CASE NO: 2602884/2020

EMPLOYMENT TRIBUNALS

Claimant: Mr J Walker
Respondent: Rayden Engineering Ltd

Heard at: Midlands (East) Region by Cloud Video Platform
On: 12 and 13 May 2021
Before: Employment Judge Legard (sitting alone)

Representation
Claimant: Ms Dannreuther (of Counsel)
Respondent: Mr Baran (Solicitor)

Covid-19 statement:
This was a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V – video. It was not practicable to hold a face-to-face hearing because of the Covid-19 pandemic.

JUDGMENT having been sent to the parties on 19 May 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

JUDGMENT

The Judgment of the Tribunal is as follows:

1. The claim of automatic unfair dismissal pursuant to s.99 ERA is not well founded and is dismissed
2. The claim for compensation pursuant to section 57A/B (time off for dependents) is not well founded and is dismissed.
3. The claim of wrongful dismissal is well founded and succeeds.
4. The Claimant is awarded the sum of £455.66

REASONS

1. The Claimant's claims

1.1 By a claim form presented on 29th July 2020 the Claimant ('C') brought claims alleging (automatic) unfair dismissal pursuant to s.99 ERA and wrongful dismissal. He also bought a parallel complaint under s.57B in light of an alleged refusal by the Respondent ('R') to permit him time off for dependents. Further complaints of unlawful deductions and in respect of a failure to provide employment particulars were settled prior to the hearing commencing (in the agreed sum of £1724) and accordingly fell away.

1.2 R denied the remaining claims. It maintained that C was dismissed for his failure to attend work without advising it of the reason or reasons for his absence.

2. The Hearing

2.1 C was represented by Ms Dannreuther of Counsel and R by Mr Baran of Counsel. The parties had prepared an agreed bundle consisting of approximately 200 pages.

2.2 This was a relatively short case. C gave evidence on his own behalf. A significant proportion of his witness statement dealt with peripheral events that concerned CV-19 testing and other satellite issues involving work colleagues, most notably a person called Shane. This was acknowledged at the outset by both legal representatives and cross-examination was tailored accordingly.

2.3 R called Mr Brendan Hayden, Operations Director, as their only witness.

3. The issues

3.1 I am grateful to both Counsel for producing an agreed list of issues which I set out below. Insofar as the s.57A issues were concerned (the key element of this complaint) the sequencing of questions that fall to be answered are in accordance with the EAT guidance set out in the case of *Qua v John Ford Morrison Solicitors* 2003 ICR 482, EAT - see paragraph 25. In terms the Tribunal is required to consider s.57A(2) first in time because, if C fails to satisfy the requirements of that subsection, then s.57A(1) (in other words the statutory entitlement) falls away.

3.2 The issues were as follows:

Automatically Unfair Dismissal – Section 99 ERA;

(i) Did C take time off or seek to take time off from work during his working hours on 19 May 2020?

There was no dispute that C did both take time off and seek to take further time off work.

(ii) Did C inform R as soon as reasonably practicable of the reason for his absence? (the first of the two questions that fall to be determined under s.57A(2))

Again, as conceded by Mr Baran in closing, there was no dispute in relation to this question.

(iii) Did C inform R how long he expected to be absent for?

(iv) If the answer to (iii) is no, were the circumstances such that he could not inform R of the reason for his absence until after he had returned to work?

It was not argued that C was unable to inform R for the reason for his absence due to the circumstances prevailing at the time so it was (iii) above that represented the key dispute in this case.

If C did satisfy the s,57A(2) criteria, then the following questions arise under s57A(1) and, specifically in this case, it is s.57A(1)(d) that is relied upon:

(v) Did C take or seek to take time off work in order to take action which was necessary because of the unexpected disruption or termination of arrangements for the care of a dependant?

(vi) If so, was the amount of time off taken or sought to be taken a reasonable amount of time in the circumstances?

(vii) Was the reason or principal reason for C's dismissal on 20th May 2020 connected to the fact that he had taken / sought to take time off work in circumstances where he was entitled to be permitted by his employer to do so under s57A ERA?

Again, perhaps unusually in such a case, this matter, namely the reason or principal reason for dismissal, was not in dispute.

(viii) If so, what compensation is just and equitable?

3.3 Insofar as the parallel complaint under s.57B was concerned, both parties agreed that this would only add anything to the overarching complaint if the Tribunal was to find that (a) C did satisfy the requirements of s.57A but (b) the reason or principal reason for his dismissal was something other than the fact that he had taken / sought to take time off work. Given that this was an issue conceded by R, both complaints necessarily depended upon determination of the s.57A issues above. Nevertheless, for completeness sake and because they are set out within the agreed list of issues, I repeat the same here:

(ix) Did R refuse to permit C to take time off work pursuant to section 57A?

(x) If so, was such refusal unreasonable?

(xi) If so, what compensation is just and equitable?

Wrongful Dismissal

(xii) Was C's non-attendance at work on 19th and 20th May a repudiatory breach of the terms of his employment contract entitling R to dismiss C without notice?

4. Findings of fact

4.1 Having considered all the evidence (both written and oral) and the submissions made by the representatives on behalf of their respective parties, I find the following facts on the balance of probabilities. There were several disputes of fact and differences of interpretation. I have resolved those conflicts of evidence where they did arise and were material to the issues.

4.2 R is a family owned company providing specialist welding and fabricating services to, amongst others, the gas, oil and petrochemical industries. At the material time, R had 45 employees at its Ilkeston site and its turnover for 2019 was in the region of £8m. Mr Brendan Hayden is R's Ops Director with responsibility for the day-to-day control and operations and his father, Richard, is the Managing Director.

4.3 C is a welder by trade. He commenced employment with R on 18th February 2020. His partner, Amber, works as a night shift supervisor at a care home and they have two children, Isabel and JJ, who at the material time were aged 10 and 8 respectively.[1]

[1] I may have wrongly recorded the ages of C's children. If so, I apologise but nothing turns on it. The important point is that they were in different schools at the material time.

4.4 It is common ground that he was not provided with a written contract of employment although he was provided with a Company handbook. A starting wage of £12 an hour was agreed and C's start time was also agreed at 0730. The handbook refers to new employees serving a probationary period and makes clear that a failure to successfully complete the same may result in termination of employment. The same handbook also makes clears that a failure to start work at the correct time may result in disciplinary action.

4.5 Very soon after commencing employment, the CV-19 global pandemic struck. The UK went into the first lockdown on 23rd March 2020 and on 27th March the Respondent's workforce, including C of course, were placed on furlough in accordance with the Government Job Retention scheme. By this stage, C had been working with R for approximately 5 weeks.

4.6 The terms on which R's employees were placed on furlough were incorporated into a letter which each employee (including C) then signed. Amongst other things, the letter provided as follows:

Your Furlough Leave shall last at least three weeks and shall end on the earliest of the following events: -
1. the Scheme ending (we expect the Scheme to be in place until at least the end of May 2020) or the Company no longer being able to claim under the Scheme in respect of you; or
2. the Company requiring you to return to work (whether or not working from home). We will try to give you at least 24 hours notice of when we need you to return.
If you are still on Furlough Leave when the scheme ends, we would like to reassure you that we very much hope to be in a position where you can return to work. If, however, this is not possible, we will consult with you at the relevant time.

4.7 At some point in April there appears to have been a discussion between C and Richard Hayden (the MD and Brandon's father) concerning a rumour that C might have been looking for work elsewhere and it was during the same conversation that C expressed to both Haydens that he was not impressed by the way in which the workshop was set up. Yet further, there also appears to have been some discussion on whether or not the Respondent was intending to retain a work colleague by the name of Shane. The details of this conversation and others on the same or similar themes are not, for the purposes of these claims, particularly important or relevant – it is however right to point out that these conversations appear to have contributed to a building tension between the owners of the business and C (who, after all, had worked there for approximately 5 weeks). It is also right to point out that C is not shy from coming forward and has what can be described as a very forthright and occasionally confrontational approach to disagreement.

4.8 The critical dates, insofar as these claims are concerned, cover 14th -20th May 2020. On either Thursday 14th or Friday 15th (there was a dispute as to precisely which day; it is not a matter which I have been able to resolve but, for reasons that I will explain, nothing much turns on this) Brendan Hayden telephoned C requesting him to come into work on the following Monday (18th).

4.9 C believed that the purpose of coming into work was simply to take a CV-19 test. Mr Hayden says that he made it clear, during the course of that conversation, that the intent was for C, amongst others, to re-commence work, conditional upon them providing a negative CV-19 test and subject to strict CV-19 compliant procedures being adhered to. In my Judgment, this makes perfect sense. There would be little point in requiring an employee to attend the workplace and take a test unless they were re-commencing work. By this stage, R was, albeit on a staggered basis, beginning to meet its orders and C was one of many who were being re-introduced back into the workplace, albeit under a strict CV-19 compliant regime. C may have

misheard or misunderstood Mr Hayden but it is clear that he was told that he would be expected to work that Monday, subject to providing a clear test.

4.10 On Monday 18th May 2020, after a short CV-19 induction speech from a supervisor, those in attendance began their shift. All save for C who, prior to starting work, had a meeting with both Brendan and Richard Hayden during which he informed them that he had not been expecting to work that day and, importantly in the context of this claim, that he would struggle to come into work on account of his partner, Amber, being a night shift supervisor in the care industry. Amber worked Tuesdays, Thursdays and Sundays. Isabel and JJ attended different schools due to their respective ages and C maintains that, during this same conversation, he told Mr Hayden that, in order to place the children in school as key worker children, their respective schools would need one week's notice. This really is the key evidential dispute in this case. Brendan Hayden accepts that a conversation took place but denies that there was any discussion about schools needing a week's notice before either child's placement under key worker status could be confirmed.

4.11 I find that C did tell both Mr Haydens that he was struggling and would continue to struggle to attend work due to a combination of the schools being closed; his partner's shift pattern and the inability of his parents-in-law and other family members to provide childcare. That is broadly consistent with the contents of a telephone conversation which took place the following day and to which I will come to shortly. However, I do not accept that C informed either Hayden that the Schools would need a week's notice before confirming placements for both children. He did not know this at the time and could not therefore have provided that information (this information was only forthcoming on Tuesday afternoon, once Amber had spoken to the respective schools). I am not persuaded that C was informed of this requirement by either School prior to the weekend. Furthermore, it transpired that there was to be no school placement for JJ in any event, irrespective of notice and irrespective of his parent's key worker status. On C's own evidence, he did not anticipate that he would be expected to work on that Monday – therefore

there would have been, in my Judgment, no reason for him to have made any enquiries with either school prior to coming into work.

4.12 Nevertheless, as a result of this discussion, a temporary arrangement was agreed whereby C would start late (at 9am) on those Tuesdays and Thursdays. As it happened, C did work that Monday after providing a clear test. On returning home that evening C spoke to his partner and they explored various childcare options, none of which were readily feasible for obvious reasons (the country remained in lockdown). Late starts, by themselves, would also fail to solve the problem. It would only be possible for C to return to work if both children were put in school.

4.13 On Tuesday 19th May, shortly before he was due to start work at 9am, C rang the Respondent (the call log indicates there were two calls, one at 8:42am and the other at 9.10). Again, nothing turns on this – the fact is that he had made contact with R prior to his shift commencing. The second, and longer, of these calls was recorded by C without the knowledge or approval of Mr Hayden. An agreed transcript has been produced as part of the hearing bundle (173-182). R does not take issue with the fact of this recorded conversation and both sides rely upon the contents of that transcript for their own purposes. I set out below the relevant extracts:

Brendan: hello
Johnnie: Brendan
B: how ya going john
J: not too bad. eerm, i cant make it until the kids are back at school mate, thats the first thing
B: right
J: we're struggling like mad, she was at work sunday night, awake monday, asleep last night, shes going to be awake today, at work tonight, awake tomorrow, you get the picture

B: right, well your the only one thats come to me with this
J: (Hiss, huff and puff) no, but i'm struggling with my kids, really struggling
B: right, so what you trying to say then john, coz
J: until the kids are at school mate, i can't
B…, we'll work with you, whatever, but you let us know what the score is

J: i cant do anything, i'm struggling til i get the kids back to school mate
B: right
J: i cant come in til the kids are back to school, you either put me back on Furlough or do whatever it is you need to do, but i cant come back til the kids are at school
B: right, thats all i need to know John, right, we'll have to have a think about how we get stuff done,

B: and its hundred mile an hour
J: as soon as the kids are at school mate, i can
B: ya what
J: as soon as the kids are at school, i can, or whatever we sort out
B: right, well, we'll have to, like i say, now you've told me, i can't make, i like, you know, i like to think my decisions out

4.14 On 21st May, two days later, C received a letter (dated 20th May) informing him that he had been dismissed due to a failure to "...*attend work or telephone in to advise the reason for your absence*..."

4.15 In his witness statement Brandon Hayden candidly accepts that he took the decision to dismiss C because of his failure to attend work in circumstances where he was making it clear that he would not return to work until such time as his children returned to school. In oral evidence, and on questioning from me, he accepted that the fact that C had behaved aggressively towards him during the course of this telephone call (and possibly towards others on the shop floor) was a contributory factor towards his decision making.

4.16 In his statement and expanded upon orally, C has explained how difficult it has been for him to secure alternative employment following on from his dismissal. In his statement he made clear that he had searched relentlessly for new employment and finally managed to secure a new job on 15th February 2021. One matter which he failed to mention until cross-examined however was that in September/October 2020 he began work on a cash-in hand basis earning approximately £2k over that same period. No mention or allowance for these earnings had been provided within any document; statement or schedule of loss. On the second morning of the hearing, after evidence had been formally closed by both sides and submissions were expected, C (through Counsel) sought at first to adduce a further statement from a case worker at the firm of solicitors in order to clarify the circumstances in which this material failure to disclose had arisen. However, following brief submissions from Mr Baran, Ms Dannreuther withdrew her application to adduce any further evidence on the point.

5. Relevant law

Statute

5.1 The right to time off to care for dependants under s.57A ERA is the domestic implementation of clause 3 of the Framework Agreement on Parental Leave and it is accepted that the UK legislation goes further than the Directive and provides more extensive protection for parents. Section 57A ERA confers an entitlement on all employees to be permitted to take such time off as is 'reasonable' in order to take action that is 'necessary' to deal with one of a number of events.

5.2 s.99 ERA 1996 provides as follows:

(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if—

(a) the reason or principal reason for the dismissal is of a prescribed kind, or
(b) the dismissal takes place in prescribed circumstances.
(2) In this section "prescribed" means prescribed by regulations made by the Secretary of State.
(3) A reason or set of circumstances prescribed under this section must relate to—

…

(d) time off under section 57A;
.

5.3 s.57A ERA provides as follows:

(1) An employee is entitled to be permitted by his employer to take a reasonable amount of time off during the employee's working hours in order to take action which is necessary—
2
(a) …,
(b) …,
(c) …,
(d) because of the unexpected disruption or termination of arrangements for the care of a dependant, or
(e) ….

(2) Subsection (1) does not apply unless the employee—

(a) tells his employer the reason for his absence as soon as reasonably practicable, and
(b) except where paragraph (a) cannot be complied with until after the employee has returned to work, tells his employer for how long he expects to be absent.

Caselaw

5.4 There is limited Appellate authority on the subject of s.57A (and its interpretation and effect) and there is unsurprisingly no such authority dealing with cases that arise under this section set against the unprecedented circumstances of the CV-19 pandemic.

5.5 In *Cortest v O'Toole [2007]* the EAT :

'20. As to the second ground, ground 2 relating to s. 57A(1)(d) of the Employment Rights Act, the guidance set out from the DTI indicates that the time taken off for dependants is to enable them to deal with certain ***unexpected events on emergencies and to make any necessary longer term arrangements*** *when dealing with the particular sub-section (1)(d). It refers as an example to time being taken off where the normal carer of the dependant is unexpectedly absent, for example, a child minder or nurse may fail to turn up as arranged or the nursery or nursing home may close unexpectedly. In relation to how much time an employee can take off the guidance says that legislation does not specify the amount of time off which is reasonable because that will vary in accordance with the emergency but in most cases one or two days should be sufficient to deal with the problem. It then goes on to say that in relation to the provisions to deal with the immediate care of the child, visiting the doctor if necessary in the case, for example, of chicken pox and to make longer term care arrangements, "the employee is not entitled to take two weeks leave to look after a sick child"...*

22. ***... The purpose of the legislation is to cover emergencies and enable other care arrangements to be put into place.*** *These cases are all fact sensitive but a period as long as one month or even longer for care by a parent would rarely, almost never, fall within s.57A .*

5.6 In *Qua v John Ford Morrison Solicitors* [2003] ICR 482 (case concerning the s.99) the following guidance was provided:

24...The essential question for this tribunal was therefore whether the reason or principal reason for the Appellant's dismissal on 27th October 2000 was that she had taken, or had sought to take, time off under section 57A ....

25.. A tribunal asked to determine this issue should ask themselves the following questions:

(1) Did the Applicant take time off or seek to take time off from work during her working hours? If so, on how many occasions and when?
(2) If so, on each of those occasions did the Applicant (a) as soon as reasonably practicable inform her employer of the reason for her absence; and (b) inform him how long she expected to be absent; (c) if not, were the circumstances such that she could not inform him of the reason until after she had returned to work?

If on the facts the Tribunal find that the Applicant had not complied with the requirements of section 57A(2), then the right to take time off work under subsection (1) does not apply. The absences would be unauthorised and the dismissal would not be automatically unfair. Ordinary unfair dismissal might arise for consideration however, if the employee has the requisite length of service.

(3) If the Applicant had complied with these requirements then the following questions arise:

(a) Did she take or seek to take time off work in order to take action which was necessary to deal with one or more of the five situations listed at paragraphs (a) to (e) of subsection (1)?

(b) If so, was the amount of time off taken or sought to be taken reasonable in the circumstances?

(4) If the Applicant satisfied questions (3)(a) and (b), was the reason or principal reason for her dismissal that she had taken/sought to take that time off work?
If the Tribunal answers that final question in the affirmative, then the Applicant is entitled to a finding of automatic unfair dismissal.

5.7 Ms Dannreuther also prayed in aid the case of *RBS v Harrison* (also EAT authority) which re-emphasises that such cases are inherently fact sensitive as well as making the point that the [DTI] guidance does not in any way impose a straitjacket upon the Tribunal when it comes to interpreting the section and applying it to the facts as found. By way of example, there is no specific period of time that must elapse between the employee becoming aware of the disruption and the date on which that disruption is expected to occur – in other words 'unexpected' means exactly that – it does not have to mean 'sudden and unexpected.'

Wrongful dismissal

5.8 A complaint of wrongful dismissal is a common law action based on breach of contract. The reasonableness of the employer's actions is irrelevant. The question is whether the contract has been breached. If it has and termination is
the result then it is wrongful.

6. Submissions

6.1 I am grateful to both legal representatives not only for the professional and measured way in which they have presented their respective cases but also for their careful and articulate submissions, both written and oral. I do not intend to rehearse the contents of the same here save to say as follows.

6.2 On behalf of the Respondent, Mr Baran urges me to adopt an objective and cold-blooded approach to the issues – it is not a case where, for example, I am charged with assessing the reasonableness or otherwise of the decision to dismiss. Either C satisfies the s.57A criteria or he does not. If he does not then that is the end of the matter. In the alternative (and over and above other points made on remedy) he argued for a very high 'Polkey' deduction on the basis that dismissal would have occurred in any event a short time later. The Claimant, argues Mr Baran, was not wrongfully dismissed; he failed to turn up for work – attending work is a key and essential term of the contract and a failure to do so therefore must be repudiatory entitling R to dismiss w/o notice.

6.3 On the Claimant's behalf, Ms Dannreuther emphasised that C clearly informed his employer both of the fact of the difficulties faced in arranging childcare as well as a time in which that disruption would continue. The time taken off by him was both reasonable and necessary; disruption to childcare was 'unexpected' and the reason he was dismissed was clearly because he had done so. The claim therefore is made out. Ms Dannreuther further argued that C had done nothing, let alone committed a repudiatory breach of contract, justifying summary dismissal. He had called his employer before his shift began and fully explained the reasons for his non-attendance – in the circumstances he was wrongfully dismissed. Finally, she argued that the Respondent's submissions on 'Polkey' should be rejected; he had acted reasonably in mitigating his loss and, subject to the late amendment to the Schedule of Loss, is entitled to be compensated in full.

7. Conclusions

7.1 Adopting the sequencing of issues set out above, and dealing first with the s.99 automatically unfair complaint, I have come to the following conclusions.

Did C take time off or seek to take time off from work during his working hours on 19th May 2020?

7.2 As already indicated, there was no dispute that C did both take time off and seek to take further time off work. The answer is therefore an unequivocal yes. C made it abundantly clear during the course of that telephone conversation that he was struggling with childcare commitments and that would have an inevitable impact on his ability to attend work not only on that specific day but over the days ahead.

Did C inform R as soon as reasonably practicable of the reason for his absence? (the first of the two questions that fall to be determined under s.57A(2))

7.3 Once again, and as Mr Baran rightly but helpfully conceded, C informed Mr Hayden as soon as reasonably practicable of the reason for his absence and subsequent potential absence – namely the inability on his and his partner's behalf to secure childcare provision.

Did C inform R how long he expected to be absent for?

7.4 This was the key issue. The transcript makes clear that C, on several occasions during the course of that conversation, informed R that he was struggling and would continue to struggle until such time as his children were back in school. In my Judgment, however, at no time either during that conversation or before did C ever say or indicate how long that struggle would continue and therefore how long he expected to be absent for. C did not state in conversation on Monday, for example, that he was expecting his children to be back in school the following Monday or that the school (or indeed both Schools) required one week's notice or even words to that effect. C could not have known then what notice, if any, either school required (that information was not received by his partner Amber until at the earliest Tues afternoon.) On his own evidence, he was not expecting to return to work on that day so would not have had had any reason to contact the school for such information prior to attending at the workplace on Monday. We know that there was no

such school provision for JJ in any event – had C made proper enquiries of the schools before attending work on Monday or indeed before the telephone conversation on Tuesday morning, this information would have been readily available and would have been communicated. Had C mentioned to R earlier that week that the children would be back in school the following Monday or that he would be back in work on that day, childcare having been sorted by then, I would have expected in the course of a lengthy telephone conversation at least one (even passing) reference to that fact – instead the timeline for the children being expected back in school is conspicuous by its absence.

7.5 In my Judgment, there is no obligation upon C to provide R with a defined length of time he expects to be absent – for example, had he said:

"I expect to struggle for the next few days"; or
"until next Monday"; or
"for no longer than a week"

Anything along those lines would have been perfectly acceptable and would fulfil the statutory requirement. The fact that the statutory language imports the word '…expects to be…' demonstrates that it is to be read with a degree of flexibility and that uncertainty in such cases is all but inevitable. However, in this case, C said no more than he would struggle in coming to work until such time as the children were 'back at school.' There was no timeline or even approximate timeline provided – there was no suggestion made to R as to when either or both children would return to school – whether that be in a few days, weeks or months. It is true that R could have asked the question itself – 'when are you expecting to get your children back in school?' and R may be criticised for not having done so – nevertheless the onus (as the statute makes clear) rests with C to provide the information not upon R to seek it.

7.6 Furthermore, I am sympathetic to Brandon Hayden in terms of the nature of the telephone conversation which allowed him little opportunity to make any

meaningful contribution such was C's forthrightness (and much of which was directed on other, peripheral issues).

7.7 Yet further still, I note that at paragraph 27 of C's own witness statement he says that, during the telephone conversation, he told Brandon Hayden that he would be back in as normal the following Mon – that is demonstrably untrue – he did not say that at any time during the conversation as the transcript attests to. I accept that credibility cuts both ways and Brandon Hayden's recollection of that same conversation (as set out in Grounds of Resistance and before such time as he had had sight of the transcript) is equally inconsistent with the transcript.

If the answer to b. is no, were the circumstances such that he could not inform R of the reason for his absence until after he had returned to work?

7.8 As already made clear, it was not argued by C that he was unable to inform R for the reason for his absence due to the circumstances prevailing at the time so this issue simply did not arise.

7.9 Because I have concluded that C failed to inform R at any time as to how long he expected to be absent (a pre-requisite for any entitlement under the section to arise) the remaining questions do not fall to be determined.

7.10 That said, had I been required to do so, (and subject to the overarching point that C failed to give any approximate timing to his absence) I would have found that the time taken off (in terms of the Tuesday) to be necessary and reasonable and that the disruption to childcare arrangements was unexpected. No-one, least of all C, could have foreseen the impact of CV-19 pandemic; when social distancing and other restrictions might be lifted; when schools might re-open; when grandparents might once again be able to assume childcare responsibilities; when furlough schemes would come to an end; when employees were entitled to return to work and so on. In those

circumstances, being called back to work at relatively short notice and the childcare disruption that inevitably arose in consequence was 'unexpected' notwithstanding the terms of the furlough agreement.

7.11 Clearly, I would also have resolved the issue as to the reason or principal reason for C's dismissal in C's favour as well – leaving no need to consider the s.57B claim.

7.12 It will be scant comfort to C but, had this been a case of (for example) ordinary unfair dismissal or similar where the reasonableness or otherwise of the employer's actions fall to be considered, then I would unhesitatingly have concluded that R acted unreasonably by conspicuously failing to consider any alternatives to dismissal and having given the clear impression to C verbally that it had been willing to work around his childcare issues.

7.13 On the other hand, had C succeeded I would have resolved the remedy issues largely in R's favour – it seems to me inevitable that C would have been dismissed or resigned within a relatively timeframe on account of the simple fact that JJ could not be placed in school and that therefore childcare difficulties would have continued unabated. Ms Dannreuther argued that they (meaning C & R) would have worked around them but offered little, if any, evidence in support of that contention.

Wrongful Termination

7.14 I have no hesitation whatsoever in concluding that C was wrongfully dismissed. C telephoned his employer before his late start shift was due to begin; informing them why he was not in attendance and this explanation was communicated in a timely, albeit forceful, manner. C was struggling to attend work that day because his partner was catching up on hard earned sleep and his children needed to be cared for. This was not a case of a simple, unexplained and/or unreasonable refusal to attend work. At no point in time

did C commit a repudiatory breach of his employment contract entitling R to dismiss C without notice. He is entitled to a week's notice and accordingly is awarded the sum of £455.66 (being the sum agreed between the parties, subject to liability).

_____
Employment Judge Legard

Date: 2.6.21

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