EMPLOYMENT TRIBUNALS

Claimant: Mr K Woodcock

Respondent: The Builders Merchant Company Limited

Heard at: Leeds **On:** 15 July 2021

Before: Employment Judge Jones

REPRESENTATION:

Claimant: In person
Respondent: Mr J Thomson, Managing Director

JUDGMENT having been sent to the parties on 16 July 2021 and written reasons having been requested by the claimant by email dated 16 July 2021, in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following are provided:

REASONS

Introduction

1. The respondent is a builders' merchant. It has four branches and employs 42 members of staff.

2. The claimant brings a complaint of unfair dismissal contrary to section 100(1)(d) and (e) of the Employment Rights Act 1996. That is, he says, that the reason or if more than one, the principal reason for his dismissal, was that he left or refused to return to his place of work in circumstances of danger which he reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, and/or that in not returning to work he was taking appropriate steps to protect himself and other persons from danger in circumstances where he reasonably believed there was serious and imminent danger.

3. The claimant was employed by the respondent at their Goole premises from 21 October 2019 until 16 September 2020. He did not have the qualifying period of two years to bring an ordinary claim of unfair dismissal. Because the circumstances

in which he had not been at work between 8 and 11 September 2020 had clearly been set out in his claim form, Employment Judge Wedderspoon allowed him to amend the claim so that it was brought under the above provision.

The Issues

4. It follows that the issue for me to determine in this case is what was the reason or if more than one, the principal reason for the dismissal.

5. The respondent says that it was because of the claimant's conduct during a disciplinary meeting on 16 September 2020 which was held by Mr Quigley, and it was his verbal misbehaviour which led to the termination of his employment. The claimant says it was for the reason set out in paragraph 2 above.

The Evidence

6. I heard evidence from the claimant, from Mr Quigley, from Mr Matt Hawkins, from Mr Duncan Thomson and from Ms Jane Thomson.

7. I was also provided with two bundles of documents, the respondent's bundle running to 35 pages and the claimant's bundle including a series of documents of 11 in total.

Findings of Fact

8. The claimant had been employed as a Yard Assistant on the dates I have set out, and he undertook a three-month probationary period which was made permanent. There was no problem with his work to any great extent by the date of his dismissal.

9. On 8 September 2020 the claimant was informed by Mr Chris Benson, who was the acting Assistant Manager for the Goole site, that one of his colleagues, Mr Ronan Collier-Booth, had tested positive for COVID-19. It was believed that Mr Collier-Booth had contracted that virus when he had been refereeing an amateur football match.

10. Mr Benson said that the claimant and his colleague could leave that day and undertake a test. The claimant left and undertook a COVID PCR test. He had to wait for two days, the test being taken on 9 September 2020 and the result coming through on 11 September 2020. The result of the test was negative.

11. The claimant's partner, Ms McKinley, was expecting a child and was at that time eight months in term.

12. The claimant had earlier expressed his anxiety about work at the commencement of the pandemic, at least at the time the UK was locked down by the Prime Minister on 24 March 2020.

13. The respondent had closed for one day but following requests from clients and having been identified as an essential worker by the Government, it was permitted to operate and duly reopened the next day and has continued to trade throughout. I am satisfied the respondent made its best efforts to read and apply

the Government guidance in respect of measures to be taken in respect of the safety of their staff and their customers. A risk assessment was undertaken, and the staff were advised of the measures they would have to take on 1 April 2020. The claimant signed a copy of the safety measures which had been set out in a letter to all staff, which included a duty to keep two metres apart as well as many other measures, including washing hands and cleanliness in the premises.

14. A further reminder was issued in August 2020 which included those duties, and this was signed by a number of staff but not the claimant.

15. However, I am satisfied that it is likely the claimant had been made aware of the need frequently to wash hands and socially to distance, and from what he tells me I believe he took best measures to do that.

16. The contract of employment has a provision in respect of sickness, and the employee has a duty to report the sickness to the immediate supervisor, interestingly where practicable "in person". I suspect it is not usually practicable to report the sickness in person, but that has been interpreted as meaning by telephone, and that is the preferred means of communicating by the respondent. That means of reporting has to be daily until a medical certificate is produced by the employee, and the employee becomes entitled to statutory sick pay after three days.

17. The claimant, I am satisfied, sent a number of WhatsApp messages to his supervisor, namely Mr Hawkins, from 4 August through to 10 September 2020. They had been provided by the claimant in a screenshot of a WhatsApp page which shows to the same number, which the claimant has named "Matt H boss work". The evidence of Mr Hawkins was that he had used this telephone number up until his birthday on 22 August 2020 when he had changed it. A message on 17 August was one to which he had replied. Mr Hawkins' evidence was that he had not received a message on 9 September in which the claimant had written that he had had his COVID test and was waiting for the result, asked whether he was going to be paid, nor a further short message on 10 September saying that he had not received any results. To that WhatsApp message there are two ticks, which suggest it had been read. If it no longer was the number of Mr Hawkins, one wonders who was reading those messages.

18. In addition, the claimant sent messages to Mr Benson on 9 September when he was reassured with a "👍" and "no worries" and confirming the result on 11 September when he received the response "happy days".

19. The claimant also sent an email to Mr Hawkins on 11 September 2020. In that email (sent at 14:56) the claimant said it was just a quick email to discuss what to do going forward after the positive COVID test at work. He said they had all tested negative (to which he meant he and his family), but he was concerned about returning to work before the baby was due as he felt there still could be a risk. He said he was wondering if everyone at work had been or was getting tested and if a deep clean had been done. He said for obvious reasons he did not want to risk bringing it home to Lindsay, his partner, so close to the birth, and he was trying to weigh up the risks. He also had a young daughter.

20. Mr Hawkins' reply on the following day at 11:59 was to say that the claimant had left the premises without good reason on 8 September 2020, failed to return and not even contacted him "until yesterday". He said they were COVID secure and had adhered to Government advice, and that the claimant had failed to respond to the safe working practice update (which was presented on 26 August) which contravened basic requirements. He said they took their responsibility seriously, and he said they were a small company and for every employee it was vital, it was an ongoing process, but it was the second time he had failed to attend work without good reason and therefore he accepted the claimant's resignation.

21. The claimant attended work on 14 September because he had not resigned but he was then suspended by Mr Hawkins and asked to attend a disciplinary hearing on 16 September 2020. The claimant attended the meeting. It was held by the Regional Manager, Mr Quigley, and Mr Hawkins was present.

22. I have heard evidence from Mr Quigley. It was presented in a straightforward way. He made concessions about errors which had been made in the process. I regarded his evidence as reliable. There was a discussion about the way in which the claimant had reported his work absence on 9, 10 and 11 September, and that the claimant had said that he had sent WhatsApp messages, although he did not show them to Mr Quigley at the time, because Mr Quigley's view was that WhatsApp was not an appropriate way to communicate. The claimant said that he worked with Ronan and believed that it was appropriate to self-isolate and was particularly concerned by the fact that his partner was heavily pregnant and he needed the test result.

23. There was then a discussion about how closely the claimant had worked with Ronan, and a disagreement about whether the claimant had placed himself at risk. This led, I am satisfied, to the claimant becoming upset, and the claimant raised his voice, talked across Mr Quigley on a number of occasions, slammed his note pad on the desk and said to him that he was putting his unborn child at risk. The claimant accepted in evidence that he had made this remark. He thought that they were not taking him seriously.

24. Mr Quigley then took a break in the meeting, hoping that would calm tempers, but immediately upon recalling the claimant he told him that he was dismissing him.

25. The letter confirming the dismissal with reasons was drafted and to be sent out by Mr Thomson, the Managing Director. A copy of a letter dated 17 September 2020, is headed "Termination of Employment", and stated:

> "Further to your recent disciplinary on 16 September 2020 with Matt Hawkins, Goole Branch Manager, and Mr Steve Quigley, Regional Operations Manager, I confirm your termination of employment on the basis of gross misconduct. Whilst attending the hearing your attitude was aggressive throughout and you accused Mr Steve Quigley of putting the life of your unborn child at risk. Aggression towards any member of staff will not be tolerated. As a gesture of goodwill we will pay you one week's notice."

26. The claimant had, I am satisfied, sent a notice of appeal before seeing that letter, on 18 September 2020. I accept that the letter on 17 September 2020 was to

be posted, and whether it was I cannot say, because the claimant says he never saw it. I am satisfied, however, it was drafted in that way by Mr Thomson at the time.

27. The claimant appealed the dismissal by letter of 18 September 2020. He set out the circumstances, which are largely the facts he expressed above and he pointed out that he had contacted Mr Hawkins via WhatsApp. He said he did not think the company procedures had properly been followed and he was not given the chance to explain himself during the meeting. He said he had never been subjected to any disciplinary matters of any kind prior to that time.

28. There was not an appeal, in the event, because the claimant was told that it would be held on 25 September 2020. The claimant emailed to say he could not attend because he was then working Monday to Friday, 9.30am to 7.00pm, every day through an agency, and that his partner was to give birth on 24 September 2020. Mr Thomson replied to say he was assuming the claimant was withdrawing his appeal, and the claimant replied, curtly, he had wrongly assumed: he was not withdrawing his appeal but that he would be available any Saturday after the birth, to which Mr Thomson said "don't be clever, I'm not just here for you, I will not be hearing your appeal on any Saturday", and he regarded the matter as closed.

29. An unannounced visit was undertaken by a Health and Safety Inspector on 22 September 2020. He met with Mr Hawkins and inspected the system which the respondent had in place. He deemed it to be satisfactory and confirmed that in an email dated 4 December 2020.

The Law

30. By section 100 of the Employment Rights Act 1996:

> *(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that—*
>
> > *(d) in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work, or*
> >
> > *(e) 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.*
>
> *(2) 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.*
>
> *(3) Where the reason (or, if more than one, the principal reason) for the dismissal of an employee is that specified in subsection (1)(e), he shall not be regarded as unfairly dismissed if the*

> *employer shows that it was (or would have been) so negligent for the employee to take the steps which he took (or proposed to take) that a reasonable employer might have dismissed him for taking (or proposing to take) them.*

31. In **Kuzel v Roche Products Ltd [2008] ICR 799**, the Court of Appeal held that section 98(1) of the ERA applied to all dismissals under Part X, which includes whistleblowing, and that it is for the employer to show the reason, or if more than one the principal reason, for dismissing the employee. However, the Court made the important observation that in most civil cases, the decision will not turn upon whom the burden falls because the standard of proof is the balance of probabilities and there will usually be sufficient evidence upon which to decide what probably happened and what the reason probably was.

Discussion and Conclusions

32. In a number of respects there were significant shortcomings in how the disciplinary proceedings concerning the claimant were managed. The ACAS Code of Practice on Discipline and Grievance Procedures is set out for employers and employees to understand the rules and procedure which should be taken before someone's employment is terminated. They were sadly not respected or applied in this case. The respondent as a small employer was not familiar with them, but it had its own policy which sought to reflect the Code.

33. The response of Mr Hawkins to the claimant's request about reassurance on his return to work was, to say the least, unsympathetic and lacking in empathy. I cannot be satisfied whether Mr Hawkins saw the messages from the claimant after 17 August 2020, although it is peculiar that the phone record I have suggests they might have been read. I do not pretend to have sufficient information of the technology to say whether the two ticks confirm that they have been seen by the phone holder, and it is not clear to me what may have happened if Mr Hawkins had changed his phone and only read the messages at a later stage. It is clear that he did not respond to any of those messages from the claimant, unlike Mr Benson who did respond to the claimant.

34. Given that Mr Benson had told the claimant he could go home on 8 September and get tested, it was not reasonable of Mr Hawkins to criticise the claimant for having waited for two days for the test. One would have expected Mr Hawkins to have had a conversation with Mr Benson before firing off his email on 12 September in which he criticised the claimant for not having returned to work with good reason, or having contacted him until the 11 September. He rejected the claimant's concerns about health safety by asserting that they had followed Government practice and took matters very seriously.

35. I cannot understand why Mr Hawkins would regard the claimant's email of 11 September as a resignation. It is plain to me that it is an email from an anxious employee who is seeking reassurance for the safety of his family at a time many people were unclear as to the level of risk of COVID. Suffice it to say, I regard the response of Mr Hawkins as inappropriate and regrettable.

36. I also regard as regrettable the failure of the respondent to set out in writing what it was the claimant was to address when he was to face disciplinary proceedings which could, and did, lead to his dismissal. Under the ACAS Code it is plain that an employee should be informed in advance of the reasons he is being asked to attend a disciplinary hearing, and the right he has for accompaniment. No such letter was sent. Rather, the claimant was called into the meeting which developed in the way I have already set out. I am satisfied Mr Quigley was acting upon the information which had been provided to him by Mr Hawkins and that Mr Quigley accepted in good faith from Mr Hawkins that the claimant had not properly reported his absences and had not given any clear reason for why he should not have been at work. I am also satisfied that Mr Quigley was too ready to criticise the claimant for a lack of social distancing in his work with Ronan. It is far better, in a situation like that, for an employee to be honest. Mr Quigley acknowledged that it was his shortcoming that he allowed the disciplinary hearing to move in that direction when it was really about the claimant's failure to report.

37. I am satisfied it is likely that tempers became frayed, in part because the respondent had not laid out in advance what it was the claimant had done right and wrong, and he was not in an adequate position to be able to respond to the disciplinary allegation. I find the claimant became so upset and become verbally aggressive, saying that his unborn child's life was being put at risk. Mr Quigley took offence. The contents of the disciplinary letter accurately reflected why Mr Quigley dismissed the claimant. It is because Mr Quigley thought he was rude and insubordinate. That concurred with what Mr Quigley said in evidence. Mr Thomson considered that to be unacceptable conduct towards a manager.

38. That being the case, it follows that I do not find that the reason for the dismissal was that the claimant had failed to attend work in circumstances of danger which he reasonably believed to be serious or imminent and could not reasonably have been expected to avert or that in those circumstances he had taken appropriate steps to avert such danger to himself and others. It was because of the angry and aggressive remarks he made. Although that included his concerns relating to his family's health and how his work might impact on that, that does not fall within the definition and meaning of section 100(1)(d) or (e) of the ERA. The reason for the dismissal was not that he had failed to attend work or taken steps to avert a danger, regardless of the reasonableness of the belief of the seriousness or imminence of it. It was that he had been rude to his manager. The claimant's complaint of unfair dismissal fails.

39. I regard his sense of grievance as a genuine one. The way in which the respondent managed this lacked empathy for an employee who up until that time had been a good worker and deserved greater consideration for his situation. I am satisfied had the respondent followed the ACAS Code of Practice, which I encourage it to read, Mr Quigley would have investigated this with Mr Benson and recognised that the claimant had been doing what he had been invited to by Mr Benson. There was no adequate investigation and the disciplinary proceedings rambled into an area that led to the claimant reacting angrily.

40. I understand why Mr Thomson responded as he did to the claimant when he said he was available on Saturdays, but the comment, "you assume wrong as I'm not withdrawing my appeal" was not as impertinent as perhaps Mr Thomson suggested

in his testy reply, “don’t get clever”. Mr Thomson could quite reasonably have said “I can’t do Saturdays, but let’s come to some other arrangement”, and not have closed matters down.

41. But the only issue in this case is what was the reason for the dismissal, and I have accepted Mr Quigley’s evidence, notwithstanding I have had certain reservations about the evidence of Mr Hawkins for reasons I have given.

Employment Judge D N Jones

Date: 18 August 2021