as corroborated by Miss Fletcher's evidence, that the claimant left in tears and in a hurry and that matters were not resolved at the meeting. That explains, in our view, the letter Miss Martin sent to the claimant after work that day (page 93 – 94) summarizing their discussions. It also explains why the claimant was signed off sick with stress by her GP from 7 July 2020. We accepted that the claimant was genuinely unwell.

21.17. The claimant submitted an appeal against the grievance outcome on 9 July 2020 on the grounds that the grievance had not been dealt with impartially. Other than the overall outcome and the fact that Miss Martin heard the grievance herself, however, the claimant did not identify any aspects of the reasoning in the grievance letter or the process followed with which she disagreed.

21.18. The respondent made arrangements for Mr Martin Yeates (usually Day Care Staff, but acting up as Temporary Day Care Manager in the claimant's absence) to hear the grievance appeal (page 96). The claimant objected to Mr Yeates hearing the appeal on the grounds that he was less senior than Miss Martin and there was evidence that he wanted the claimant's job. We accepted Mr Yeates' evidence that, while he was technically less senior than Miss Martin, his role with the respondent was such that he was not overly invested in it (paragraph 9 of his witness statement). His career was as a nurse, and he worked for the respondent merely to top up his hours in between his nursing assignments. We accepted his evidence that he took his professional obligations seriously and had no qualms about telling Miss Martin if he thought she had done something wrong. We were not persuaded by the written evidence from Miss Glascott that she had been told by Miss Martin that Mr Yeates had expressed an interest in the claimant's job. That evidence was second hand, was denied by Miss Martin and Mr Yeates, and Miss Glascott was not at the hearing for her evidence to be tested.

21.19. Mr Yeates made a number of recommendations in the grievance appeal outcome for improvements in Miss Martin's handling of matters, although he did not uphold the claimant's appeal. Miss Martin took advice from her HR advisors before appointing Mr Yeates to hear the appeal and, other than the overall outcome and Mr Yeates' involvement, the claimant has not identified any particular aspect of his reasoning or process which caused her concern. We find Mr Martin's handling of the grievance appeal was impartial and fair. Mr Yeates provided his reasoning to the claimant (pages 102 – 106 on 23 July 2020).

21.20. We accepted Miss Martin's evidence that, approximately a week after the grievance appeal outcome, Miss Fletcher spoke to her about the claimant (paragraph 22 of Miss Martin's witness statement, corroborated by the evidence of Miss Fletcher in cross examination). We accepted Miss Fletcher's evidence that this concerned events on 6 July, when the claimant returned to work for the day. We accepted Miss Martin's

explanation that the delay in Miss Fletcher coming forward was because she was young (aged 17 at the time) and needed to speak to her mum about what to do before approaching Miss Martin.

21.21. Miss Fletcher reported that the claimant had repeatedly called Miss Martin 'a bitch' when Miss Martin was absent on 6 July 2020. Miss Fletcher also reported that the claimant had told her she had been working elsewhere cleaning caravans 'cash in hand'. We accepted Miss Fletcher's evidence in cross examination that she still clearly recalled the conversations with the claimant on 6 July 2020. The claimant says she told Miss Fletcher she had merely been for a job interview to clean caravans, but we accepted Miss Fletcher's evidence that she clearly understood (whether rightly or wrongly) that the claimant told her she was working at the caravan site. Miss Fletcher also showed Miss Martin the May Messages for the first time. We accepted Miss Fletcher's evidence that she volunteered this information to Miss Martin because she wanted to tell her what had happened on 6 July 2020 and before. She had no reason to be dishonest and clearly felt troubled and uncomfortable by the two more senior women falling out.

21.22. The claimant continued to be signed off sick by her GP, presenting a sick note until the end of the school summer holidays. The respondent wrote to the claimant on 5 August 2020, informing her of her dismissal, with payment of one week's payment in lieu of notice, outstanding sick pay and outstanding holiday pay (page 109). No explanation was provided of the reason for her dismissal. It is agreed that the respondent did not warn the claimant of dismissal and followed no procedure whatsoever in dismissing the claimant. We accepted the respondent's evidence that Miss Martin was following the advice of her HR advisors that she was not required by law to follow a procedure nor give the claimant a reason for her dismissal. We find that, had Miss Martin been advised to do so, she would have followed a proper process. She had followed her advisor's advice on all other occasions and did so on this occasion.

21.23. The claimant wrote to the respondent on 6 August 2020 (page 110) requesting the reason for her dismissal, asking to appeal against the dismissal and disputing the calculation of her notice pay because it was not based on continuous employment from 1 November 2014.

21.24. The respondent rejected the claimant's request to appeal, arguing that her continuous employment had commenced with the respondent on 19 May 2020 and refusing to give reasons for dismissal. We accepted, having seen the advice given to the respondent from its HR advisors (pages 234 to 238), in relation to which the respondent waived any legal privilege, that the respondent was advised that the claimant did not have two years' continuous service and there was therefore no need to follow any procedure, allow an appeal or give her a reason for her dismissal. The respondent, having accepted prior to this hearing that the claimant did in fact have more than two years' continuous service, says that advice was wrong. We accepted however that Miss Martin genuinely believed that the advice she was receiving was correct and had no reason to doubt it at the time. We find it surprising, nevertheless, that she gave the

claimant no justification or reason for dismissing her, given the lengthy personal friendship between them, the length of time the claimant had worked for Miss Martin's businesses and the size and nature of the workplace. Common decency would appear to dictate that some explanation ought to have been offered, even if it was only that their relationship had broken down to such a point that the claimant's employment could no longer continue. Instead, Miss Martin said nothing.

21.25. We find, from Miss Martin's evidence, that the reasons for her decision to dismiss the claimant were mixed. Clearly there had been a breakdown in their relationship, as evidenced by their experiences on 6 July 2020. There was also Miss Martin's belief that the claimant had been working elsewhere while on unpaid leave. There was also their dispute over the car and the holiday. It was clear to us, however, from Miss Martin's evidence and the timing of her decision to dismiss the claimant, that the decisive factor was Miss Fletcher's revelations in late July 2020 about the May Messages and what the claimant said about Miss Martin on 6 July 2020. It was the fact that the claimant had been undermining and badmouthing Miss Martin behind her back to a junior member of staff. The principal reason for dismissal was therefore the claimant's conduct on 6 July 2020 and in the May Messages. However, Miss Martin's belief that the claimant had been working elsewhere was clearly a contributing factor.

21.26. We do not find, from the evidence before us, on the balance of probabilities, that the claimant did work cleaning caravans cash in hand while on unpaid leave. The claimant denies it and denies telling Miss Fletcher. It is possible Miss Fletcher misunderstood and we accepted the claimant's evidence that she had issues around childcare making it difficult for her to go out to work until household mixing was permitted from 6 July 2020.

21.27. The claimant did not deny calling Miss Martin 'a bitch' to Miss Fletcher, nor indeed did she deny the allegation in Miss Martin's witness statement (paragraph 16) that she became verbally aggressive and called her 'a bitch' to her face on 6 July 2020. Nor did the claimant deny that she sent the May Messages to Miss Fletcher undermining Miss Martin. We find that, given how small the respondent's business is, how integral the relationship between Miss Martin and the claimant was to the running of the business and the line management relationship between the claimant and Miss Fletcher, these actions amounted to gross misconduct, both singly and cumulatively. The respondent's disciplinary policy identifies insubordination and verbal abuse as examples of gross misconduct (page 158) and the claimant's actions clearly fall within that category, in our view.

The law

Unfair dismissal

22. Under section 98 of the Employment Rights Act 1996 it is for the employer to show:

(1)(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is 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.

23. Conduct and capability are reasons falling within section 98(2) ERA.

24. In determining whether the employer acted reasonably or unreasonably in dismissing for the reason given, the burden of proof is neutral and it is for the tribunal to decide. Section 98(4) ERA reads:

> *The determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend upon 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 that question shall be determined in accordance with equity and the substantial merits of the case.*

25. The test of whether or not the employer acted reasonably is an objective one, that is tribunals must determine the way in which a reasonable employer in those circumstances in that line of business would have behaved. The Tribunal must determine whether the employer's actions fell within the range of reasonable responses open to a reasonable employer in the circumstances (**Iceland Frozen Foods Limited v Jones [1983] ICR 17** (approved by the Court of Appeal in **Post Office v Foley, HSBC Bank PLC (formerly Midland Bank PLC) v Madden [2000] IRLR 827**)). The Tribunal must not substitute its decision for that of the respondent. The range of reasonable responses test (the need for the Tribunal to apply the objective standards of the reasonable employer) must be applied to all aspects of the question whether the employee was fairly and reasonably dismissed (**Sainsbury Supermarkets Limited v Hitt [2003] IRLR 23**).

26. In determining the fairness of a dismissal for alleged misconduct, the Tribunal should normally apply the case of **British Home Stores Ltd v Burchell [1978] IRLR 379**. The Tribunal should consider whether the Respondent entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. This lays down a three stage test: 1) the employer must establish that he genuinely did believe that the employee was guilty of misconduct; 2) that belief must have been formed on reasonable grounds; and 3) the employer at the stage at which he formed that belief on those grounds, must have carried out as much investigation into the matter as was reasonable in all the circumstances of the case. The burden of proof is on the employer on point (1) but it is neutral on the other two points (**Boys and Girls Welfare Society v McDonald [1996] IRLR 129; Sheffield Health and Social Care NHS Trust v Crabtree [2009] UKEAT/331/09**). Whether or not the employee is actually guilty of the misconduct is not relevant to the fairness of the dismissal.

27. Whether the employer complied with the ACAS Code of Practice on Disciplinary and Grievance Procedures is relevant to the question of reasonableness for section 98(4) ERA. Paragraph 43 provides that a

grievance appeal should be dealt with impartially and wherever possible by a manager who has not previously been involved in the case.

28. Following the case of **Polkey v AE Dayton Services Ltd** [1988] ICR 142, the Tribunal will ask whether, in an unfair dismissal, if a fair process had been followed, would the employee have been dismissed in any event? What would have occurred but for the dismissal? In some cases, it may be clear that the employee would not have been dismissed if a proper process had been followed, in which case there would be no reduction to the compensatory award. In other cases, the tribunal may find that the dismissal would have occurred in any event. This may result in a small additional compensatory award to take account of any additional period of time for which the employee would have been employed had the proper procedures been carried out. Alternatively, it may not be possible to determine one way or the other, in which case, the tribunal must assess the percentage chance of the employee being dismissed. The Tribunal is not under an obligation to make a specific finding about exactly how a particular issue would have been resolved, however. The nature of the *Polkey* exercise is simply to make an assessment, of what will often have to be a fairly broad-brush nature, about what might have happened in a hypothetical situation which never in fact transpired (**Croydon Health Services v Beatt** [2017] EWCA Civ 401, [2017] IRLR 748).

29. The case of **Software 2000 Ltd v Andrews** [2007] IRLR 568 *established* guidance:

    29.1. The Tribunal must assess the loss flowing from the dismissal, using its common sense, experience and sense of justice. Normally that requires it to assess for how long the employee would have been employed but for the dismissal.
    29.2. If the employer seeks to contend that the employee would or might have ceased to be employed in any event had fair procedures been followed, or alternatively would not have continued in employment indefinitely, it is for him to adduce any relevant evidence on which he wishes to rely. However, the Tribunal must have regard to all the evidence when making that assessment, including any evidence from the employee himself.
    29.3. There will be circumstances where the nature of the evidence which the employer wishes to adduce, or on which he seeks to rely, is so unreliable that the tribunal may take the view that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made.
    29.4. Whether that is the position is a matter of impression and judgment for the Tribunal. But in reaching that decision the Tribunal must direct itself properly. It must recognise that it should have regard to any material and reliable evidence which might assist it in fixing just compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence.
    29.5. An appellate court must be wary about interfering with the Tribunal's assessment that the exercise is too speculative. However, it must

interfere if the Tribunal has not directed itself properly and has taken too narrow a view of its role.

29.6. Having considered the evidence, the Tribunal may determine

29.6.1. That there was a chance of dismissal between zero and 100%. Compensation will be reduced to reflect that chance.

29.6.2. That employment would have continued but only for a limited fixed period.

29.6.3. Employment would have continued indefinitely.

30. Section 122(2) ERA provides that:

> *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*.

31. Section 123(6) ERA imposes a duty on tribunals to consider the issue of contributory fault in any case where it was possible that there was blameworthy conduct on the party of the employee, regardless of whether the issue was raised by the parties:

> *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.*

32. In considering the issue of contribution under s122(2) ERA 1996 and s123(6) ERA 1996, a three stage approach is set out in **Nelson v BBC (No2) [1979] IRLR 346**, namely that there must be a finding that there was conduct on the part of the employee in connection with her unfair dismissal which was culpable or blameworthy, there must be a finding that the matters to which the complaint relates were caused or contributed to, to some extent, by the action that was culpable or blameworthy, and finally, that there must be a finding that it is just and equitable to reduce the assessment of the claimant's loss to a specified extent.

33. In the course of his submissions on unfair dismissal, Mr Bronze referred us to the following cases:

33.1. **Lynock v Cereal Packaging Ltd** [1988] IRLR 510: Mr Justice Wood's guidance on the matters to be considered in relation to capability dismissals involving absence;

33.2. **Doman v Royal Mail Group Ltd** ET/2803550/10: a single incident of swearing towards a line manager can warrant dismissal;

33.3. **Morris v Sperry Corporation** EAT/51/81: behavior out of keeping with the senior status of the employee warranted dismissal;

33.4. **Treganowan v Robert Knee and Co Ltd** [1975] ICR 405 QBD: creation of a tense atmosphere at work seriously affected the employer's business was a factor in a fair dismissal;

33.5. **Hutchinson v Enfield Rolling Mills Ltd** [1981] IRLR 318; an employer is entitled to look behind a sick note;

33.6. **Brito-Babapulle v Ealing Hospital NHS Trust** UKEAT/0358/12: the seriousness of claiming sick pay whilst working elsewhere.

Indirect sex discrimination

34. Section 19 of the Equality Act 2010 ("EqA") provides that a person (A) discriminates against another (B) if A applies to B a provision, criterion or practice ("PCP") which is discriminatory in relation to a relevant protected characteristic of B's. Subsection (2) goes on to explain that a PCP is discriminatory in relation to a relevant protected characteristic of B's if:
    (a)A applies, or would apply it to persons with whom B does not share the characteristic;
    (b) It puts or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it;
    (c) It puts, or would put, B at that disadvantage; and
    (d) A cannot show it to be a proportionate means of achieving a legitimate aim.

35. The key disputes in this case were about group disadvantage (section 19(2)(b)) in relation to the holidays PCP, particular disadvantage (section 19(2)(c)) in relation to the children in the workplace PCP, and objective justification, in particular, proportionality (section 19(2)(d)) for all of the PCPs.

36. For section 19(2)(b) the pool of people used for the purposes of comparison must be those whose circumstances are the same or not materially different from the claimant (section 23(1) EqA). In other words, the comparison must be with those who, apart from the particular characteristic in question, are in circumstances which are the same or not materially different to those of the claimant (**Pendleton v Derbyshire County Council** [2016] IRLR 580).

37. The Equality and Human Rights Commissions' Statutory Code of Practice (2011) ("EHRC Code") provides that: "In general, the pool should consist of the group which the provision, criterion or practice affects (or would affect) either positively and negatively, while excluding workers who are not affected by it, either positively or negatively" (paragraph 4.18).

38. The joined cases of **Essop v Home Office**; **Naeem v Secretary of State for Justice** [2017] UKSC 27, [2017] IRLR 558 at [27] in the Supreme Court comprehensively considered the principles relating to a claim of indirect discrimination (Lady Hale at paragraphs 23 – 29):

    38.1. There is no requirement for an explanation of the reasons why a particular PCP puts one group at a disadvantage when compared with others.
    38.2. Indirect discrimination does not require a causal link between the less favourable treatment and the protected characteristic (like direct discrimination). Instead it requires a causal link between the PCP and the particular disadvantage suffered by the group and the individual. It assumes equality of treatment, but aims to achieve equality of results.
    38.3. The reason for the disadvantage need not be unlawful in itself or be under the control of the employer or provider. Both the PCP and the reason for the disadvantage are 'but for' causes of the disadvantage: removing one or the other would solve the problem.

38.4. There is no requirement that the PCP in question put every member of the group sharing the particular protected characteristic at a disadvantage.

38.5. It is commonplace for the disparate impact, or particular disadvantage, to be established on the basis of statistical evidence, but a correlation in the statistics is not the same as a causal link.

38.6. It is always open to the respondent to show that the PCP is justified.

39. For the purpose of finding discrimination, a tribunal is entitled to take account of (take "judicial notice" of) facts that are "so notorious or so well established to the knowledge of the court that they may be accepted without further enquiry" (**Phipson on Evidence** (19th Edition)).

40. Both parties referred us to the recent case of **Dobson v North Cumbria Integrated Care NHS Foundation Trust** UKEAT/0220/19 in which the EAT held that the Tribunal should have taken judicial notice of the fact that women, because of their childcare responsibilities, were less likely to be able to accommodate certain working patterns than men.

41. In **Dobson**, the EAT set out principles derived from **Phipson**:

a. *There are two broad categories of matters of which judicial notice may be taken: (i) facts that "are so notorious or so well established to the knowledge of the court that they may be accepted without further enquiry" and (ii) other matters that "may be noticed after inquiry, such as after referring to works of reference or other reliable and acceptable sources".*
b. *The Court must take judicial notice of matters directed by statute and of matters that have been "so noticed by the well-established practice or precedents of the courts";*
c. *However, beyond that, the Court has a discretion and may or may not take judicial notice of a relevant matter and may require it to be proved in evidence;*
d. *The party seeking judicial notice of a fact has the burden of convincing a judge that the matter is one capable of being accepted without further inquiry.*

42. The EAT in **Dobson** reviewed the authorities on judicial notice concerning childcare responsibilities, including **London Underground v Edwards (No 2)** [1999] IRLR 364 [1999] ICR 494 and **Shackletons Garden Centre Ltd v Lowe** UKEAT/0161/10 and drew out two points (paragraph 46):

a. *First, the fact that women bear the greater burden of childcare responsibilities than men and that this can limit their ability to work certain hours is a matter in respect of which judicial notice has been taken without further inquiry on several occasions. We refer to this fact as "the childcare disparity";*
b. *Whilst the childcare disparity is not a matter directed by statute to be taken into account, it is one that has been noticed by Courts at all levels for many years. As such, it falls into the category of matters that, according to **Phipson**, a tribunal must take into account if relevant.*

43. The EAT went on to observe (paragraph 47) that:

That is not to say that the matter is set in stone: many societal norms and expectations change over time, and what may have been apt for judicial notice some years ago may not be so now. However, that does not apply to the childcare disparity. Whilst things might have progressed somewhat in that men do now bear a greater proportion of child caring responsibilities than they did decades ago, the position is still far from equal. The assumptions made and relied upon in the authorities above are still very much supported by the evidence presented to us of current disparities between men and women in relation to the burden of childcare.

44. At paragraph 48:

b. …A matter in respect of which judicial notice may be taken, by its very nature, ought to be one that is uncontroversial. The fact that it is not might cast doubt on whether it really is so notorious and well-established that it can be accepted without further inquiry.

…

d…The childcare disparity is very well-established. It is frequently referred to in the authorities … and is also referred to in the EHRC Code of Practice, which the Tribunal is obliged to take into account. As such, there is little need for more to be said by way of pleading. Furthermore, as a specialist employment tribunal, the childcare disparity is a matter that falls within the scope of its specialist expert knowledge and can be taken into account without more. We consider that approach to be consistent with the general direction of travel of making it easier for litigants to establish claims of indirect discrimination, and the fact that claims are often brought by litigants in person, who may be aware of the childcare disparity, but who may have no knowledge of the principles relating to judicial notice.

45. The EAT further noted (paragraph 50):

However, taking judicial notice of the childcare disparity does not necessarily mean that the group disadvantage is made out. Whether or not it is will depend on the interrelationship between the general position that is the result of the childcare disparity and the particular PCP in question…. Judicial notice enables a fact to be established without specific evidence. However, that fact might not be sufficient on its own to establish the cause of action being relied upon. As is so often the case, the specific circumstances will have to be considered and one needs to guard against moving from an "indisputable fact" (of which judicial notice may be taken) to a "disputable gloss" (which may not be apt for judicial notice): see ***HM Chief Inspector of Education, Children's Services and Skills v Interim Executive Board of Al-Hijrah School*** *[2018] IRLR 334 (CA) at para 108. Taking judicial notice of the childcare disparity does not lead inexorably to the conclusion that any form of flexible working puts or would put women at a particular disadvantage*.

46. Further (paragraph 56):

Group disadvantage may be inferred from the fact that there is a particular disadvantage in the individual case. Whether or not that is so will depend on the facts, including the nature of the PCP and the disadvantage faced. Clearly, it may be more difficult to extrapolate from the particular to the general in this way when the disadvantage to the individual is because of

a unique or highly unusual set of circumstances that may not be the same as those with whom the protected characteristic is shared.

47. The EHRC Employment Code states (paragraph 4.9) that 'disadvantage' is to be construed as '*something that a reasonable person would complain about – so an unjustified sense of grievance would not qualify. A disadvantage does not have to be quantifiable and the worker does not have to experience actual loss (economic or otherwise). It is enough that the worker can reasonably say that they would have preferred to be treated differently.*

48. In the absence of judicial notice, a claimant still does not necessarily have to produce statistical evidence to prove particular disadvantage. If relevant statistics exist, they would be important, but the claimant's own evidence, along with that of anyone else in the group, might be sufficient.

49. The respondent referred us to **Boon v Chief Constable of Lancashire** ET/1900473/13, as an example of the principle that it is not enough for the claimant merely to establish membership of the protected group. The PCP must also put (or would put) the claimant at the disadvantage. So, a woman without family responsibilities could not establish indirect discrimination even if the Tribunal is satisfied on the fact that the burden of childcare makes it generally more difficult for women than men to fit into the employer's long-hours work culture.

50. The respondent also referred us to **Keane v Investigo and others** UKEAT/0389/09, in which the EAT held that where an application for a job is not genuine (that is, where the applicant would not be interested in accepting the role if they were offered it), the applicant will not suffer any disadvantage if they are not offered the job, and therefore could not base an indirect discrimination claim on a potentially discriminatory PCP.

51. In relation to justification, the respondent referred us to **Cockram v Air Products Plc** UKEAT/0122/15, in which the EAT emphasised the importance of the tribunal considering all the evidence on justification put forward by the employer and **Magoulas v Queen Mary University of London** UKEAT/0244/15, in which the EAT held that there is no general burden on either an employer or the Tribunal to look into alternatives to an employer's PCP in every case and whether such a burden arises will depend upon the facts of each particular case. The respondent is only required to demonstrate that the measures taken were "reasonably necessary" in order to achieve the legitimate aim(s) (**Barry v Midland Bank** [1999] ICR 859).

52. The respondent also referred us to **University of Manchester v Jones** [1993] ICR 474 and **Heskett v Secretary of State for Justice** [2020] EWCA Civ 1487) on the subject of proving objective justification.

Determination of the issues

53. Having deliberated on all the matters set out above, we determined the issues (and made such further findings of fact as necessary), on the balance of probabilities, in accordance with the following unanimous findings.

Unfair dismissal

54. The respondent concedes that the claimant was unfairly dismissed because, following the advice of her advisors, and believing that the claimant did not have sufficient length of service to be able to present a claim for unfair dismissal, Miss Martin followed no kind of procedure whatsoever in dismissing the claimant. The claimant is seeking compensation and a separate remedy hearing will be listed to determine the amount. However, it was agreed at the outset of this hearing that the Tribunal would be required to consider whether, had a proper procedure been followed, the claimant would have been dismissed in any event and therefore whether any compensation might be reduced to reflect that outcome. It therefore remains necessary for us to consider the reason for dismissal and reasonableness under section 98(4) ERA 1996, despite the respondent's concession on liability, so that we are able to properly consider what might have happened to the claimant's employment if things had been done differently.

55. What was the reason or principal reason for the claimant's dismissal? Was it one of the potentially fair reasons set out in sections 98(1) or (2) of the Employment Rights Act 1996 ("ERA")? The responded relied upon capability and/or conduct. We were not persuaded that the reason for dismissal was capability. We found on the facts that it was not the claimant's inability to return to work which was the principal reason for her dismissal. Rather, Miss Martin had a genuine belief that the claimant had committed gross misconduct by undermining and verbally abusing her to Miss Fletcher and working elsewhere while on unpaid leave. It was clear from the timing of the dismissal, that it was Miss Fletcher's revelations about the claimant's May Messages which were the final straw for Miss Martin, causing her to seek advice about how to terminate the claimant's employment. We find that the reason for dismissal was conduct, and therefore is one of the potentially fair reasons set out in section 98(2) ERA.

56. The respondent pleaded 'some other substantial reason' as an alternative reason for dismissal for the first time at the hearing. Mr Bronze submitted that it was open to us to find that the reason for dismissal was one which had not been pleaded by the respondent. We agree that there was a complete breakdown in the relationship between Miss Martin and the claimant. Their relationship was so fundamental to the operation of the business that, even had Miss Martin not dismissed the claimant for her conduct, there was a very high likelihood of the claimant's employment terminating in any event within a short period of time. The principal reason for dismissal was conduct, but had that not occurred, we consider the claimant would have been dismissed in any event because of the breakdown in the relationship between the claimant and Miss Martin.

57. Did the respondent act reasonably or unreasonably in all the circumstances in treating that reason as sufficient to dismiss the claimant? The respondent accepted that it did not adopt a fair procedure and therefore dismissed the claimant unfairly. But, had it been advised differently in respect of the claimant's entitlements, would the claimant's dismissal have been conducted fairly? The lack of proper process was absolute. There was no compliance with the ACAS Code of Conduct on Disciplinary and Grievance Procedures: no allegations provided to the claimant, no meeting or opportunity to respond,

no opportunity to appeal, no reason given for dismissal. There was no investigation into the allegations nor was the claimant given any opportunity to put forward any mitigation.

58. We find that, had Miss Martin been advised to do so, she would have followed a proper process. She followed her advisor's advice on all other occasions and did so on this occasion. The key question therefore is, what would have happened had she been properly advised? While this is speculation, we consider that the respondent's handling of the grievance process and the other facts of the case as we find them above give us sufficient clues to enable us to reach the following conclusions.

59. Firstly, we find that Miss Martin would have held an investigation into the allegations of misconduct. This would have included an investigation into the allegation that the claimant had been working elsewhere during her unpaid absence (which undermined all she had said about not being able to attend work because of childcare). We find that any investigation into the claimant's alleged misconduct may have shown that she was not, in fact, working elsewhere. We accepted the claimant's evidence that she had merely been for an interview and did not have childcare to cover working elsewhere. Had Miss Martin investigated, it is likely she would have discovered that fact and this would not have formed part of the allegations at any subsequent disciplinary proceedings. However, we consider that this discovery would have made little difference to the outcome. We accepted Miss Martin's evidence at the hearing that the claimant would still have been dismissed had she not known about the other work. The decisive factor in the claimant's dismissal was the language she used about Miss Martin to Miss Fletcher and her behavior on 6 July 2020.

60. We consider that an investigation into the May Messages and the claimant's conduct on 6 July 2020 would not have resulted in any change to the outcome. The evidence was clear; the May Messages themselves, Miss Fletcher's account of the claimant's comments on 6 July 2020 and Miss Martin's own experience of the claimant's behavior on that day, none of which were denied by the claimant. We find that Miss Martin would have genuinely concluded on reasonable grounds that the claimant was guilty of gross misconduct by undermining and abusing her. A reasonable investigation into the allegations would therefore have made no difference to the outcome, in our view, other than to prolong the timescale. Given the limited nature of the evidence and few people involved, we consider that any investigation would have needed to be small scale and would have taken Miss Martin no more than a day or two.

61. Next, what would have happened if Miss Martin had followed the ACAS Code in the disciplinary process. Would the claimant have been dismissed? Would she have appealed, would an appeal have been heard and what would the outcome have been? When would any dismissal have occurred or, if dismissal was not inevitable, what would the likelihood of dismissal have been?

62. We find Miss Martin would have given the claimant notice of the allegations and held a disciplinary hearing, offering her an opportunity to respond to the allegations. We have Miss Martin's handling of the claimant's grievance and

grievance appeal as a guide to how Miss Martin would have handled any disciplinary procedure. We find, therefore, that she would have heard the disciplinary hearing herself, as there was no other personnel available to do so in such a small company. She would also have approached the disciplinary hearing with an open mind, ensured an independent note taker, listened carefully to the claimant's arguments and considered the outcome fairly. We conclude that she would have acted within the range of reasonable responses of a reasonable employer in the circumstances.

63. The claimant suggested at the hearing in cross examination of Miss Martin that her mental health was part of the reason for her behavior on 6 July 2020. Miss Martin agreed that the claimant was "not herself" on 6 July 2020. Indeed, the claimant was signed off sick with stress from 7 July 2020. We find that, had there been a disciplinary meeting, the claimant may have raised her mental health in mitigation for her behavior. Had Miss Martin considered that, and investigated with the claimant and possibly her GP or in other ways, we find that it is possible Miss Martin might have discounted the claimant's behavior on 6 July 2020. However, the claimant has not suggested that the May Messages were caused by mental health problems. These were a key factor in Miss Martin's decision making. We consider that Miss Martin would inevitably have dismissed the claimant for her conduct or because of the breakdown in their relationship caused by the May Messages in any event.

64. Would an appeal have made any difference? We find that the claimant would have appealed, as she did in the grievance process, and that any appeal would have been likely to have been heard by Mr Yeates, as also happened with the grievance. We find that Mr Yeates would have approached the matter with an open mind and acted within the range of reasonable responses of a reasonable employer. However, in view of the evidence, the size of the company and the crucial nature of the relationship between the claimant and Miss Martin to the functioning of the business, we conclude that Mr Yeates would have upheld the claimant's dismissal.

65. Would an appeal have repaired the relationship between the claimant and Miss Martin, such that Miss Martin would be prepared to forgive the claimant's gross misconduct? As Miss Fletcher's revelations to Miss Martin showed, the relationship between the claimant and Miss Martin had entirely and irretrievably broken down and we did not accept the claimant's evidence in cross examination that, after all the animosity which had passed between them, an appeal would have repaired that relationship. The damage had already been done and we find that there was no real likelihood that they would have remedied that, whatever steps had been taken.

66. Taking account of the principles in **Polkey** and the guidance in **Software 2000** we consider that this is a case where the claimant would certainly have been dismissed in any event, albeit that the date of dismissal would have been different because the respondent would have taken some time to investigate and conduct a disciplinary procedure.

67. How long would the investigation and disciplinary procedure have taken? We find above that the investigation would have taken no more than one or two days. In considering the timing of any disciplinary procedure we have taken account of the size of the business, the nature of the allegations and evidence

available to Miss Martin and, in particular, by way of comparison, the length of time it took her to hear the claimant's grievance. We find that, had she followed a fair procedure, Miss Martin would have taken around 2 weeks to complete the investigation and disciplinary process. The claimant would therefore inevitably have been dismissed fairly 2 weeks after the date of her unfair dismissal.

68. Would it be just and equitable to reduce the basic award because of any conduct of the claimant before dismissal? We consider that the claimant's conduct in undermining Miss Martin in the May Messages was culpable and blameworthy conduct. Miss Fletcher, to whom the messages were sent, was aged 17 and reported to the claimant. In a time of confusion amid the Covid 19 pandemic and with businesses and employees struggling to operate or obtain clear advice, it was not appropriate for the claimant to undermine her employer behind her back to a less senior employee. This was particularly so given the size of the respondent's business and significance of the individuals' relationships to the successful operation of the business. We consider that it would be just and equitable to reduce the basic award to some extent. We reserve our decision on the extent of that reduction until we have heard submissions from the parties on that particular question at the remedy hearing.

69. Did the claimant cause or contribute to her dismissal by blameworthy conduct? We consider that the claimant did contribute to her dismissal by her blameworthy conduct. As set out above, the May Messages were an act of gross misconduct which led to her dismissal. Ordinarily, that finding would be sufficient to lead us to make a reduction from the compensatory award to reflect the level of the claimant's contribution. Where there has been a finding that a claimant would be likely to be dismissed in any event following **Polkey** we might reduce the compensatory award by a percentage to reflect that likelihood and then go on to reduce it further to reflect the claimant's contribution. However, in this case, we have concluded that the claimant would have been likely to continue to be employed for a further two weeks while a proper procedure was carried out and then would inevitably have been dismissed. Given our findings following **Polkey,** any compensatory award will be limited to two weeks. While the claimant was responsible for her own dismissal, she was not responsible for the timing of the dismissal nor the fact that it was carried out unfairly. We consider that the claimant's conduct did not contribute to the unfairness of her dismissal and did not contribute to the fact that her dismissal occurred some two weeks before it would have done had the respondent followed a fair procedure. We find that it would not be just and equitable to reduce the two weeks' compensatory award to nil. We reserve our position on the extent of any reduction to the compensatory award for contribution until we have heard submissions from the parties on this issue at the remedy hearing.

<u>Indirect sex discrimination</u>

Return to work PCP

70. The respondent accepted that it had a provision, criterion or practice ("PCP") of requiring employees to return to work off furlough from 1 June 2020. The

respondent accepted that it applied that PCP to the claimant and other employees (including men).

71. The respondent accepts that this was a PCP which applied to all staff and that women shoulder the primary care responsibilities for school age children and that they would therefore be put at a particular disadvantage in that they would struggle to reconcile their work/life commitments by this PCP. The respondent accepts that this PCP also put the claimant at this particular disadvantage.

72. Was this PCP a proportionate means of achieving a legitimate aim? The respondent says its aim was to re-open the business and the claimant accepts that there was no other aim. We find that this was a legitimate aim for requiring employees to return to work.

73. We consider that the PCP was an appropriate and reasonably necessary way of achieving that aim. The respondent needed a workforce to ensure that the business could re-open and to ensure that clients' pets were looked after and licensing requirements complied with. Could something less discriminatory have been done instead? Miss Martin did not insist on the claimant returning to work, nor discipline her for refusing to do so. Instead, she extended the claimant's furlough leave and granted the claimant unpaid leave to cover the school closure until the date when household mixing was permitted. The PCP was not strictly applied to the claimant therefore until 6 July 2020, when the claimant was able to send her child to another household for childcare. Miss Martin took steps to accommodate the claimant, including offering her unpaid leave, paid annual leave and the option of initially bringing her daughter into work. She paid Miss Fletcher and Mr Yeates to cover the claimant's work while the claimant was absent. We accepted Miss Martin's evidence that she was advised she could not risk continuing to claim under the CJRS for the claimant's wages if she was employing someone else to cover the claimant's hours.

74. We find that, balancing the needs of the claimant and the respondent, the respondent did all it reasonably could to accommodate the claimant's needs. We accepted Miss Martin's evidence that the business did not have the funds to manage without the claimant and/or pay her to stay at home for the whole of the period the schools were out. Miss Martin was also concerned to ensure the proper cover to comply with licensing requirements and achieve a balance between her accommodations for the claimant and other employees. The claimant was a key player in the respondent's business and her absence caused real difficulties for Miss Martin in running the business. The measures the respondent took were reasonably necessary in order to achieve the legitimate aim (**Barry**). We conclude that the respondent's PCP was a proportionate means of achieving a legitimate aim in the circumstances.

Children in workplace PCP

75. The respondent accepted it had a PCP of not allowing children in the workplace from June 2020 onwards. The respondent accepted that this PCP put women at a particular disadvantage when compared with men, in that women typically bear primary responsibility for childcare and are therefore more likely to need to bring children into the workplace for childcare purposes.

76. The respondent did not accept that this PCP put the claimant at that particular disadvantage however, because the claimant did not want to bring her child into the workplace. We agree that there was not (and would not be) any particular disadvantage to the claimant during the Covid pandemic and the period of the government's guidance on social distancing and other restrictions. The claimant accepted that she rejected the option of bringing her daughter into work as 'disgusting'. We accepted the respondent's evidence that the PCP had come about, in part, because the claimant's objection had caused Miss Martin to take advice and change the rule that children could attend. It was not clear from the evidence that this PCP would have continued after the end of the Covid 19 pandemic, nor that it would have put the claimant at any disadvantage in the future. We therefore find that the claimant has not shown on the balance of probabilities that she was or would be put at the particular disadvantage by this PCP.

77. Even if we had found that she was or would be put at the particular disadvantage by the PCP, we would find that it was a proportionate means of achieving a legitimate aim. We find that the reason for the introduction of the rule was to follow the Government's advice around Covid 19 and restrictions in the workplace. We find that was a legitimate aim. It was not aimed personally at the claimant, although it was prompted by the claimant's objections to bringing her daughter into the workplace. We find that the respondent took advice, introduced the rule in accordance with government guidance and following an assessment of its own premises and informed the claimant of its reasons. We consider that the PCP was an appropriate and reasonably necessary way to achieve the legitimate aim, and balancing the needs of the claimant and respondent, it was proportionate in the circumstances.

Holidays PCP

78. The respondent accepted that it had a PCP of not allowing block booking of annual leave during the school summer holidays. The respondent accepted that it applied that PCP to the claimant and other employees (including men).

79. The respondent did not accept that this PCP put women at a particular disadvantage when compared with men. The respondent accepted that the Tribunal should take judicial notice of the fact that women shoulder the primary childcare responsibilities. But the respondent did not accept that this extended to putting women at a particular disadvantage during summer holidays or in respect of block booking annual leave.

80. The claimant suggested that the Tribunal should have regard to the fact that, because more women than men are single parents, they have a greater need to block book annual leave during school summer holidays for childcare than men. We accepted the evidence presented by the claimant (page 232) that around 90% of single parents were women in September 2019. The claimant is asking us to take 'judicial notice' of the fact that, because of this, women would have a greater need to block book annual leave during school summer holidays for childcare than men and would therefore be put at a particular disadvantage by a PCP preventing block booking of annual leave.

81. We have carefully considered the claimant's position, particularly with reference to the **Dobson** case, to which she directed us. In that case the Tribunal was found to have erred in not taking judicial notice of the fact that women, because of their childcare responsibilities, were less likely to be able to accommodate certain working patterns than men. We took careful note of the comments and guidance of the EAT in that case regarding judicial notice (as set out above). However, we consider that that case takes the claimant no further than the respondent's existing concession. The respondent has conceded that we can take judicial notice of the 'childcare disparity' as it is called in **Dobson**. The further step the claimant requires to arrive at the group disadvantage (that women, because they are more likely to be single parents, are more likely to need to block book annual leave during school summer holidays than men) is sufficiently controversial that it cannot be said to be so notorious and well established that it can be accepted without further inquiry. Even a cursory exercise in imagining different families' arrangements for summer holidays throws up difficulties for the claimant's argument. For example, it is immediately clear that many single parents and/or women might recruit grandparents or friends to care for children on a few days each week during the summer holidays, and therefore prefer to book only some days each week during the summer holidays. What does 'block booking' even mean, in this context? It is clear from this example that there would need to be an evidential basis for any findings. We cannot take 'judicial notice' of something which is unclear and incapable of being accepted without further inquiry. We have not been shown any evidential basis on which to find that there was a particular disadvantage to women from this PCP. **Dobson** warns against assuming that all flexible working requirements are liable to put women at particular disadvantage and we consider that, were we to find that there was group disadvantage in this case, we would fall into error. We would be moving from an 'indisputable fact' to a 'disputable gloss' (**Al-Hijrah School**).

82. Further and separately, it is not clear to us that the claimant herself suffered a particular disadvantage as a result of this PCP, given that household mixing was permitted from 6 July 2020 and she was permitted to take annual leave over the school summer holidays, just not all of the dates she initially sought. It was not clear to us that she was, in fact, trying to 'block book' annual leave.

83. Even if we were to find that the PCP put more women than men at a disadvantage and put the claimant at a disadvantage, we would find that this was a proportionate means of achieving a legitimate aim. Despite Miss Martin's peremptory refusal of some of the claimant's holiday, we consider that, overall, the PCP was proportionate to achieve the legitimate aim of ensuring members of staff were able to book annual leave during the summer months, particularly during July and August and that there was sufficient staff cover in adherence with the licensing requirements for the business. The PCP was an appropriate and reasonably necessary way to achieve those aims. Miss Martin was trying to be even handed between her staff at a busy time. She could have responded to the claimant in a more considered fashion, but she did approve some of the claimant's dates and subsequently reverted to the claimant with further available dates for annual leave when she learned that Miss Fletcher could cover those dates. Balancing the needs of the claimant and respondent, we find that the PCP was a proportionate means of achieving the aim in question.

84. The complaint of indirect sex discrimination therefore fails and is dismissed.

Employment Judge Bright

11 August 2021