Case Number: 3314621/2020

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs F Semon	AND	Lion Construction Ltd

HEARD AT: **Watford Tribunal Centre** **ON:** 8 & 9 November 2021

(submissions 26 November)

BEFORE: **Employment Judge Douse (Sitting alone)**

Representation

For Claimant: Mr D.Beemah, Counsel

For Respondent: Ms E. Evans Jarvis, Senior Litigation Consultant

RESERVED JUDGMENT

1. The Claimant's claim that she was unfairly dismissed is well-founded and accordingly succeeds;
2. Absent the errors in the process it was 75% likely the Claimant would have been fairly dismissed, accordingly her Compensatory Award will be reduced by that amount; and
3. The Claimant caused or contributed to her dismissal entirely and so her Basic Award and Compensatory Award will be reduced by 100%.

REASONS

Claims and Issues

1. The Claimant, by way of a claim form presented on 5 December 2020, brought a complaint of ordinary unfair dismissal, and in the alternative automatic unfair dismissal.
2. The issues to be determined by me were agreed by the parties before the hearing as:

Ordinary Unfair Dismissal

2.1 Did the respondent have a potentially fair reason for dismissing the claimant? The respondent relies on 'conduct' as being the potentially fair reason for the claimant's dismissal, pursuant to s. 98(2)(b) ERA 1996. Further or in the alternative, the respondent contends that the claimant was dismissed for some other substantial reason (s.98(1)(b) ERA 1996).

2.2 If so, was the respondent's decision to dismiss the claimant reasonable in all of the circumstances of the case, pursuant to s. 98(4) ERA 1996?

2.3 When considering reasonableness of the dismissal for 'conduct' under s.98(4) ERA 1996, the tribunal must consider whether the Burchell test been satisfied, as follows:

2.3.1 Did the respondent believe that the claimant was guilty of the misconduct alleged?

2.3.2 If so, did the respondent have reasonable grounds upon which to sustain that belief?

2.3.3 Did the respondent carry out such investigation as was reasonable in all the circumstances of the case?

2.4 Was the claimant's dismissal procedurally fair?

2.5 Was the claimant's dismissal substantively fair?

2.6 Was the decision to dismiss the claimant pre-determined?

Automatic Unfair Dismissal – s.100 ERA 1996

2.7 Was the sole or principal reason for the claimant's dismissal that she brought to the respondent's attention, by reasonable means, circumstances

connected with her work which she reasonably believed were harmful to health and safety, pursuant to s.100(1)(c) ERA 1996

2.8 Was the sole or principal reason for the claimant's dismissal that, in circumstances of danger which she reasonably believed to be serious and imminent and which she could not reasonably have been expected to avert, she left (or proposed to leave) or (while the danger persisted) refused to return to her place of work or any dangerous part of her place of work, pursuant to s.100(1)(d) ERA 1996?

2.9 Was the sole or principal reason for the claimant's dismissal that, in circumstances of danger which she reasonably believed to be serious and imminent, she took (or proposed to take) appropriate steps to protect herself or other persons from the danger, pursuant to s.100(1)(e) ERA 1996?

Remedy

2.10 If the claimant succeeds with her claim(s), what should she be awarded by way of financial compensation?

2.11 Has the respondent failed to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures?

If so, was that failure unreasonable?

If so, should the claimant be awarded an uplift on compensation?

If yes, by what percentage should the claimant's compensation be uplifted?

2.12 If the tribunal finds that the claimant's dismissal was unfair, should her compensation be reduced on account of:

2.12.1 Polkey;

2.12.2 Contributory fault.

If so, by what amount or percentage should the claimant's compensation be reduced?

Procedure, documents and evidence heard

3. The case was listed for a 2 day hearing via CVP.
4. There were two electronic bundles, totaling 218 pages, which the Claimant says were not agreed by her. She says that there are irrelevant documents within there, and some she has requested have not been included so she provided a supplementary bundle of 14 pages. During the course of the hearing, the Claimant

also provided documents related to her job searches and benefits in support of her mitigation of losses.

5. My attention was taken to a number of these documents as part of me hearing evidence - I refer to this bundle by reference to the relevant page number.
6. I heard from the Claimant on her own behalf and from Mr Paul for the Respondent. Both witnesses gave evidence by way of written witness statements that I read in advance of them giving oral evidence. Both witnesses were cross-examined.
7. Due to lack of time, rather than making oral closing submissions the representatives were asked to send written submissions by email to the Tribunal by 24 November 2021. Both parties provided written closing submissions in this way.

Submissions

Respondent

8. Ms Evans-Jarvis, on behalf of the Respondent, provided 14 pages of written submissions which summarised the Respondent's case that:
    a. The dismissal was for conduct
    b. A reasonable investigation was carried out
    c. The disciplinary procedure carried out was fair

9. It was submitted that the Claimant's claim of her contracting Covid 19 by being at work amounted to no more than a mere expression of an opinion - I was referred to the case of *Easwaren v St Georges University of London* in support of this.
10. It was submitted that the Respondent carried out a fair disciplinary process and that the dismissal was in the bad of reasonable responses.
11. In the event that I found the dismissal unfair, I was invited to apply a 100% deduction to the basic award for contributory conduct, and 100% deduction to the compensatory award on the basis that the Claimant would still have been dismissed if there had been a fair process.

Claimant

12. Mr Beemah, on behalf of the Claimant, provided 24 pages of written submissions.
13. He submitted that:
    a. The Respondent did not have a potentially fair reason for dismissal because the termination letter was unclear, and that in any event failure to attend a disciplinary hearing could not be considered misconduct
    b. The Respondent did not have a reasonable belief that the Claimant was guilty of misconduct
    c. The Respondent carried out no investigation
    d. The Claimant believed she was in serious and imminent danger if she returned to the office

e. The Claimant:
    i. Brought her concerns to the Respondent's notice
    ii. Took reasonable steps to avert the danger by refusing to return to the office
f. The Respondent did not raise that had lost faith in the Claimant during the disciplinary process, so cannot rely on SOSR
g. In relation to remedy:
    i. There should be no reduction to the basic or the compensatory award because C's conduct was not culpable or blameworthy
    ii. There should be a 25% uplift to the compensatory award for failure to follow the ACAS Code of Practice

14. He also says that paragraphs 37-41 of C's witness statement are unchallenged evidence as Ms Evans Jarvis did not cross examine her on that. Additionally, he says that it was not put to the Claimant that her failure to attend a disciplinary meeting was an act of gross misconduct, warranting dismissal.

Findings of fact

15. From the evidence and submissions, I made the following findings of fact. I make my findings after considering all of the evidence before me, taking into account relevant documents where they exist, the accounts given by the witnesses in evidence, both in their respective statements and in oral testimony. Where it has been necessary to resolve disputes about what happened I have done so on the balance of probabilities taking into account my assessment of the credibility of the witnesses and the consistency of their accounts with the rest of the evidence including the documentary evidence. In this decision I do not address every episode covered by that evidence, or set out all of the evidence, even where it is disputed.
16. Matters on which I make no finding, or do not make a finding to the same level of detail as the evidence presented to me, in accordance with the overriding objective reflect the extent to which I consider that the particular matter assisted me in determining the identified issues. Rather, I have set out my principal findings of fact on the evidence before me that I consider to be necessary in order to fairly determine the claims and the issues to which the parties have asked me to decide.
17. The Claimant was employed as a Secretary/Administrator from 28 April 2014 until she was dismissed, on 7 September 2020.
18. The Respondent is a small family run business, providing building contractor services. They had four employees, including the Claimant, prior to her dismissal.
19. On 19 March 2020, the Claimant and her colleague asked the Respondent if they could work from home. The Respondent said that he would check the viability of this with the company's IT provider. The Claimant says that she was asked to

20. contact the IT consultant, which she did, and they confirmed that it would be a simple process to set her and her colleague up to work from home. The Respondent denies this.
21. On 20 March 2020, the Respondent replied to this request by email, stating that he considered it to be safe and appropriate to keep the office open as long as distance was maintained, all surfaces were cleaned when touched, and contact with others in the building was avoided. He said that this would be reviewed if there was any new guidance or advice, and confirmed that:

> *"As mentioned, if you decide that your prefer not to attend the office, I will respect your decision and we can discuss that at the time."* [79-80]

22. Taking judicial notice, on 23 March 2020, the UK government announced a national lockdown in response to the Covid-19 pandemic.
23. On that day the Claimant and her colleague advised the Respondent that they would not be coming to work for the next two weeks. He agreed that they could take unpaid leave, confirming via WhatsApp and email [81 & 85].
24. The Claimant confirmed to the Tribunal that she was not someone who was identified as vulnerable and had been advised to shield during the pandemic, and that she did not live with someone that this applied to either.
25. On 24 March 2020, the Respondent sent an email and Whatsapp message to the Claimant, and her colleague, advising of the measures he intended to put in place:

> *"1. I intend to have only one person working in the office at a time for the foreseeable future - it is intended to offer Faye morning hours and Caroline afternoon hours. We will communicate remotely;*
>
> *2. As a result of substantial postponed offers of work and in an attempt to mitigate the use of the communal parts, working hours will be reduced to ensure only one break is needed;*
>
> *3. To avoid the kitchen it will be suggested to bring bottled water from home or I can provide this and to immediately bag you crockery and cutlery and take it home to wash;*
>
> *4. For access and egress and use of the WC I will provide surgical gloves and a form of sanitiser and or wipes."* [83 & 86]

26. I accept the Respondent's explanation that the change to working hours was not intended to be a reduction in work or pay for the Claimant, and that this was a mistaken belief on her part.
27. The Respondent emphasised the need to follow the above procedures in a Whatsapp message sent to staff on 26 March 2020 [89].
28. On 28 March 2020, via Whatsapp message, the Respondent provided an update on the situation at the office [92]. This included photographs of the masks, wipes, sanitiser and gloves provided [93].

29. On 2 April 2020, the Respondent emailed the Claimant and her colleague, asking them to return to the office from the week commencing 6 April with specific changes to working hours. He advised that:

> *"The company did consider the option for you both to work from home as discussed however, found not to be reasonably practical for the following reasons:*
>
> - *Both your job roles include office based activities such as filing, printing, gathering daily post, dealing with delivery notes, preparing day files etc.*
> - *Working from home could not be achieved without several of the above items being taken to and from the office and delivered to your homes on a frequent basis.*
> - *Neither of you have suitable computers at home to remotely access the company's systems.*
> - *The company's concerns regarding privacy issues and maintaining compliance with GDPR legislation.*
> - *Your suggestion to achieve partial working from home would have resulted in office equipment being removed and reinstalled at your homes at considerable cost to the company. I have been reliably informed that other companies, small and large, required their staff to have provided their own computers to enable remote access. Other companies have achieved working from home using laptops and the like, having all necessary equipment and materials at home. You specifically mentioned MGA working from home however I can inform you they are still working in the office but now on an individual basis.*
> - *The building is not normal overly busy to affect social distancing and our office is for just the 3 of us and we all have our personal space which is over 3 metres apart.*
> - *Neither of you travel to the office using public transport." [97-98]*

30. The Claimant and her colleague replied to the Respondent via email on 6 April 2020, advising that they would not be coming to work "for the duration of the lockdown" [100]. They also addressed again why they believed working from home was possible and additionally raised concerns about lone working with males from other offices.
31. Taking judicial notice, on 16 April 2020 lockdown was extended for 'at least' three weeks.
32. On 13 April 2020, the Respondent emailed the Claimant, stating:

"As you are aware I have always taken Health & Safety and wellbeing of employees very seriously and as previously stated, all reasonable steps have been taken to ensure your safety within the office environment. We have written assurances from the Landlord that the building is cleaned regularly and is maintained as a healthy environment. The building is protected by 24 hour CCTV and the caretaker is in attendance throughout the day making it a safe and secure environment.

There is now a backlog of your work, therefore the work is very much there. As such it is vital to the running of the company that the work is carried out. Whilst we understood your concerns and were supportive in accommodating the initial leave at such short notice up to6th April 2020, this is not something the company can sustain any longer. You are therefore expected to return to work on Thursday 16th April 2020 at 9.30am. Failure to do so will be considered unauthorised absence. This means you will receive no pay for this time and may also be subject to disciplinary action.

If it is your decision to not attend work on Thursday 16th April, we will need to arrange the immediate handover of your office keys given that we may need to make other arrangements to get the work done." [107]

33. The Claimant and her colleague replied by email on 15 April 2020, stating that:

"We are standing firm in our decision not to return to work in the office for the duration of the lockdown period imposed by the Government, for the reasons outlined in our email dated 6th April 2020. As such, it is with regret that we will not be be [sic] attending the office on Thursday 16th April 2020 as requested." [105]

34. The previous concerns were repeated, and they raised additional concerns:

"We would also like to point out that only one ladies toilet in the building (out of three) has a working hot water tap, there are no sanitary waste disposal bins and that the bins within the toilets are not emptied on a daily basis." [106]

35. During April and May 2020, the communications between the Claimant and Respondent was limited to provision of requested employment documents. There were no requests for the Claimant to return to the office.
36. Throughout her evidence, the Claimant expressed that her family, friends and neighbours were working from home and she couldn't understand why the Respondent wouldn't allow her to.

37. Taking judicial notice, a conditional plan for lifting lockdown was announced on 10 May 2020. Those who could not work from home were told to return to work, but avoid public transport.
38. The Respondent gave evidence that he wrote a covid risk assessment on 15 May 2020, which he then updated on 16 September 2020, 8 December 2020, and finally 16 January 2021. Only the 2021 assessment, recorded as version 4, was provided to the Tribunal [203-218].
39. On 8 June 2020, the Respondent emailed the claimant asking what her intentions were now that the government had announced a return to work [116].
40. On 12 June 2020, the Claimant replied confirming that she still believed office workers should be working from home. She also requested a copy of the landlord's written assurances regarding cleaning processes [117-118].
41. The Respondent replied by email on June 2020, repeating their position, advising they would ask for further written confirmation from the Landlord in relation to the policies they had implemented, and requesting an update in the Claimant's availability for work. He confirmed that continued absence was unauthorised [117].
42. On 19 June 2020, the Claimant advised by email that her position was unchanged from her previous correspondence. She made another request for written information from the landlord [115-116].
43. The Respondent replied by email on 20 June 2020, quoting the government message to return to work, and advising that as the landlord had updated the building assessment this had been requested [114]. He repeated that the Claimant's absence was considered to be unauthorised.
44. Taking judicial notice, on 23 June 2020 relaxing of restrictions in England were announced.
45. Whilst the Claimant had been off work, the Respondent had discovered issues related to conduct that they wanted to address.
46. The Respondent had a disciplinary policy [62-68], which outlined the procedure and provided examples of misconduct [64] and gross misconduct [65].
47. On 25 June 2020, the Respondent emailed the Claimant inviting her to an investigation meeting on 30 June 2020, to be conducted by telephone. The invite confirmed that:

> *"The purpose of the meeting is to allow you the opportunity to provide an explanation for the following matters of concern:*
>
> *1. The alleged inappropriate communications with others where you communicated with a longstanding self-employed worker using company data via your personal phone late at night, which caused him problems with his partner. You also contacted him after you ceased work, to ascertain what was happening on site during lockdown, when the said communication should have been with me as company director and your manager. I sent you a texted message on 26th March 2020 at 11.15am, regarding this and to inform you to contact myself if you required any*

information regarding work related matters. These concerns were emailed to you on 28th April 2020. You did not respond to either communication.

2. The alleged inappropriate communications with members of MGA staff using company data via your personal phone late at night and at other times. These actions caused embarrassment and had a detrimental effect on the standing of the company with MGA in our shared office environment, all of which is stated in our email dated 28th April 2020. You did not respond.

3. The alleged failure to seek permission to use company funds to purchase personal items of which you asked [CC] how to pay for the items via email on 11th March 2020, to which she appears not have formally responded.

4. The alleged failure to communicate that you had been researching redundancy payment calculations along with [CC] in November 2019.

5. The alleged failure to return to work following reasonable management requests to do so. You knowingly placed the company in jeopardy, by your actions in providing no notice of your intention to cease attendance prior to government announcements of lockdown. This was in collusion with your friend and colleague [CC], whereby you had both decided to attempt forcing the company to agree working from home although this had been discussed and confirmed in my email (dated 19th March 2020) that this was not financially viable, practical or that the company was not legally obliged to do so and you were made aware this.

6. The alleged failure to cooperate with the company in your role as an employee whereby your communications have been obstructive and contained combative and aggressive tones, resulting in a breakdown of the ability to reasonably communicate with you.

The meeting will be conducted by Mrs Elizabeth West (Independent HR Advisor) and Mrs Lesley Paul will also be in attendance as a note taker and the notes will issued to you for agreement. Possible outcomes from the meeting are that we may decide it is necessary to pursue a formal disciplinary procedure with you, or alternatively we may decide that there are no grounds for this."

I understand that you will want to know what is going to happen as soon as possible, and I will endeavour to let you know as quickly as I can. It may be that the discussions in the meeting enable Mrs West to at least give you some idea of whether I need to carry out any further investigations before getting back to you.

> *You should be aware that the requirement for you to attend this investigation meeting during your working hours (during which time you will be paid, it should take no longer than 1 hour) is deemed by the company as a perfectly reasonable management instruction. Hence if you fail to attend without notification, or good reason, we will treat your non-attendance as a separate issue of misconduct."* [122-123]

48. The investigation meeting was postponed to 7 July 2020, but as the Claimant could not make this date it was postponed again to 8 July. The Respondent advised the Claimant *"If you do not attend this meeting, a decision may be made in your absence based on the information available to me." [121]*
49. The Claimant confirmed she was unable to attend, so the Respondent invited her to submit a written statement by 5pm on 8 July 2020 [120].
50. The Claimant provided comments by email, sent to the Respondent at 5.21pm on 8 July 2020 a written statement [145-148]. In relation to the failure to attend work, the Claimant stated:

> *"These requests were not reasonable during a global pandemic. We both know my job could run successfully from home, but you wouldn't even give it a trial run to see how it went. I have requested a list of jobs that absolutely could not be done from home but you have not given this to me. .In my opinion you also knowingly put the company in jeopardy by not adhering to guidelines and at the very least, give working from home a go and assess to see if it suits. I would also like to clarify that although the construction industry remained open, it didn't mean all office staff within the industry should stay in the office.*
>
> *Collusion, this is a strong word you have used. Caroline is my colleague and we were and still are in the situation together, why would we not support each other in these very hard times? As for forcing the company to agree for us to work from home, all we wanted was for you to follow the guidelines and put our health and safety first, which you have stated previously that this is so important to you. Just not during a global pandemic from a killer virus. The guidelines were put in place to protect people and the NHS and I still don't understand why you were happy to put my heath at risk Damian by not following these guidelines. Everybody I know from all sectors were working from home, not ideal, but they made it work.*
>
> *The IT costs to set us up to work remotely would have been in my opinion minimal. When I discussed working from home with Mustafa (as per your instruction) he said "Do you want me to do it now? This indicates it simply needed him to remote access my PC for maybe 10/15 minutes. Surely this*

would have been a far better road to take rather than the one we are all on now!"

51. The next day, at 10.15am the Respondent advised by email that it had been decided that a disciplinary hearing was appropriate, and the Claimant requested copies of notes recording how the decision had been reached, and details of the HR Adviser's credentials [144]. The Respondent later confirmed that there was no meeting as she was not there, and there were no notes [141].
52. On 22 July 2020, the Respondent emailed the Claimant:

> *"As you did not attend the investigation meetings Mrs West could not produce a report therefore had no involvement."* [143]

53. On the same day, the Respondent wrote to the Claimant advising that she was required to attend a disciplinary hearing on 13 August 2020, at the Respondent's offices [125-126]. The allegations were as set out in the invitation to the investigation meeting, except that number 6 had added detail regarding issues returning office keys on 17 April 2020.
54. The letter advised that the outcome could be a final written warning or termination. It also advised that non-attendance would be treated as a separate matter of misconduct.
55. The Claimant advised she could not attend as she would be on holiday between 8 and 22 August 2020 [140].
56. On 3 August 2020, the Respondent wrote to the Claimant advising that the disciplinary hearing would be rescheduled to 5 August [149]. The letter concluded with a warning that non-attendance at the hearing would be considered a separate matter of misconduct.
57. The Claimant replied by email on 4 August 2020 [151], stating that she believed the relationship of trust and confidence had broken down, and that it was unfair for Mr Paul to conduct the disciplinary hearing. She advised that she saw no point in attending the meeting on 5 August, and asked for an independent person to take Mr Paul's place.
58. The Claimant did not attend the hearing on 5 August 2020. The Respondent did not go ahead without her, but advised the Claimant that day that the hearing was rescheduled for 7 August [154]. The Claimant replied [153] that she would not be attending, referring the Respondent back to her letter of 4 August.
59. On 6 August 2020, the Claimant emailed the Respondent [155-156] to say that she would attend a disciplinary as long as it was chaired by an independent person and the note taker was not a member of Mr Paul's family. She also requested that the date be rescheduled to enable her to bring a union representative.
60. The Respondent rescheduled the disciplinary hearing, by way of letter on 11 August 2020 [157], for 25 August. They advised that the cost of an independent chair and note taker was prohibitive, so Mr Paul would run the meeting with another staff member taking notes.

61. The Respondent informed the Claimant that:

> *"To ensure you feel comfortable, the hearing will take place at The Barn...as a neutral venue. The meeting will be arranged to take place in a private outdoor area where COVID-19 guidelines can be adhered and followed."*

62. This letter repeated the warning that non-attendance would be treated as a separate matter of misconduct:

> *"You have been previously warned that if you did not attend the hearing without notification or good reason, this failure would be treated as a separate issue of misconduct. Although we are now re-scheduling the hearing to discuss the original issues, your non-attendance will also be considered. You should consider that you are now receiving a final warning and forewarning that if you fail to attend this rescheduled hearing without notification or good reason, this will be treated as a further act of misconduct and your employment will be terminated."* [158]

63. On 19 August 2020, the Respondent wrote to the Claimant [159] advising that they wanted to deal with issue of non-attendance (allegation 5) separately from the others (allegations 1-4 and 6).
64. The scheduled disciplinary hearing was now to deal solely with the Claimant's unauthorised absence, with the other allegations to be addressed at another meeting. Although this was phrased as "*Your alleged unauthorised absence without leave from work namely that you have been absent from work since Monday 6th April 2020 without good reason and have failed to provide medical certification for this period",* I find that this was essentially the same matter as contained in original allegation number 5.
65. The letter stated:

> *"If you are unable to provide a satisfactory explanation for the matters of concern set out above, you may be given a warning, or a final written warning if deemed appropriate, in accordance with our disciplinary procedure."*

And

> *"If you do not attend the disciplinary hearing without giving advance notification or good reason, I will treat your non-attendance as a separate issue of misconduct."*

66. The Claimant replied by email on 24 August 2020 [162], again querying why an independent person couldn't hold the disciplinary hearing when this had been suggested in July. in relation to the venue stated:

> *"I have visited the Barn hotel, and to hold a disciplinary hearing in the garden is ludicrous. It is not a private environment or at all suitable, have you seen the weather forecast for tomorrow (heavy rain and winds), another reason holding a disciplinary hearing in a hotel garden is ridiculous!"* [162]

67. She then addressed points related to a number of the allegations *(I do not recite them here as by this point the disciplinary hearing was in relation to absence from work only),* before stating:

> *"Based on the above and the way you have conducted the whole process, I can confirm I will not be attending the hearing tomorrow or on any other day, unless it is handed to others to deal with, as you said it would be."* [164]

68. The Respondent replied on 27 August 2020 [165], advising that:

> *"I will reschedule the disciplinary hearing for 1.00pm on Tuesday 1st September 2020. The hearing will be conducted by phone and Sian Hammond will chair the meeting. Toni Cole will also attend as note taker. These notes will be issued to you to confirm accuracy. I can reassure you that once completed; I will consult my employment law advisors regarding the decisions."*

And

> *"If you are unable to provide a satisfactory explanation for the matters of concern set out above, you may be given a final written warning or your contract terminated if deemed appropriate, in accordance with our disciplinary procedure. If you do not attend the rescheduled disciplinary hearing without giving advance notification or good reason, we will treat your non-attendance as a separate issue of misconduct and a decision will be made in your absence. If you wish to make a written submission in relation to the above allegation then please email this to damian@lionheadconstruction.co.uk by 11.00am on Tuesday 1st September 2020 and this will be passed to the chair of the meeting for their deliberation."* [166]

69. The Respondent requested confirmation from the Claimant regarding attendance by telephone of provision of a written statement by 5pm on 28 August 2020. Just after 5pm that day, the Claimant emailed the Respondent [169] requesting details of Sian Hammond's credentials. She did not confirm what her intention was in relation to the hearing.
70. The Respondent replied on 29 August, advising that *"Sian Hammond is a professional person with experience of these matters who the company has engaged with to read the prepared scripted queries relating to the allegation"* [168],

and asking for the Claimant to confirm if she would be attending the hearing by 9.30am on 31 August 2020.

71. The Claimant responded on 30 August, expressing concern about the lack of information about Sian Hammond [167-168]. She does not mention if she intends to attend the disciplinary hearing.
72. The disciplinary meeting took place without the Claimant. Again, there are no written records of this meeting.
73. On 7 September 2020, the Respondent wrote to the Claimant [170] advising her that her employment had been terminated. The letter stated:

> *"In my letter of Wednesday 19th August 2020 I advised you that if you did not attend the disciplinary hearing on Tuesday 25th August 2020 without giving advance notification or good reason, we would treat your non-attendance as a separate issue of misconduct. You failed to attend the first disciplinary hearing on Tuesday 25th August 2020 and did not contact us to provide a valid reason for your non-attendance therefore I wrote to you again on Thursday 27th August 2020 and requested you attend a re-scheduled hearing on Tuesday 1st September 2020. I also explained in this second letter that this was your final warning and if you failed to attend for a second time, we would terminate your employment.*
>
> *Due to the importance of these letters and, in order to ensure safe receipt, I sent each of the above letters to you twice, one copy by post and another copy by email which you have acknowledged.*
>
> *However, despite the clear warnings in both letters, you did not attend the re-scheduled disciplinary hearing on Tuesday 1st September 2020 and did not contact us to provide a valid reason for your non-attendance. Your on-going failure to obey our reasonable instructions to attend the meetings amounts to a further act of misconduct.*
>
> *Having carefully reviewed the circumstances, I have decided that your employment should be terminated." [170-171]*

74. The letter advised the Claimant that she was entitled to six weeks' notice, and also referred to her right to appeal the decision within five days.
75. There was email communication between the Claimant between 7 and 10 September 2020, where the Claimant sought clarification of: the reason for her dismissal; the date payment for notice would be made; and arrangements to collect her personal belongings.
76. On 11 September 2020, the Claimant appealed the decision to dismiss her [176-179] - the grounds were summarised by the Respondent as:

> *"The hearing scheduled for 19th August 2020 was arranged separately to an existing disciplinary hearing –you believe that this was done knowing that your employment would be terminated.*

You did not receive a favourable response to an email sent on 7th September to clarify your dismissal. You notified the organisation on 24th August you would not be attending the original hearing on 25th August due to it being in an inappropriate location i.e. a public area.

The meeting was rescheduled from 25th August to 1st September in order for you to execute your right to be accompanied however; a location was not confirmed for the hearing.

You believe the original hearing of 25th August was re-scheduled before you had the opportunity to attend. You believe you have a valid reason for your absence which was stated in your email dated 6.4.20, 15.4.20,12.6.20, 19.6.20.

You feel the disciplinary hearing has been obstructive throughout, and you believe you have not seen evidence of the huge costs involved in set up costs to work from home, or an explanation as to the manual and operational procedures preventing us from working remotely." [185]

77. The appeal meeting was scheduled for 23 September 2020 – the Claimant was given the option of attending or providing written evidence to be considered. She chose to provide additional information in writing and confirmed she would not attend [183-184].
78. On 30 September 2020, the Respondent wrote to the Claimant [188-189] informing her that her appeal had failed and her dismissal had been upheld.
79. The Respondent gave evidence that at each stage of the disciplinary process they sought advice and guidance from Peninsula, who provided this under the company's legal insurance policy, about what to do and what to say in communications with the Claimant.
80. The Claimant began applying for new roles from January/February 2021, and provided details of applications via her Universal Credit account. The summary of applications had dates expressed in numbers of days since application, which suggested that applications had been made during the Claimant's employment with the Respondent. Upon examination of the details of each of these, one had an application date on February 2020, which the Respondent asked me to infer as an intention to leave the Respondent's employment. I do not do so – I accept the Claimant's explanation that this was a single manual entry error.

The law

Unfair dismissal – ss. 94 & 98 ERA 1996

81. An employee has the right not to be unfairly dismissed by their employer (s. 94 ERA 1996). It is well established that, in order to successfully defend a claim of unfair dismissal, an employer must be able to show that: (a) there was a fair reason

for the dismissal, and (b) the decision to dismiss was reasonable having regard to all the circumstances of the case (ss. 98(1), 98(2) and 98(4) ERA 1996)).

82. In *British Homestores v Burchell [1978] IRLR 379*, the EAT stated a dismissal for reasons relating to conduct will only be fair if:

    (i) The employer believed the employee to be guilty of the misconduct alleged;

    (ii) The employer had reasonable grounds for sustaining that belief;

    (iii) At the time the employer held that belief, it had carried out as much

    investigation as was reasonable.

83. Although the EAT in Burchell said it was for the employer to establish that the test was satisfied, it has subsequently been clarified that the burden is neither on the employer or the employee, but is "neutral" (*Boys and Girls Welfare Society v McDonald [1996] IRLR 129 EAT*).
84. When considering whether an employer had a genuine belief based on reasonable grounds, a tribunal must inevitably have regard to the material on which the employer's purported belief was based. However, the question is not whether the tribunal would have believed the employee to be guilty based on that material, but whether the employer acted reasonably in forming that belief. The question of whether the employer acted reasonably is to be judged objectively.
85. The tribunal must decide whether the employer's decision to dismiss the employee fell within the range of reasonable responses that a reasonable employer in those circumstances and in that business might have adopted (*Iceland Frozen Foods v Jones [1982] IRLR 439*). The range of reasonable responses test applies both to the decision to dismiss and to the investigation (*Sainsbury's Supermarkets Ltd v Hitt [1003] IRLR 23*). This means that the tribunal has to decide whether the investigation was reasonable, not whether it would have investigated things differently.
86. For the purposes of this test, it is irrelevant whether or not the tribunal would have dismissed the employee if it had been in the employer's shoes: the tribunal must not "substitute its view" for that of the employer (*Foley v Post Office; Midland Bank plc v Madden [2000] IRLR 827)*.

Automatic Unfair Dismissal

87. Section 100 ERA 1996 provides that:

    (1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principle reason) for the dismissal is that –

(a) having been designated by the employer to carry out activities in connection with preventing or reducing risks to health and safety at work, the employee carried out (or proposed to carry out) any such activities,

(b) being a representative of workers on matters of health and safety at work or member of a safety committee—

(i) in accordance with arrangements established under or by virtue of any enactment, or

(ii) by reason of being acknowledged as such by the employer, the employee performed (or proposed to perform) any functions as such a representative or a member of such a committee,

(ba) the employee took part (or proposed to take part in) consultation with the employer pursuant to the Health and Safety (Consultation with Employees) Regulations 1996 or in the election of representatives of employee safety within the meaning of those Regulations (whether as a candidate or otherwise),

(c) being an employee at a place where—

(i) there was no such representative or safety committee, or

(ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,

he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety,

(d) in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work, or

(e) in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger.

(2) For the purposes of subsection (1)(e) whether steps which an employee took (or proposed to take) were appropriate is to be judged by reference to all the circumstances including, in particular, his knowledge and the facilities and advice available to him at the time.

(3) Where the reason (or, if more than one, the principal reason) for the dismissal of an employee is that specified in subsection (1)(e), he shall not be regarded as

unfairly dismissed if the employer shows that it was (or would have been) so negligent for the employee to take the steps which he took (or proposed to take) that a reasonable employer might have dismissed him for taking (or proposing to take) them.

88. Section 100(1)(e) was considered by the EAT in *Oudahar v Esporta Group Ltd [2011] ICR 1406*, EAT – see in particular paragraphs 27-29 of the EAT judgment.

Conclusions

89. Having regard to the findings of relevant facts, applying the appropriate law, and taking into account the submissions of the parties, I have reached the following conclusions on the issues the parties have asked me to determine.

Ordinary unfair dismissal

Did the respondent have a potentially fair reason for dismissing the claimant?

90. The Respondent suggested that the reason for dismissal was conduct – namely unauthorised absence from work from x – which formed part of the investigation from the outset.
91. The Claimant asserted that she was not clear whether this was the reason for dismissal, or if it was the failure to attend the disciplinary hearing on x. It was submitted on her behalf that the Respondent dismissed her because she was a troublesome employee – they have produced no evidence of this. In fact, the Claimant has maintained that she was happy in her job with no issues until these events.
92. I find that the original unauthorised absence from work, and the later failure to attend the disciplinary hearing, must be taken together – they form a composite reason for dismissal. The basis is an ongoing failure to follow management instructions, which amounts to misconduct in line with the Respondent's disciplinary policy.
93. The misconduct identified by the Respondent was a potentially fair reason for dismissal. They have satisfied the burden of showing a potentially fair reason.

Was the respondent's decision to dismiss the claimant reasonable in all of the circumstances of the case?

Did the respondent believe that the claimant was guilty of the misconduct alleged?

94. I have no doubt that the employer had a genuine belief in the misconduct alleged. This is a simple matter of the Claimant not complying with an instruction to attend work, or disciplinary meetings.

If so, did the respondent have reasonable grounds upon which to sustain that belief?

95. I find that there were reasonable grounds for the belief based on a reasonable investigation, as set out below.

Did the respondent carry out such investigation as was reasonable in all the circumstances of the case?

96. The Respondent did comply with the minimal requirements of the code of Practice: the Claimant was aware of the allegations, had the material on which the Respondent relied, was called to a meeting and was offered an appeal.
97. The Respondent's investigation only need to consist of assessing the Claimant's written representations as she had chosen not to attend an in-person meeting. The matter clearly required little, if any, further investigation by the respondent.

Was the claimant's dismissal procedurally fair?

98. I find that a fair procedure was followed in the circumstances, which complied with both the requirements of the ACAS Code and the general requirements of fairness. The Claimant was called to an investigation, she had the opportunity to attend a disciplinary meeting, and was informed of her right to be accompanied. The Respondent invited the Claimant to meetings at every stage of the process, gave her the right to be accompanied, provided her with copies of the evidence, and gave her every opportunity to explain her position.
99. I consider that the investigation was adequate in the circumstances. The nature of the allegations being considered – failure to attend work and/or a disciplinary hearing – required little investigation beyond consideration of the Claimant's reasons for not attending work.
100. However, I am troubled by Mr Paul's involvement throughout the process. He:

    (a) was the manager who instructed the Claimant to return to work;

    (b) was the investigator;

    (c) approved the referral of the investigation to a disciplinary hearing;

    (d) conducted the disciplinary hearing itself; and

    (e) conducted the appeal hearing

101. As the Respondent is small, and without a dedicated HR function, it *may* have been reasonable for the investigation to be conducted by the same manager who hears the hearing. However, having determined at various points that an independent person would be appointed – Ms West for investigation and Ms Hammond for the disciplinary hearing - the expectation was created that this is what would happen. The decision to then not make use of these resources was taken because the Claimant did not attend the meeting/hearing - that is not a

sufficient reason. Additionally, as a result, no notes were created at either the investigation meeting or disciplinary hearing.

102. Although Mr Paul took external advice at each stage of the process, each decision was ultimately made by him. This aspect causes the dismissal to be procedurally unfair.

Was the claimant's dismissal substantively fair?

103. I am mindful of the fact that I am judging the decision to dismiss according to the range of reasonable responses of a reasonable employer, and I should not substitute my judgment for that of the employer on this point.

104. As far as dismissal is concerned, one employer may dismiss given the finding of misconduct, one employer may not given the set of circumstances that were presented. However, I have no doubt that considering the totality of the circumstances, this dismissal fell within a reasonable range of responses.

105. Whilst the Respondent didn't specifically characterise the misconduct as gross misconduct, they had repeatedly warned the Claimant that dismissal was a possible outcome of the disciplinary process. I do not draw any inference from the absence of this warning in one communication, especially as correspondence that followed it did include that information.

106. They also specifically referred to the requirement to attend a meeting as a further reasonable management instruction, which may result in dismissal.

107. Where correspondence that came before and after that isolated document referred to it, it was clearly an oversight. In any event, the disciplinary policy included that as an example of gross misconduct, whereby dismissal could be the outcome – the Claimant cannot said to have been unaware of the potential outcome for her.

Was the decision to dismiss the claimant pre-determined?

108. The decision to dismiss the claimant cannot be said to have been predetermined. The Respondent rescheduled the disciplinary hearing on multiple occasions for the Claimant's convenience before making a decision based on the available information. Had there been any intention to dismiss regardless of the outcome the Respondent would have gone ahead with the first hearing.

Automatic unfair dismissal

108. I have to consider the following questions both objectively and subjectively, i.e. did the Claimant believe the circumstances were harmful to health and safety and/or of serious and imminent danger, and was that belief objectively reasonable?

Was the sole or principal reason for the claimant's dismissal that she brought to the respondent's attention, by reasonable means, circumstances connected with her work which she reasonably believed were harmful to health and safety, pursuant to s.100(1)(c) ERA 1996

Was the sole or principal reason for the claimant's dismissal that, in circumstances of danger which she reasonably believed to be serious and imminent and which she could not reasonably have been expected to avert, she left (or proposed to leave) or (while the danger persisted) refused to return to her place of work or any dangerous part of her place of work, pursuant to s.100(1)(d) ERA 1996?

Was the sole or principal reason for the claimant's dismissal that, in circumstances of danger which she reasonably believed to be serious and imminent, she took (or proposed to take) appropriate steps to protect herself or other persons from the danger, pursuant to s.100(1)(e) ERA 1996?

109. I accept that the Claimant had significant concerns about the Covid-19 pandemic. This is entirely understandable at the early stage. She did raise some issues with the Respondent about the general cleanliness of the building, and specifically the

110. I have to consider the circumstances as they were at the time of these events and in light of what was known to the parties and particularly the claimant at the time. We have learnt much more about the virus since March 2020, but my focus is on that point in time.

108. It was clear, even in late March 2020, that Covid-19 was a real risk to everyone, that it was a deadly virus and that it was affecting the older and vulnerable more. The guidance at that time was that Covid-19 was spread by close contact and the advice was to maintain two metres distance from others and to wash hands regularly.

109. I consider the size of the workspace and the small number of employees to be a relevant factor. It was not hard to socially distance and measures were in place to reduce the risk of Covid-19 transmission.

110. I remind myself that the Claimant's email on 6 April 2020 made reference to staying off work until the lockdown eased.

111. I do not find that the Claimant believed there were circumstances of serious and imminent danger, within the workplace, but that she considered there were circumstances of serious and imminent danger all around.

112. Having regard to all the circumstances, as the Claimant knew them, in my judgment, the Claimant could reasonably have been expected to avert any dangers, by abiding by the guidance at that time, namely by socially distancing within the workspace, by using

the additional personal protective equipment provided, and by regularly sanitising her hands.

113. If there were specific tasks which she felt removed her ability to socially distance, it seems to me these were tasks she could reasonably have refused to carry out, or raised specifically with his employer.

114. In my judgment, whilst conditions relating to Covid-19 could potentially amount to circumstances of serious and imminent danger in principle, I do not consider that they did so in this case. I do not consider that the Claimant reasonably believed that the circumstances were of serious and imminent danger, for the reasons set out above.

115. Although there was guidance to work from home where possible, the Respondent was entitled to conclude that this was not possible and require staff to attend the office.

116. The Claimant's focus throughout this case has been on wanting to work from home, and the reasonableness of that request, based on ease of setting it up by the Respondent and the behaviour of the employers of her friends, family, and Neighbour.

117. This case is not about a request flexible working. It may be that this was reasonable and possible, but it does not follow that there was therefore serious and imminent danger within the workplace that justified the Claimant not attending. The two are entirely separate.

118. I am not satisfied that it was appropriate to absent herself from work entirely when, it was not hard to socially distance at the workplace. I further do not consider it was an appropriate step to absent herself from work entirely, in order to avert any specific dangers where she could not socially distance.

119. When considering s100(1)(d), I conclude the Claimant's decision to stay off work was not directly linked to her working conditions I find that this is not a case where the claimant refused to return to her place of work, or any dangerous part of her place of work due to the conditions in that environment; she refused to return to her place of work until the national lockdown was over. I cannot conclude that the decision to absent herself, regardless of what the situation might be at the workplace, until a national change was made (and then beyond), can lie at the door of the Respondent. For that reason, and for those set out above, in my judgment, the criteria in this paragraph are not made out.

120. When considering the test within s100(1)(e) and applying the approach in Oudahar, I conclude that the Claimant did not reasonably believe that the circumstances were of serious and imminent danger. Furthermore, I consider the steps she took in absenting herself entirely were not appropriate. Therefore, s100(1)(e) is not engaged.

121. For the avoidance of doubt, I do not consider that any belief that there were circumstances of serious and imminent danger were objectively reasonable, largely for the reasons set out above.

Remedy

122. The first question is the so called 'Polkey' question - what would have happened if a fair procedure had been followed, namely if Mr Paul had not been the decision maker at each stage of the process. Taking into account all of the circumstances, I conclude that there was a high probability that the Claimant would have been dismissed in any event. As such, I apply a 90% reduction to the compensatory award to reflect this.

123. Turning to the issue of contributory fault, the employee's conduct is the proper focus of the Tribunal's attention when considering a reduction under Section 123(6) of the ERA. The Section requires the Tribunal to consider a reduction where the dismissal was caused or contributed to by a claimant. The Claimant was intent on not returning to the office, even after her own self-imposed deadline of the end of lockdown. At each stage of the disciplinary process, she appeared determined not to engage unless on her terms. The Respondent agreed to her requests for an independent investigator and chair, and she did not attend. Meetings were rescheduled both at her request, and when she simply didn't attend. Her conduct was both blameworthy and culpable and led to her dismissal. In my view it would be inequitable to make any compensatory award.

124. The Tribunal has a discretion under Section 122(2) to reduce or not reduce a basic award because of a claimant's actions before the dismissal if it is just and equitable to do so. It is only in unusual cases that the deductions vary between the basic and compensatory award and I see no reason why the basic award should not be reduced to nil for the same reasons as I have outlined above.

Tribunal Judge K Douse

Dated: …21 February 2022……

Sent to the parties on: 23/2/2022

N Gotecha

For the Tribunal Office