



EMPLOYMENT TRIBUNALS

Claimant: Mrs C Blanchard
Respondent: Oulton Abbey Care Home
Heard at: Birmingham
On: 5 October 2021 (and in chambers on 24 November 2021)
Before: Employment Judge Flood

Representation

Claimant: Mr Mc Clean (Counsel)
Respondent: Mr Khan (Counsel)

RESERVED JUDGMENT

1. The claimant's complaints of breach of contract, for unpaid holiday pay and for a redundancy payment are dismissed upon withdrawal.
2. The claimant's complaint of unfair dismissal succeeds.
3. The claimant was dismissed for some other substantial reason, a potentially fair reason for dismissal falling within s.98 of the Employment Rights Act 1996.
4. The respondent acted unfairly in all the circumstances of the case in treating that as a reason to dismiss the claimant.
5. The respondent is ordered to pay to the claimant the following amounts:
 - A basic award of £6,085.80
 - A compensatory award of £11,927.73
6. No reductions for Polkey or contributory fault are made.
7. The ACAS Code of Practice on Discipline and Grievance does not apply and an uplift to the compensatory award pursuant to s.207A Trade Union and Labour Relations (Consolidation) Act 1992 is not applicable.

REASONS

The Complaints and preliminary matters

1. The claimant brought a complaint of unfair dismissal contrary to section 94 of the Employment Rights Act 1996 (“ERA”). She had also brought a complaint of breach of contract, claims she is entitled to a redundancy payment and that she is due unpaid holiday pay. The claimant confirmed on 29 September 2021 that the claim for breach of contract was withdrawn and confirmed at the hearing that the claims for unpaid holiday pay and a redundancy payment were no longer pursued. Those complaints were dismissed upon withdrawal.
2. There was some discussion at the outset of the hearing of the scope of the matters in dispute on the unfair dismissal complaint. The Tribunal had written to the parties on 28 June 2021 upon receipt of the ET3 response, asking for views on whether the respondent was able to concede that the dismissal had been procedurally unfair. This was on the basis that both parties appeared to agree that there was no meeting at which a proposal to dismiss the claimant was discussed and she was dismissed without warning by letter. The provisional view of Employment Judge Camp was that the contention that the dismissal was fair had no reasonable prospects of success. He suggested that the issues of substantive fairness and what would be awarded by way of a compensatory award would remain in dispute at the hearing. The respondent wrote on 8 July 2021 and confirmed that the respondent would be relying on Polkey v A.E. Dayton Services Limited [1988] ICR 142 and that the respondent had acted reasonably on the basis that consultation or warning would be useless. The claimant’s representatives interpreted the response as accepting the suggestion of Employment Judge Camp that the dismissal was procedurally unfair. It also appears that this was the view taken by Employment Judge Monk when she wrote to the parties on 29 September 2021 to ask their views as to whether the length of the hearing could be reduced to one day (which both parties agreed with).
3. At the outset of the hearing Mr McClean submitted that procedural unfairness had been conceded, but Mr Khan confirmed that this was not the case and both procedural and substantive unfairness remained in issue. It was necessary to deal with all such matters at the hearing which took the rest of the day. Having concluded the evidence at 4pm, the claim was adjourned for written submissions to be made by 12 October 2021. The hearing was reconvened without the parties on 24 November 2021 (which was the earliest date available) and a reserved decision was then made.
4. A bundle of documents had been prepared and agreed by the parties (“the Bundle”). Unless otherwise stated, references to page numbers in this document are to page numbers in the Bundle.

The Issues

5. The issues which needed to be determined were:

Unfair dismissal – some other substantial reason

- 5.1. What was the reason or principal reason for dismissal? The respondent says the reason was a substantial reason capable of justifying dismissal, namely the needs of the Respondent to meet the needs of its guests by provision of afternoon activities but the necessary hours for which the Claimant refused to work, contrary to her contract of employment. .
- 5.2. Did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant?

Remedy for unfair dismissal

- 5.3. What basic award is payable to the claimant, if any?
- 5.4. Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?
- 5.5. If there is a compensatory award, how much should it be? The Tribunal will decide:
- a) What financial losses has the dismissal caused the claimant?
 - b) Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
 - c) If not, for what period of loss should the claimant be compensated?
 - d) Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
 - e) If so, should the claimant's compensation be reduced? By how much?
 - f) If the claimant was unfairly dismissed, did s/he cause or contribute to dismissal by blameworthy conduct?
 - g) If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?
 - h) Does the statutory cap apply?

Findings of Fact

6. The claimant gave evidence by way of a witness statement and orally in response to cross examination, re-examination, and Tribunal questions. The respondent's witness Ms E Posey ("EP"), Operations Manager of the respondent and dismissing officer gave evidence in the same manner. I have considered the relevant parts of the Bundle.
7. The oral evidence given by the claimant was consistent with her witness statement, the claim form and the contemporaneous documents. I accepted much of what the claimant said and found that her recollection of events was good. I found the oral evidence of EP to be consistent with her witness statements and with the respondent's pleaded case. There was not that much discrepancy between the accounts of the witnesses attending the Tribunal hearing other than their recollections of the meeting and telephone conversation between the two witnesses in some respects. I did note that EP was not involved in some of the discussions involving the Care Quality Commission ("CQC") and the decision to change the role performed by the

claimant (as this happened before she joined the respondent) nor was she fully familiar with the role performed by the claimant at the care home and her evidence on this was relating of conversations between other people. Where there was a dispute in evidence, I tended to prefer the evidence of the claimant as this was more consistent with the letters and notes of discussions that were prepared at the time, much of these were prepared by the claimant herself shortly after the meetings or conversations in question.

8. On the relevant evidence raised, I make the following findings of fact:

8.1. The respondent runs a care home on the site of Oulton Abbey and is a 49 bed facility providing residential and nursing care. Oulton Abbey is also home to a Benedictine community of Roman Catholic nuns.

8.2. The claimant had worked with the respondent since 1 September 1989 and at the time of her dismissal was carrying out the role of Diversional Therapist. She had previously worked as a cleaner and then an orderly at the respondent's care home taking on the diversional therapy role in 1990.

8.3. The claimant's current contract of employment signed on 26 May 2017 was at page 38 to 41. I was referred to the following clauses in the contract:

6. Hours

You are employed to work 23 hours per week minus breaks. The days and hours required by contract agreement are 28 hours, set out on a weekly duty rota by your Manager/immediate superior and may be changed time to time to meet the needs of the home. These days are including weekends and public/bank holidays.

The working week is Sunday to Saturday.

The days and hours you are required to work will be set in a weekly duty rota issued monthly by your line manager, this may need to be changed from time to time to meet the needs of the home.

8.4. A job description for the claimant's role (which described her as Well Being and Activity Co-ordinator, although it is not in dispute that the claimant was employed as a Diversional Therapist) was at pages 40-41. The claimant acknowledged that this job description required her to be flexible.

8.5. Before May 2020 the respondent did not unilaterally seek to make changes to the claimant's hours.

8.6. The claimant's duties were to arrange outings and entertainment to provide stimulation and enjoyment for the residents. She organised all activities inside and outside the home including games, quizzes, coffee mornings, fitness sessions etc and would organise trips out approximately once a fortnight for lunch at a local pub or garden centre. The quality of

the claimant's work was not in question and it appeared that the respondent and the residents of the home appreciated and valued her work. The claimant enjoyed her role and intended to carry it out as long as she was fit to do so (the claimant is currently aged 80) and was able to walk the short distance (2 minutes) from her home to the care home.

8.7. The claimant usually carried out her duties between 9am and 1.30pm Monday to Friday (having reduced her hours 3 years earlier (with agreement) from working up to 3.30pm each day). These hours were consistently worked and EP acknowledged in cross examination that despite the clause in the contract of employment, the respondent would need to seek agreement with the claimant before changing these. There was a degree of flexibility with the hours that she worked and she often worked evenings weekends and during holiday periods. During the hearing, I was shown a document that had been prepared by the claimant listing all the events she had organised during 2019 and 2020. This noted a large number of events involving trips out and of musical and other entertainment groups visiting the home at various times of the day and although many took place during the morning (e.g. a fitness group from 10.30-12.00 on March 14th), a significant number of events took place in the afternoon (e.g. a visit to a garden centre from 1.00.-5.00 on March 11th) and evening (e.g. a fund raising quiz from 5.30 to 9.00 on 18 May). Some such events were whole day events (e.g. a Canal Trip taking place on 3 June). It is clear that the day to day hours of the claimant were generally in the morning but that she did regularly work different hours to accommodate events and trips.

CQC Inspection

8.8. The care home was subject to a CQC inspection in August/September 2019 and the report produced and published by the CQC on 19 September 2019 was at page 108-123. The care home was rated as "Good" which is the second highest of 4 ratings which could be achieved, with "Outstanding" being the highest. The claimant was spoken to by the inspectors during the CQC inspection as well as other staff. It was suggested by EP that the CQC mentioned directly to the claimant during a conversation that the activities should be extended into the afternoon which the claimant denied. I accepted the claimant's evidence on this and find that this was not discussed with the claimant by anyone at the CQC at this time. There was a section in the report dealing with activities within the home which was generally positive (page 120) referring to the trips out, entertainment and other activities. It is also noted within the CQC report that

"The Provider had plans to develop the activities programme further".

8.9. EP started as Operations Manager at the care home in April 2020. Her role included decisions around budgeting, staff, human resources and residents activities although she acknowledged that the day to day care operations were not within her remit (but were the responsibility of the General Manager and Matron (Ms L Jones) ("LJ")). EP gave evidence that although this was not mentioned in the CQC report, following a post-

inspection debrief, the CQC inspectors verbally advised LJ, the then Home Manager, that if the Care Home implemented a more pro-active and dynamic activity provision for its residents, that would assist in the raising the CQC rating. A contemporaneous note of this was not retained by LJ but EP told the Tribunal that LJ reported this conversation to her. We did not have any direct evidence from LJ on this particular issue. I accept that there was a discussion about activities during the CQC inspection. This is supported by the reference in the report above (paragraph 8.8) and is also referred to a number of times in subsequent correspondence (see below). I was not able to make a finding that there was a communication from the CQC that the care home's rating would be upgraded to "Excellent" if activities had been improved upon (as appeared to be suggested in later correspondence – see page 98) as there is no direct evidence to support this.

8.10. EP said that as a result of this LJ and Mr R Ffello (Agent of the Trustees of the respondent who was involved in the management of the home) ("RF") decided on behalf of the respondent that the existing Diversional Therapist role held by the claimant would need to be modernised and become more structured to suit the business needs of the care home and to improve the CQC rating and meet the resident's needs. She said that the aim was to move resident activities to the afternoon and weekends rather than mornings (with mornings being used for residents to get up and go through their morning routines). EP explained that the concern with activities taking place in the morning was that then residents would return to their rooms and nap in the afternoon which may result in mental decline. EP stated that as part of these plans, the respondent decided to employ an Activities Co-ordinator as a managerial role to oversee the Diversional Therapists. The discussions around this had involved LJ, RF and the Deputy Matron, Ms Blumby although she was not aware of any notes of these discussions. She indicated that there may well be e mails recording these decisions and discussions but that these had not been provided to the Tribunal as she had not been asked to provide them. I accepted that the discussions had taken place broadly as suggested by EP and that the decision had been made as she suggests. It was unfortunate that no record was found or direct evidence could be given about how these decisions were made and precisely what impact it was envisaged that the changes would have on the claimant.

8.11. In February 2020 the claimant was absent from work due to a hip operation and was on sick leave although had recovered well and was looking forward to her return. With the onset of the Covid 19 pandemic she was then put on sick leave (as she had been advised she needed to shield) and was then placed on furlough leave with her agreement on 8 April 2020 (see letter at page 82) being paid at a rate of 80% of her normal weekly pay.

8.12. On 27 May 2020 the claimant was contacted by EP and invited to come into the care home for a discussion about the proposed changes to her role. EP explained that the decision already taken to change the role by LJ and RF was to be implemented by her and that it was driven by the

needs of the residents and their mental health which she felt had been declining further during the Covid 19 pandemic, as contact and activities had not been possible during this time. The claimant acknowledged in cross examination that during the Pandemic, the mental health of the residents was being impacted by the lack of activities and being confined to their rooms. EP did not inform the claimant in advance of what would be discussed and said she had hoped it would be a chat and that some accommodation could be reached. EP admitted that the possible settlement figure of £2,500 had already been discussed and approved if the claimant felt she could not meet the new business needs. The claimant was unaware of the purpose of the meeting and had assumed it was something to do with her furlough leave and how it would progress moving forward.

- 8.13. EP had not met in person or had any significant interaction with the claimant at this time. The meeting took place on 28 May 2020 at 10.30a.m and a note of the discussion prepared by EP is shown at page 86.
- 8.14. The claimant says that she was informed that day that "*Rob Ffello and Louise Jones (the Matron) had asked her to inform me that they were changing my role from Well Being Activities Co-Ordinator (Diversional Therapist) to Activities Co-ordinator and my hours were now changing to 12.30 pm. to 4.30 pm. on a 6 day week*". The claimant said she was shocked to be informed of this and felt it did not make sense as the residents tended to have naps in the afternoon so trips took place in the morning. She says she was informed that this was on account of a CQC recommendation but did not believe this at the time (as she had met with the inspector on the last visit who had made no suggestion about afternoon activities).
- 8.15. The claimant then told me that she told EP when asked if she had family commitments, that she did sometimes need to be available in the afternoons so could not commit to all of these new hours. At this point she contends that EP said that "*Rob will offer you a settlement of £2,500*". At this point the claimant said she offered to reduce her hours, do 3 afternoons a week or work from 10am to 3pm. EP admits that the claimant mentioned adjusting her hours to working until 3pm and went on to give evidence that she then told the claimant she would discuss this with the Trustees and take it further. The claimant said that EP told her that the new hours were "*the ones to be worked and were non-negotiable*". The claimant was provided with a job description (page 86a) which appeared to be the job description of the Activities Co-ordinator role and asked to think about it. The claimant at this stage said she told EP that she had understood it to be non-negotiable to which EP replied that she would need an answer within 7 days.
- 8.16. The accounts of that meeting of the claimant and EP in fact do not differ significantly save that the note made by EP does not refer to the claimant having offered to reduce her hours or do 3 afternoons a week or 10am to 3pm (or that EP offered to take this to the Trustees to consider it) and the comment made by EP that what had been offered was non-negotiable.

On this particular issue I prefer the evidence of the claimant as to her recollection of discussions. The note made by EP makes reference to how the respondent “*saw her role developing in the future*” and that the role needed to be “*modernised and more structured*”. This supports the claimant’s recollection of being informed that her role would be changed as well as her hours. In addition, later in the note, EP records:

“I have asked [the claimant] to let us know her decision of which she can continue with the role with adapted hours and duties or accept the gratitude payment over the next week”.

This supports the claimant’s view that the offer of the change of role and hours or to leave with a payment was a binary choice. There was no record in the note of EP to an offer to work different hours being made or that this would be considered by the respondent. I was satisfied that the claimant was left with the impression at the end of the meeting that she had to accept the changed hours (and role) or that she could take the gratitude payment and leave her employment. The claimant was not provided with a letter from the respondent after this meeting confirming the discussion that took place or the next steps she or the respondent should take. This was a glaring omission.

- 8.17. Following the meeting, the claimant wrote to the respondent on 4 June 2020 and the letter was shown at page 87. This letter expressed the claimant’s shock and upset about what she had been told and went on to set out her views on the proposal that her role and hours be changed. It went on to note that the claimant did not view the role of Activities Co-ordinator to be a suitable alternative to her current role “*for a number of reasons but mainly I can not work 12.30-4.30 and evenings/weekends due to my family commitments which we discussed when I came to see you*”

The letter went on to state that her view was that her currently role was redundant and that she was not opposed to the idea of a settlement as a result but it should reflect her length of service and dedicated service.

- 8.18. The respondent did not provide a written response to this letter but the claimant was contacted by EP by telephone on 15 June 2020 (a week and a half later). It is clear that this was a difficult conversation. EP’s note of the conversation was shown at page 89 and she gave evidence that during this conversation the claimant shouted and was aggressive to her, although not abusive. This note recorded that the claimant had repeated several times that EP had told the claimant she had to “take it or leave it” which EP denied saying. EP did not during this conversation discuss or raise with the claimant any alternative hours nor was anything communicated to the claimant about her previous offer to work until 3pm and what the Trustees had said about it. EP said it had not been possible during this conversation to raise any alternative solutions due to the claimant’s behaviour and aggression during the telephone call. The claimant admitted that she was very upset during that telephone conversation as she felt that the respondent were trying to manouvre her out of her role. She denied being aggressive to EP. I find that the

conversation became heated and the claimant raised her voice although was not aggressive. This was not helped by the fact that the conversation took place by phone (I observed during the hearing that the claimant had difficulties at times hearing the video link which I note not as a criticism but an observation) which may have led to some difficulties in audibility and understanding which contributed to the tension in the telephone call.

- 8.19. The claimant wrote a further letter to the respondent on 16 June 2020 which is shown at page 90. She referred to the telephone conversation and stated that she had taken advice from ACAS who had told her that the hours that had been offered to her were a variation to her contract which she did not have to accept. The claimant went on to state that she could not work the hours offered due to family commitments. She continued:

"I am extremely upset about the situation and feel that our relationship has broken down."

The claimant went on to state that she would be prepared to consider a settlement figure along the lines of a redundancy payment. The claimant acknowledged that she did not make a counter offer in this letter of working different hours and that this was because she had already been told that working afternoons was non-negotiable.

- 8.20. EP replied to this letter on 29 June 2020 (page 92) with a brief letter as follows:

"In your letter you stated that you feel that our working relationship has broken down, please could you confirm that this is indeed your decision to terminate your employment..."

It went on to state that there was no redundancy settlement as her current role was still in place with adapted hours for business needs.

- 8.21. The claimant wrote again to EP on 1 July (page 93) and confirmed that she did not intend to terminate her contract but that she was prepared to consider a settlement agreement and that she was finding the matter *"increasingly distressing and stressful"*.

Decision to dismiss

- 8.22. EP gave evidence (which I accepted) that it became apparent to her that the claimant would not agree to the proposed changes to her hours of work and that it was her view that she was not going to fulfil her obligations under her contract of employment and so she decided to terminate the claimant's contract of employment. She explained that she believed that the claimant was attempting to engineer some sort of settlement by redundancy but the respondent did not consider this to be a redundancy situation, rather an attempt by it to vary the claimant's hours in accordance with her contract of employment. The respondent communicated its decision to dismiss the claimant by a letter dated 6 July 2020 (page 94). This letter made reference to the terms of the claimant's

contract as referred to above. It went on to state:

“we do need to change the working Rota of your role to suit the needs of the Residents and the Business. This will still be your agreed contracted hours of 23 hours minus breaks. We would need the hours to consist of afternoons and weekends.

You have expressed that you cannot fulfill these hours due to family commitments and therefore this would result in your not fulfilling your terms of contract which you signed and agreed to on the 26th May 2017”

It went on to state:

“Unfortunately, as we are unable to meet a compromise and your are unwilling to be flexible as agreed in your contract, the only forward option for us is to agree termination of your contract. This is not Redundancy as the role is still in place for your return. And no settlement figure will be offered. We will continue to pay you until the 30th July 2020, after which we will terminate your contract.”

The letter of termination did not offer the claimant a right to appeal.

8.23. The claimant did not hear from the respondent further but she sent a letter via her solicitors on 13 July 2020 (page 95-96).. The respondent acknowledged it was an oversight that it had not offered the claimant the right to appeal its decision to terminate her employment and offered her a right to appeal via a letter written from its solicitors to the claimant’s solicitors on (page 97-98). The claimant did not submit an appeal.

8.24. Following the claimant’s employment being terminated, the respondent recruited an Activities Co-ordinator, Jessica and another employee to work alongside her. This was K Fello who worked the hours of 12-4.30 up to 6 days a week. Jessica subsequently left the employment of the respondent and a new Activities Co-ordinator now carries out the role working 10am until 5pm and the home now employs two further employees working on activities between 11 am and 5pm.

8.25. Since her dismissal, the claimant had not worked and had not been able to actively look for employment as she had suffered Covid 19 in early 2021 and her mental health had suffered as a result of her dismissal.

The Relevant Law

9. Sections 94 and 98 of the Employment Rights Act 1996 (“ERA”) provides:

94 The right

An employee has the right not to be unfairly dismissed by his/her employer.

98 General

(1) In determiningwhether the dismissal of an employee is fair or unfair it

is for the employer to show-

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

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held .

...

(4) Where the employer has fulfilled the requirements of subsection (1) , the determination of the question whether the dismissal is fair or unfair(having regard to the reason shown by the employer)-

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

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

10. Section 122(2) of the ERA provides:

Where the tribunal considers that any conduct of the complaint before the dismissal (or where the dismissal was with notice before the notice was given), was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.

11. Section 123(6) of the ERA provides:

Where the tribunal finds the dismissal was to any extent caused or contributed to by any action of the claimant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

12. Hollister v National Farmers' Union [1979] ICR 542, [1979] IRLR 238 - The reorganisation of a business coupled with an employee's refusal to accept a new contract could amount to a "substantial reason of a kind such as to justify the dismissal".

13. Catamaran Cruisers Ltd v Williams [1994] IRLR 386 it is an error of law to say that significant changes can be made only if the survival of the business is threatened but a Tribunal must be satisfied that changes were not imposed for arbitrary reasons. The Tribunal must carry out a balancing process considering the position from both employee's and employer's point of view.

14. Kerry Foods Ltd v Lynch [2005] IRLR 680, EAT if the employer seeks to rely upon the need to implement the reorganisation as constituting a substantial reason, he must demonstrate that it has discernible advantages to the business but it is not for the Tribunal to make its own assessment of the advantages of the business decision.

15. St John of God (Care Services) Ltd v Brooks and ors [1992] IRLR 546 – if there is a sound business reason for a reorganisation, the reasonableness of the employer’s conduct must be judged in that context. A Tribunal must determine whether the employer’s decision to dismiss for some other substantial reason fell within the range of reasonable responses.
16. In determining the question of reasonableness it was not for the Tribunal to impose its standards and decide whether the employer should have behaved differently. Instead it had to ask whether “the dismissal lay within the range of conduct which a reasonable employer could have adopted” as set out in the case of Iceland Frozen Foods v Jones [1982] IRLR 439.
17. The “range of reasonable responses” test applies not only to the actual decision to dismiss, but also to the procedure adopted by the employer in putting the dismissal into effect - Sainsburys Supermarkets Ltd v Hitt [2003] IRLR 23.
18. Tribunals must not put themselves in the position of the employer and consider what they themselves would have done in the circumstances. It must not decide what it would have done if it had been management, but whether the employer acted reasonably. A decision must not be reached by a process of substituting themselves for the employer and forming an opinion of what they would have done had they been the employer. — Grundy (Teddington) Ltd v Willis 1976 ICR 323, QBD; HSBC Bank plc (formerly Midland Bank plc) v Madden 2000 ICR 1283, CA.
19. Polkey v A E Dayton Services Ltd [1987] IRLR 503 HL, the chances of whether or not the employee would have been retained must be taken into account when calculating the compensation to be paid to the employee. Tribunals are required to take a common-sense approach when assessing whether a Polkey reduction is appropriate - Software 2000 Limited v Andrews [2007] IRLR 568; the nature of the exercise is necessarily “broad brush” - Croydon Healthcare Services v Beatt [2017] IRLR 274; and the assessment is of what the actual employer would have done had matters been dealt with fairly not how a hypothetical fair employer would have acted (Hill v Governing Body of Great Tey Primary School [2013] IRLR 274).
20. When considering contributory fault the conduct must be “culpable or blameworthy” - Bell v The Governing Body of Grampian Primary School [2007] All ER (D) 148. The Tribunal may take a very broad view of the relevant circumstances when determining the extent of contributory fault - Gibson v British Transport Docks Board [1982] IRLR 228.
21. The ACAS Code of Practice on Disciplinary and Grievance Procedures (“ACAS Code”) may apply to ‘some other substantial reason’ dismissals where there is a conduct issue when the dismissal process is initiated even if ultimately the dismissal is not for conduct but for some other substantial reason (Lund v St Edmunds School [2013] ICR 26).

Conclusion

22. The parties provided detailed written submissions which I have considered in detail. The respondent contended that the reason for dismissing the claimant was *“the needs of the Respondent to meet the needs of its guests by provision of afternoon activities but the necessary hours for which the Claimant refused to work, contrary to her contract of employment”*. I accept that this was the respondent’s factual reason for dismissing the claimant. I refer to my findings of fact at paragraph 8.10 (which set out the basis for the respondent deciding to implement the changes to its activities provision) and at paragraph 8.22 (which set out the conclusion reached by EP that the claimant would not agree to work in the afternoon). There was some suggestion that the reasons provided were a ruse to dismiss the claimant for some other reason but I was not satisfied that the evidence supported this. I accepted the submission of Mr Khan that there was no hidden agenda in this regard.
23. The next question I have to determine was whether this reason for dismissal a potentially fair one within the meaning of section 98 of the Employment Rights Act 1996. Mr Mc Clean suggests that the respondent’s reasons for imposing the changes to the activities provision were arbitrary and demonstrated no advantage to the business. He points out that the claimant already provided activities in the afternoons; that there was nothing in the CQC report recommended any change to activities; there was no evidence of any benefit to residents to afternoon activities (and the claimant herself did not agree with this approach); and that the claimant’s activities were long standing and popular. He also submits that the claimant’s contract does not provide for a wide ranging right to change her hours and had a consistent pattern of hours unchanged for at least three years. He also suggests that the claimant had not unreasonably refused new terms in the circumstances in which they were presented to her. The respondent submits that there was already an intention on the respondent’s part to shift activities to the afternoon (which had at the very least been discussed at the time of the CQC inspection) but that the need for this became more acute with the onset of the Covid 19 lockdown. He also suggests that the claimant had made it clear that she was unprepared to work afternoons.
24. Firstly on the reasons for the change in the activities provision proposed by the respondent, the claimant may well have valid objections to the plan and disagree with the rationale for it based on her long and valuable experience in carrying out activities at the home over many years. However the caselaw above directs me to consider this from both the employee’s and the employer’s point of view (Catamaran Cruisers case above). Advantages to the business must be shown, but it is not for the Tribunal to make its own assessment of the advantages of a business decision (Kerry Foods above). I accepted that the respondent had discussed the provision of activities at the time of the CQC inspection (para 8.9 above). I also accepted that this led to a discussion and decision by LJ and RF that activities would change (para 8.10 above). I further accepted EP’s evidence that this decision had crystallised further during the Covid 19 Pandemic (para 8.12). I was therefore satisfied that the respondent had shown the advantages to its business in implementing the change. On the second element, that is the respondent’s

reliance on the claimant's refusal to accept the change, I was also satisfied that as at the point of dismissal the claimant had made it clear that she was not prepared to work in the afternoons (see paras 8.17.8.19 and 8.22). As to whether this was a reasonable position for the claimant to take and whether this was a breach of her contractual terms, is more relevant as to whether the respondent was entitled to treat this as a sufficient reason for dismissing the claimant and whether dismissal was in the range of reasonable responses (see below). Nonetheless on the facts found, and for these reasons, I was satisfied that the respondent has shown a potentially fair reason for dismissal which can be properly characterised as "some other substantial reason."

25. The next question is whether the respondent was entitled to treat this as a sufficient reason for dismissal (s98(4) ERA). In my view it was not and therefore the claimant's dismissal was unfair. I conclude this for the following reasons

Procedural unfairness

26. When looking at whether the dismissal was reasonable in all the circumstances, I firstly considered whether the dismissal was procedurally fair. My conclusion is that it was not for the following reasons:

26.1. The claimant was given no warning that during the meeting of 28 May 2020 her continued employment and possibility of dismissal would be discussed. She was entirely unaware of the purpose of the meeting. (para 8.12 above).

26.2. The respondent had already finalised its decision on changing hours and anticipated that the claimant may be dismissed as a result of the changes; and had put in place a financial offer if the claimant's employment was to be terminated (para 8.12). This suggests a strong element of pre-determination of its decision before any discussions had even taken place with the claimant.

26.3. The claimant was not provided with anything in writing in advance of the meeting on 28 May 2020 (including advising her of any rights to be accompanied that may apply) and significantly was not provided with anything in writing following that meeting setting out what had been proposed and what steps would now be taken (paras 8.12 and 8.16). This was a significant omission as the claimant left that meeting, upset and under the impression that her role was to be made redundant. This was followed by a number of days where there was no communication at all from the respondent and it was in fact the claimant who wrote in first setting out her position (which had by this point perhaps understandably hardened).

26.4. No meaningful consultation or discussion took place between the respondent and the claimant about the proposed changes and the impact on her. She left the meeting on 28 May 2020 with a decision as to either change her hours to work in the afternoon or leave employment with a £2,500 payment (para 8.16). The claimant's suggestion that she worked different hours was never responded to (para 8.16). There was no further

discussion during the subsequent telephone conversation about alternative arrangements (para 8.18). I accept that the tense telephone conversation between the claimant and EP may have made this difficult, but the respondent (as the employer wanting to implement the change) did not attempt to arrange a further meeting or discussion so that this could be explored in a less difficult setting.

26.5. The first letter the claimant received at all from the respondent was EP asking the claimant to confirm that she had in fact decided to terminate her employment (8.20). This is not the conciliatory letter as suggested by Mr Khan to reassure the claimant that she was not redundant but asking the claimant to confirm she had resigned and making it clear that she would not receive a redundancy settlement as her role remained (albeit with different hours). There is no attempt at all to engage the claimant in consultation or discussion on the proposed changes at all in this letter.

26.6. The dismissal letter did not offer the claimant a right to appeal against her dismissal (8.21).

All of the above were procedural failings that were well outside the range of reasonable responses in the circumstances of the changes that had been proposed. Whatever the contractual position, the impact of the change on this employee was likely to be significant and a reasonable employer should have properly considered this and followed a detailed and more consultative approach to the change, rather than the rushed process it did follow. The respondent's failure to take basic procedural steps was well outside the range of reasonable responses.

Dismissal not within the range of reasonable response

27. The next issue to determine is therefore whether dismissal was within the range of reasonable responses. The claimant had an unblemished employment record and had worked at the respondent's care home for 30 years with excellent feedback from residents and management (paras 8.6 and 8.8). EP confirmed that there was no issue at all with the claimant's work. The respondent does not appear to have discussed with the claimant the provisions of her employment contract as regards to hours, or the fact that the claimant had consistently worked the hours she was currently doing for 3 years without change. It appears to have simply relied on what it saw as an unfettered contractual right to make changes to hours without considering in any way what the impact might be on the claimant. To have moved straight to dismissal without even holding a properly arranged meeting to discuss what the claimant's objections were to the changes, what hours she could reasonably accommodate and whether there was any compromise to this and to provide no notice at all to the change appears to me to be wholly outside the range of reasonable responses.

28. The respondent relies on what it says were unequivocal statements in the claimant's correspondence to demonstrate that the claimant had completely shut her mind to afternoon working and was unprepared to engage in dialogue. It is true that the claimant was firm in her written communications as to what her position was. However all of the claimant's letters must be read

in the context of a vacuum of formal written communication from the respondent, her employer, since being informed in a meeting on 28 May 2020 that she must change her hours together with the offer to leave with an ex gratia payment (para 8.16). The complete lack of communication after that meeting no doubt led to the claimant taking a more defensive stance from thereon in and at this stage raising the issue of redundancy and a settlement. It was a reasonable response for her to have had given the impression she was left with after the meeting on 28 May 2020 (para 8.16). The claimant was never given anything in writing which confirmed to her what the plan was for change and what the process was for implementing the change. Perhaps had this taken place, some of the claimant's later letters and indeed inflexible stance could have been avoided. The claimant had already suggested an alternative approach but despite EP saying this was discussed with the Trustees, this was never again raised with the claimant or put forward as an alternative (para 8.18). Again, had this been done at an early stage, the escalation of the claimant's correspondence might have been avoided and indeed a solution may well have been found to avoid the need for dismissal at all.

29. For all of the above reasons, I conclude that respondent did not act reasonably in all the circumstances in treating its reason as a sufficient reason to dismiss the claimant and so the claimant's dismissal was unfair.

Remedy

30. The claimant does not seek reinstatement or re-engagement so I proceeded straight to consideration of the award to be payable to the claimant as set out in the list of issues above.

Polkey

31. Firstly, I considered whether any adjustment should be made to the any compensation that may be awarded to the claimant on the grounds that if a fair process had been followed by the respondent in dealing with the claimant's case the claimant might have been fairly dismissed in accordance with the principles in Polkey v A E Dayton Services Ltd above.
32. The procedural flaws which have led to the finding of unfair dismissal go from the initial meeting held with the claimant (and the failures to give advance notification of that) right through to the dismissal itself (see para 26 above). I entirely accept Mr McClean's submissions that this is not a case where the employer could have reasonably concluded at the time of dismissal that consultation would be utterly useless. The respondent had not engaged in any consultation nor had it gone back to the claimant with an answer on a proposal she had made to work different hours. We heard no evidence of what the respondent's view on this proposal made by the claimant actually was. I am not able to make a finding that had the respondent carried out the procedure in a fair and reasonable manner that the claimant would still have been dismissed. The respondent's failings at the early stage of the process to communicate and discuss its proposals with the claimant in a reasonable manner, led to the difficulties which then followed and the claimant then forming a view that she was in a redundancy situation and should be paid a

settlement. I am therefore not able to speculate as to what would have happened had this not taken place as it may have led to an entirely different outcome. For these reasons, no reduction on the basis of Polkey is appropriate.

Contribution

33. When considering a deduction to the basic or compensatory award on the basis of contribution. Firstly, it is necessary to identify the conduct which is said to give rise to possible contributory fault. Secondly, I must decide whether that conduct is blameworthy. Thirdly, under section 123(6) ERA, I should consider whether the blameworthy conduct caused or contributed to the dismissal to any extent and finally I must determine to what extent it is just and equitable for the award to be reduced.
34. The claimant's conduct said to give rise to contributory fault is her failure to offer flexibility and to enter into meaningful discussion over hours acting contrary to her employment contract and solely causing the termination of her employment. I refer to my conclusions at paragraph 27 above and I further conclude that the claimant's conduct in this regard was not blameworthy. I was satisfied that her inflexibility following the meeting of 28 May 2020 must be seen in the context of the lack of clear communication from her employer and clear plans for what would happen with her ongoing employment. I found the claimant's actions to be understandable in the circumstances of an employee finding themselves in the position she did after 30 years of employment. It was the respondent who wanted to implement the changes to the claimant's role and it had the responsibility to engage in consultation and discussion with the claimant about how this might be achieved (regardless of its views on the contractual position). It singularly failed to do this so I do not consider the conduct of the claimant to be blameworthy and so do not need to go on to consider whether it cause or contributed to her dismissal.

Basic Award

35. I have firstly looked at what basic award is payable to the claimant, and accept the calculation as set out in the written submissions of Mr Mc Clean. The claimant has 30 years of service with the respondent, all of which took place when she was over 41 so is entitled to 1.5 gross weeks pay (£202.86) for each year of service up to a maximum of 20 years. This amounts to the sum of **£6,085.80.**
36. I have considered whether it would be be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal and if so, to what extent and concluded that no such reductions should be made to the basic award for the same reasons set out at para 34 above.

Compensatory Award

37. When considering whether to make a compensatory award and if so at what level, I have addressed each of the issues set out at para 5.5 above. The claimant's Schedule of Loss is set out at pages 34-35. The claimant claims

that as at the date of the hearing, she is entitled 35 weeks lost earnings at the net rate of weekly pay she was earning as at her dismissal (£191.94) and 27 weeks lost earnings at £193.59 (allowing for an increase in her net weekly pay to reflect an increase in the rate of the national minimum wage from 1 April 2021). She also claims a further 52 weeks future loss beyond the date of the Tribunal hearing on the basis that the claimant although now being aged 80, was fit and well at the Tribunal hearing and was willing and able to work as long as she was physically fit to walk the short distance from her home to the care home. It contends that the claimant has not failed to mitigate her loss and that no adjustment should be made for Polkey or contribution. The claimant also seeks a 25% uplift as it states that the respondent failed to follow the ACAS Code (which Mr McClean says applies as a result of the Lund case above and similar authorities on dismissals for some other substantial reason).

38. The respondent submits that any loss of earnings in fact only began from 1 October 2020 as she was in fact paid 12 weeks notice (not 3 as the Schedule of Loss suggests). It also submits that there is a serious question mark over the claimant's capacity for work since October 2020 in any event. It contends that the claimant has failed to mitigate her loss by seeking alternative employment

39. I conclude that the claimant would have continued working until the date of the hearing (and I note that the respondent now employs three people in its activities function with varying hours, which may well have been able to accommodate the claimant's wishes and needs had the process been handled correctly and a compromise reached). I do not conclude that there was any failure of the claimant to mitigate her loss. The claimant had worked in her current position for 30 years and in these particular circumstances would have found it very difficult to secure suitable alternative employment elsewhere, particularly given she was 79 when she was dismissed, and required local employment to fit around her family responsibilities. I accepted that the claimant had been ill during this period with her mental health suffering as a result of her dismissal and because she contracted Covid 19 in early 2021. All such matters contributed to the claimant's ability to mitigate her loss and find alternative employment and so I do not consider it appropriate to reduce her compensatory award period in this regard.

40. As to future loss, I accepted the evidence of the claimant that she would have liked to work for the respondent as long as she was able to do so. She contends that a period of 52 weeks further loss would be appropriate. This is a difficult and speculative exercise to undertake. Certainly the claimant presented at the Tribunal as someone who was capable and well and in good health for a woman of 80 years old. However there are very many reasons why the claimant may take the decision to end her career with the respondent and indeed the respondent needs may again change in the future. I take the view that there is a reasonable chance that the claimant's employment may have ended in the near future and on that basis, I consider that an award of future loss limited to 12 weeks is appropriate. This would take the claimant to the end of 2021 in terms of future loss.

41. I was not addressed on the impact of the Covid 19 Pandemic and further

national lockdowns and the impact that this had on any loss of earnings of the claimant during the relevant period. For this purpose I take judicial notice of the fact that a second national lockdown came into force in England between 5 November and 2 December 2020 and a third national lockdown was in place from 6 January 2021 with restrictions on care home activities being eased from 17 May 2021. On the basis of the findings of fact above (para 8.11) I conclude that had the claimant remained employed past her dismissal, it is likely that she would again have been placed on furlough leave during those second and third national lockdowns when the activities again had to cease at the care home). This would have reduced her pay during this period to 80%.

42. For the reasons set out at paras 31-34 above, I do not conclude that there is a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason or that the claimant caused or contributed to dismissal by blameworthy conduct. There are therefore no further reductions to the claimant's compensatory award on either of these bases.

43. There was no issue raised by the respondent about the claimant's conduct at the initiation of the process such that the ACAS Code should have been followed. Consequently there can be no increase or reduction to compensation for failure to follow the ACAS Code by either party because the ACAS Code did not apply.

44. The claimant's compensatory award is therefore calculated as follows:

Losses to date of hearing:

Period 1 (from end of notice pay period to start of second national lockdown)

1 October 2020-4 November 2020 – (35 days) 5 weeks @ £191.94 = £959.70

Period 2 (Second national lockdown)

5 November 2020-2 December 2020 – (28 days) 4 weeks @ 80% of £191.94 (£153.55) = £614.20

Period 3 (from 3 December 2020 to start of third national lockdown)

3 December 2020 to 5 January 2021 – (34 days) 5 weeks @ £191.94 = £959.70

Period 4 (second national lockdown at lower NMW rate)

6 January 2021 – 31 March 2021 – (84 days) 12 weeks @ 80% of £191.94 (£153.55) = £1842.60

Period 5 (second national lockdown at higher NMW rate)

1 April 2021 - 17 May 2021 – (46 days) 6.5 weeks @ 80% of £193.59 (£154.87) = £1006.65

Period 6 (from easing of restrictions in care homes to date of hearing)

18 May 2021 – 5 October 2021 – (140 days) 20 weeks @ £193.59 =
£3871.80

Future losses:

12 weeks at £193.59 - £2323.08

Loss of statutory rights - £350

Total compensatory award = £11,927.73

Employment Judge Flood
On 30 November 2021