EMPLOYMENT TRIBUNALS

Claimant		Respondent
Ms D. Meynell	v	**Mrs L. Stephenson**

Heard at: **Sheffield (hybrid)** **On: 04 and 05 May 2021**

Before: Employment Judge T R Smith

Appearance:

For the Claimant: In person

For the Respondent: Mr Uduje, of counsel

Note: This has been a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V-video. It was not practicable to hold a face-to-face hearing because of the Covid19 pandemic.

JUDGMENT

1. The Claimant's complaint of unfair dismissal is well founded.
2. No adjustment shall be made to any award under the provisions of section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992.
3. No adjustment shall be made to any award under the provisions of Polkey -v- A.E Dayton Services Ltd 1988 ICR142.
4. There shall be a 20% deduction from any compensation awarded to the Claimant on the basis of the Claimants culpable conduct.

Written reasons provided pursuant to Rule 62 (3) of the Employment Tribunals Constitution and Rules of Procedure) Regulations 2013

Evidence

1.The Tribunal had before it statements from both the Claimant and the Respondent.

2.The Claimant chose not to give evidence at the conclusion of the Respondents case and therefore the Tribunal gave greater weight to the evidence of the Respondent, given it was tested in cross examination.

3.The Tribunal had before it an agreed bundle totalling 459 pages. A reference to a number is a reference to a document in that bundle.

4.Mr Uduje made application in respect of a number of documents in the bundle which referred to settlement discussions between the parties. The Tribunal concurred with his application and the Tribunal has not taken them into account in its deliberations. After that ruling Mr Uduje indicated he was content for the same constituted Tribunal to continue to hear the case.

5.He further made application in respect of a number of documents which he said should not have been disclosed by those instructing him. This had never been raised either at the previous aborted hearing by different counsel or in correspondence. For the oral reasons given by the Tribunal it did not accede to that application.

6.The Tribunal considered all the evidence in the round, even if it is not referred to a specific piece of evidence, document or submission. It has confined its findings to those matters in dispute, that needed to be determined, to address the agreed issues.

Agreed List of issues

7.At the start of the hearing the parties agreed that the Tribunal was required to determine the following issues:-

- What was the reason for the dismissal? The Respondent asserted that it was some other substantial reason of a kind such as to justify the dismissal of the Claimant. This is a potentially fair reason under section 98 (1) (b) of the Employment Rights Act 1996 ("ERA96"). It must prove that it had a genuine belief in the some other substantial reason and that this was the reason for dismissal.
- Did the Respondent hold that belief on reasonable grounds? Did she act reasonably or unreasonably in treating that reason as a sufficient reason for dismissal having regard to the factors set out in section 98 (4) ERA96?
- If the dismissal was unfair, did the Claimant contribute to the dismissal by culpable conduct? This required the Respondent to prove, on the balance of probabilities, the culpable conduct relied upon ("the Contribution issue")
- Did the Respondent prove that if she had adopted a fair procedure the Claimant would have been fairly dismissed in any event, and/or to what extent and when? ("the Polkey issue")?
- Did the ACAS code of practice: disciplinary and grievance procedures 2015 apply?

- If so were either party in breach?
- If so, was it reasonable to make an adjustment under section 207A of the Trade Union and Labour Relations (Consolidation) act 1992 ("TULCRA").

8.The night before the hearing Mr Uduje was told to self-isolate due to contact with a person who tested positive for Covid19. Unfortunately, due to demands on Tribunal space, it was not possible to make arrangements for a hybrid hearing until the afternoon of day one. As a result of the loss of half a day it was agreed that the Tribunal would determine liability, contribution, and Polkey only, and then, if necessary, proceed to remedy at a separate hearing, if the parties could not reach agreement.

Findings of fact

9.The Respondent is the mother of Ms Keira Berry.

10.Sadly she suffers from quad cerebral palsy. This has a negative impact on her immunity system.

11.The Claimant commenced employment with the Respondent on 25 March 2017 as part of a team of carers supporting Ms Berry, both day and night.

12.Amongst the team of Ms Berry's carers were Ms Lord and Ms Glentworth.

The Claimant has a partner, Ms Eleanor Bull.

13.On Friday 20 March 2020 the Claimant finished her night shift at 7 am. She was due to start work again on Monday, 23 March 2020 at 5 pm.

14.The Claimant went to a local public house, the Miners Rest, at about 5:30 pm on Friday 20 March with her partner, and also with her friend, Ms Jackie O'Neill.

15.Ms Glentworth had taken Ms Berry to a local public house earlier that day. That is an undisputed fact.

16.It is relevant to record that the Claimant asserted that two carers had also taken Ms Berry to a public house on 16 March 2020. The Tribunal is satisfied this allegation was properly investigated and it was reasonable for the Respondent to conclude that there was insufficient evidence to support that assertion.

17.At 5 pm on Friday 20 March the Prime Minister announced :-

"And I want to thank everyone for following the guidance we issued on Monday [this must be a reference to an announcement made on 16 March]:

To stay at home for 7 days if you think you have the symptoms,

For 14 days if anyone in your household has either of the symptoms – a new continuous cough or a high temperature.

To avoid pubs, bars, clubs and restaurants……"

He went on to say: –

"*But we need now to push down further on that curve of transmission between us….*

We are collectively telling, telling cafes, pubs, bars, restaurants to close tonight as soon as they reasonably can, and not to open tomorrow……

Now, these are places where people come together, and indeed the whole purpose of these businesses is to bring people together. But the sad things is that today for now, at least physically, we need to keep people apart….

And listening to what I have just said, some people may of course be tempted to go out tonight. But please don't."

18.The Claimant said that her and her friends socially distanced in the Miners Rest and the Claimant had taken hand sanitiser with her. They sat in a quiet corner. Ms O'Neill had checked before entering the public house to see if it was busy. It was not. There are only approximate two people inside.

19.There was no cogent evidence that the Claimant had heard Prime Minister's speech that evening. Looking at the timing, and given the speech started 5 o'clock and the Claimant was in the Miners Rest, at the latest by 5.30pm that adds credence to her account.

20.Throughout the subsequent proceedings, details of which are set out below, the Claimant denied she heard the speech (139). The Respondent could not point to any cogent evidence to show she reasonably believed the Claimant had heard Prime Minister's speech. At its highest she could point to a text message which said *"last pint freedom"* which equally was explainable, as the Claimant had maintained all along, and in her statement, in another context.

21.A message appeared on Facebook on Saturday 21 March from Ms Lord who said *"no social distancing for you then lass"* (48*).* Ms Lord had not been present in the Miners Rest. From the posted pictures, although Ms Ball was in the Claimant's social bubble she was within 2 metres of Ms O'Neill. No other person can be seen in the public house. There is no evidence of anyone standing. The pictures were entirely consistent with the Claimant's account that the public house was virtually empty.

22.Digressing at this point it is important to note that on 20 March 2020 it was perfectly lawful to visit a public house. At its highest, people were being encouraged not to congregate in such establishments.

23.The Respondent had not put in place any specific Covid 19 measures prior to 20 March 2020, such as issuing personal protective equipment. No specific instruction were issued by the Respondent to staff that they were not to attend public houses or indeed any other venues, where people may congregate.

24.Indeed at the last work team meeting held on 02 March 2020 it was recorded *"there were no particular worries about coronavirus at this time"(*218). In fairness to the Respondent that was probably in line with the majority of public thinking, and the Tribunal considered it important to look at matters through the lens of how matters were approached both in March and the subsequent change in attitude by October 2020.

25.No specific steps were put in place to protect the Respondent's daughter; they knew that Ms Berry was susceptible to infections and there were already existing hygiene measures in place.

26.Returning to the Facebook posts the Respondent then joined in the conversation (49) stating "*glad you find it funny. you work for a very valuable young lady. thanks"* .

27.The Claimant responded, indicating that Ms O'Neill had checked the pub before they went in, that it was *"dead"* with only two people in, and they sat in the corner. She made the point that she considered she had a greater interaction with people while shopping for food. She told the Respondent not to worry. The Respondent replied with a *"thumbs up"* sign. It was therefore reasonable for the Claimant to conclude that the Respondent accepted the Claimants explanation.

28.On Monday 23 March 2020 all staff were told not to attend work due to Covid 19. Thus there was no risk of infection whatsoever to Ms Berry when the Claimant was due to return to work..

29.On the same date the Respondent started to consider the possibility of terminating the Claimant's contract by seeking advice, although she did not express these concerns to the Claimant.

30.Also on Monday, 23 March 2020 the Prime Minister announced that new strict rules applied to all households in the United Kingdom and the public were ordered too stay-at-home. There is no suggestion that the Claimant then breached this instruction.

31.The Claimant was, along with the other carers then furloughed from 23 March 2020. She was never to return to work.

32.By this stage the Claimant was seeking advice as regards the termination of the Claimant's employment and disclosed that advice, which was not to pursue an allegation of gross misconduct, but to consider termination on the basis of some other substantial reason. (230). The Respondent did nothing.

33.The Respondent continued to shop, including offering to shop for others during lockdown (e.g. 24 March 2020 , page 200 and 20 April 2020). She was of course perfectly entitled to go to and from shops. She did not consider that it was necessary to resort to online shopping due to the vulnerability of her daughter.

34.The Claimant had occasional contact direct and indirect with the Respondent following the incident on 20 March 2020. This included dropping off birthday presents on 05 June 2020, while socially distancing, for Ms Berry and her brother,. On this occasion there was a discussion of about 15 to 20 minutes.

35.At no point during any of these occasional contacts was any issue raised by the Respondent as regards the Claimant attending the Miners Rest on 20 March 2020.

36.Throughout the Respondent's evidence she repeatedly said that she needed *"reassurance"* before the Claimant could come back to work. 05 June was a perfect opportunity to raise any concerns she had with the Claimant and to seek such seek reassurance but she did not do so. The Tribunal concluded that the issue of *"reassurance"* was not in the Respondent's mind following the incident on 30 March up to and including the termination of the Claimant's contract of employment.

37.On 10 July 2020 the Claimant received from the Respondent a picture of the personal protective equipment that was now available and was told, along with other staff, that they would be returning to work on 1 October 2020. Thus at this stage the Claimant had no reason to believe that her employment was in any way in jeopardy. That is despite the fact that the Respondent had been seeking advice as to whether she could terminate the Claimant's employment.

38.The documentation (279/280) shows that in July the hours for the care team were likely to be reduced as Ms Berry could not go out. The Respondent wanted to make the Claimant redundant. She was seeking advice. However in the Tribunal's judgement, as it was the Claimant who undertook the vast majority of the night time shifts, there was no diminution in her area of work.

39.In evidence the Respondent fairly accepted that the number of hours care that her daughter required had not diminished in respect of the duties undertaken by the Claimant. Had it not been for the incident on 20 March 2019 she confirmed the Claimant would have continued working for the Respondent. There was no likely redundancy in the future involving the Claimant and indeed it appeared that the hours of total care that Ms Berry required actually increased.

40.On 10 August 2020 the Claimant was told she was being suspended because there was irretrievable breakdown in relationships as the Claimant had attended the Miners Rest on 20 March 2020 and put Ms Berry's health at risk.

41.A disciplinary hearing was held on 17 August 2020 chaired by a Ms Robertson. She was a consultant appointed by the Respondent.

42.Details of that hearing are contained in a report, which also contained the notes of the meeting (67 to 98).

43.The Tribunal was satisfied that the notes of the interview with the Claimant were reasonably accurate save for the fact that an extract of the Prime Minister's speech of 20 March was not shown to the Claimant

44.The Claimant indicated to Ms Robertson she had some social media evidence that she considered relevant and wanted her to see as it put matters into context. Ms Robertson stated she would come back to the Claimant after interviewing witnesses, but did not do so. Thus she did not have all the evidence the Claimant wished to be considered before a decision was made as to her future employment.

45.An internal email dated 26 August 2020 (272) from Ms Robertson stated *"Based on the discussion that I had with* (the Claimant) *I don't believe that there is a strong enough case to dismiss SOSR grounds however I do believe that a sanction would be applied either written or final written warning"*.

46.In the ultimate report produced by Ms Robertson however she stated the Claimant should be dismissed with notice (77). The Respondent agreed she did not accept the initial advice of Ms Robertson (and its proper to record that she was not bound to do so) and believed the Claimant should be dismissed because she acted irresponsibly in attending the Miners Rest.

47.The Respondent differentiated between the Claimant and the case of Ms Glentworth taking her daughter to a public house on 20 March because it was in a pub garden, the barmaid came out to serve Ms Glentworth and government advice that people should resist the temptation to go to public houses that evening had not been issued. However the Prime Minister had said the previous Monday that people were to avoid public houses and Ms Glentworth had gone to a public house. The Tribunal accepted the circumstances were not truly comparable but the alleged difference between the circumstances of Ms Glentworth and the Claimant were not as great as the Respondent contended. No disciplinary action was taken against Ms Glentworth.

48.The Respondent instructed a Ms Ruffle to write to the Claimant on her behalf on 15 September 2020. Ms Ruffle has a company called Unruffled Ltd , a care management company, which was assisting the Respondent. In the letter, sent on behalf of the Respondent, the Claimant's employment was terminated with notice (99)

49.The letter stated: –

Dear Daniele,

I am writing to confirm the decision following the recent meeting on Monday 17th August 2020 with Charlotte Robertson where you discussed the difficulties in your working relationship with your employer, Lisa Stephenson.

The topic of the meeting was the irretrievable breakdown within the working relationship which is unresolvable by other means.

Having discussed the matter and your explanations at length, Charlotte Robertson was in agreement that the breakdown in the working relationship is irretrievable and unresolvable by any other means.

Please see the enclosed report for more details regarding this decision.

Under the circumstances of the personal nature of your work with Miss Kiera Berry and our inability to find acceptable alternatives, I must regretfully inform you that your employment is being terminated for some other substantial reason, namely that the relationship between you and Lisa Stephenson, your employer has irretrievably broken down and that she no longer wishes you to provide care to her daughter, Kiera Berry.

As an employee with three years of service, you are entitled to 4 weeks' notice of termination which will take effect from the date of receipt this letter, which means your effective date of termination of your employment will be 13 October 2020.

Your P45 and any outstanding monies will be sent to you as soon as possible under separate cover.

You have the right of appeal against this decision and should you wish to do so you should write to Wendy Ruffle at wendy@unruffled.co.uk within 7 days giving the full reasons as to the grounds of your appeal.

If you have any questions about the content of this letter, please do not hesitate to contact me…"

50.Of course Ms Robertson was initially of the view that the relationship had not irretrievably broken down. She changed her opinion in the Tribunal's judgement at the request of the Respondent. That is the most logical assumption having regard to the evidence. No other explanation was offered.

51.The Claimant appealed her dismissal by letter 22 September 2020 (100 to 102).

52.In summary she contended the Respondent had not shown a fair reason for dismissal and in reality was relying upon her conduct on 20 March 2020. She challenged some of the findings of the disciplinary hearing. She believed that if her conduct had been fairly investigated it would have been found the penalty was too harsh. Her behaviour was not such to reasonably lead to the conclusion that there been an irretrievable breakdown of the working relationship. She had broken no known laws or any specific instructions given to her by the Respondent. Members of staff had taken Ms Berry to a public house and not been subject to any action on the 16 and 20 March. The Claimant went on to assert there been a failure to consider

alternatives, and dismissal was not within the band of responses of a reasonable employer. Although not specifically mentioned in the grounds of appeal, the Claimant did raise at the start of the appeal the failure of Ms Robertson to look at the social media that she considered relevant before a decision was taken. On this point the Tribunal observed the appeal officer did consider such information and thus there was no overall unfairness in the disciplinary procedure in this specific regard.

53.The Claimant's appeal was held on 29 September 2020 and conducted by a Ms Hart, a consultant with the same organisation as Ms Robertson.

54.The Claimant made it clear in her appeal that despite the disappointment in the way she had been treated she was prepared to return to work and suggested some form of mediation. She did not consider there was an irretrievable breakdown in the relationship. It is proper to record that relations between the Claimant and the Respondent were cordial before the incident leading to the Claimant's dismissal.

55.Ms Hart was not called to give evidence and there are aspects of the evidence which were contradictory.

56.By way of illustration, on 29 September 2020 (149) Ms Hart wrote to the Respondent, noting that the Claimant was very apologetic and remorseful and stating "*therefore taking the above into consideration the purpose of my letter is to formally request that you reconsider that you allow* (Claimant) *to return to work to provide care for your daughter. I would ask you to consider that during her employment with your family she has had a very good service record and the issues that you quite rightly raised very much out of character for this employee"*

57.However the recommendation in Mr Hart's report states (152) *"…having given full and thorough consideration to the information presented (Ms Hart) recommends that this appeal fails and the original decision to dismiss…is upheld".* she went on to say "(Claimant) *showed little concern nor remorse for her actions and attempted to focus her appeal on mitigating her conduct and in doing so played no thought of the breakdown of trust which is clearly shattered beyond repair…"*

58.This does not sit comfortably with the letter the appeal officer had sent to the Respondent where she specifically referred to the Claimant been very apologetic and remorseful. No evidence was offered to explain the change in stance.

59.Ms Hart found, having looked at all the evidence that, given the steps the Claimant had taken prior to and at the pub, that the risks to Ms Berry were no greater than shopping (146). It should be remembered that Respondent chose, after 20 March, to go shopping rather than using a delivery service and did offer to do shopping for a number of the carers. It follows therefore that in terms of risk, the behaviour of the Claimant was no worse than that of the Respondent according to the appeal officer.

60.Ms Hart found that there was a delay in the concerns being raised with the Claimant which she attributed to delays in obtaining legal advice and the change of the Court of Protection deputy. With respect the former cannot be right as on the evidence the Respondent was seeking advice almost immediately after the incident. The latter point has more weight given it appeared that the Respondent considered that in order to dismiss the Claimant she needed the deputy's permission and she was in the process of changing her daughter's deputy in the spring of 2019.

61.Ms Hart found the reason for the lack of trust was because the Claimant had not been *"adhering to the rules set out by the government"* (147). Pausing at this juncture

the Claimant did not breach any law. There was no statutory instrument. There was not even a role which had any form of legal effect. At best there was an exhortation or advice

62.The Respondent considered the report and decided the appeal should not be upheld. The Respondent placed specific emphasis on one part of the appeal meeting with the Claimant when the Claimant was asked what she considered to be the alternatives to dismissal. The Claimant said:- *" Well I'd have thought at least a sit down meeting, face to face, to discuss like I've just mentioned, like put some policies or procedures in place because she hasn't done at any point. Possibly say-, I mean, at this worst, I mean yeah, a verbal warning just to say, "Look, please don't do that again," but to be perfectly honest with you, I don't see how she can even go that far because I was in my own free time."* The Respondent took that to mean that the Claimant would do whatever she wanted in her own free time and never follow any instructions given to her if it had any impact upon her behaviour outside work. That is not what the Claimant said. She was saying that she didn't see how even a verbal warning was justified given there were no policies or procedures and she had not been told not to go to a public house. She was not saying that she would not obey lawful orders or government regulations.

63.The Respondent instructed Ms Ruffle to send a letter to the Claimant rejecting the appeal. That letter was dated 12 October 2020.

Submissions

64.The Tribunal does not mean any discourtesy to either party by failing to repeat their submissions in detail. It did however take into account each and every submission

The Claimant

65.The Claimant made a short and focused submission on the issue of fairness addressed to the facts. She did not make any submissions of law

The Respondent

66.Mr Uduje relied on both an oral and written submission. In terms of case law he took the Tribunal through the statutory framework set out in ERA 96.

67.He referred to cases of **Hutchinson-v- Calvert EAT/0205/06** (a case that must be looked at with care in respect of the facts as the EAT remitted the case having found the ET applied the wrong legal test) where the EAT stressed that it was for the employer to show that they genuinely believed trust and confidence had broken down and the reason relied upon was not trivial. He also mentioned **Treganowan -v- Robert Knee Ltd [1975] ICR 405**. The latter case emphasised that personality clashes or irreconcilable differences could amount to an SOSR and the size of the employer was a relevant consideration. The Tribunal accepted that correctly stated the law.

68.He took the Tribunal to **Jefferson(Commercial) LLP -v- Westgate EAT/0128/12,** a case holding that a lack of meetings did not necessarily render an SOSR dismissal unfair. With respect the Tribunal did not find that a helpful case given here the Respondent did follow a full procedure. Mr Uduje made reference to the decision in **Express Medical Ltd -v- O'Donnell EAT /0263/15,** a case on perversity where a Tribunal had failed to make a deduction under the Polkey principle where the breakdown of relationships was acknowledged on both sides. The Tribunal concluded

that decision was distinguishable from this case as the Claimant did not consider that there was an irretrievable breakdown in the relationship.

69.The Tribunal was supplied by Mr Uduje with a copy of a first instance decision of E.J Garnon sitting alone in Newcastle, **A -v- B 2504233/19**. The Tribunal did not consider it added anything to the existing law and in any event was not binding on this Tribunal.

70.Mr Uduje carefully set out the reasons why he considered the Respondent had established the principal reason for dismissal. In terms of the reasonableness of termination he said there was a loss of trust and confidence. The Respondent was entitled to take that view because she believed the Claimant's behaviour put her daughter at risk. Dismissal was a reasonable response.

71.In terms of contribution the Claimant was entirely blameworthy and it was her conduct resulted in her dismissal. The Claimant lacked insight. Contribution should be a hundred percent.

72.In terms of Polkey he repeated similar submissions to those he had made in respect of contribution.

Conclusion and discussion

Unfair dismissal.

73.The Tribunal applied section 98 (1), 98 (2) and 98 (4) of the ERA 96 which provides as follows: –

"98 (1) – in determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show:

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

(b) that either 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 helped.

98 (2) – a reason falls within this subsection if it…….

(b) relates to the conduct of the employee.

98 (4) –….. Where the employer has fulfilled the requirements of subsection (1) the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer):

(a) depends on the weather in the circumstances (including the size and the administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case."

74.The first question is, can the Respondent show, on the balance of probabilities, a potentially fair reason for dismissal. Here the Respondent relied on some other substantial reason ("SOSR").

75.In **Abernethy – v – Mott, Hay and Anderson 1974 IRLR213** the Court of Appeal held that a reason for dismissal was a set of facts known to the employer or beliefs held by the employer which would cause the employer to dismiss the employee.

76.To amount to a substantial reason to dismiss, the Respondent must show her decision could, but not necessarily did, justify dismissal — **Mercia Rubber Mouldings Ltd v Lingwood 1974 ICR 256, NIRC**. It must be more than some whimsical or insubstantial reason.

77.The Tribunal noted that at times the Respondent has considered dismissal for conduct (which at one stage the Respondent said was celebrating lockdown) and possibly redundancy. The Tribunal was also conscious that there is a fine but important distinction between dismissing the Claimant for her conduct in causing the breakdown of the working relationship and dismissing her because the relationship had broken down. In the Tribunal's view, this was not a case of the Respondent seeking to rely on a reason that was not established; rather, the issue could have been framed as either conduct or SOSR and the Respondent decided to focus on the latter.

78.The Tribunal concluded that the principal reason the Claimant was dismissed was because she went to the Miners Rest and the Respondent considered that, that action was a breach of the Prime Minister's guidance which in turn could impact upon her daughter's health and well-being. That potentially can amount to an SOSR so the Respondent has surmounted the first hurdle.

79.The next question is whether that decision was reasonable and here neither party has any burden of proof.

80.As in all unfair dismissal claims, the Tribunal had to decide the fairness of the dismissal by asking whether the decision to dismiss fell within the range of reasonable responses that a reasonable employer might adopt. In many cases there may be a band of reasonable responses and the Tribunal must not substitute its own judgement for that of the Respondent, if the Respondent's decision fell within that band. The Tribunal has been scrupulous in reminding itself of this principle.

81.That said whilst the Tribunal must have respect for the opinion of the Respondent it is ultimately for the Tribunal and not for the Respondent to decide whether the dismissal fell within or outside the range of reasonable responses open to an employer in the circumstances.

82.In other words, whether the reason, once established, justifies dismissal is to be answered by the Tribunal's overall assessment of reasonableness under section.98(4) ERA 96.

83.Was the dismissal reasonable?

84.The Tribunal has not found this an easy case but has concluded it was not for the following reasons.

85.Firstly the Claimant broke no rule or instruction from the Respondent. She broke no law. At best there was an exhortation of the Prime Minister on Friday 20 March not to go to public houses. There is insufficient evidence that the Claimant knew of that message. Even if the Tribunal is wrong the Prime Minister's reasons need to be analysed. It was so people were not packed together increasing the risk of transmission of Covid 19. Here the Claimant went to a public house that was virtually empty. She used hand sanitiser. The Respondent failed to have regard to the risk to her daughter. The Claimant's observation that there was about as much risk going to

shops has some weight. It is supported by the appeal officer who came to the very same view. It must be remembered at this stage face masks were not obligatory. Going to a pub per se cannot have justified dismissal as Ms Berry was taken to one by another carer earlier that day and nothing was done, even though the previous Monday the Prime Minister had encouraged people not to go to, inter-alia, public houses. The risk of infection hadn't changed. The only thing that had changed was the Prime Minister's announcement. The Respondent herself considered that shopping was not a risk to Ms Berry and indeed even offered to shop for some of the staff.

86.Secondly when the Respondent challenged the Claimant by social media, having heard her explanation as the circumstances in the Miners Rest, she initially sent a " thumbs up". Linked to the first point there was no suggestion between March and dismissal the Claimant breached any legal obligation imposed by the government or failed to follow any instruction from the Respondent.

87.Thirdly there was no risk to Ms Berry as the Claimant was not at work on the following Monday. That may have been pure happenstance due to the lockdown, but the fact remained there was no risk to Ms Berry.

88.Fourthly it was unreasonable for the Respondent to conclude the Claimant would not abide by any relevant laws or any specific instructions she might give as regards her daughter's health. There were already stringent hygiene protocols in force prior to Covid 19 to protect Ms Berry and there is no suggestion that the Claimant did not abide by them. In fact she had a clean disciplinary record.

89.Fifthly the Respondent sought to distinguish between the other carer who went to a public house on the same day as the Claimant. Whilst the Tribunal has already conceded the facts were not analogous, given the Claimant did not know of the Prime Minister's announcement it is difficult to understand why the Claimant was dismissed but the other member of staff was considered to behaved in a manner that required no disciplinary investigation, let alone any disciplinary sanction.

90.Sixthly whilst the Respondent was not required to accept the initial recommendations of the determining and appeal officer and the appeal officer she was required to show cogent reasons for departing from those recommendations because the respective officers had the opportunity to hear all the evidence and the Respondent had not. The Respondent has not been able to so do, to the satisfaction of the Tribunal, other than to emphasise that she felt the Claimant had not given her *"reassurance*". She had never personally spoken to the Claimant; it would appear from the evidence during the disciplinary process. The Tribunal is satisfied that had reassurance being requested by the Respondent it would have been given by the Claimant. This is supported by the findings of Ms Hall.

91.Seventhly there is the clear discrepancy in that Ms Hart said the Claimant was remorseful but the Respondent considered she was not. The Claimant was prepared to build bridges including mediation but the Respondent was not.

92.Eighthly as the EAT held in **Phoenix House Ltd -v- Stockman 2017 ICR 84** if the Respondent has a closed mind the relationship has not irretrievably broken down. The Respondent was being told what the Claimant did was no riskier than shopping which she herself continued to do and offered to do for others. She had no cogent evidence the Claimant had disobeyed the Prime Minister's message of the 20th which wasn't law and, at the best, exhortation . The dismissal cannot be justified by the Respondent on the basis that the Claimant went to a pub per se because the Prime Minister had

urged people not to do so from the previous Monday and no action was taken against Mrs Glentwood .

93.The Tribunal then reviewed all the evidence in the round. It has reminded itself that a personal care relationship is a special relationship. Respect must be given by the Tribunal to a person's decision as to who they do or do not want in their own home. This is a weighty factor. It is appropriate, however, to note there has never been any criticism of the standard of care the Claimant gave or any evidence that Ms Berry had made any complaints or was in anyway unwilling to continue to be cared for by the Claimant. The Tribunal is also entitled to take into the equation the interests of the Claimant.

94.Even though there is a caring relationship it must still be reasonable to dismiss the Claimant and although the special relationship is a factor, and a weighty factor, the Tribunal concluded that a reasonable employer, aware of all the facts would not have concluded that there was an irretrievable breakdown in the relationship.

95.In the circumstances the Tribunal concluded, for the above reasons, the dismissal was unfair.

The ACAS Code

96.Section 207A (2) of the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULCRA 92") provides: –

"(2) if, in the case of proceedings to which this section applies, it appears to the employment Tribunal that-

(a) the Claimant to which the proceedings relate concerned the matter to which a relevant Code of Practice applies,

(b) the employer has failed to comply with that Code in relation to that matter, and

(c) that failure was unreasonable,

the employment Tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%".

97.Before deciding whether there has been a breach of the code the Tribunal must first determine whether the Code applies.

98.In **Phoenix House Ltd v Stockman 2017 ICR 84, EAT***,* the EAT held that the Code does *not* apply to SOSR dismissals based on a breakdown in the working relationship. In the EAT's judgment, it would not be right to apply the sanction for non-compliance under S.207A TULR(C)A in the absence of clear words in the Code applying it to the dismissal in question. Whilst it is true that the case of **Lund v St Edmund's School, Canterbury 2013 ICR D26, EAT** points the other way this was specifically considered in **Stockman** and distinguished. In **Lund***,* the employer had initiated disciplinary proceedings in respect of the employee's conduct and therefore the ACAS Code applied, even though the employee ended up being dismissed for SOSR.

99.Given the Code does not apply; the Tribunal did not need to consider the issue of any breaches.

Polkey

100.Under Section 123 (1) ERA 96 the Tribunal must consider whether it would be *"just and equitable"* to make a reduction from any compensatory award.

101.The case of **Polkey -v- AE Dayton Services Ltd 1988 ICR 142** held that a Tribunal must consider whether the unfairly dismissed employee could have been dismissed fairly at a later date.

102.The Polkey principal applies not only to cases where there is a procedural unfairness but also to substantive unfairness, although in the latter case it may be more difficult to envisage what would have happened in the hypothetical situation of the unfairness not having occurred, see **King -v- Eaton Ltd (2) 1998 IRLR 686.**

103.The burden of proving that the Claimant would have been dismissed in any event is on the Respondent.

104.The Tribunal looked carefully at the guidance given in **Software 2000 Ltd -v- Andrews 2007 ICR 825** on the application of Polkey.

105.In summary the guidance directs that the Tribunal must assess how long the employee would be employed but for the dismissal. If the employer contends that the employee would or might have ceased to have been employed in any event had a fair procedure been adopted, the Tribunal must have regard to all relevant evidence, including any evidence from the employee (for example an intention to retire). There will be circumstances where the nature of the evidence is so unreliable that the Tribunal may reasonably take the view that the exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on the evidence can properly be made. The Tribunal must have regard to all material reliable evidence even if there are limits to the extent to which it can confidently predict what might have happened. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence. A finding that an employee would have continued in employment indefinitely on the same terms should only be made where the evidence to the contrary namely that the employment would be terminated earlier is so scant that it can effectively be ignored.

106.The proper approach when applying the Polkey principle is not to look at what the Respondent would have done if she had not made an error, rather to look at what would have happened if the correct procedure had been applied.

107.Dealing firstly with the issue of whether there was the possibility the Claimant could have been made redundant. On the very fair evidence given by the Respondent it is clear that the Claimant would not be made redundant and therefore no discount can be made.

108.Turning then to dismissal, and bearing in mind that the principal in Polkey applies both to procedural and substantive errors, the Tribunal is not persuaded the Respondent has discharged the burden upon it. The Respondent had reached a view that the Claimant was to be dismissed. She had a closed mind to any other view. She looked at a number of options as to how dismissal could be affected. Nothing procedurally or substantively would have changed the Respondent's view. It follows therefore that again there should be no Polkey reduction on this ground.

Contribution

109.Section 123 (6) ERA 96 states that *"[W] here the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the….. compensatory award by such proportion as it considers just and equitable having regard to that finding."*

110.The wording in relation to any deduction from the basic award is set out in section 122(2) and differs from that in section 123 (6) ERA 96.

111.A reduction for contributory conduct is appropriate according to the Court of Appeal in **Nelson-v- BBC (2) 1980 ICR 110** when three factors are satisfied namely:

- The relevant action must be culpable or blameworthy
- It must have caused or contributed to the dismissal, and
- It must be just and equitable to reduce the award by proportion specified

112.Many types of SOSR dismissal do not involve any fault on the part of the employee and so the question of contributory conduct is unlikely to be an issue. That is not to say there can never be a deduction in such a case. Contributory fault may be present in cases involving a breakdown in trust and confidence for which the employee was at least partially to blame , see, for example, **Perkin v St George's Healthcare NHS Trust 2006 ICR 617, CA*;* Butcher v Salvage Association EAT 988/01*;*** and **Huggins v Micrel Semiconductor (UK) Ltd EATS 0009/04*.***

113.For a deduction to be made a causal link must exist between the employee's conduct and the dismissal. In other words, the conduct must have taken place before the dismissal; the employer must have been aware of the conduct; and the employer must then have dismissed the employee at least partly in consequence of conduct.

114.A finding of contributory fault does not require that the action of the employee was the sole or principal or operative course of the dismissal: – **Polentarutti -v- Autokraft Limited 1991 IRLR 457.**

115.. Having regard to Prime Minister's message the previous Monday the claimant would have been wise to have not gone to the minus rest the following Friday. She could and should have given a more comprehensive explanation to the respondent when she enquired about the social media posts.

116.The Tribunal concluded there was a small element of blame and that conduct was causally linked to the termination of the Claimant's employment and therefore it was appropriate to make a deduction that at the bottom end of the scale. The Tribunal concluded doing the best that a 20% deduction would be just and equitable.

Employment Judge Smith

05 June 2021