EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100610/2022

Held in Glasgow on 16, 17 and 18 May 2022; via CVP on 27 and 28 June 2022

Employment Judge R King

Ms Jennifer Lafferty	**Claimant Represented by: Ms L Bain - Solicitor**
Simon Community Scotland	**Respondent Represented by: Mr E McFarlane - Litigation Consultant**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the claimant's claims of unfair dismissal and wrongful dismissal are dismissed.

REASONS

Introduction

1. The claimant claims that she was unfairly dismissed and wrongfully dismissed when her employment was terminated on 27 October 2021. She claims that she was not dismissed for a potentially fair reason but because she had raised certain concerns about her employment situation with the respondent's Director of Services. The respondent rejects her claims and maintains that it dismissed her for gross misconduct.

2. The claimant gave evidence on her own behalf. George Provan (Head of Service for North Lanarkshire Services), Jackie Smith (Head of Women's Services) and Frank Reilly (Strategic Lead) gave evidence on behalf of the respondent. A joint bundle of documents was produced. Both representatives made oral submissions and provided authorities.

Relevant law

Unfair Dismissal

3. Section 94 of the Employment Rights Act 1996 (ERA 1996) provides the claimant with the right not to be unfairly dismissed by the respondent.

4. It is for the respondent to prove the reason for dismissal and that it is a potentially fair reason in terms of section 98 (ERA 1996). At this first stage of enquiry, the respondent does not have to prove that the reason did justify the dismissal; merely that it was capable of doing so.

5. If the reason for dismissal is potentially fair, the Tribunal must determine, in accordance with equity and the substantial merits of the case, whether the dismissal was fair or unfair under section 94 (ERA 1996). This depends on whether in the circumstances, including the size and administrative resources of the respondent's undertaking, the respondent acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee. At the second stage of enquiry, the onus on proof is neutral.

6. If the reason for the claimant's dismissal relates to the conduct of the employee, the Tribunal must determine whether at the time of the dismissal, the respondent had a genuine belief in the misconduct and that the belief was based upon reasonable grounds having carried out a reasonable investigation – ***British Home Stores v Burchell 1978 IRLR 379.***

7. In determining whether the respondent acted reasonably or unreasonably, the Tribunal must not substitute its own view as to what it would have done in the circumstances. Instead, the Tribunal must determine the range of reasonable responses open to an employer acting reasonably in the circumstances and determine whether the respondent's response fell within that range.

8. The respondent's response can only be considered unreasonable if no employer acting reasonably would have responded in that way. The range of reasonable responses test applies both to the procedure adopted by the respondent and the fairness of its decision to dismiss – ***Iceland Frozen Foods Limited v Jones 1983 ICR 17 EAT***.

9. Any provision of a relevant Acas Code of Practice, which appears to the Tribunal may be relevant to any question arising in the proceedings, shall be considered in determining that question (section 207A, Trade Union and Labour Relations (Consolidation) Act 1992).

10. The Acas Code of Practice on disciplinary and grievance procedures provides that:

    i. Employers and employees should raise and deal with issues promptly and should not unreasonably delay meetings, decisions or confirmation of these decisions;

    ii. Employers and employees should act consistently;

    iii. Employers should carry out any necessary investigations to establish the facts in the case;

    iv. Employers should inform employees of the basis of the problem and give them an opportunity to put their case and response before any decisions are made;

    v. Employers should allow employees to be accompanied to any formal disciplinary or grievance meeting; and

    vi. An employer should allow an employee to appeal against any formal decision made.

11. The code also provides that in misconduct cases, where practicable, different people should carry out the investigation and disciplinary hearing.

Wrongful Dismissal

12. Wrongful dismissal is dismissal in breach of contract. Fairness is not an issue. The sole question is whether the terms of the contract, which can be express or implied, have been breached by the employer. The employee will have a claim in damages if the employer, in dismissing them, breached the contract and caused them loss.

13. Dismissing an employee without notice may be justified where the employee has committed a repudiatory breach of contract. An employer has a choice whether to accept the repudiatory breach or whether to affirm the contract. Where the employer decides to terminate the contract, then they have accepted the repudiatory breach by the employee. The question of what level of misconduct is required for an employee's behaviour to amount to a repudiatory breach is a question of fact for the court or tribunal.

14. The classic exposition of the concept of repudiatory breach of an employment contract was by ***Lord Evershed in Laws v London Chronicle (Indicator Newspapers Limited) [1959] 285 at 287*** where he set the question out as being *"whether the conduct complained of is such as to show the servant has disregarded the essential conditions of the contract of service".*

15. More recently, this was put in another way, namely whether the conduct *"so undermines the trust and confidence which is inherent in the particular contract of employment that the employer should no longer be required to retain the employee in his employment"* – ***Neary v Dean of Westminster [1999] IRLR 288.***

Issues

16. The Tribunal had to determine the following issues.

    i. What was the reason for the claimant's dismissal?

    ii. Was the reason for dismissal a potentially fair reason within the meaning of section 98(1) and 98(2) of the Employment Rights Act 1996?

    iii. If, as asserted by the respondent, the reason for the dismissal was related to the claimant's conduct and thus potentially fair, was the dismissal actually fair having regard to section 98 (4) of the Employment Rights Act 1996 and in particular the following:-

        a) Did the respondent have a reasonable belief that the claimant had been guilty of misconduct?

b) Did the respondent have reasonable grounds for that belief?

c) By the time it held that belief, had the respondent carried out as much investigation as was reasonable in the circumstances?

d) Was the decision to dismiss fair having regard to section 98 (4) of the Employment Rights Act 1996, including whether in the circumstances the respondent acted reasonably in treating the reason for dismissal as a sufficient reason for dismissing the employee?

e) Did the decision to dismiss and the procedure adopted fall within the *"range of reasonable responses open to a reasonable employer*"? ***(Iceland Frozen Foods Limited v Jones 1983 ICR 17)***

f) If the respondent did not adopt a fair and reasonable procedure, was there a chance the claimant would have been dismissed in any ***event (Polkey v AE Dayton Services Limited 1987 All ER 974).***

g) Did either party unreasonably fail to comply with the Acas Code of Practice and, if so, should the Tribunal reduce or increase any compensatory award due to the claimant (and if so by what factor not exceeding 25%)?

h) By her conduct, did the claimant contribute to her dismissal and should any compensatory award be adjusted accordingly (and, if so, by what factor?)

i) Did the claimant engage in conduct that was culpable of blameworthy and, if so, should the Tribunal make a reduction to any basic award to which the claimant would be entitled (and, if so, by what factor) to reflect this?

j) Did the claimant's conduct amount to a repudiatory breach of contract entitling the respondent to dismiss her without notice?

k) What financial loss has the claimant suffered in consequence of her dismissal and has she taken reasonable steps to mitigate her loss?

Findings in fact

17. Having heard evidence, the Tribunal makes the following findings in fact.

Background

18. The respondent is a homeless charity which supports homeless and formerly homeless people throughout the west of Scotland, including in Glasgow and North Lanarkshire. It provides care and support for service users within various care home settings as well as supporting certain service users who live supported in their own homes.

19. The respondent employed the claimant as a support worker from 1 December 2008 until her summary dismissal on 27 October 2021. Prior to her dismissal, the claimant worked in the respondent's outreach service, providing support to service users in their own homes or in temporary accommodation provided by the respondent.

20. The claimant's pay in the last three months of her employment was £357.35 gross per week and £306.62 net per week, with the respondent contributing 5% of her gross pay each month to her employer pension scheme. She had previously earned a higher rate of pay with the respondent when she had worked in different roles that had involved night shifts.

The claimant's absence through reduced mental health

21. In February 2021 the claimant began a period of long-term sickness absence, which lasted until 2 August 2021. During her absence she asked the respondent for a transfer from her outreach role to a support role based in one of the respondent's managed services, similar to roles she had carried

out previously. Such a role became available at the respondent's Motherwell Bridgework service during her absence. However, it was offered to another employee because the claimant was unfit for work when that vacancy arose. The claimant believed that she had been unfairly overlooked for that vacancy, which she believed had gone to someone less suitable.

The claimant's correspondence with Hugh Hill

22. On 19 July 2021 the claimant e-mailed the respondent's Director of Services Hugh Hill requesting a meeting to discuss her concerns about her alleged unfair treatment. Soon after her return to work from sickness absence on 2 August she met with Mr Hill on 25 August 2021 and explained to him that she believed she had been treated unfairly, having been overlooked for the Motherwell Bridgework role and also for training courses, those opportunities having gone to employees whom she thought to be less suitable for them than she was.

23. Following their meeting Mr Hill e-mailed the claimant on 26 August informing her that –

''It was a pleasure listening to you yesterday and enlightening.

I've spoken with a few colleagues about our conversation and we've agreed to do a bit of a deeper dive on some of the issues you raised. Really appreciate your insights and sharing how you felt.

I'll be in touch again''

The claimant's son's post music festival symptoms

24. On or around 30 August 2021, the claimant's son, with whom she lives in the same household, returned from a music festival. On the following day he telephoned her while she was at work and told her he felt he was '*dying'* from symptoms that he described to her as the same as he had experienced when he had previously had COVID 19 ('COVID') in June 2021.

25. On 31 August the claimant contacted Test and Protect who sent a PCR test to her home for her son to test himself because she was not confident about

driving him to a testing centre. In the meantime, he took a lateral flow test on 31 August, which was negative, but his symptoms persisted. The PCR test arrived on 2 September and on Saturday 4 September he received confirmation that he had tested positive for COVID.

26. The claimant was aware of her son's symptoms on 31 August 2021 and was also aware that they were consistent with symptoms of COVID. Widely available Scottish Government guidance at this time was that household contacts of anyone experiencing symptoms of COVID should self-isolate until they received a negative PCR test unless they were double vaccinated and two weeks clear of the second vaccination. The claimant was not double vaccinated at this time.

27. A high proportion of the service users for whom the respondent provides care and support have long term underlying health problems. While they are generally extremely vulnerable, many of them also find it hard to trust health services**.** Only one per cent of them have received COVID vaccinations

28. Because of the obvious health risk to its vulnerable service users in the event of COVID entering their homes and the potentially devastating impact of having to close a service, the respondent had circulated the Government guidance by e-mail to all its employees. It was well known among the workforce that the respondent required the self-isolation guidance to be followed strictly, in common with other measures such as mask wearing, hand sanitising and social distancing.

29. Although she had certain difficulties recovering e-mails that were sent to her during her absence between February 2021 and 2 August 2021, the claimant was aware of the Government guidance on self-isolation on 31 August 2021 when her son reported to her that he was suffering symptoms of COVID.

The claimant's attendance at work between 31 August and 3 September 2021

30. Even though she was aware of the self-isolation guidance, the claimant did not follow it and she remained at work on 31 August 2021 and then subsequently attended for work between 1 and 3 September 2021. During

this period the claimant visited several of the respondent's premises as well as several service users' homes, potentially bringing her into close contact with colleagues and service users alike and therefore exposing them to the risk of contracting COVID.

31. The individuals with whom she could potentially have come into close contact during the period in question were as follows:

- Wednesday 1 September 2021 - 3 Black Street staff members, 1 outreach staff member, 8 Black Street residents, 3 North Lanarkshire outreach clients.
- Thursday 2 September 2021 - 3 Black Street staff members, 1 outreach staff member, 8 Black Street residents, 2 North Lanarkshire outreach clients.
- Friday 3 September 2021 - 4 Black Street staff members, 2 outreach staff members, 1 Homes First staff member, 1 outreach staff member, 1 MAP staff member, 8 Black Street residents, 3 North Lanarkshire outreach clients.

32. It was only following her son's positive PCR test on 4 September that the claimant followed the guidance and self-isolated at home throughout the week commencing 6 September 2021, during which she too experienced symptoms consistent with those of COVID. She attended her GP on 13 September and was diagnosed with a non-COVID related virus, returning to work on 15 September 2021.

33. As well as being aware of the relevant public health guidance on self-isolation, the claimant was also aware that the respondent required her to follow that guidance to reduce the risk of transmission of COVID into the respondent's workplaces and into the homes of its service users because of their vulnerability and the potentially devastating impact of having to close a service if COVID was introduced.

34. However, she claimed to believe that anyone who had previously contracted COVID was immune from contracting it again for a period of 180 days after

the first bout. As both she and her son had contracted the virus in June 2021, she maintained that they were immune from the virus and that she was not required to self-isolate. The claimant had no reasonable basis for that asserted belief.

35. As a result of her failure to self-isolate, when she attended work between 31 August and 3 September 2021 there was a material risk that she would bring the virus into her workplace and into the homes of the respondent's vulnerable service users.

The return to work/fact finding meeting on 15 September 2021

36. On 15 September 2021, on her return from her period of absence, the respondent's George Provan conducted a return to work meeting with the claimant at the respondent's Bridgework premises in Motherwell. During their meeting she explained that her son had returned home from a music festival on 30 August, that he had developed COVID symptoms the next day and had then telephoned her at work to inform her and tell her that he was self-isolating at home as a result. He had then taken a PCR test and had tested positive on 4 September.

37. Having dealt with the return to work part of the meeting, Mr Provan proceeded to discuss with the claimant his concern that she had attended work between Tuesday 31 August 2021 and Friday 3 September 2021 when her son, a household contact, was suffering from the symptoms of COVID. Mr Provan was concerned that she had attended work in circumstances where government guidance, which the respondent was following strictly, was that she should self-isolate and book a PCR test in order to avoid risking the spread of COVID among the respondent's employees and service users.

38. Mr Provan asked the claimant why she had not followed the government guidance to self-isolate and book a test. The undisputed notes of the fact finding interview contained the following passages:

"George – is there a reason why you did not book isolate and book a test?

Jen – I did not think he had covid and thought we were immune.

George – Where did you get this advice?

Jennifer – No idea, just people telling me I was immune. Spoke to Sam and previously in Black there was a suspected case of covid. Sam asked me to leave the office and go into the lounge as Jen had previously had covid and said she was immune. Sam says just sit there then.

George – did you not check the government website, the scottish guidance (NHS inform) on what to do if you are living with someone who has to self isolate?

Jen – No, there are a lot of different websites with a lot of information.

George – when you booked a test for Robbie, did you not collect a test and seek advice about self isolating?

Jen – No, I actually told them the only reason I couldn't take him to a test was because I was at work. At no point did they advise me to self isolate and Jen did not ask.

George – Did you read the covid guidance that has been sent to you and all staff on 3 separate occasions during the course of the pandemic, May, August & March of this year, which clearly advises that if you or anyone in your household has symptoms then they and the household must self isolate and get a test?

Jen – I would have done as I read everything that comes in. Jen said she also had problems with her emails as she had lost a lot of emails.

George – can you remember signing a google form to confirm that you had to sign confirmation of reading the guidance?

Jen – not that specific form but there is always something updated.

George – the guidance is that you also need to self isolate and get a test done when a household is symptomatic were you not aware of this?

Jen – I was not aware of this. He had symptoms but we did not believe he had covid. I would not put people at risk.

George – did you not think to contact the NHS or even contact your manager and seek advice if you were unclear?

Jen – Already called 911 and updated them and told them of the household. They never said anything about me having to self isolate.

George – did you speak to any of your colleagues and advise that Robbie had symptoms and was self isolating?

Jen – Jen spoke to Michelle and Sam and not really seeking advice but only mentioned it in conversation."

39. The claimant also informed Mr Provan that she believed that another employee had attended work when her own son had COVID symptoms, but that she had not been investigated and therefore she was being treated differently.

Mr Provan's further investigation

40. Following the fact-finding interview, Mr Provan spoke to Michelle Patrick and Sam Fingland, the colleagues whom the claimant told him she had advised of her son's COVID symptoms when she had been at work between 31 August and 3 September 2021.

41. Mr Provan spoke to Michelle Patrick on 15 September 2021. The notes of that conversation record the following exchange–

‘*'George – did she speak to you the week before she went off sick about her son and his symptoms? This would have been the week commencing 30th August.*

Michelle - "Not that I can recall".

42. Mr Provan then spoke to Sam Fingland on 27 September 2021. The notes of that conversation record the following exchange –

''George - I advised Sam that Jen had said that she discussed with her that her son had covid symptoms the week commencing the 30th of August, is this accurate?

Sam - The first I heard she had a son was on the 6th of September when she spoke to me about him having COVID symptoms.

…

George - What advice would you have given Jen if she had told you her son was symptomatic on the week commencing 30 August

Sam – The same advice I would give to anyone. To book a test for the person but also a test for themselves and not to come into work until they had a negative PCR test result. Even with a negative PCR test people should still be self isolating outside working hours."

43. Mr Provan also spoke to the employee whom the claimant believed had attended work while her son was symptomatic but had not been investigated. She admitted to him that her son had been suffering from COVID but that she had remained off work until she obtained a negative PCR test. Mr Provan accepted her version of events.

44. Having completed his fact-finding investigation Mr Provan prepared and submitted an Investigation Form to the next level of management in order that they could decide on any further disciplinary action that they deemed appropriate. Mr Provan did not at any point give the claimant an indication about his view of the likely outcome of the disciplinary proceedings.

The disciplinary hearing

45. Following the fact-finding investigation, the respondent's Jackie Smith wrote to the claimant on 1 October 2021 inviting her to a disciplinary hearing at 3 p.m. on Wednesday 6 October 2021 on the Google Meet video platform in respect of the following allegations:

- *"Failure to adhere to Public Health Guidance surrounding covid self isolation rules and therefore placing service users and staff at risk by attending work when your son (who you live with) was symptomatic and subsequently tested positive.*
- *Breach of trust and confidence in relation to the above.*

- *Breach of SSSC Codes of Practice in relation to the above, specifically – "as a social service worker, I must uphold public trust and confidence in social services".*

46. In her letter, Miss Smith informed the claimant that if the respondent concluded that she had committed gross misconduct then one possible outcome was summary dismissal. The letter also informed the claimant of her right to be accompanied by a work colleague or an employee/union representative.

47. The disciplinary hearing took place as planned on Wednesday 6 October 2021. At the outset, the claimant explained that she did not have union representation or a companion, but that she was happy to proceed on that basis. Gemma Reid from HR attended as note taker.

48. During the hearing the claimant was afforded every opportunity to answer the allegations against her. She explained to Miss Smith that her understanding was that when her son returned from the music festival on 30 August 2021 both she and her son were immune from COVID because they had previously had COVID in June 2021. While she admitted that she was aware of the relevant Government guidance on self-isolation and had seen the respondent's e-mails repeating that guidance she had decided not to self-isolate because she did not believe that her son could have had COVID and therefore she did not consider that the self-isolation guidance applied to her. However, she informed Miss Smith that she now accepted that she should have self-isolated.

49. The claimant also told Miss Smith that during the week beginning 30 August when she had been at work, she had told both Sam Fingland and Michelle Patrick about her son's symptoms and neither had told her to self-isolate.

50. She also explained that her understanding of Government guidance was that there was no need to take a test unless symptomatic. When she had called Test and Protect they had confirmed that she had done the right thing by not taking a test. Miss Smith was concerned that the claimant appeared to be

focused on testing whereas the respondent's concern was about her failure to self-isolate.

51. Following the disciplinary hearing, Miss Smith considered all the evidence, including the claimant's submissions. Having done so she arranged a video call with her on 27 October 2021 to explain her decision and reasons, following which she wrote to the claimant on 27 October 2021, as follows:

*"**Outcome of Disciplinary Hearing – Summary Dismissal***

I am writing to you regarding your Disciplinary Hearing on 6th October.

…

Findings

I have reviewed all the evidence and your representation and can summarise my findings. You stated at the hearing that when your son was initially unwell, you did not suspect that he had COVID, even when he stated that he was suffering from the same symptoms. You advised him that he couldn't contract COVID as he was immune, as it was your understanding that once you had COVID, you are immune for a period of 3 months. You advised during the hearing that you, your partner and son had all tested positive for covid in July 2021.

Despite the fact you claim you did not suspect this to be COVID, you did contact Test and Protect on Tuesday 31st August when your son advised of the same symptoms of his previous covid illness. You stated that you didn't wish to drive to a testing centre after working all day and you weren't that confident at driving therefore you requested a testing kit be posted out. You then received this kit on Thursday 2nd September, and you sent it back on the same day. Your son then received a positive test result on Saturday 4th September.

During this time (Tuesday - Friday) you continued to remain in work. You visited various North Lanarkshire services and had contact with approximately 11 staff members and 16 of our service users, who are extremely vulnerable.

Due to the vulnerability of our service users, the organisation had issued numerous communications regarding what was expected of staff if they are a close contact, symptomatic or have a positive test. The most recent of these being on 27 August 2021, due to the upcoming music festivals in Glasgow and surrounding area.

Having discussed this matter with the managers at the service, they have noted that none of them were made aware of your son's symptoms or pending test and it wasn't until you called Sam Fingland, Service Leader, on Monday 6th September that you mentioned your son had received a positive test result. Due to this result, you took a test on the same day, and you also highlighted that you had started to become symptomatic on Sunday 5th and therefore had to self-isolate. You told Sam this when you called in.

I explained that under public health and company guidance, you were expected to self-isolate as soon as you were aware that your son was symptomatic, especially given the fact that the symptoms were the same as when he had tested positive for covid previously.

Considering your points of mitigation, throughout the hearing, you failed to explain why you did not self-isolate but instead explained your understanding of the testing procedure. You advised that you were aware that you were only to take a test if you are symptomatic, hence why your son took a test but that you or your partner did not. However, this was contradicted by your initial view that you were immune, and you further contradicted this by taking a test on Saturday after your son received his positive test but before you were symptomatic on the Sunday. You also stated that you had a general conversation with Sam Finland and your colleague Michelle Patrick during the week you were at work and during this conversation, you advised that your son was symptomatic however neither Sam nor Michelle recall this conversation. Sam also clearly narrated to me that should she had been made aware, she would have asked you to isolate immediately, and I can find no reason to doubt this assessment.

Conclusions

Due to the admissions that you have made, there is little dispute in the factual scenario. Thus, I have little trouble in concluding that you did indeed fail to follow COVID protocols.

I have therefore spent time considering the appropriate level of sanction. Given the potentially serious nature that a COVID outbreak could have on our service users, not to mention other staff, this is something I believe to be most serious in nature. This is reinforced by the periodical reminders that we provided to ensure that all staff were aware of their obligations and duties. Therefore, in your failing to do so, I believe that this demonstrates a complete disregard for process and/or a negligence in your duty. Thus, I believe that it is serious enough to constitute gross misconduct.

During your disciplinary hearing, you stated that you did not agree with the investigation or subsequent hearing as you felt that you had not done anything wrong. You also failed to acknowledge the seriousness of the incident nor give us any encouragement that you would act differently if the same circumstances arose in the future. Also, the inconsistencies in your explanation of events now and at the time of the initial investigation, as well as the lack of corroboration from other workers on your version of events, do not persuade me that you were misled or confused, and raise serious concerns over your honesty and integrity.

Furthermore, given the vulnerability of our service users and the transparency of communication regarding covid within the organisation and externally, I am unconvinced that you totally misunderstood the rules. If you had at least sought clarity from a manager within the organisation, they would not have allowed you to continue working and this situation would have been avoided and our services protected, however you failed to seek clarity from anyone in the organisation.

I have considered your past disciplinary record and length of service, but without any further compelling exculpatory evidence, I do not believe that the sanction should be downgraded. Likewise, I feel that the trust and confidence

between you and the organisation has been irrevocably damaged to the point that you could not return to the service.

Based on the above, I now wish to advise you that the outcome of your Disciplinary Hearing is your Summary Dismissal on the grounds of Gross Misconduct. By virtue of your summary dismissal for Gross Misconduct, you forfeit the right to notice (statutory; contractual or payment in lieu). Therefore, your contact will be terminated on date 27 October 2021."

52. In reaching her decision, Miss Smith considered whether a penalty short of dismissal would be appropriate but ultimately concluded that the claimant's failure to recognise the seriousness of her actions and acknowledge the potential risk to service users was such that she had taken no reassurance that there would be no repeat in future.

The claimant's appeal against dismissal

53. In due course, the claimant appealed against the penalty of dismissal and an appeal hearing took place before the respondent's Frank Reilly by Google Meet on Thursday 11 November 2021. In advance of the hearing she provided a written notice of appeal setting out her grounds of appeal. Once again, the claimant was offered the opportunity to be accompanied but declined. During the appeal hearing, the claimant was afforded every opportunity to make representations as to why she should not have been dismissed. Once again, Gemma Reid from HR attended as note taker.

54. In support of her appeal, the claimant submitted that her son had taken a lateral flow test on Tuesday 31 August 2021 which had been negative and therefore she had assumed that he did not have COVID. The claimant also referred to the written conditions of entry to a BBC music festival in May 2021, which she had provided as a screenshot to Mr Reilly in advance of the appeal hearing, one of those conditions being -

''Proof of natural immunity based upon a positive PCR test taken within 180 days of the show / event''

55. She explained to Mr Reilly that in line with that entry condition she had understood that she and her son had natural immunity at the material time, having both had COVID in June 2021. In the circumstances she believed it was reasonable for her to conclude that he could not have COVID in August and that it was therefore also reasonable for her not to have self-isolated between 31 August and 3 September 2021.

56. She also explained that the incident had happened not long after she had returned to work after a lengthy period of absence because of mental health issues and on her return she had been unable to recover emails that had been "wiped" from her system. It had therefore been unfair for the respondent to rely on her having read emails about COVID rules in the workplace when she had in fact been unable to read them. In addition, she had been unaware of the SSSC guidance on its website.

57. The claimant also explained to Mr Reilly that she had contacted Test and Protect but that they had advised her not to take a PCR test as a previous positive reading could give a false reading because residual fragments could be in her system.

58. Mr Reilly clarified that the respondent's concern was not about testing but about the claimant having failed to follow guidance about isolating when a household contact had COVID. When he asked her whether she was aware of the relevant guidance on self-isolating that the respondent was following, her response was:

"Yes, I do know, but as I said before, I didn't believe he had COVID. Spoke to T&P, LFT was negative, so I thought he was immune, and I had no symptoms, didn't just think I would come into work and spread it about."

59. The claimant also submitted to Mr Reilly that she had told her manager Sam Fingland about her son's symptoms and she had not told her to self-isolate. She also believed that one of her colleagues had gone into work with COVID symptoms, as had Sam Fingland, and no action had been taken against them. In all the circumstances she believed her dismissal had been harsh, inconsistent, and unfair.

The appeal decision

60. Following the appeal hearing, Mr Reilly retired to consider his decision. In common with Miss Smith, Mr Reilly concluded that even at this point in the dismissal process, the claimant had still not acknowledged that she had done anything wrong. He was also satisfied there was no evidence of any inconsistency of treatment. He therefore wrote to the claimant on 18 November 2021 rejecting her appeal for the following reasons:

"In reviewing your submissions, I have taken account of the different guidance between Scotland and England. 'Natural immunity' is a phrase that applies in England and is not recognised by the NHS or Social Care in Scotland. It is the guidance from NHS Scotland and SSSC which we are duty bound to implement under the Coronavirus (Scotland) Acts 2020" (as amended).

I do note that due to this different government guidance, if this was viewed in isolation, that it may well not have been immediately clear to you what procedure you should have followed. However, this is not what I believe to be the case. As was noted in the original decision, SCS has issued clear and concise guidance of the standards that we expect staff adhere to throughout the pandemic. In particular, specific guidance was issued immediately prior to this before TRNSMT festival as we had identifies there was a higher risk of cross infection at these type of events. As such, I am unconvinced with your position that you were unaware that SCS expected you to isolate.

I am also conscious of the professional responsibility of SSSC registered staff to ensure that they are following and implementing guidance for the safety of colleagues and those we support, specifically 5.7 in the Code of Practice: I will not put myself and other people at risk. Even taking away the guidance put above, given the higher risk profile of the supported people that we assist, I also believe that on a common-sense approach would obviously dictate that you should isolate even when there is suspicion of a covid case, and this would have been fully endorsed by management should you have made them aware.

This is another point of consternation for me that it appears that you did not inform management of the situation. On one hand, you believed that you were immune, but on the other you did organise for a PCR test to be carried out. Likewise, if you were confused by the guidance then I would have expected this to be raised with management as a point of urgency, rather than at the late stage that it was.

Conclusion

I note that the sequence of events presented at your previous hearing were not in dispute and also your interpretation of the guidance you chose to follow was quite clear. However, it is also clear that staff across the Simon Community have been informed on a number of occasions that suspected COVID symptoms within a household should result in self-isolation until a negative PCR test is produced. When I asked you if you understood this to be the case, you agreed that you did.

In analysing your submissions and the minutes from our meeting, I have concluded:

- *You did not appear to be aware, or acknowledge, that your actions put the health and wellbeing of others at risk.*
- *You did not follow the guidance that was communicated to all staff and is freely available on NHS Scotland and SSSC websites.*
- *The additional evidence you presented was hearsay and does not take into account the wider surrounding circumstances in which you were working and the risk profile of our service users.*

Considering this in the round, I have concluded that the evidence you have presented is not sufficient to persuade me to overturn the decision of your original hearing. I therefore confirm that I endorse the decision to summarily dismiss you from the Simon Community Scotland for gross misconduct and your appeal is not upheld. I must advise you that this decision is final and there is no other right of appeal."

61. The claimant's dismissal had a profound effect on her health to the extent that she has been unfit to work since her dismissal and she has not sought any alternative employment. Her mental health remains significantly affected by the circumstances of her dismissal.

Submissions

The respondent

62. On the respondent's behalf, Mr McFarlane submitted that the claimant had been dismissed for the potentially fair reason of conduct and that her dismissal had been fair.

63. In the first place, he submitted that Mr Provan had conducted a reasonable investigation and that the claimant's suggestion that she had been "ambushed" was denied. There was no requirement for the respondent to give the claimant any advance warning of the fact-finding interview. The test was whether the respondent had acted reasonably, and it had met that test. While she had been taken aback, the investigation had to start somewhere.

64. When the investigatory meeting did take place, it was conducted reasonably and the claimant had been given every opportunity to put her case, including afterwards on the day of the investigation meeting when she followed up to Mr Provan with an email. There followed several telephone meetings between Mr Provan and other witnesses, and all of these were conducted appropriately. In all the circumstances, the investigation had been a reasonable one.

65. Although the claimant had claimed that her dismissal had been a sham and that the true reason was because she had raised issues with the respondent's chief executive Mr Hill, there was no evidence of that. The claimant had been dismissed for misconduct and all the evidence of that misconduct had ultimately come from the claimant.

66. In Mr McFarlane's submission, the claimant's conduct was properly described as gross negligence amounting to misconduct. When her son had told her that he was "*dying"* when he come home from the music festival but in fact

suffering from the same symptoms he had suffered when he had COVID, the issue of COVID was clearly in her mind.

67. In the circumstances the claimant ought to have known about her duty to self-isolate because of the government guidance, which had been repeated and circulated by the respondent and by its regulator, the SSSC. The respondent was entitled to take issue with her and her conduct was sufficiently serious to dismiss her. In Mr McFarlane's submission, the key issue for the Tribunal was whether dismissal was within the range of reasonable responses and in his submission it was.

68. In a procedural sense, the claimant had also been treated fairly. The SAMH policy she had referred to, while not a policy that the respondent was legally bound to follow *had* been followed and therefore the respondent had followed a reasonable procedure in line with her expectations. Ultimately a reasonable investigation had taken place, she had attended a disciplinary hearing where had been offered every opportunity to state her case and she had been offered an appeal in which she also fully participated.

69. The evidence was clear that she had attended work when her son, a close household contact, had COVID symptoms. It must have been the case that a precautionary approach was the right thing to do from an experienced social care worker with long service. This was a case where the claimant's long service went against her because she should have and did know better. Yet she adopted a wilful blindness to her son's situation and the respondent was entitled to regard her conduct with consternation. Overall, the respondent's decision was reasonable and there had been procedural fairness.

70. There was no evidence that supported the claimant's claim that she had been treated differently from other employees in similar circumstances. Reference was made to ***Hillcrest Care Limited v Morrison EAT/2992004.***

71. Mr McFarlane also submitted that there was no evidence that the claimant's dismissal had any connection to the issues that she raised with Mr Hill before she was dismissed. While the claimant may have *perceived* that the true

reason for dismissal was because of the issues that she had raised, there was no basis on which the Tribunal could make such a finding.

72. Ultimately, the claimant had accepted that her conduct was blameworthy. The question for the Tribunal was the degree of blameworthiness. In the respondent's submission, the claimant had been grossly negligent and had put vulnerable service users at risk. Her dismissal in those circumstances was within the range of reasonable responses.

73. If the Tribunal found the dismissal was unfair, then the respondent submitted that the claimant's losses should be calculated having regard to the outreach role that she was doing before her dismissal and not the role that she had previously done that included nightshifts and was more financially lucrative for her.

74. If the Tribunal concluded the claimant had been unfairly dismissed, he submitted that the claimant had been wholly to blame for her dismissal and had therefore contributed 100% to her dismissal. Reference was made to ***Hollier v Plysu Limited IRLR 260 1983.***

75. If it was found that there been an unfair procedure adopted Mr McFarlane submitted that a fair dismissal would have resulted in any event had a fair procedure been adopted and that a 75% reduction would be appropriate to reflect that.

76. Mr McFarlane also submitted that in circumstances where the claimant was now unfit to work, then her future losses were potentially nil in any event.

77. In relation to wrongful dismissal, Mr McFarland submitted that the Tribunal had to make its own findings of fact ***- Nugent Care v Boardman 2013 EWCA Civ 198***. He submitted that on the evidence, there was sufficient evidence for the Tribunal to find that the claimant had acted in a grossly negligent way amounting to a repudiatory breach of contract by failing to act in a reasonable manner and thereby putting service users at risk.

Claimant's submissions

78. Miss Bain submitted that the respondent's decision had not been within the band of reasonable responses. The claimant had been very clear as to the reason why she had not self-isolated, which was that she genuinely believed she and her son had immunity because they had previously tested positive in June 2021. The claimant had also relied on the guidance issued by the BBC, which indicated that anyone would have immunity from COVID for 180 days after a positive test. She had reasonably concluded that the BBC would have applied relevant government guidance and that is why she had followed it.

79. The claimant's son had not tested positive by the time she initially went to work on Tuesday 31 July 2021. Her return to work was reasonable in light of her genuine belief of her natural immunity. Although the respondent did not accept that her belief was genuine, it truly was. It was unfair that Miss Smith had accepted that a negative LFT was sufficient in order to attend work but she would not accept that the claimant's son's negative LFT was sufficient to give the claimant assurance that she could go to work safely.

80. Referring to ***Sandwell & West Birmingham Hospitals NHS Trust v Westwood UKEAT/32/09,*** Miss Bain submitted that gross misconduct involved either deliberate wrongdoing or gross negligence. The claimant's conduct amounted to neither of those. Mr Provan had agreed with that view and had told her he did not believe that her behaviour had amounted to gross negligence. She had not acted maliciously. It was significant that if she had self-isolated, there would have been no financial detriment to her so there was no financial reason not to do so. Her conduct had not been deliberately wrong, and no reasonable employer would have formed the view that she did not have a reasonable belief that she was immune. The claimant genuinely believed that she had immunity and she genuinely did not believe that she was putting service users at risk. At its highest, she had misinterpreted confusing guidance.

81. Miss Bain also invited the Tribunal to accept that the conversations that the claimant said had taken place between herself and her colleagues had in fact

happened. The claimant's evidence was that she had spoken to her colleagues and that they knew about her son's symptoms but had not given her any instruction to self-isolate. While those colleagues had said that they did not recall the conversations that the claimant alleged had taken place, it did not mean that they had not happened. The respondent's findings in relation to that point had been unreasonable.

82. So far as the SSSC codes were concerned, these had never been specifically referred to during the disciplinary hearing and to rely on them was unfair. Any reasonable employer would not have considered that they should act in the manner amounting to gross negligence.

83. She submitted that the Tribunal should also take into account that the claimant had difficulties with her emails and had been unaware of guidance that had been circulated by the respondent. Mr Provan should have investigated that point further and no reasonable employer would have dismissed her when faced with the evidence about the problems that she had recovering emails.

84. Miss Bain also submitted that the claimant had never been flippant and that it had been wrong for Ms Smith to conclude that she had been.

85. The fact-finding investigation had also been unfair because Mr Provan had given the claimant no notice of it even though he was aware there would be a fact-finding investigation meeting after the return to work meeting. As a result, she was unprepared, which was evidenced by her sending on further information to Mr Provan after that meeting had taken place.

86. The claimant genuinely believed that her concerns raised with Mr Hill had been the reason she had been dismissed. She had raised certain concerns with him and shortly after, she was under investigation. He had said in his e-mail to her that he would discuss her concerns with management and as far as the claimant was concerned, *'management'* meant the managers who had dismissed her. It was reasonable for her to draw the inference that the managers involved in the dismissal would have been the same managers with whom Mr Hill had discussed her complaints.

87. The claimant's dismissal was also unfair and inconsistent with its treatment of the other employees who had attended with symptoms and had not been dismissed. Their situations had been truly comparable, yet they were treated more leniently.

88. In relation to wrongful dismissal, Miss Bain submitted that the claimant had not acted in a way that amounted to a repudiatory breach of contract. She had not knowingly breached COVID guidance.

89. In relation to compensation, if the Tribunal found she had been unfairly dismissed there was no basis upon which her compensation should be reduced. She had not acted in any way that was culpable or blameworthy to the extent that any of the factors in ***Nelson v BBC 1979 IRLR 346 (CA)*** were met.

90. Furthermore, she had not failed to mitigate her losses in circumstances where she was simply too unwell to work due to her low mood following her dismissal.

91. On the matter of compensation the claimant also wished the Tribunal to take into account the higher level of salary and additional overtime payments that she would have earned for sleepovers had she been transferred to the role she had asked Mr Hill to give her prior to her dismissal, even though that was not her role when she was dismissed.

Discussion and decision

92. In the first place, the Tribunal accepted that the reason for the claimant's dismissal was a reason related to her conduct and that this was a potentially fair reason. The Tribunal was satisfied that there was no evidence of any link between her dismissal and the concerns she had previously raised with Mr Hill, even though they were closely linked in time.

93. The investigation conducted by the respondent arose from it having come to the respondent's attention that the claimant may have attended work alongside its employees and its vulnerable service users in circumstances where her son, a household contact, was to her knowledge suffering from

symptoms of COVID. In those circumstances it was entitled to consider this a serious matter.

94. It was therefore reasonable for Mr Provan to conduct a fact-finding meeting on the claimant's return to work. Although the claimant felt taken by surprise, the Tribunal finds that this meeting was carried out in a manner that was fair and reasonable. There was no requirement on Mr Provan to provide the claimant with advance notice of the meeting and there was no evidence that the absence of notice resulted in any unfairness to her.

95. Further, in all other respects the Tribunal finds that the respondent carried out a thorough and fair investigation into the claimant's alleged conduct and that at all stages of the disciplinary process it engaged fully with and considered the claimant's explanations for her actions.

96. The claimant's position throughout the entire disciplinary procedure was that she had believed that she and her son were immune from COVID and even though he had developed symptoms that were the same as he had suffered when he had previously had COVID, it was impossible for him to get COVID or for that to transmit to her. In the circumstances, she claimed that her actions in going to work instead of self-isolating had been reasonable.

97. The Tribunal finds that the respondent was entitled to reject her explanation for her actions because it was not based on science or on any advice that she was reasonably entitled to rely on. The BBC event screen shot that she produced at the appeal stage did not support her position that she was immune from COVID and did not have to self-isolate. In any event the fact that she did not produce this screen shot until the appeal stage casts serious doubt on her having relied on it at the material time.

98. The claimant's account is also undermined by her having contacted Test and Protect and having arranged for her son to take both a lateral flow test and a PCR test when on his return from the music festival he complained that his symptoms were the same as he had suffered when he had COVID in June. It is more likely than not that had she genuinely believed that she and her son were immune from COVID she would not have immediately taken those steps.

99. The Tribunal accepted the respondent's evidence that its population of service users are a generally vulnerable group, many of whom have long-term health problems and only a tiny proportion are vaccinated against COVID. It is and was well known that the virus is extremely infectious and transmissible and particularly dangerous for certain sections of the population including those who suffer from long term underlying health problems, such as affect the service users in the respondent's care, only one per cent of whom have received a COVID vaccine.

100. In the circumstances, the respondent, like many companies within the care sector, require to be extra vigilant in preventing possible sources of infection reaching its care home environment. The repercussions in the event of transmission of COVID into the respondent's community of service users would likely have been extremely serious and potentially deadly.

101. The claimant was an experienced worker within social care and therefore knew about the importance of the government guidance, repeated by the respondent, that at that point in the pandemic any household contact of an individual with COVID symptoms should self-isolate and take a PCR test. She also knew the possible consequences of not following that guidance.

102. In all the circumstances the Tribunal finds that the respondent had a genuine belief on reasonable grounds that the claimant had failed to follow public health guidance and had attended work on 31 July and between 1 and 3 August 2021 in circumstances where she should have been self-isolating and that by her conduct, she exposed her colleagues and vulnerable service users to the risk of catching COVID and the potentially serious consequences of that.

103. So far as the respondent's reference in the disciplinary letters to breach of the SSSC's Code of Conduct is concerned, the Tribunal found that such a breach was a collateral consequence of the claimant's conduct but that the principal reason for her dismissal was her failure to follow public health guidance.

104. The Tribunal was also satisfied that at all times the respondent adopted a fair procedure and acted in compliance with the Acas Code of Practice on disciplinary and grievance procedures.

105. The Tribunal therefore concludes that the claimant's dismissal was within the band of reasonable responses available to the respondent and was not unfair.

Wrongful dismissal

106. The Tribunal has found in fact that the claimant failed to follow public health guidance and attended work between 31 August and 3 September 2021 in circumstances where she should have self-isolated because there was a risk of transmission of the COVID virus to colleagues and vulnerable service users.

107. Having regard to the nature of her job and its inherent responsibility to keep service users safe, the claimant thereby disregarded one of the essential conditions of her contract of employment and in so doing undermined the essential trust and confidence that the respondent previously enjoyed in her.

108. In those circumstances, the Tribunal is satisfied that her actions amounted to a repudiatory breach of her contract of employment, which the respondent accepted by dismissing her, and that she was not wrongfully dismissed.

109. Her claims are therefore dismissed for the foregoing reasons.

Employment Judge: **R King**
Date of Judgment: **22 August 2022**
Entered in register: **22 August 2022**
and copied to parties