EMPLOYMENT TRIBUNALS

Claimant: Mr H Luz Martins

Respondent: Tech Gloves IT Limited

Heard at: London Central
(Via Cloud Video Platform) **On: 10 and 11 June 2021**

Before: Employment Judge Joffe

Appearances
For the claimant: In person
For the respondent: Ms A Smith, counsel

JUDGMENT

1. The claimant's claim that he was automatically unfairly dismissed for making protected disclosures, contrary to section 103A Employment Rights Act 1996, is not upheld and is dismissed.

2. The claimant's claim that he was automatically unfairly dismissed, contrary to section 100(1)(e) of the Employment Rights Act 1996, is not upheld and is dismissed.

REASONS

Claims and issues

.1 The claimant brought two claims of automatically unfair dismissal. The parties had agreed a list of issues but we discussed that list at the outset of the hearing and amended it as it did not fully and accurately reflect the legal tests the Tribunal would

have to apply nor did it fully articulate the facts which were asserted. The list as amended was as follows:

S 103A Employment Rights Act 1996: automatically fair dismissal because of a protected disclosure

i) Did the claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996? The Tribunal will decide:

What did the claimant say or write? When? To whom? The claimant says he made disclosures on these occasions: in a series of emails sent to the respondent on 29 July 2020. They were said to be disclosures about the fact that the respondent did not provide private health insurance to its employees.

ii) Did he disclose information?
iii) Did he believe the disclosure of information was made in the public interest?
iv) Was that belief reasonable?
v) Did he believe it tended to show that: the health or safety of any individual had been, was being or was likely to be endangered?
vi) Was that belief reasonable?
vii) If the claimant made a qualifying disclosure, it was a protected disclosure because it was made to the claimant's employer.
viii) Was any protected disclosure the reason or principal reason for the claimant's dismissal

Claim under s 100(1)(e) Employment Rights Act 1996): automatically unfair health and safety dismissal

ix) Were there circumstances of danger which the claimant reasonably believed to be serious and imminent? The circumstances were requiring the claimant to work and in particular to attend a client's site in London during the pandemic without private health insurance provided by the respondent.
x) If so did the claimant take or propose to take appropriate steps to protect himself and others or to communicate these circumstances by any appropriate means to the employer? The steps relied on were asking the respondent for private health insurance.
xi) Was his taking of those steps the reason or principal reason for his dismissal?

Findings of fact

<u>The hearing</u>

3. I heard evidence from the claimant on his own behalf. For the respondent, Mr D Abbass, Mr M Rubin and Ms V Zuluaga gave evidence. I had an agreed bundle of

148 pages. I was provided with three videos of meetings which the claimant attended during the disciplinary process.

4. An oral judgment and an abbreviated account of the reasons were given at the hearing and I explained to the parties that full written reasons would follow with the written judgment.

3. On 11 December 2019 the respondent company was formed. It provides managed IT support to businesses. It has two directors. Mr Abbass and Mr Rubin. It has a company secretary, Veronica Zuluaga, who is also the bookkeeper and financial controller. Mr Abbas is the operations director. Mr Rubin provides technical management and develops and manages the IT engineering team.

4. At the relevant time, the respondent had three engineers including the claimant; it had a total of seven staff including the claimant and management.

5. The claimant was employed by the respondent on a contract dated 16 January 2020 as a 1st / 2nd line support engineer. His employment started on 4 February 2020. His role involved providing remote IT support to clients by phone and also attending client premises.

6. The claimant is originally from Portugal. He worked in the UK first in 2007 and has travelled extensively internationally to work. He does not have extensive experience of using the NHS; he told me he had not been hospitalised or required emergency care in the UK. He has not used private medical care in the UK but has had the benefit of private medical insurance in other countries where he has worked in the past.

7. On 1 March 2020, the claimant was issued with a new contract to reflect a pay rise.

8. It is relevant to record some more general facts about the state of the pandemic. By February 2020, there was increasing awareness of the spread of Covid 19 and by 26 March 2020, the UK entered its first lockdown.

9. I take judicial notice of the fact that government guidance and restrictions changed over time as did the understanding of the risks presented by the virus and the information available to the public about those risks. The respondent's evidence was that attendance at client premises by engineers was work which was permitted throughout the period and the claimant did not challenge that evidence. I was told that such visits only occurred when the support could not be provided remotely and it was 'mission critical' to the client that the support was provided.. Mr Rubin said that it was clear that clients were required to observe social distancing. The respondent followed government advice and provided the claimant with PPE.

10. It is also relevant to make some findings about what medical options existed for someone with symptoms. We had a discussion during the proceedings about whether I could take judicial notice of the fact that emergency care was not available generally under private health insurance. I indicated that I could not take judicial notice of that fact. I indicated that it was my general impression that Covid cases were being dealt with by the NHS but that I would need to see evidence that such care was not provided at all by private providers.

11. I was subsequently and during the course of evidence provided with the fruits of internet search by the respondent's solicitor. I understand that in accordance with his duty to the tribunal he looked for and produced all information he could find which indicated either way what the position was for private healthcare providers. I also gave the opportunity to the claimant to look for and produce any further such information he wished to. He declined the invitation and accepted in submissions that in fact private health care would have been a 'placebo' – it would have given him comfort to have it rather than providing him with any tangible benefits had he contracted Covid 19.

12. I summarise the information presented to me:

- An article by the organisation *Which* contained the following extracts:

  What will happen to health insurance prices?

  In March, the Association of British Insurers (ABI) told Which? that it did not expect COVID-19 would push up prices.

  ActiveQuote has confirmed this is the case. Aviva said its price rise in April was not due to COVID-19.

  Treatment for people hospitalised for COVID-19 will be under the NHS even if it's received within a private setting.

  What should privately insured COVID-19 patients do?

  They should turn to NHS 111 and if necessary continue on with the NHS.

  All COVID-19 patient management is being led centrally by Public Health England with the NHS leading the response.

  Private hospitals don't include emergency facilities. Policyholders can, however, use their private insurance for advice and support.

- A number or items from various insurers which showed that they were not accepting patients with Covid 19 and not providing treatment for such patients.

13. It was not clear exactly what information was available on the internet at the time of the events which are the subject of this case but my understanding from the material was that the situation in relation to the role of the NHS and private providers had pertained throughout the pandemic.

14. On 20 May 2020, the claimant sent an email to Mr Abbass requesting annual leave.in July 2020. He asked for a letter to prevent him from having to quarantine on his return from a holiday abroad. This was at a time when there was considerable uncertainty as to what travel might be permitted and what conditions might be placed on those travelling abroad. after an exchange of emails, Mr Abbass wrote a letter:

I hereby support that Hugo Luz Martins, is an essential information technology professional within our business, providing highly skilled onsite technical support to our company's clients in Central London, some of the tasks being systems emergency response and continued network operation, to ensure latest communications standards.

15. The claimant told the Tribunal he was travelling to somewhere safer than London but did not tell the Tribunal where.

16. Between February 2020 and his dismissal, the claimant went to clients' sites on ten occasions. Mr Rubin said that he checked with the claimant that he was comfortable about the visits and the claimant was always enthusiastic. He would not have sent the claimant to any site visit unless necessary which is why there were so few over this period.

17. The last visit the claimant undertook was on 27 July 2020.

18. The claimant's evidence was that his awareness of the dangers of the pandemic had grown over time. He originally had not taken it seriously, apparently because of views he had seen expressed on social media, but he told the Tribunal and I accepted, that by July he was feeling anxious about working on client sites and taking public transport. His consciousness of the dangers had grown. It is correct to say that by July 2020, the rate of infection in the UK had been significantly reduced and there was a relaxation of lockdown so the claimant's awareness and anxiety were increasing at a period when objectively the dangers had reduced, although I accept that throughout the pandemic any worker in the claimant's position has been been having to assess risk based on information and guidance which are in a state of flux. It has been an anxious time for many workers.

19. On 29 July 2020, the claimant had a discussion with Mr Rubin about visit to a client on 30 July. This was said to be the respondent's most important client. The claimant did not raise any health or anxiety concerns with Mr Rubin.

20. There was then a series of emails between the claimant and Mr Abbas which are relevant to quote in their entirety. The first email from the claimant to Mr Abbass was copied to the rest of the team:

Dear Derek

Really hope that your well.

I am writing cause of my concern.

Will we at any point have Health Insurance?

Mr Abbass replied:

As you know we are an evolving company. At present we do not provide health insurance or any other value added employee services. We are currently focusing on growing the business.

Our next target is to invest in our team in training them to have expanded skill sets and enabling them to meet their personal growth goals The management team is also looking at how we can provide certified training for our team to enable us to meet with the expectation of our customers.

As we grow, we will certainly look at adding other benefits to the team above and beyond our legal obligations as a company. There currently is no legal obligation for companies to provide private healthcare in the UK, although I do appreciate having healthy team members is better for the company. Maybe we can carry out some

research and see if there is an option where the company can procure discounted private healthcare for employees if they want it.

We certainly want to keep our employees happy but at this early stage in the company the best way we can do this is by ensuring revenue is higher than operating costs, so we can ensure salaries are paid and we can grow the company to provide opportunity for our team and make ourselves more attractive to our customers. Hopefully this way existing customers stay with us and new customers join us. This in turn will enable us to introduce more benefits to the team.

Hope this answers your question.

The claimant wrote again, again the team remained copied in:

Dear Derek

Don't understand why this is not a TGIT priority.

Its certainly mine due to going onsite.

Want corporate protection.

21. Mr Abbass was taken aback by the tone of this email, which he described as terse. He nonetheless replied:

I believe we are following UK Government guidelines regarding COVID and providing all legal obligations to our employees. If we are not then please advise and I will investigate. As I said; Private healthcare is on the roadmap for the company but I don't have a time line for it at this stage.

22. The exchange continued:

Dear Derek

Employers Liability Insurance is required by law (under the Compulsory Insurance Act 1969).

Kind regards

Hugo Martins

Mr Abbass responded:

Thank you Hugo

We obviously have this insurance but I don't see how it has anything to do with Health insurance?

Derek

23. The claimant's reply was:

Dear Derek

This has - check file attached.

The claimant attached the letter previously provided to him in connection with his holiday. Mr Abbass was concerned that the letter did not relate to other employees but had been copied to them. He could not see the relevance of the letter to the claimant's request for health insurance.

24. In what he says was an effort to draw a line under the matter, Mr Abbass wrote back:

Hugo,

First of all, I don't think you should be sharing private documents with the team but as you have and its now in the public domain. I will respond.

I completely don't understand your point, what does this have to do with Health insurance or Public liability insurance?

This document was requested by you so you could go out of the country on holiday and be able to return. You personally requested it following my concern that you may not be able to return due to COVID and a potential quarantine situation. It was written in a format following an example doc you found that you believed would help you return in this event. Not for any other reason

If you have any other issues please feel free to call me

Derek

25. The claimant in evidence was critical of Mr Abbass for not ringing him to have a one to one discussion but he himself had started the email conversation and did not respond to the offer of a telephone discussion.

26. The claimant wrote back instead:

Dear Derek

The letter of support is true.

Still is my job to go onsite.

Being smart protected.

Kind regards

Hugo Martins

27. Mr Abbass replied:

Hugo

I don't think this conversation is covering any new ground.

You want Private healthcare. My response was clear; It is not a legal requirement for any company in the UK to provide Private healthcare as standard to employees but it is on our roadmap to provide when the company is able.

As everyone else, you are free to purchase Private health insurance for yourself at your own cost but in the mean time. I also stated that the company would see if we can buy at a discounted rate for our team until we offer this as a benefit

You stated you didn't think you were protected. My response was; As I have said previously we are following the Government COVID guidelines re going to and working on site.

You questioned if we had Employers liability insurance, which was absolutely nothing to do with private healthcare but even so, I responded that as a fully Legal company, we have this insurance in place.

You also provided a letter that was to support your personal vacation arrangements, which was also nothing to do with the original point regarding Healthcare or going onsite to customers

Your latest response seems to insinuate you are going on site and not being protected by the company but I have asked you several times to state why you think you are not protected?

If you have a point to make that I am missing, please let me know

I have also stated that I believe this conversation should now be moved to a one to one conversation, if anything results from it that benefits the wider team, I will ensure this is communicated to them.

28. The claimant then wrote:

Dear Derek

It's a smart practice to ensure onsite engineers have the best medical protection.

As they're subject to external threats in the line of their work - specially nowadays.

I am NOT comfortable going onsite during a Worldwide pandemic without any cover.

Kind regards

Hugo Martins

29. Mr Abbass responded to the claimant and Mr Rubin only:

Hugo

Whilst I appreciate your concerns. We will not be changing company policy to provide health insurance for any of our employees, including you or ourselves.

I do [not] appreciate you emailing the team your personal concerns, despite being asked not to several times. I also do not need your advice on how to manage the company or what is or isn't company smart or best practice, especially as you have absolutely zero experience in this field.

As stated several times now in previous emails we comply with all regulations and also provide all legal obligations regarding company benefits. If you require something outside this, then we are happy for you to purchase it as an individual or wait until we have made enquiries to see if we can find a private healthcare plan that our team can buy at a discount. Please be aware that you have to declare any private healthcare as a company benefit and are taxed at the relevant rate

Derek

30. The claimant then copied in the whole team in response:

Dear Derek

This concerns the TEAM as well.

"we are happy for you to purchase it as an individual"???

"Please be aware that you have to declare any private healthcare as a company benefit and are taxed at the relevant rate" LOL Really????

31. Mr Abbass said in evidence that he felt this email was unprofessional and disobedient, since the claimant had copied in the team despite being asked not to do so.

32. Mr Abbas then emailed the claimant, not copying in any other member of staff:

Do that again and I will issue a disciplinary procedure against you. I told you not to copy the team several times and you have. I have provided you the information you asked for in as clear terms as I can.

Its incredibly disrespectful to carry on in the conduct that you are and does not serve the benefit of you or the team.

The fact that the answer is not one you are happy with does not give you the right to disobey a direct request from one of your managers.

I hope this is clear.

Derek

33. In response the claimant once again copied in the team:

Dear Derek

I am not comfortable going onsite tomorrow without Corporate Health Insurance.

Kind regards

Hugo Martins

34. Mr Abbass then wrote to the claimant:

Hugo

I have covered this several times now. I also advised you I would initiate disciplinary procedures if you emailed the whole team again, which you have. So please take this email as notice that this is what I intend to do. I will write to you to invite you to a disciplinary meeting, this invitation will advise you of your rights and potential outcomes.

There is no reason as a company we would provide this at this stage in the company growth. In the UK you have a perfectly good NHS system which is free. If you want private healthcare then you need to buy it personally. You knew the terms of your contract when you joined. Yes the situation with COVID is making life more difficult and we are following all guidelines, none of which is buy your employees private healthcare.

As I also advised you, private healthcare through the company may not save you as much money as you think, as it is a taxable benefit. Please take individual advice about this.

If you are not willing to go to site, then we will need to discuss this as a management team, especially as your reason is not a valid one in law. You are employed as an onsite engineer. If you do not want to go onsite, then we will have to consider how to proceed with you as an employee, especially as your current conduct is concerned.

Derek

35. At some point in July, it would appear prior to this date, the claimant submitted an online enquiry to Virgin about medical insurance. He says he then spoke on the telephone to someone from Virgin and asked some questions about Covid 19. He said he could not remember what he was told as he stopped listening once he heard the price of the insurance.

36. Mr Abbass said that he decided to initiate an investigation into the claimant's conduct and attitude after the email exchange. The decision was not based on the original question about private healthcare, which he had attempted to deal with politely and professionally. He agreed with Mr Rubin and Ms Zuluaga that he should not be involved in the disciplinary because of his role in the incidents which gave rise to the disciplinary I note that this left the respondent with only two managerial personnel to deal with the investigation, disciplinary and appeal stages of the disciplinary process.

37. On 30 July 2020, the claimant texted and emailed Mr Rubin, saying that he was sick and would not be working that day. He produced a fit note which said that he had anxiety disorder. The certificate expired on 13 August 2020. The claimant told the Tribunal that it was not possible to get face to face appointments with his GP and it had been difficult to get the certificate. He was aware that there was a number on the internet to ring if a person had Covid symptoms and he had saved the number on his phone.

38. On 30 July 2020, Mr Abbass emailed the claimant to say that there was an investigatory meeting scheduled for 17 August. The accompanying letter said that the meeting was about 'allegations of Misconduct and Insubordination during emails copied to the entire Techgloves IT team on the 29th July 2020'. The claimant was asked to submit a written statement.

39. The respondent suspended the claimant's access to its systems.

40. On 31 July 2020, the claimant emailed Mr Abbass to ask why his access had been suspended and said that doing so was illegal.

41. Mr Abbas replied: *As you are off sick with anxiety, we do not want you to be bothered by any work issues. There is no reason for you to need any of these things as you are not at work. When you return all these things will be reinstated*

42. On 14 August 2020, the claimant obtained a further fit note expiring on 16 August 2020.

43. On 17 August 2020, the claimant sent an email saying he was fit and asking for his access to be reinstated:

Thank you very much for such caring and attention!

Really meant a lot to me - thanks to that now I am fully recovered and ready to get back to work today (Monday the 17th of August 2020) by 9am.

Please be so kind to reinstate every single access by that time as I need them to operate!

44. He sent in a statement as requested:

The emails I sent to the team were reflexion of my concern, a global concern nowadays. Due to the fact COVID-19 is getting to new phase all over the world, my awareness although it reflects specifically on my particular case, since I operate onsite mainly, can also apply to every other colleague within TGIT.

Obviously, I sincerely apologise for disrespecting the authority of the company's Director.

That being the case, I am not at peace working in an environment were the priority doesn't go with the most basic human rules, as is keeping the staff safe from danger.

Providing the staff masks and gloves are no longer doing the job now, as human interaction grows in getting more and more dangerous due to the pandemic.

As you know I travel in public transports in order to get to clients, so maybe providing me a company's vehicle would be a great way to bypass this danger, as I won't be so exposed.

Other than that, specific Health Care according to working hours.

This won't being TGIT priority- it is mine

45. On 17 August 2020, an investigatory meeting was conducted by video link. The meeting was recorded and I saw a transcript which the claimant did not take issue with. Ms Zuluaga conducted the investigation and Mr Rubin was present but played no active role. Ms Zuluaga put the emails to the claimant. Some of his responses were as follows:

My only interest is my life, my well being and my health. OK so if this is not a priority to the director of the company I believe that we don't understand each other because if he's my leader or my mentor or my let's say Director sure. Uh, I wouldn't follow him. OK. So just make it clear for both of you I don't follow leaders that I don't believe in. OK, so if he's my leader or the leader of the company and we don't share the same values then we don't share anything. OK, because this is a relationship

Doesn't have the same priorities as me so I should be the one expressing where the differences are exactly so this is where I set the gap the mark of the line between me and you. This is how I think this is how you think. If we can get together on this position good. If not then we don't have a partnership anymore. I will ask for divorce. That's it.

46. Ms Zuluaga considered that the claimant's responses showed that he did not regret his behaviour and would behave in the same way again. Ms Zuluaga decided the matter should be referred to a disciplinary hearing and notified the claimant on 18 August of a hearing on 20 August. She notified him of his entitlement to be accompanied by a colleague or a trade union representative,

47. The charge was:

Misconduct and Insubordination during emails copied to the entire Tech Gloves IT team on the 29th July 2020.

48. On 20 August 2020, a disciplinary meeting was held by Mr Rubin. Ms Zuluaga was present. This meeting was also recorded and I saw a transcript and watched the video. The claimant was laughing and eating biscuits and Mr Rubin felt his attitude in the meeting was itself disrespectful and unprofessional.

49. Having watched the video, I considered that that was a reasonable conclusion. The claimant laughed in particular when some of his own statements were read out including the email where he said 'LOL#' to Mr Abbass' suggestion that he could obtain his own private health insurance. The impression given was that he was amused by his own behaviour and not contrite.

50. A relevant passage of the transcript records the claimant as saying:

First of all. I learn to respect myself very much in time and we are only a six people company. I was on sick leave for two weeks.

Nobody called me to check if I was OK. And we are making this a mess of it. We work in London, central London. Why don't you provide corporate healthcare? We live in a city. Our clients are there. If you don't do this, I don't want to work for you, that's it. Why should you make a mess of it, let's find a way to work this out or to say goodbye that's it.

51. On 21 August 2020: Mr Rubin sent the claimant a dismissal letter which explained:

The reasons for your dismissal are as follows:

1. Misconduct.

2. Confidentiality, specifically sharing of private emails to the team.

3. Failing to follow instructions.

52. The claimant was given one month notice, but not required to work his notice. He was notified of his right to appeal.

53. In evidence Mr Rubin said that the fact the claimant raised the issue of private health insurance was not the reason for the dismissal. It was his conduct and attitude in a small company. It was hugely complicated to dismiss the claimant but he did not feel he had any choice as he could not condone the claimant's behaviour or the example it set to other staff.

54. On 24 August 2020, the claimant sent in an email to Mr Rubin by way of appeal. He said:

Following appeal of dismissal reasons:

1. Misconduct

Is it misconduct to fight for what it's right?

Is it so out of line to request for Health Care?

Isn't this now a concern for all of us in London?

2. Confidentiality

Nothing private or confidential was shared.

…

Following this appeal please consider Corporate Health Insurance for your company.

55. On 26 August 2020, there was an appeal hearing by video link again heard by Ms Zuluaga. She of course had conducted the investigation but the respondent was running out of senior personnel. The hearing was again recorded and transcribed.

56. Amongst other statements made by the claimant, was the following:

I never said I don't follow leaders. I follow a leader that I believe in OK and when it's not the company's policy to provide extra protection, I mean extra healthcare, especially working on central London due to the global concern that we face that's not a leader that I want to follow. OK, because we don't share the same principles we don't share the same values specially on healthcare.

You should keep your team safe. That's that's what I believe at least. OK, keep the team safe. If that's not a company's policy, it is definitely mine. It's on my statement. That's how I finished. OK, and it is still what I believe.

Yeah, I was a bit. I was a bit rude on the way I act yeah because yeah, I I totally I request health insurance but not for tomorrow. Not for the next day now. OK, it's now. Specially starting in September, this is very, very important to me OK. This is why I make this stand, you know, and that's why I express myself this way because of how important this is. That's basically it.

57. Ms Zuluaga dismissed the claimant's appeal.

58. The evidence of the respondent's witnesses was that the claimant was dismissed not because he raised the issue of private healthcare but because his conduct and attitude were not acceptable in a small company. This related to the tone of the later emails and the fact that the claimant continued to copy in other staff members contrary to a direct instruction not to do so.

Law

Protected disclosures

59. Section 43B(1) ERA 1996 defines a qualifying disclosure as a disclosure of information which in the reasonable belief of the worker making the disclosure is in the public interest and tends to show one of a number of types of wrongdoing. These include d) that the health and safety of any individual has been, is being or is likely to be endangered.'

60. To be a protected disclosure, a qualifying disclosure must be in circumstances prescribed by other sections of the ERA, including, under section 43C, to the worker's employer.

61. Guidelines as to the approach that employment tribunals should take in whistleblowing detriment cases were set out by the EAT in Blackbay Ventures (trading as Chemistree) v Gahir (UKEAT/0449/12/JOJ):

61.1 each disclosure should be identified by reference to date and content

61.2 the basis upon which the disclosure is said to be protected and qualifying should be addressed

61.3 if a breach of a legal obligation is asserted:

each alleged failure or likely failure to comply with that obligation should be separately identified; and

the source of each obligation should be identified and capable of verification by reference for example to statute or regulation

61.4 the detriment and the date of the act or deliberate failure to act resulting in that detriment relied upon by the claimant should be identified

61.5 it should then be determined whether or not the claimant reasonably believed that the disclosure tended to show the alleged wrongdoing and, if the disclosure was made on or after 25 June 2013, the claimant reasonably believed that it was made in the public interest.

62. There is a number of authorities on what a disclosure of 'information' is. It must be something more than an allegation; some facts must be conveyed: Cavendish Munro Professional Risks Management Ltd v Geduld [2010] ICR 325. There is no rigid dichotomy between allegations and facts. A statement must have sufficient factual content and specificity such as is capable of showing one of the matters listed at s 43B(1): Kilraine v Wandsworth LBC [2018] ICR 1850.

63. An expression of an opinion or state of mind is not itself a disclosure of information. More than one communication may be read together and amount to a protected disclosure: Norbrook Laboratories (GB) Ltd v Shaw [2014] ICR 540.

64. An enquiry on its own may not disclose any information: Parsons v Airplus International Ltd EAT 0111/17

65. The burden of proof is on the worker to show that he or she held the requisite reasonable belief. The tribunal must look at whether the claimant subjectively held the belief in question and objectively at whether that belief could reasonably be held. The allegation need not be true: Babula v Waltham Forest College [2007] IRLR.

66. The reasonableness of the worker's belief is determined on the basis of information known to the worker at the time the decision to disclose is made: Darnton v University of Surrey [2003] IRLR 133.

67. Factors relevant to the issue of whether a worker reasonably believed that a disclosure was in the public interest include:

67.1 the number in the group whose interests the disclosure served (the larger the number, the more likely the disclosure is to be in the public interest)

67.2 the nature of the interests affected (the more important they are, the more likely the disclosure is to be in the public interest)

67.3 the extent to which those interests are affected by the wrongdoing disclosed (the more serious the effect, the more likely the disclosure is to be in the public interest)

67.4 the nature of the wrongdoing disclosed (the disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing)

67.5 the identity of the alleged wrongdoer (the larger and more prominent the alleged wrongdoer, the more likely the disclosure is to be in the public interest)

(1) Chesterton Global (2) Verman v Nurmohamed [2017] IRLR 837.

68. An employee may have a reasonable belief that a health and safety complaint which principally affects that employee is made in the wider interests of employees generally: Morgan v Royal Mencap Society 2016 [IRLR] 428, EAT.

69. An employee is automatically unfairly dismissed if the reason or principal reason for his or her dismissal is that the employee made a protected disclosure: section 103A Employment Rights Act 1996.

70. If an employee lacks the two years' continuous service required to claim ordinary unfair dismissal, he or she has the burden of showing, on the balance of probabilities, that the reason for dismissal was an automatically unfair reason: Smith v Hayle Town Council 1978 ICR 996, CA

Health and safety dismissal.

71. An employee is automatically unfairly dismissed if the reason or principal reason for dismissal is one of the health and safety reasons set out in section 100 Employment Rights Act 1996.

72. Tribunals should take a two stage approach under section.100(1)(e). Firstly:

- Were there circumstances of danger that the employee reasonably believed to be serious or imminent?
- Did he or she take or propose to take appropriate steps to protect him or herself or other persons from the danger?

The second stage is to consider whether the employer's sole or principal reason for dismissal was that the employee took or proposed to take appropriate steps. If so the dismissal would be automatically unfair: Oudahar v Esporta Group Ltd [2011] ICR 1406, EAT.

73. The 'circumstances of danger' are not limited to dangers in the workplace itself: Harvest Press Ltd v Mr T J McCaffrey [1999] IRLR 778, EAT.

74. Subsection 100(1)(e) is to be read with words inserted as follows: 'in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger *or to communicate these circumstances by any appropriate means to the employer*' in order to comply with EU Directive No.89/391: Balfour Kilpatrick Ltd v Acheson and ors [2003] IRLR 683.

75. Subsection 2 of section 100 provides: 'For the purposes of subsection (1)(e) whether steps which an employee took (or proposed to take) were appropriate is to be judged by reference to all the circumstances including, in particular, his knowledge and the facilities and advice available to him at the time.'

Submissions

76. I heard oral submissions from both parties and refer to them insofar as is necessary to explain my conclusions.

77. The claimant in his submissions said that private health insurance should have been provided to him as a placebo – something which would have made him feel better and more comfortable even if it would not have provided actual medical care in the event of him becoming ill with Covid-19.

Conclusions

Protected disclosure

Issues: Did the claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996? The Tribunal will decide:

What did the claimant say or write? When? To whom? The claimant says he made disclosures on these occasions: in a series of emails sent to the respondent on 29 July 2020

Did he disclose information?

78. The respondent's submission was that no facts were disclosed; there were questions raised, opinions expressed by the claimant and allegations made but nothing that could properly be called facts.

79. I looked very closely at the entire course of emails cumulatively and in context. They started with a query which was certainly not, taken on its own, a disclosure, and continued with expressions of the claimant's desire to have corporate health insurance and his opinion that it was necessary. The point at which there was a disclosure of facts (albeit of facts already known to the employer) was when the claimant attached the letter which provided information about his duties including the information that he went onsite. At this point it seemed to me that the exchange could be said to have included information. Those facts, in the context of the allegations, queries and opinions in the rest of the email chain, are the information which requires scrutiny. There remains however the question of whether that was information which the claimant reasonably believed tended to show that health and safety was being endangered.

Issue: Did he believe the disclosure of information was made in the public interest?

80. I accepted that the claimant did believe that he was making a disclosure in the public interest. He explained that he thought that employers were obliged to take exceptional measures in exceptional times and that his right to life was engaged. He said these were matters affecting everyone.

Issue: Was that belief reasonable?

81. Ms Smith did not initially address this issue in submissions, and, when I asked her what the respondent's position was, said that the question of reasonable belief in the public interest was a low bar and that the respondent was not really defending the claim on this basis. She said however that I could take account of the small number of employees affected, i.e. the claimant and the part-time engineer who also went on site.

82. Looking in the round at the various Chesterton factors, I bear in mind this was a very small company and a very few individuals involved. However the interests touched on were very important ones at a time of national preoccupation with safety at work during the pandemic. If the information did tend to show a failure to protect health and safety in relation to the pandemic it did seem to me that this was information which could be reasonably regarded as in the public interest. It would certainly have been of interest to other employees in similar circumstances for example.

Issue: 6.1.5 Did he believe it tended to show that:

6.1.5.4 the health or safety of any individual had been, was being or was likely to be endangered;

83. This question relates to the genuineness of the claimant's belief. The respondent pointed to the facts that the claimant had applied in May 2020 for a holiday and then gone abroad (The Tribunal was not told where but the claimant said it was a safer part of the world) and had previously made no complaint about attending on site.

84. The evidence I heard and saw including the email chain itself and the claimant's subsequent absence from work with anxiety satisfied me that the claimant was genuinely concerned at this stage that he was at risk. He said, and I accepted, that earlier in the pandemic he had not taken the pandemic seriously because of an impression he formed from reading views on social media but by this point his views had changed. His concern seemed to centre around London in particular in circumstances where the first wave was known to have hit London particularly hard. I was satisfied that at this time the claimant genuinely thought not having private health insurance put his health and safety at risk in circumstances where he had to attend sites in central London and use public transport to do so.

Issue: Was that belief reasonable?

85. I concluded that the belief was not reasonable, bearing in mind that the test is in part subjective and part objective – i.e. I was looking at the beliefs of the claimant himself through an objective lens rather than the beliefs of a hypothetical reasonable employee. The assertion the claimant was making was that his health and safety was being

endangered because of the lack of private healthcare in the particular circumstances of the pandemic. I accept that he was not aware at the time that private health care would not have added anything to what was available through the NHS. But there were two factors which made his belief unreasonable:

- He gave no evidence at all of any facts or matters or evidence he relied on which could reasonably have led him to believe that he would not have received appropriate treatment on the NHS. The facts that for most purposes GPs were not providing in person appointments and that there might be delays in accessing ordinary medical care were not reasonably to be regarded as casting light on what would have happened in an emergency situation. The claimant accepted that he had looked on the internet to see what he should do if he did have Covid symptoms, was aware that there was a telephone number provided and had saved the number on his telephone. He must therefore have looked at the government / NHS advice which was readily available on the internet and showed that there was a route to obtain assistance;
- He had been in contact with a private health provider and asked questions about Covid cover but had not listened to the answers or did not recall them. His evidence in this respect was unclear and unsatisfactory. Had the claimant pursued his enquiries reasonably he would have realised that private health insurance would not assist him.

Issue: If the claimant made a qualifying disclosure, it was a protected disclosure because it was made to the claimant's employer.

Issue: Was any protected disclosure the reason or principal reason for the claimant's dismissal?

86. A tribunal should always scrutinise with care a claim that a person was dismissed because of their behaviour in the course of making a protected disclosure. Although I have concluded that the claimant did not make a protected disclosure, I have nonetheless gone on to consider whether I would have been satisfied that the disclosure he did make was the reason or principal reason for his dismissal, had I found it to be a protected disclosure.

87. The respondent's account was that the reason for the dismissal was the claimant's conduct and attitude and refusal to follow a direct instruction – his disrespectful tone and his insistence on continuing to copy in the team when asked not to do.

88. I accepted the respondent's evidence because the way the correspondence developed clearly demonstrated exactly what it was that had troubled Mr Abbass.

89. I took into account Mr Abbass' full and polite replies to the claimant's initial questions, his repeated attempts to get the claimant to pursue his requests without copying in the entire team, his assurance that if there were matters that needed to be shared with the team arising from the discussion that would occur. He gave the claimant a clear warning that continued refusal to obey the management instruction would result in a disciplinary process. There was nothing in the evidence which suggested that the initial enquiry had provoked any animus against the claimant and everything to show that Mr Abbass reached a view that the claimant's conduct was unacceptable after repeated and reasonable attempts to persuade him to alter that conduct.

90. It clearly was not in the respondent's interest to lose an important member of staff during a difficult time.

91. In the hearings which followed, I accepted that Mr Rubin and Ms Voluaga genuinely reached the view that the claimant's behaviour was misconduct but also that, because of what he said and how he behaved in the hearings, he did not accept that he had behaved inappropriately overall and would not act any differently in future.

92. Although reasonableness is not part of the test when looking at what the reason for the dismissal was, if I had concluded that the views about and the characterisation of the claimant's conduct was unreasonable, that might have been material from which an inference could have been drawn that the real reason for the dismissal was the disclosure. On the evidence I had I simply had no reason to reject the account of the respondent's witnesses, whom I found straight forward and clear.

Issue: Were there circumstances of danger which the claimant reasonably believed to be serious and imminent? The circumstances were requiring the claimant to work and in particular to attend a client's site in London during the pandemic without private health insurance provided by the respondent.

93. I have accepted above that the claimant genuinely believed his health was endangered.

94. It seems to me that in order to give proper effect to this section and be consistent with the case law, I have to consider how what is a reasonable belief would have been shaped by the extraordinary circumstances of the pandemic. I take judicial notice of the fact that an employee in the claimant's position would have been well aware during the first wave of the pandemic that the UK and London in particular had been very hard hit, that employees were required to work at home where possible and that public transport was perceived as a forum in which there was a risk for transmission. Any such employee would also have had to grapple with the awareness that scientific knowledge and government guidance on the back of that knowledge were developing and changing. In particular the necessary precautions and the extent to which these mitigated the risks was information which was developing.

95. I concluded that, in those circumstances, a belief that travelling to a central London site on public transport presented a serious and imminent danger was a reasonable one for the claimant to hold. The reasonableness of that belief did not depend on what health care was available to an individual.

Issue: If so did the claimant take or propose to take appropriate steps to protect himself and others or to communicate these circumstances by any appropriate means to the employer? *The steps relied on were asking the respondent for private health insurance.*

96. In considering this issue, I noted that section 100(2) requires the question of what steps were appropriate to be judged by reference to circumstances including what facilities or advice were available to the employee.

97. The steps taken by the claimant were to ask about and then to press for private health insurance to be provided to him in the course of the email correspondence.

98. The question of what is appropriate focuses on the employee and effectively what he knew or ought to have known, given available facilities and advice. I concluded that the steps taken by the claimant were not appropriate given in particular the matters I have highlighted earlier:

- The lack of information and advice which could reasonably cause the claimant to believe that he would not have received appropriate treatment through the NHS;
- Advice he could and should have availed himself of as to whether private health insurance would have provided useful assistance to the claimant should he have become ill with the virus.

99. If the claim is properly to be regarded as one in which the claimant was communicating circumstances of danger to the employer, the circumstances of danger were limited to the requirement to attend client sites during the pandemic and did not include the absence of private health care. The means chosen by the claimant were not appropriate because he continued to copy in other members of the team when requested not to do so.

Issue: Was his taking of those steps the reason or principal reason for his dismissal?

100. I have already found that the reason for the dismissal was the respondent's view that the claimant's tone and his behaviour in continuing to send emails to the entire team having been instructed not to constituted misconduct. So even if the claimant had taken appropriate steps, the fact of taking those steps was not the reason for the dismissal.

101. Looking at it in another way, if the earlier emails in the chain (before the tone deteriorated and before the claimant was asked not to copy in other members of staff) are regarded as the claimant communicating circumstances of danger to the respondent by appropriate means, it was not those emails or that communication which led to the dismissal. It was the claimant continuing to copy in members of his team when asked not to do so and the tone of his ongoing correspondence.

Conclusion

102. For all of these reasons, the claimant's claims are dismissed.

Employment Judge JOFFE

Date 30th June 2021

JUDGMENT SENT TO THE PARTIES ON

.30/06/2021..

FOR THE TRIBUNAL OFFICE