EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
	v	
R Lassignardie		First MTR South Western Trains Limited

Heard at: Watford by CVP **On**: 15 and 16 June 2022
Before: Employment Judge Anderson

Appearances
For the Claimant: R Capek (employment consultant)
For the Respondent: O Dobbie (counsel)

RESERVED JUDGMENT

1. The reason for the claimant's dismissal was conduct.

2. The dismissal was not unfair.

3. The dismissal was not wrongful.

4. The claim is dismissed.

REASONS

Claim

1. By way of a claim form presented on 2 June 2021 the claimant, Romuauld Lassignardie, claims that he was unfairly and wrongfully dismissed. The respondent filed a response on 13 August 2021 resisting the claim, stating that the claimant was dismissed fairly for conduct reasons, and the conduct amounted to gross misconduct.

List of Issues

2. Mr Capek had drafted a list of issues which included both standard questions of law for the tribunal to find on and many case specific issues. Ms Dobbie accepted the list of standard questions. I agreed with Ms Dobbie that whether

the tribunal needed to answer the case specific questions set by Mr Capek was a matter for the tribunal. The accepted list is as follows:

Unfair dismissal

a. What was the principal reason for dismissal?
b. Did R act reasonably or unreasonably in treating C's conduct as sufficient reason for dismissal?
c. At the point of dismissal did R genuinely believe that C was guilty of misconduct? (This needs to be considered both at the point of dismissal and at the point at which the appeal proved to be unsuccessful).
d. If so, were those beliefs based on reasonable grounds?
e. Were these grounds established by an investigation that was reasonable in all the circumstances?
f. Did R follow a fair procedure?
g. Was dismissal with a range of reasonable responses available to a reasonable employer in the all the circumstances?

Wrongful dismissal

h. Was C lawfully summarily dismissed for gross misconduct.

The hearing

3. The claimant was represented by Mr Capek. The respondent was represented by Ms Dobbie. I was provided with an agreed bundle of documents of 214 pages. I received a witness statement from the claimant. From the respondent I received the witness statements of Lee Burgess and Tim Keen. All three witnesses attended the hearing and gave oral evidence.

4. At the outset of the hearing Mr Capek made the following applications:
    a. To add to the hearing bundle a set of notes of an investigatory meeting dated 9 January 2021, which had been annotated by the claimant.
    b. To introduce into evidence a supplementary witness statement from the claimant which referred to the annotated notes.
    c. To introduce into evidence a witness statement from Hayley Bouchard, a trade union representative who represented the claimant at an appeal hearing. Ms Bouchard's evidence addressed the annotated notes and dealt with a new matter relating to similar cases to the claimant's which may have resulted in different outcomes.
    d. To call Ms Bouchard to give evidence.
    e. To include two ACAS documents in the bundle which are publicly available.

5. Mr Capek explained the reasons why he was making the applications. Ms Dobbie, for the respondent, objected to all applications other than the inclusion of the ACAS documents, and set out her reasons for this.

6. Having taken into consideration the balance of hardship to each party in allowing or refusing the applications, whether refusing or allowing the applications would cause injustice to either party and the delay in making the applications, I made the following decision:
    a. *Application to admit annotated notes and the claimant's supplementary witness statement into evidence* - the annotated notes are admitted into evidence. The annotated notes were referred to by the claimant in his ET1. The respondent has been aware of the notes since a list of documents was exchanged in November 2021 and has had a copy since March 2022 so this is not a matter the respondent can have been unprepared to deal with. The notes are clearly relevant to any decision that is made on process in relation to the unfair dismissal case. The claimant should have made a paper application earlier rather than raising the matter orally today, but as the respondent was aware of the matter it had the opportunity to take steps to deal with it so suffers little prejudice compared to the possible prejudice the claimant may suffer if the evidence is disallowed. I have noted Ms Dobbie's comment that there is reference in the claimant's supplementary witness statement to the annotated notes being a version of the annotated notes and not the originals, but what is meant by that is not clear and it is a matter that can be dealt with in cross examination. As the supplementary witness statement deals only with the annotated notes I give permission for that to form part of the evidence before the tribunal.
    b. *Application to admit Ms Bouchard's witness statement and call Ms Bouchard as a witness*:
        i. *The evidence on other similar cases dealt with by the respondent* – Mr Capek said he had assumed Ms Bouchard would not help with the claimant's case initially, and then decided to ask her in any event at a later stage of the proceedings (April 2022). It is not clear why he could not have tried earlier. Mr Capek told me that he has twenty years professional experience of conducting cases in the employment tribunal. Any prejudice to the claimant in disallowing the evidence is less clear than is the case with the annotated notes. Misconduct cases can be very similar but have a crucial difference which leads to a different outcome. Cases turn on their own facts. My job is to look at the reasonableness of the respondent's actions in relation to the claimant. Allowing the evidence would be prejudicial to the respondent as it was only alerted to this matter last week. Further work would be required of the respondent including further disclosure and possibly additions to witness evidence. This is not proportionate where any prejudice to the claimant is unclear. The claimant is not granted permission to adduce the evidence of Ms Bouchard on this matter.

ii. *The evidence on the annotated notes* – as I have already decided that the annotated notes can form part of the evidence I see little prejudice to the respondent in allowing in Ms Bouchard's evidence on this matter.
iii. The claimant has permission to call Ms Bouchard as a witness but only to give evidence on the matter of the annotated notes.

c. As the respondent has no objection and the documents are publicly available, the two ACAS documents can be adduced in evidence.

7. This decision was made on the first day of the hearing. On the morning of the second day of the hearing Mr Capek said that the claimant had decided not to call Ms Bouchard. I clarified with him that he wished to withdraw her witness statement from evidence. Ms Dobbie objected to this. She said that she wanted to make submissions that the witness statement of Ms Bouchard was inconsistent with the claimant's evidence. I refused permission for that as the witness statement was no longer in evidence.

Findings of Fact

8. The claimant was employed as a rail operator supervisor by the respondent, a train operating company, from 8 October 2018 until 16 February 2021.

The first PCR test

9. The claimant states that he had Covid symptoms in early December 2020 including a loss of taste and smell and took a PCR test on 8 December 2020. The test was negative, and he returned to work on 11 December 2020 with the knowledge of his manager. At the point of return he was still suffering from a loss of taste and smell.

The second PCR test – reasons for taking a test

10. The claimant took a postal PCR test on 23 December 2020. The test was posted the same day.

11. There is a dispute between the parties as to whether the symptom of loss of taste and smell continued from 9 December 2020 to 23 December 2020 when the claimant took a second test, or it was a new symptom which prompted him to take the test.

12. The claimant appears to give different explanations to the respondent as to why he took a PCR test on 23 December 2020. At the fact finding meeting on 9 January 2021 he said that the reason was '*I was at the end of my flu symptoms and found that I had lost some taste and smell' so ordered a test kit.* He goes on to say that '*Because the loss of taste and smell is connected to Covid I took a test.'*

13. The claimant says that the notes are an inaccurate record of the conversation and he said that he 'still' had some loss of taste and smell in relation to the first sentence quoted above and that in relation to the second sentence, his answer was much longer and what was recorded was a small part in the wrong context.

14. To Lee Burgess at a subsequent disciplinary hearing the claimant said that he had a loss of taste and smell for some weeks, that was one of the symptoms which had led him to take a test on 9 December 2020, and that he had taken a second test because he still had that symptom. He said his wife was tested monthly and he decided to have one too.

15. To Tim Keen at the subsequent appeal meeting, he said in his prepared statement:

16. *11.12.20-22.1.20: I worked my rostered shifts during this period. I was feeling much better. My senses of taste and smell gradually returned and was virtually back to normal by the end of this period.*

    and

    Neither of us was experiencing symptoms, and my own sense of taste and smell was virtually back to normal, so we embarked on the tests on a precautionary basis rather than to seek confirmation that we were infected.

17. In response to questioning from Mr Keen the claimant said that he took the test because his wife wanted some re-assurance and she asked him to take the test.

18. Fiona Brown, the claimant's manager, had a conversation with the claimant about why he took the test on 27 December 2020. She wrote in a statement for the respondent dated 7 January 2021 that the claimant said to her:

    'I had symptoms of no taste and smell last week and booked a test along with my wife on 23 December 2020… What is the issue? I am perfectly well just no taste or smell no other symptoms. Yes I was ill before in December if you remember I took a test and it was negative so I came back to work, but still I had no smell or taste and my wife and baby became ill too so we booked another test last week on my rest day the 23rd December.'

19. The claimant disputes that he said to Ms Brown that his wife and child were ill.

20. Whilst the claimant's story changed in some respects throughout the various interviews that took place as part of the disciplinary process, I find on the evidence that the claimant's loss of taste and smell was a symptom that began early in December 2020 and continued at least until 27 December 2020. I accept that the claimant's answers at the fact-finding meeting on 9 January 2021 were not a true reflection of his actions due to his shock at finding himself in an investigatory meeting which he had not anticipated. I find that when he took a test on 23 December 2020, he did not take the test because he had developed a new symptom. I do not accept that the claimant's taste and smell were almost back to normal at that point, as he suggests in his statement to Mr Keen. I find that he took the test because he still had a loss of taste and smell.

The second PCR test – attending work

21. The claimant attended work the next day, 24 December 2020. This was an overtime shift.

22. The claimant next returned to work on 27 December 2020, again for an overtime shift.

23. The respondent's guidance on Covid, which was given to all employees, was based on the government guidelines at the time. The respondent's guidance on self-isolation dated 21 December 2020 is as follows:

    'What are the requirements for self-isolation?

    If you have COVID 19 symptoms however mild you must self-isolate for at least 10 days from when your symptoms started. You should arrange a test through the Government's website: Arrange a Covid 19 test to see if you have Covid 19. Do not go to a GP surgery, pharmacy or hospital.

    If you are not experiencing symptoms but have tested positive for Covid 19 you must also self-isolate for at least 10 days, starting from the day the yest was taken. If you develop symptoms during this isolation period, you must restart your 10-day isolation from the day you develop symptoms.

    After 10 days, if you still have a temperature you should continue to self-isolate and seek medical advice. You do not need to self-isolate after 10 days if you only have a cough or loss of sense of smell or taste, as these symptoms can last for several weeks after the infection has gone.'

24. The claimant's only symptom at the time he took the second test was a loss of taste and smell. I find that under this guidance he did not need to isolate as he had taken a test on 8 December 2020 which was negative, and he did not take the test because he had developed a new symptom.

The claimant's actions on 27 December 2020

25. The claimant received a text message on 27 December 2020 confirming a positive Covid result. The text was received on his phone at 8am. There is a dispute between the parties as to when the claimant read the text. It is agreed that it was read at latest by 8.45am. The claimant was in a small office alone (estimated to be between 3 and 4 square metres). The claimant says that he isolated in the office when he read the text and started to clean awaiting the arrival of Ms Brown, a manager.

26. Ms Brown, was due to start work at 9am. Ms Brown arrived at 9am or 9.15am. She came into the office and the claimant told her he had received a positive Covid test result. He showed her the result on his phone and allowed her to touch the phone in order to see the entire message. The claimant did not text or call Ms Brown to alert her to his Covid positive status. He did not call or text anyone else. He did not do anything to prevent Ms Brown from entering

the office and did not prevent her from touching his phone. Ms Brown was wearing a mask. The claimant was not.

27. The claimant says variously that he needed to stay in the office as it was a signing on/off point for various staff, if he left there would be no indication of the potential health hazard and that he panicked, also that there was a short time between him reading the text and Ms Brown arriving.

28. Because the claimant had registered the test in his daughter's name Ms Brown left the office, telling the claimant to stay there, while she sought advice on whether he needed to provide to the respondent a test result in his own name. She took advice from another manager, and then told the claimant to go home.

29. A copy of the respondent's risk assessment was on the wall in the office. It states that if an employee receives notification that they have been in contact with an infected person or develop new symptoms they should leave immediately. The respondent's guidance was that face masks should be worn in non-public facing offices unless social distancing was possible.

The disciplinary process

30. Ms Brown made a statement on 7 January 2021 about what had taken place on 27 December 2020. The respondent instigated an investigation into the actions of the claimant on 24 and 27 December 2020, on which it appeared he may have attended work in breach of the respondent's covid rules and government guidance. Glen Balkwill was the investigation manager. He interviewed the claimant on 9 January 2021, and again on 22 January 2021 and 11 February 2021. The claimant was provided with notes of each meeting at the end of each meeting. The notes were taken by Mr Balkwill during the meetings. Mr Balkwill interviewed Ms Brown on 21 January 2021.

31. At the meeting on 11 February 2021 Mr Balkwill read out and gave the claimant a letter notifying him that he was to face two charges under the respondent's disciplinary policy for gross misconduct. The charges were put as follows:

    a. That on duty that commenced on 24 December 2020 at Woking Station, having undertaken a test for COVID-19 due to displaying symptoms, and whilst awaiting the result, you reported for duty thereby potentially causing a health and safety risk to SWR colleagues and customers
    b. That on duty that commenced on 27 December 2020 whilst awaiting your COVID-19 test result you reported for duty at Woking Station and upon receipt of a positive COVID-19 test result failed to take immediate action to remove yourself from the workplace thereby potentially causing a health and safety risk to SWR colleagues and customers.

32. The claimant was advised that the process may result in dismissal and that he could both bring a representative to a disciplinary hearing and call witnesses.

33. The hearing took place on 16 February 2021 and Luke Burgess, senior stations operations manager, was appointed as the decision manager. The claimant attended the meeting with his representative.

34. It is the claimant's case that following the first fact finding meeting with Mr Balkwill he had read the notes of that meeting and felt that they were not a true record of the interview. In his supplementary witness statement the claimant said he: *'added seven annotations which served as markers indicating points where I felt that Mr Balkwill had either misrepresented what I had said or had not recorded it in sufficient detail.'* He goes on to say that he does not claim that this was a deliberate act on the part of Mr Balkwill and also that he did not raise this with Mr Balkwill. The claimant says that he raised it with Mr Burgess before the disciplinary meeting commenced on 16 February 2021 and Mr Burgess refused to look at the annotated notes, stating that he would be working from the original version which formed part of the disciplinary hearing pack. Mr Burgess denies this and says that conversation never took place. The claimant says that he also raised the matter of the notes with his trade union representative. Neither the claimant nor his trade union representative raised during the meeting that the claimant was unhappy with the notes from the first fact finding meeting. Mr Burgess questioned the claimant directly about answers he had given to Mr Balkwill during the fact-finding meeting on 9 January 2020 and the claimant answers those questions without saying that he believed that the notes were inaccurate or incomplete. On balance I find that the claimant did not raise with Mr Burgess that he believed the notes of the 9 January 2020 were incorrect or ask him to accept a version which the claimant had annotated. I do not accept that the claimant would have answered questions about those notes and failed to raise that he believed that the notes were inaccurate. I do not accept that a trade union representative, if aware of this matter, would simply fail to raise it at a disciplinary hearing.

35. The claimant was assisted at the meeting by his trade union representative Alan Hayward. The claimant provided a personal statement to Mr Burgess at the outset of the meeting which Mr Burgess read before questioning the claimant. The meeting commenced at 13:59. It was adjourned from 15:56 until 17:13 and when it reconvened Mr Burgess advised the claimant that he found both charges proven and dismissed him summarily. He explained his decision as follows, as recorded in the meeting notes:

"Having gone through everything and the information that you provided and my questions. I have reason to believe that you requested a test because you knew that you still had this loss of smell. You said that it was because your wife was having one so you decided to do it as well. However you said that at the back of your mind it could be because of your loss of taste. At your fact finding you said that you ordered it because the result on 8 December could have been incorrect and you still had symptoms. You did not take steps to remove yourself from the workplace once you're positive result came through.

The manager came into the room with you and when asked if you would do anything differently, you said it was better for the manager to enter and that they were in no danger due to wearing a face mask and being socially distanced. Even though you are positive for COVID-19 it was only a 10 minute wait and you thought that it was the best course. However you locked yourself in the office to avoid contact with colleagues but allowed Fiona to enter and make contact with you. Why is Fiona any different to your other colleagues? You said that staying was the best course however I felt that from what you have explained today I believe that you compensated [sic] the health and safety of your SWR colleagues and customers."

36. Mr Burgess concluded in the disciplinary hearing that the claimant had taken a test because of an ongoing loss of taste and smell. In his witness statement and in oral evidence he said that he had concluded that the claimant took the test because he had a new symptom of loss of taste and smell. I find that the evidence is clearly that Mr Burgess concluded at the hearing that the symptom was ongoing. On an application of the respondent's guidance this does not indicate that he should have isolated on 23 December 2020. I find that Mr Burgess honestly believed that the guidance indicated that the claimant should isolate but this was not a reasonable belief based on the wording of the guidance.

37. I find that the Mr Burgess honestly and reasonably believed that the claimant had put the health and safety of colleagues in danger on 27 December 2020 when he failed to remove himself from the workplace on receiving a positive test result and by allowing Ms Brown into the office.

38. An appeal hearing was listed for 19 March 2021 and Tim Keen, deputy head of stations and revenue protection was appointed as the appeal manager. The claimant was represented by his trade union representative Haley Bouchard. The claimant met Ms Bouchard on 9 March 2021 and he says that at that meeting he gave her a copy of his annotated notes from the first fact finding meeting. The claimant explained that as he did not have photocopying access he copied his annotations on to a clean copy of the notes for Ms Bouchard. The claimant also says that he asked Mr Keen to accept the annotated notes before the appeal hearing began but Mr Keen refused. Mr Keen denies that this conversation took place. As with the disciplinary hearing, Mr Keen refers to the fact find notes of 9 January 2021 during the appeal hearing. Neither the claimant nor his trade union representative raised that they believed the notes were inaccurate. It is not referred to in the statements written by the claimant's representative, Mr Capek, or his trade union representative, which were read at the hearing. I find that it was not raised by the claimant with Mr Keen that the claimant wished to adduce annotated notes of the meeting of 9 January 2021 because he believed that the notes were inaccurate.

39. The claimant had prepared a statement for the hearing with the help of his legal representative Mr Capek. Ms Bouchard had also prepared a statement. Both statements were read out at the hearing, and Mr Keen then questioned the claimant about his actions. After an adjournment in which Mr Keen

considered the information presented to him, the meeting was reconvened. Mr Keen told the claimant that he believed that both charges were proven and he dismissed the claimant's appeal. In relation to the first charge he said:

40. Looking at the Charge 1 the charge is proven; we know that because you had mild symptoms at the time of taking the test. We will never know if this was linked to Covid or something else at time what took test (sic) , but we do know that you received a text a few days later confirming you were positive. I believe that you felt you had good reason to test as you still had mild symptoms…I get that your wife wanted you to be tested again, and maybe you didn't feel the need but if you are taking the test you need to self-isolate.

41. Mr Keen said in his witness statement that he had concluded the loss of taste and smell was a new symptom at the time the claimant took the second PCR test. I find that the evidence is that Mr Burgess accepted at the appeal hearing that it was an ongoing symptom.

42. Whilst again I accept that Mr Keen's honestly held belief was that charge 1 (*That on duty that commenced on 24 December 2020 at Woking Station, having undertaken a test for COVID-19 due to displaying symptoms, and whilst awaiting the result, you reported for duty thereby potentially causing a health and safety risk to SWR colleagues and customers*) was proven, I find that the belief was not reasonable as there was no guidance that people with symptoms who had taken a test and had a negative result should self-isolate even where those symptoms, if they were a cough, cold or loss of taste and smell, were ongoing. The claimant had advised the respondent of his ongoing symptoms when he returned to work with the respondent's permission on 11 December 2020.

43. I find that Mr Keen honestly and reasonably believed that charge 2 was proven and that by failing to take action to protect Ms Brown and failing immediately to leave the workplace he had caused a health and safety risk to colleagues.

Submissions

44. Mr Capek, for the claimant, submitted written submissions running to 19 pages, the contents of which I have not reproduced here. Mr Capek added that under the respondent's Covid guidance the claimant was entitled to work before he received his test result on 27 December 2020. He said that if that charge falls away then the charge relating to his behaviour after he received the positive result (charge 2) in not in itself a grave enough matter to warrant summary dismissal.

45. Ms Dobbie said that the claimant on 27 December 2020 showed a serious and reckless approach to Ms Brown's safety and that the claimant's actions on that day are more than sufficient for a summary dismissal. Ms Dobbie said that the changes in the claimant's account of why he took the test went to his credibility. She said there was national guidance on Covid which the claimant acted against and that he demonstrated no remorse for his actions which led the respondent to consider that there was a risk of a repetition.

Law, Decision and Reasons

46. For unfair dismissal the question I need to answer is whether the dismissal was fair or unfair. This is a two-stage process. The first stage is for the respondent to show a potentially fair reason for dismissal, and secondly if that is achieved, the question then arises whether dismissal is fair or unfair.

47. Section 98 of the Employment Rights Act 1996 identifies a number of potentially fair reasons for dismissal which include at s98(2)(b) the conduct of the employee. I am satisfied on the evidence that the claimant was dismissed for conduct.

48. The second stage as set out at s98(4) of the Employment Rights Act 1996 is to consider whether the dismissal was fair or unfair, having regard to the reason shown by the employer and 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.

49. In misconduct dismissals, there is well-established guidance for Tribunals on fairness within section 98(4) in the decisions *in Burchell 1978 IRLR 379* and *Post Office v Foley 2000 IRLR 827*. The Tribunal must decide whether the employer had a genuine belief in the employee's guilt. Then the Tribunal must decide whether the employer held such genuine belief on reasonable grounds and after carrying out a reasonable investigation. In all aspects of the case, including the investigation, the grounds for belief, the penalty imposed, and the procedure followed, in deciding whether the employer acted reasonably or unreasonably within section 98(4), the Tribunal must decide whether the employer acted within the band or range of reasonable responses open to an employer in the circumstances. It is immaterial how the Tribunal would have handled the events or what decision it would have made, and the Tribunal must not substitute its view for that of the reasonable employer (*Iceland Frozen Foods Limited v Jones 1982 IRLR 439, Sainsbury's Supermarkets Limited v Hitt 2003 IRLR 23,* and *London Ambulance Service NHS Trust v Small 2009 IRLR 563).*

50. In relation to the first part of the Burchell test I am satisfied that the respondent had a genuine belief in the claimant's misconduct. The claimant took a PCR test on 23 December 2020. At that time, he was suffering from a loss of taste and smell, widely know to be a common symptom of Covid 19. He attended work on 24 and 27 December 2020 before receiving a test result. When he did receive the test result, he did not leave work immediately and did not take any action to protect the safety of Ms Brown when she arrived at work. From an investigatory meeting conducted on 9 January 2021, the investigation manager understood the claimant to have been suffering from a new symptom of loss of tase and smell when the charges were brought.

51. I must then consider whether the respondent's genuine belief in the claimant's misconduct was based on reasonable grounds and after carrying out a reasonable investigation.

52. The disciplinary process consisted of an investigation that involved three interviews with the claimant and an interview with Ms Brown. The claimant was then invited to a disciplinary hearing, and subsequently an appeal hearing. He was given notice of those two meetings. He was provided with relevant documentation before the meetings. He was able to, and did, bring a trade union representative to each meeting. Complaint was made about the claimant having no notice of the first investigation meeting. There is no requirement that a person be given warning of an investigatory meeting and there is nothing particular to this case that would make it unreasonable for the respondent not to have given the claimant notice.

53. In relation to charge 2 I find that the investigation was reasonable. Ms Brown was interviewed as part of the investigation. The claimant had the opportunity to see and challenge Ms Brown's statement and in fact there is little dispute about the actions the claimant took when he received a positive test result on the morning of 27 December 2020.

54. In relation to charge 1 I find that the investigation was not reasonable as neither Mr Burgess nor Mr Keen engaged fully with the claimant's argument that he was unaware that isolation was required as a result of taking a second test. The respondent's guidance did not say that. The government guidance did not say that either. Whilst the charge is not phrased as one of the claimant failing to follow the respondent's guidance, the questions in the hearings in relation to charge 1 do relate to what the claimant understood the guidance to be. It was not disputed by the respondent that the claimant had informed his manager that he had taken a PCR test on 8 December 2020, received a negative result on 9 December 2020, and informed his manager before he was told he could return to work on 11 December 2020 that he had a loss of taste and smell. On the claimant's evidence nothing had changed when he took the second test on 23 December 2020. Both Mr Burgess and Mr Keen acknowledged that loss of taste and smell was an ongoing symptom on 23 December 2020 when they gave reasons for their decisions in the disciplinary and appeal meetings. The conclusion that the charge was proven was not reasonable on the evidence provided.

55. I must then consider whether the decision to dismiss was within the range of reasonable responses. As set out above it is immaterial how the tribunal would have handled events, the test is simply whether a reasonable employer could have reached the decision to dismiss on the particular facts. As I have found that the investigation in relation to charge 1 was flawed then it follows that the decision to dismiss on the basis of charge 1 was not within the band of reasonable responses. In relation to charge 2, I find that the sanction of summary dismissal was within the band of reasonable responses open to the respondent. It is plainly within the band of reasonable responses to consider that allowing a colleague into a small room with him, failing to put on a mask

and allowing that colleague to touch his phone, all the while in the knowledge that he had tested positive for Covid, was conduct serious enough to amount to gross misconduct and dismissal. Mr Keen said a factor in his decision making was that the claimant was unremorseful in the appeal hearing, and he could not be sure that the behaviour would not be repeated. This is a relevant factor in the consideration of application of a sanction.

56. For wrongful dismissal, I need to consider whether the act or acts which resulted in dismissal were acts that occurred and which so undermined the term of trust and confidence implied into a contract of employment that the employer was justified in dismissing the claimant summarily.

57. I find that the claimant had an ongoing symptom of loss of taste and smell at the time he took the test on 23 December 2021 and there was no guidance to indicate that the act of taking a test meant that he should isolate. This behaviour did not amount to gross misconduct.

58. I find that in failing to remove himself immediately from the respondent's premises when he received the positive test result on 27 December 2020, in allowing Ms Brown into a small room with him, without warning her, and in failing to wear a mask, the claimant's behaviour in putting Ms Brown, and potentially other people, in danger was so serious that summary dismissal was warranted.

59. The claimant's claims of unfair dismissal and wrongful dismissal are dismissed.

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Employment Judge Anderson

Date: 25 June 2022

Sent to the parties on: 30 June 2022

For the Tribunal Office