



EMPLOYMENT TRIBUNALS

Claimant: Miss E Reynolds
Respondent: Carebase (Sewardstone) Ltd
Heard at: East London Hearing Centre (via CVP)
On: 28 June 2022
Before: Employment Judge Garsed (sitting alone)

Representation

Claimant: Nick Toms (Counsel)
Respondent: Matt Jackson (Counsel)

RESERVED JUDGMENT ON LIABILITY

The judgment of the Employment Tribunal is that the claim of unfair dismissal is not well-founded, and the claim is therefore dismissed.

REASONS

Background and basic procedural history

1. This is a claim brought by Miss Eileen Reynolds (the Claimant), against her former employers, Carebase (Sewardstone) Limited (the Respondent).
2. The Claimant was employed by the Respondent as a Care Assistant at the Ashbrook Care Home.
3. Her employment commenced on 29 April 2019, and she was continuously employed in that role, until she was dismissed by letter dated 11 August 2021 following a disciplinary hearing on 09 August 2021. The decision to dismiss her was upheld at an appeal hearing on 02 September 2021 and this was confirmed to the Claimant by letter dated 03 September 2021.

4. An ACAS early conciliation certificate was issued on 24 November 2021. An ET1 Claim Form was received by the Employment Tribunal on 29 November 2021 and the claim is therefore comfortably in time. The claim is for unfair dismissal and corresponding compensation, only.

5. An ET3 Response Form was received by the Employment Tribunal on 22 February 2022 and the claim is wholly resisted.

The Hearing

6. This hearing was convened and conducted as an online video hearing.

7. The Claimant attended the hearing and was represented by Mr Nick Toms (Counsel). The Claimant had previously provided to the Tribunal and to the Respondent, a signed witness statement dated 09 June 2022 and she also gave oral evidence at the Tribunal hearing. She was assisted during the giving of oral evidence by her son, Mr Lee Coghlan, as she required some support with using the technology and finding documents. He did not give evidence, he was visible to all other participants whilst helping the Claimant, and his involvement was limited to the assistance described.

8. The Respondent was also in attendance at the hearing in the form of Sharon McCarthy from the Respondent's Human Resources department, Jean Bishop (Business Manager) and Dawn Sharp (Business Manager). The Respondent was represented by Mr Matt Jackson (Counsel).

9. The Respondent had previously provided to the Tribunal and to the Claimant a witness statement from Jean Bishop which is unsigned and undated (no issue is taken with this by the Claimant), and a witness statement from Dawn Sharp which is also unsigned and undated (again, no issue is taken with this).

10. Of the Respondent's witnesses, only Jean Bishop gave oral evidence at the Tribunal hearing and the written statement of Dawn Bishop was admitted in evidence, but she gave no oral evidence and was not cross-examined. This was because she was in Spain on the date of the Tribunal hearing, and it had not been possible to confirm beforehand, that she would be able to give evidence to the Tribunal in accordance with any local requirements there may be for that to occur.

11. The parties had also provided for the purpose of the Tribunal hearing, an agreed bundle of documents, which is indexed and paginated, and extends to 199 pages. I have considered the bundle in its entirety in reaching my conclusions and will refer to the page numbers when referring to an item relevant to a particular aspect of this judgment.

12. The evidence before the Tribunal at this hearing, was focussed on the issue of liability and the parties agreed that this should be decided first and separately, and that any necessary remedy could be determined at a separate and later hearing, depending on the Tribunal's findings on whether the claim is well-founded or not.

13. This judgment was reserved at the conclusion of the hearing as it was not possible in the remaining time available to provide an oral judgment.

The Relevant Law in relation to Unfair Dismissal:

14. Under Section 94 of the Employment Rights Act 1996 ('the ERA 1996') an employee has a right not to be unfairly dismissed by their employer. Section 98 of the ERA 1996 governs what constitutes a fair or unfair dismissal.

15. Section 98(1) provides that in deciding whether a dismissal was fair or unfair it is for the employer to show the reason for that dismissal.

16. That reason must be one of the potentially fair reasons to be found within Section 98(2) of which, subsection (2)(b) states: "*A reason falls within this subsection if it relates to the conduct of the employee.*"

17. Section 98(4) of the ERA 1996 requires the Tribunal to consider whether the employer acted reasonably in dismissing the employee for one of the reasons in Section 98(2).

18. In a conduct dismissal, the Tribunal in undertaking the consideration set out in Section 98(4) of the ERA 1996, must follow the approach described in the decision in **British Home Stores Ltd v Burchell** [1978] IRLR 379, which requires this Tribunal to consider four questions in determining whether the decision to dismiss on the grounds of conduct was fair and reasonable:

- Whether the employer genuinely believed that the employee had engaged in the conduct for which she was dismissed?
- Whether they held that belief on reasonable grounds?
- Whether in forming that belief they carried out a proper and adequate investigation?
- Whether subsequent to such an investigation and in all the circumstances, the dismissal was a fair and proportionate sanction based on the conclusions they had reached?

19. In addition, as set out in **Iceland Frozen Foods Ltd v Jones** [1983] ICR 17 and **Sainsbury's Supermarkets v Hitt** [2003] IRLR 23, the Tribunal must consider the reasonableness of the employer's decision to dismiss and, in determining the

reasonableness of that decision, the Tribunal must not substitute its own decision as to what was the right course to adopt for the employer (*per* **Post Office v Foley** [2000] IRLR 827). Instead, the Tribunal must consider the band of reasonable responses to the conduct within which one employer might reasonably take one approach whilst another quite reasonably may have taken a different one.

20. I must decide therefore, whether in all the circumstances of this case, the decision to dismiss the Claimant fell within the band of reasonable responses which a reasonable employer might have chosen. If the decision to dismiss her falls within that band of reasonable responses it is a fair dismissal, however if the decision to dismiss falls outside that range of reasonable responses, it will be an unfair dismissal.

The Issues

21. It is not disputed that the Respondent dismissed the Claimant, and nor is it in issue that the reason relied upon for the dismissal was gross misconduct. It is therefore left to the Tribunal to determine whether that decision to dismiss the Claimant on the grounds of conduct was substantively and procedurally fair.

Findings of Fact

22. The Parties agree that the Claimant was employed by the Respondent as a Care Assistant at the Ashbrook Care Home.

23. Ms Bishop accepted in her evidence that contrary to the reference that was provided by the Respondent, for the Claimant, the Claimant in fact had a good work and attendance record. Ms Bishop was not the author of the reference, but she conceded that this was an unfair reference which did not accurately represent the Claimant's actual performance or record of attendance during her employment.

24. It is also agreed between the parties that an incident occurred at about 07.45am, on the 30 July 2021 and that this was in the context of another staff member, Ms Tracey Armstrong, leaving her employment. As Ms Armstrong was leaving, several staff, including the Claimant collected money for the purchase of leaving gifts. The collection money was used by another staff member, Ms Justine Law, to purchase gifts which included a box of beer. It is clear from the evidence, that the Claimant did not make the purchase and did not bring the gifts into the home.

25. Ms Justine Law, having obtained the leaving gifts brought them to the Ashbrook Care Home early on the morning of 30 July 2021. She passed them over the fence to another care assistant, Ms Charlotte King (also referred to as Charlotte Lee in the bundle index), and the gifts were then taken to the residents' lounge.

26. In the residents' lounge a group of staff members, including the Claimant, had gathered to sign the leaving card for Ms Armstrong. It is clear from the Claimant's evidence and that of Ms Bishop, that there was also one resident present watching

television at the start of the incident and that another resident came to the lounge during the incident but was then escorted away by staff other than the Claimant.

27. The Claimant accepts that she was not wearing a face mask at that time, and she says that this was because she was in a hurry to sign the card.

28. The manager of the home, Mr Jonathane Ribeiro, observed the gifts including the beer being passed over the fence and in response he came into the resident's lounge and demanded that the beer be removed, and he also told the staff present to put on masks.

29. The Claimant was suspended later that morning at about 09.30am / 10.00am, and subsequently interviewed about the incident by Sharon McCarthy, Head of HR. The meeting notes from that interview are not in the bundle and it was decided by the Tribunal at the hearing that these would not be admitted subsequently, although they had been referred to by the Claimant in cross examination, as the Claimant has previously confirmed to the Respondent that these notes are not relied on as part of her claim.

30. The Claimant was invited to a disciplinary hearing which took place on 09 August 2021 and the decision was made by Ms Bishop, that four allegations of gross misconduct should be upheld, and the Claimant should be dismissed. The allegations were:

- I. Unsatisfactory or unprofessional behaviour whilst on company premises or business. That you spoke to your manager in an unprofessional way in front of colleagues and residents.
- II. Bringing alcohol into the premises without authorisation. That you brought alcohol into the home in a resident lounge in front of residents.
- III. Serious breach of rules and procedures relating to health and safety at work. You failed to wear a mask as you were rushing to write a colleague goodbye card which is a breach of protocol / procedure.
- IV. Wilful neglect or a form of abuse of residents and relatives. You raised your voice and acted in an inappropriate manner in front of residents.

31. The outcome was notified to the Claimant by letter dated 11 August 2021. The Claimant appealed against her dismissal and the appeal was heard on 02 September 2021 by Ms Sharp, and although the second allegation was not upheld on appeal, the appeal as whole was unsuccessful and the decision to dismiss the Claimant for gross misconduct was confirmed based on the finding that only allegations 1, 3 and 4 should be upheld. The appeal outcome was notified to the Claimant by letter dated 03 September 2021.

The positions of the parties

32. The Claimant accepts that she was dismissed in respect of allegations of misconduct and that this is a potentially fair reason for her dismissal. It is submitted however, that the dismissal was procedurally unfair due to a flawed investigation. The four flaws suggested are that; leading questions were asked in the interviews, that there was no investigation in relation to the Claimant's suggestion that there was an accepted practice of not wearing face masks until after handover and at the start of the shift, that there was no investigation in relation to previous instances of alcohol being brought into the home, and that the disciplinary decision maker consulted the investigator prior to making the decision. Next, it is submitted that the dismissal was substantively unfair as the Respondent did not have reasonable grounds for concluding that the Claimant was responsible for any of the alleged misconduct. Finally, it is submitted that the sanction of dismissal was not reasonable in all the circumstances of the case, and no reasonable employer would have dismissed the Claimant in the same circumstances.

33. The Respondent's position is that the dismissal was both substantively and procedurally fair. It is submitted that the investigation was not criticised by the Claimant at the time it was carried out and that even if there were any faults in the process the investigation was more than sufficiently thorough and that the decisions made were reasonable in all the circumstances and properly based on the evidence obtained in the investigation. The Respondent rejects the suggestion that the process and the outcome amount to deliberate mistreatment of the Claimant. It is submitted that the findings made by the employer in respect of all the disciplinary allegations upheld on appeal were based on a genuine belief that the Claimant was responsible for that misconduct, and that there were reasonable grounds for reaching those conclusions based on the evidence obtained in the investigation and that the decision to dismiss was a proper and reasonable sanction based on the conclusions they had reached. The Respondent's submissions also included a reminder that the Tribunal must not substitute its own decision for that made by the employer, and to instead determine whether the outcome decided upon by the Respondent, was one which was within the band of reasonable responses.

Determination on the issues to be decided

34. As already recorded in this judgment, it is not in issue that the Claimant was an employee of the Respondent or that the Respondent dismissed the Claimant for gross misconduct, which is a potentially fair reason within the scope of section 98 (2) (b) of the ERA 1996, and I make those findings accordingly.

35. In applying section 98(4) of the ERA 1996, it is necessary in this case to consider individually and collectively all of the disciplinary allegations, other than the second allegation (bringing alcohol into the home) which was overturned on appeal and so did not form part of the basis upon which the decision to uphold and confirm her dismissal was made, and to apply the test which derives from the decision in **British**

Home Stores Ltd v Burchell [1978] IRLR 379 to the Respondent's approach to investigating, considering and responding to them.

36. The only allegations which were ultimately, at the conclusion of the appeal, found by the Respondent to warrant a decision to dismiss the Claimant were:

Allegation 1: *"Unsatisfactory or unprofessional behaviour whilst on company premises or business. That you spoke to your manager in an unprofessional way in front of colleagues and residents."*

Allegation 3: *"Serious breach of rules and procedures relating to health and safety at work. You failed to wear a mask as you were rushing to write a colleague goodbye card which is a breach of protocol / procedure."*

Allegation 4: *"Wilful neglect or a form of abuse of residents and relatives. You raised your voice and acted in an inappropriate manner in front of residents."*

Did the employer genuinely believe that the Claimant had engaged in the conduct for which she was dismissed?

37. I find that the Respondent in the form of Ms Bishop and Ms Sharp did genuinely believe that the Claimant had behaved as alleged.

38. Although in relation to allegations 1 and 4, the specifics of what the Claimant said are not set out in the evidence obtained by the Respondent, there was evidence available to the Respondent which suggested that the Claimant had shouted or raised her voice as part of the incident on 30 July 2021, and/or had 'talked rudely' in the residents' lounge and whilst two residents had been present.

39. Although the Tribunal did not receive oral evidence from Ms Sharp, Ms Bishop in her evidence was resolute in defending her decision to find that the Claimant had behaved unprofessionally and inappropriately in relation to her manager, and thereafter in front of colleagues and residents. She explained how she had considered the evidence of the several witnesses and had concluded that there was sufficient evidence to show that the Claimant had talked loudly or shouted whilst Mr Ribeiro was departing the lounge and had talked in a rude manner thereafter and in the presence of the two residents, causing distress to at least one of them.

40. Regarding allegation 3, as already stated, the Claimant accepts that she was not wearing a mask at the time of the incident on 30 July 2021. This is plainly a sound basis upon which the Respondent could genuinely conclude and believe that she wasn't wearing one.

41. In her oral evidence to the Tribunal the Claimant also agreed she *"should have been wearing a mask and so should everyone else"* and that the reason for this was not therefore because it was ordinary practice, but because they wanted to *"get Tracey's card done"* and she *"didn't think it would be a problem"*, which corresponds almost exactly to the wording of disciplinary allegation 3, and appears to amount

essentially to an admission now, not just of not wearing a mask, but that this would amount to misconduct as entailed by the wording of allegation 3.

42. Ms Bishop was challenged on the genuineness of her belief that the Claimant had behaved as alleged in the disciplinary allegations, and it was put to her that she had at the conclusion of the disciplinary hearing used words to the effect of 'out with the old, in with the new' and that this indicated that she was intent on dismissing the Claimant and had made her decisions independently of the evidence.

43. The Claimant in her evidence was sure that she had heard those words but conceded she did not see the speaker and so was not able to say that it was Ms Bishop who said that, or who it was said to, or in what context. Ms Bishop firmly denied saying this at all.

44. On the balance of probabilities, I find that the Claimant did hear that phrase, but I am unable to attribute it to Ms Bishop or find that this undermines the sincerity of Ms Bishop's belief that the Claimant behaved as alleged.

Did the employer hold this belief based on reasonable grounds?

45. Again, I find that there were reasonable grounds for this belief, based on the evidence available to the Respondent's decision makers. I remind myself that it is not for me to decide whether the Claimant behaved as alleged, based on the evidence available to the Respondent, or the Tribunal, simply whether there were reasonable grounds upon which the Respondent formed a genuine belief that the Claimant had behaved as alleged in disciplinary allegations 1, 3 and 4.

46. Ms Bishop in undertaking the disciplinary hearing on 09 August 2021, and Ms Sharp in considering the appeal on 02 September 2021 were both able to have regard to a range of evidence from numerous witnesses to the incident on the morning of 30 July 2021 as well as the account of the Claimant as provided during the disciplinary and appeal hearings.

47. Firstly, regarding allegation 3, as already stated, the Claimant has always accepted that she was not wearing a mask at the time of the incident on 30 July 2021 and in the residents' lounge, and this must of course be a reasonable ground upon which the employer could believe that she was not wearing one.

48. Next, and particularly in relation to allegations 1 and 4, there are several short statements provided by the staff who were present, shortly after the incident and during the investigation:

- Rozer Parmar's statement dated 30 July 2017 [sic.] at p. 62 of the bundle, says Mr Ribeiro used a "*calm and nice manor* [sic.]". He goes on to say that a resident was "*now crying whilst Eileen and Charlotte were talking*

rudely between themselves. Tracy took [the resident] out and I took her from Tracy."

- Marcia Akanni's statement dated 30 July 2021 , says Mr Ribeiro said *"this is not allowed, not in a shouty voice"* and that he also said *"all you 3 should be wearing your masks in a raised voice still not shouted."* She then says, *"Justine retaliated and said OK we will take it out."* In relation to the Claimant, she says *"Eileen and Justine talking in a rude manner afterwards. Charlotte didn't say much / anything."*
- Charlotte King in her statement on p. 76 of the bundle describes Mr Ribeiro's tone as *"angry"*. She also says that *"both Justine and Jonathan were shouting when got heated."* In relation to the Claimant, she says *"I stayed in lounge when Justine and Jonathane left, didn't say anything as sitting with Eileen."*
- Oyo Varol's statement dated 30 July 2021 at p. 80 of the bundle appears not to cover Mr Ribeiro's involvement but instead and describes *"... some staff upset. Tracey, Charlotte, Eileen and Marcia on table. All taking about how they didn't like how they were spoken to."*

49. Justine Law was interviewed in the investigation on 03 August 2021 and the meeting notes are in the bundle at pp. 84 and 85. She describes Mr Ribeiro as shouting. She also says that she was shouting, and she told Mr Ribeiro to 'piss off' and that Eileen (the Claimant) was shouting too.

50. In terms of Mr Ribeiro's version of events, there is an email sent by Mr Ribeiro on 30 July 2021 at 08.30am at p. 78 of the bundle. In this email Mr Ribeiro describes an apparently calm exchange on the part of all involved, until he says that he returned to check if the alcohol had been removed which it hadn't. He then says, *"At this point Justine said she didn't like my tone. I reinforced I don't have a tone, she can't treat Ashbrook as it's her own private Pub and bring alcohol nor drink alcohol, as this is gross misconduct. That's when Justine told me to fuck off in front of staff and residents. This is when I lost it. I told her that attitude is disgraceful and I would be taking this further if needed. I then walked away but I could hear her shouting and swearing."*

51. The allegation that the Claimant shouted is also made by Mr Ribeiro in his meeting with Sharon McCarthy on 03 August 2021 (bundle pp. 82 and 83) in which he says on p. 82 *"As I was leaving Justine and Eileen were taking over each other and being really loud I could not hear wat they were saying..."* and in answer to the question *"Can you confirm that Justine and Eileen were shouting?"* he responds *"Yes!"*.

52. The other witnesses either don't describe the Claimant saying anything specifically or in a particular way (Charlotte King and Oyo Varol), or they describe her as 'talking rudely' after the confrontation which was primarily between Ms Law and Mr Ribeiro (Rozer Parmar and Marcia Akanni).

53. The Claimant in the disciplinary meeting (at p. 92 of the bundle) agreed that she was *“upset and angry”* but (at p. 93 of the bundle) said that there were *“no offensive words, just lots of shouting. I couldn’t really hear what was being said. I didn’t say anything”* and that she *“can’t remember” if offensive words were used towards Mr Ribeiro, as “it all happened so fast and we were shocked.”*

54. It is correct, as Mr Toms has submitted on the Claimant’s behalf, that there is no evidence available either to the Respondent or to the Tribunal, as to what specifically is meant by ‘talking rudely’ or of any precise words used by the Claimant at the time, which could illustrate or further evidence, this description.

55. However, it would not have been necessary for the Respondent to identify and evidence a particular form of words, in order to be able to form a genuine belief on the reasonable grounds created by the evidence obtained and described above, that the Claimant, behaved in the general terms which were alleged, namely ‘unprofessionally’ (allegation 1) and ‘inappropriately’ (allegation 4) based on the various descriptions of the event provided by the witnesses.

56. I agree that there is some merit in the criticism made by Mr Toms, of the wording of the head of disciplinary allegation 4, and that objectively it is quite difficult to see how the behaviour alleged amounts to being ‘wilful neglect or a form of abuse’ however the finding by the Respondent that the particulars of that allegation were made out and amount to misconduct, on the evidence available, is in my judgment genuine and based on reasonable grounds.

57. On this subject, Ms Bishop in her evidence was confident in her finding that the Claimant’s behaviour in the resident’s lounge and in the presence of two residents was a serious concern. One resident was caused actual distress. Ms Bishop agreed that this was not necessarily specifically or exclusively because of the Claimant, but in reaction to the incident, including according to Ms Bishop, the Claimant’s continuation of it by her reaction and behaviour in the residents’ lounge. The other resident, a dementia sufferer who is not a fluent English speaker, was exposed to a risk of distress, even if not actually caused to be upset. Ms Bishop explained that it is vital that all staff respect the residents’ areas and to consider those parts of the premises, as the residents’ home. It is therefore, according to Ms Bishop, unacceptable when working in this environment to behave in a way which could impact on the residents’ use and enjoyment of their home.

In forming this belief, did the employer carry out a proper and adequate investigation?

58. I find that the Respondent did carry out a proper and adequate investigation of these allegations.

59. The Respondent evidently followed its established process for the investigation of potential disciplinary concerns. Ms McCarthy undertook a prompt investigation and

obtained evidence from all staff members who were present at the incident which was the focal point of the investigation.

60. The Claimant does criticise the investigation on the basis that leading questions were asked of witnesses and it is correct that some, but certainly not all the questions, used during the investigation meetings and the disciplinary meeting do potentially suggest a particular response.

61. However, it is not possible to conclude that any leading questions were asked, in order to produce a particular outcome, or that this was anything other than an honest effort to investigate the concerns thoroughly and fairly. There is no evidence upon which I could find that Ms McCarthy or Ms Bishop in undertaking the investigation and disciplinary hearing respectively, were framing their questions intending to manipulate those processes. At most, it could be concluded that some mistakes were made in choosing the questions, however, those errors are not sufficiently material to the evidence produced in the investigation or the findings eventually made by the Respondent on the evidence obtained, to conclude that the investigation was not properly conducted, or not adequate.

62. It has also been suggested by the Claimant, that the investigation and disciplinary process as a whole was flawed, and so the dismissal was procedurally unfair, because Ms Bishop allegedly consulted Ms McCarthy before reaching her decision on the allegations. There is no evidence of this however, other than the suggestion by the Claimant, that Ms Bishop said at the conclusion of the disciplinary meeting that she would have to have a discussion with Ms McCarthy before confirming the outcome in writing.

63. As Ms McCarthy is the Respondent's Head of HR, there are a range of entirely proper reasons why Ms Bishop would need to have an appropriate and necessary discussion with her as part of the fulfilment of investigation and disciplinary process and there is no evidence upon which I could properly conclude that Ms Bishop and Ms McCarthy met to discuss or plan the findings Ms Bishop should make, or that they in any other way improperly collaborated to produce a particular decision or outcome.

64. The Claimant's case also includes a suggestion that the investigation was flawed due to an omission in not investigating whether it was a standard or accepted practice for care assistants not to wear masks until after the handover.

65. Unfortunately for the Claimant, she accepted during the investigation and disciplinary meeting that she wasn't wearing a mask and accepted during the Tribunal hearing that she and all the other staff present should have been as well. On that basis, I can see no reason why the Respondent should have expanded the investigation to consider whether there was a practice which was at odds with the local and national policies in place at the time, as it would not have excused the behaviour anyway, and the Claimant now appears to agree.

66. Finally, in relation to the adequacy or legitimacy of the investigation, the Claimant submits that the investigation should have extended to considering previous occasions on which alcohol was brought into the premises and what the policy was on that. As the second allegation (of bringing alcohol into the home), did not ultimately form part of the basis upon which the Claimant was dismissed, I cannot see how that suggestion remains relevant. Instead, I am persuaded that the ultimate treatment of that allegation, shows that the Respondent took an honest and fair approach to the investigation and disciplinary process as a whole, and when it became apparent at the appeal stage that it would not be just to uphold the second allegation, that decision was overturned.

Subsequent to that investigation and in all the circumstances, was the dismissal a fair and proportionate sanction based on the conclusions they had reached?

67. I find that the decision to dismiss the Claimant in response to the evidence and findings made by the Respondent on allegations 1 and 4 was fair and proportionate, based on the decisions they had made.

68. I do have sympathy with the Claimant based on Mr Toms' submission to the effect that the decision to dismiss the Claimant appears to be a somewhat severe sanction, particularly given her employment history, characterised by good performance, a consistently caring manner and approach to residents, and an excellent attendance record, however it bears repeating, as it is so vitally important, that it is not for the Tribunal to substitute its own view as to the outcome the employer should have chosen, for the decision which was actually reached by the employer. The consideration instead is whether the employer's decision was within the band of reasonable responses.

69. I am in no doubt that whilst there would be some other employers in the same industry which would not have opted to dismiss the Claimant, based on the investigation of, and findings made in relation to, allegations 1, 3 and 4 and in all the circumstances of the case, there are equally undoubtedly others which would reasonably choose the same outcome in the same circumstances. Although it may be a severe penalty, it is not in my judgment unfair or disproportionate to the seriousness of the misconduct found by the Respondent's decision makers.

70. Crucially, in respect of allegations 1 and 4, these are findings of unprofessional and inappropriate behaviour on the part of the Claimant experienced by a more senior member of staff, several other colleagues and two residents of the care home where the Claimant worked. Objectively, that is sufficiently serious misconduct to justify dismissal, even for a first example and even with a good previous work history.

71. Equally importantly, when considering the decision to dismiss based on the findings on allegation 3, I take account of what Ms Bishop said in her evidence in relation to the Claimant not wearing a mask in the residents' lounge that she would not condone this, and that not wearing a mask in the presence of a resident, is a serious breach of the home's policy in relation to Covid 19, which required staff to wear a mask

in any area where there are residents. She also referred in her evidence to the national level rules in relation to wearing masks which were in place at that time.

72. Mr Jackson in his final submissions for the Respondent, also invited the Tribunal to take judicial notice of the fact that wearing a face mask in a care home during the Covid 19 pandemic was both a legal requirement and basic common sense given the prevalence of Covid related deaths in care homes. I agree, and I find that the misconduct found in allegation 3 by the Respondent is sufficiently serious to result fairly and proportionately in a decision to dismiss the Claimant, notwithstanding her good employment history and notwithstanding that she had not been previously disciplined for that issue.

73. Again, it may well be the case that some other comparable employers would not have dismissed the Claimant in these circumstances, in relation to allegation 3, however I am confident that there would also be many other reasonable employers who would also have chosen that sanction, even just on that concern alone, given the whole context of the Covid 19 pandemic, the consequent importance of the requirement and the significance of the risk to vulnerable care home residents.

74. I am unable to conclude therefore that the decision to dismiss the Claimant was one that no reasonable employer would make, and so is one which is beyond the band of reasonable responses or that it was therefore an unfair dismissal in respect of the findings made by the Respondent on allegations 1 and 4, or allegation 3.

75. Addressing the legal argument made by Mr Toms, in his written submissions that this case requires consideration of the principle in **Sillifant v Powell Duffryn Timber Ltd** (1983) IRLR 91 per Browne-Wilkinson J, that it is a rare case where an employer can take the view that there could be no explanation or mitigation which could cause him to alter his decision, I take the view that this does not have any real bearing in this case.

76. It is clear that the Respondent did alter their decision to an extent, and as already identified in this judgment, the fact that the original allegation 2 was overturned on appeal is a good indicator of the authenticity of the process and that the Respondent was prepared to take account of the Claimant's explanation. In relation to mitigation, the Respondent's conclusions refer to the Claimant's mitigation, so it is not correct to say that this was disregarded by the Respondent as incapable of being relevant to the decision, but simply the Respondent didn't consider it sufficient to justify choosing a different sanction when set against the seriousness of their findings. I have already addressed, why I consider the outcome to be within the band of reasonable responses, in all the circumstances of the case.

77. Mr Toms has also cited the case of **Taylor v Parsons Peebles NEI Bruce Peebles Ltd** (1981) IRLR 119 and the principle therefrom that it is not reasonable to apply a policy of automatic dismissal as the only possible penalty. In this case however, the evidence shows that the decision to dismiss was neither automatic nor

the only possible penalty under the Respondent's disciplinary policy. The decision to dismiss was reached as the conclusion of a proper process of investigation and decision making. The decision to dismiss was not the only possible penalty, it was one of the options, and the outcome that the Respondent selected, but they were not bound to do that.

78. For all the reasons set out and explained in this judgment, the claim is therefore not well founded, and is dismissed.

**Employment Judge Garsed
Date: 27 July 2022**