



EMPLOYMENT TRIBUNALS

Claimant

Ms Charlotte Rendina

Respondent

Royston Veterinary Centre Limited

Heard at: Bury St Edmunds (by CVP) **On:** 02 & 03 September 2021

Before: Employment Judge M Warren

Appearances

For the Claimant: Miss A Fadipe (Counsel).

For the Respondent: Ms J Linford (Counsel).

RESERVED JUDGMENT

1. The claimant's claims of unfair dismissal, for breach of contract, (notice pay) and for holiday pay each succeed. The remedy to which the claimant is entitled will be determined at a Remedy Hearing to take place by CVP on **27 October 2021** to commence at 10.00 am.

REASONS

Background

1. Ms Rendina was employed by the respondent as an Assistant Veterinary Surgeon from 22 January to 30 March 2020. After early conciliation between 24 April and 24 May 2020, she issued these proceedings on 30 July 2020 claiming automatic unfair dismissal for Health & Safety reasons, notice pay and holiday pay. The claims are resisted. There has been no preliminary hearing. Both parties have been legally represented throughout.

The Issues

2. The parties agreed on a list of issues which appears in the bundle at page 143. Both representatives confirmed at the outset of the hearing that I may rely upon this list of issues.

3. Ms Rendina says that she was automatically unfairly dismissed contrary to s.100(1)(c) and/or (e) of the Employment Rights Act 1996. She says that she drew Health & Safety matters to the attention of her employer by doing the following:
 - 3.1 Telling the practice manager Mrs Young on 16 March 2020 that she wanted to wear a mask at work because she was asthmatic;
 - 3.2 Asking at a practice meeting on 16 March 2020 whether staff could limit patients to one per consultation;
 - 3.3 Raising concerns with Mrs Young about the lack of measures in place to protect staff from Covid-19;
 - 3.4 Emailing Mrs Young and the sole director of the respondent, Dr White, on 23 March 2020 raising concerns with regard to Covid-19.
 - 3.5 Informing Mrs Young on 24 March 2020 that she was not comfortable carrying out routine procedures.
 - 3.6 Raising with Dr White issues of concern with regard to Covid-19 in the Practice Meeting on 24 March 2020, (I note this latter point does not appear in the list of issues, but it is part of the claimant's pleaded case and was dealt with in the hearing).
4. The question for me will be whether Ms Rendina did the foregoing and if so, whether that amounted either to:
 - 4.1 Bringing to her employer's attention by reasonable means, circumstances she reasonably believed were harmful or potentially harmful to her Health & Safety or the Health & Safety of her colleagues or clients, or
 - 4.2 Her declining to carry out certain procedures constituted her taking or proposing to take appropriate steps to protect herself or others in circumstances of danger which she reasonably believed to be serious and imminent, (i.e. the potential risk of contracting Covid-19).
5. If either of the foregoing are made out, the question for me will then be whether the reason or principal reason for her dismissal was because of those matters or whether she was dismissed, (as it says in the agreed list of issues) because she had failed to satisfactorily complete her probationary period. The position of the respondent is in fact as pleaded, that she was dismissed because of complaints received from clients, poor clinical record keeping, missing client appointments due to poor timekeeping, poor technical competence and charging clients for procedures that had not been carried out resulting in the respondent

having to reimburse clients, (this latter point was not pursued or referred to during the hearing).

6. Ms Rendina also says that she was not paid the correct amount by way of notice pay, nor the correct amount for accrued due and untaken holiday pay.

Evidence

7. I had witness statements before me from Ms Rendina, Mrs Young and Dr White.
8. I had before me a bundle of documents running to page 171. I was not asked to add any additional documents to the bundle during the hearing.
9. On a minor practical point, I should be grateful if the respondent's solicitors would please note that whilst they emailed the bundle in two parts because of the technical difficulties in a large bundle being received by the Tribunal's email system, in such circumstances it would be better if the respondent's solicitors would please use the Tribunal's Document Upload Service, which was developed for this purpose. It was a minor inconvenience to me that my bundle was in two parts.

The Law

10. Section 100 of the Employment Rights Act 1996, (ERA) provides as follows:
 - (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—*

...

 - (c) *being an employee at a place where—*
 - (i) *there was no such representative or safety committee, or*
 - (ii) *there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,*
he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety,

...

(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.*

11. In the case of Balfour Kilpatrick Limited v Acheson [2003] IRLR 683 the EAT identified three requirements to be satisfied in respect of a case pursuant to s.100(1)(c), namely:

- 11.1 It must have been not reasonably practicable to raise issues of Health & Safety through a Health & Safety Representative or Committee;
- 11.2 The employee must have brought to the employer's attention by reasonable means something he or she reasonably believed to be harmful or potentially harmful to Health & Safety, and
- 11.3 The reason or principal reason for dismissal must be that the employee asserted that right.

12. In respect of a claim pursuant to s.100(1)(e) the EAT clarified in Oudahar v Esporta Group Limited UKEAT/0566/10 the tribunal must consider:

- 12.1 Whether the criteria in sub-section (e) had been met namely whether in circumstances of danger the employee reasonably believed to be serious and imminent he or she had taken or proposed to take appropriate steps to protect him or herself or others from danger and if so,
- 12.2 Whether the sole or principal reason for dismissal was that the employee proposed to take such steps?

13. In a case where a claimant does not have the requisite 2 years continuous service to bring a claim for, "ordinary" unfair dismissal pursuant to s.98 of the ERA, but is relying upon one of the reasons for dismissal that would

render such dismissal automatically unfair and for which 2 years' service is not required, the burden of proof lies with the claimant to show that the automatically unfair reason was the reason for dismissal, see Smith v Hayle Town Council [1978] ICR 996 CA.

14. In calculating a period of notice to terminate employment, where an employee has worked on the day that notice was served, the period of notice begins to run on the following day, see West v Kneels Limited [1987] ICR 146 EAT.
15. Workers are entitled to 5.6 weeks paid holiday per year pursuant to the Working Time Regulations 1998. For a full time employee, that works out at 28 days holiday a year, including Bank Holidays. A worker is entitled to paid holiday. When employment is terminated, the worker is entitled to receive payment for any holiday entitlement which has accrued during the holiday year but had not been taken by the date of dismissal.

Facts

16. The respondent company is a Veterinary Practice operating from two locations and employing approximately 15 people at the relevant time. Dr White is the only Director of the company and is the principle shareholder. Mrs Young is the Practice Manager.
17. I was not referred to any evidence about the existence of either a Health & Safety Committee or an appointed Health & Safety Representative. No point in this regard was put to Ms Rendina. When I asked Dr White about the existence of a Health & Safety Committee or Representative, he said to me that Health & Safety was Mrs Young's responsibility. He made reference to the staff handbook, which was not in the bundle. I find that there was no Health & Safety Committee or appointed Health & Safety Representative.
18. By letter dated 30 December 2019, Ms Rendina was offered employment as a full time Veterinary Assistant commencing 20 January 2020 on a 3 month probationary period.
19. Subsequently, Ms Rendina was provided with a contract of employment which provided:
 - 19.1 At clause 2.1:

"At any time during your probationary period your employment may be terminated by one weeks' notice in writing from the company."
 - 19.2 At clause 6.1, that her salary was to be £29,000 per annum payable by equal monthly instalments.
 - 19.3 At clause 11.2, that she was entitled to 8 days holiday a year in addition to UK bank and public holidays. One assumes that this is

a typographical error and her contractual entitlement was the statutory minimum of 28 days, (inclusive of bank holidays).

20. Ms Rendina's employment commenced on 20 January 2020.
21. On two occasions during the first two months of her employment, Dr White told Ms Rendina that he was satisfied with her progress.
22. There was one complaint about Ms Rendina in the early weeks of her employment, from a client who was known to have complained about other vets. Dr White assured Ms Rendina that she was not to worry about it and that some clients looked for ways to try and get their money back.
23. Ms Rendina is of joint nationality, both Italian and British. She has family in Italy. It will be recalled that the Coronavirus in Europe emerged first in Italy and there were worrying and distressing reports from Italy during late February and early March 2020.
24. During early March 2020, there were news reports of the virus spreading in the United Kingdom.
25. On 16 March 2020, (the day the Government asked people to avoid non-essential contact and travel) Ms Rendina asked Mrs Young if she could wear a mask at work as she was particularly concerned, given that she suffered from asthma. Mrs Young said that she would have to speak to Dr White about that.
26. That evening, there was a meeting of all staff in the practice chaired by Dr White. In this meeting:
 - 26.1 Dr White said that Covid-19 was like cold and flu and was being over hyped by the press.
 - 26.2 Dr White said that there was no need for signs or notices at the practice and no need for hand sanitisers or wipes.
 - 26.3 Ms Rendina suggested consultations should be limited to one person in attendance only. Dr White rejected that suggestion.
 - 26.4 Ms Rendina asked Dr White if she could wear a mask and he agreed, provided that she explained to clients that this was because she was vulnerable.
27. After this meeting, Ms Rendina expressed to Mrs Young her concerns about the lack of measures being put in place to provide protection to Ms Rendina, her work colleagues and visiting clients, from the spread of Coronavirus. Mrs Young conveyed to Dr White that Ms Rendina had expressed these concerns.

28. At one o'clock in the morning on 23 March 2020, Ms Rendina sent an email to the practice from her home using the email address, info@roystonvets.com. She could not use the respondent's internal emailing system because she was not at work. It is the email address used by the respondent's clients. The respondent denies receiving this email, citing IT problems at the time which meant that sometimes emails were not received. The respondent produced no evidence to corroborate their assertion that they had IT problems and that some emails were not received. I did not find Dr White's nor Mrs Young's evidence in this regard credible. I find that the respondent did receive Ms Rendina's email and that Mrs Young and Dr White were aware of it.
29. In the email of 23 March 2020, Ms Rendina explained she had attended a webinar organised by the British Veterinary Association, (BVA) regarding Covid. She proceeded to pass on information regarding the recommendations made to veterinary practices by the BVA, including for example minimising contact with clients and colleagues, working from home where possible, delaying routine work, only provide an emergency service, ask client's to practise good hygiene and put arrangements in place for cleaning all surfaces. The information she provided was cut and pasted from the BVA website. She concluded her email as follows:

"I hope you have found this email useful, I am asking you if you could please consider putting the measures advised by the BVA into place during the upcoming months, I know it will really impact the business and hope that the scheme put in place by the Government will be able to offer some support. I also hope that we are able to work as a team and come out of this stronger and more united. I have been increasingly concerned about Covid-19, especially as I am aware of the severity of situation my friends and family in Italy find themselves in and can't help but worry about them, and miss them, constantly.

I am also aware that I must stay as healthy as possible in the event that I may need to look after my Grandmother living alone in the UK, as the rest of my family members are currently blocked abroad. I apologize if I may have come across as "unfriendly" lately, it is a very difficult time."

30. That evening the Prime Minister announced the first lockdown. After the announcement, Dr White sent the following text message to the respondent's staff:

"Following the Government's announcement earlier this evening I want you to know that we will be open "as normal" tomorrow. Please come into work at your normal time. The situation is very dynamic and may change at short notice. I appreciate your understanding and co-operation in these very unusual times. David"

31. In evidence, Dr White confirmed that that was an accurate recital of the text message he had sent. In his witness statement at paragraph 6 he had asserted that the text informed staff that there would be changes made to their working practices in light of the announcement. Details of those changes would be forthcoming. He would not accept in cross examination the above text as quoted did not say that. This is one of a number of

examples of why it is I did not always find the evidence of Dr White credible.

32. On arrival at work the next morning, (24 March 2020) Ms Rendina found that work in the respondent's practice continued as normal and that she was expected to see booked in clients and patients as normal. Ms Rendina was uneasy and wanted time to consult with the Royal College of Veterinary Surgeons, (RCVS) the regulatory body of vets. She therefore avoided some procedures that she was scheduled to undertake that morning which she saw as non-essential. She avoided them by telling Dr White that she was not happy undertaking them, as a newly qualified vet, in the clinical sense. She did not reveal to him at the time that her concern was the Coronavirus situation. Dr White acknowledged in evidence that he surmised though, that this was her motive.
33. Ms Rendina was subsequently able to speak to the RCVS and in her mind, she received confirmation that carrying out routine procedures might be a breach of the Veterinary Code of Practice, depending upon the circumstances.
34. After that telephone call, Ms Rendina revealed to Mrs Young why she had avoided the procedures that morning. Mrs Young passed that information on to Dr White.
35. During the evening, Dr White held a practice meeting with all staff. Ms Rendina covertly recorded the meeting. It does her no credit that she did so. However, the recording is admissible evidence and a transcript has been prepared, which is in the bundle. In cross examination, Dr White would not accept that the transcript was an accurate representation of what was said at that meeting. Dr White has had the benefit of legal representation, the recording has been available to him and his lawyers to listen to and the transcript has been open to them for review. There has been no objection as to the transcript's accuracy. This is another example of why it is I did not always find Dr White's evidence credible.
36. In the meeting to begin with, two nurses expressed their concern that they were being expected to undertake routine work. The point is discussed.
37. At the top of page 121 Ms Rendina said:

“The suggestion would be if it’s to be emergency only to have the minimum staff for emergency only practice, which means only the ones that are going to actually be dealing with the emergency, and whoever can work from home. And just be little staff as possible. So social distancing, can be maintained at all times, and only deal with emergencies, or put repeat prescriptions that can be then given to the client, or, you know, encouraged to do something like telemedicine, where, basically, where you can do phone consults or Skype consults, so you can still talk to the client and reassure them and triage the patient over the phone before deciding to let them in. If it’s an emergency, let them in. Of course, if it isn’t, then you don’t.”

Dr White responded by asking who decides whether it is an emergency or not?

38. At the top of page 122, Ms Rendina suggests that at that point in time, only farm vets, vets working in the food supply chain and vets carrying out emergency treatment, were considered key workers.

39. At the top of page 125 one can see Dr White said to those present:

“For various reasons, I had wind of what you guys might say. So I’ve been confirmed to the RCVS. And they denied saying what you have just told me. Ok, and it’s certainly not on the website.”

40. At the bottom of that page, Ms Rendina said:

“I spoke to them and I specifically asked if I carryout routine procedures, is that against the Code of Conduct? And they said in this situation, it would be deemed as misconduct.”

41. In the middle of page 126 when one can see that Ms Rendina made reference to the BVA webinar. Dr White is recorded as responding:

“I know what you are saying, but you are not listening to what I said.”

42. In the second paragraph of page 127 Dr White is recorded as having said:

“There is an awful lot of worry out there. Some of it is real, and some of it is hyped up. In fact, I would argue that most of it is hyped up.”

43. In response one of the nurses replies:

“People are dying of something that’s literally is becoming worse and worse daily, otherwise the Government wouldn’t be doing this”.

To which Dr White responds:

“No, incorrect.”

Ms Rendina responds:

“How do you explain Italy?”

After some comments by the nurse, Dr White then said:

“Can I just rattle off some statistics to 98.8% of the people who are diagnosed with Coronavirus, had inter current conditions, some of them up to three in the inter current conditions.”

44. At the top of page 130 one can see that Dr White said in response to others speaking of the pressure on the NHS and people dying from the virus:

“But I think you were misinformed. There’s not a huge amount of misinformation out there. At the moment you listen carefully to what the officials are saying. And they see people are dying with Coronavirus, not from Coronavirus.”

Ms Rendina responds:

“I can’t listen to this, but no, no, we have to play our part. We have to play a part in avoiding transmitting this disease to people and by doing that we have to stop routine things because that’s the way which we are playing our part.”

To which Dr White responds:

“Absolutely not, Charlotte, absolutely not. You are trying to dictate to me you, Charlotte you are trying to dictate to me how I should live my life separately and independently of what ...”

45. There then follows more sensible discussion on how the practice undertake emergencies only, that decisions on what are emergencies should be down to the individual vet and how that will be organised in terms of shifts. The meeting finishes with Dr White saying that he will put some proposals together.

46. On 30 March 2020, Dr White met with Ms Rendina without warning at the end of her shift. He informed her that she was dismissed. He said that they had reached a level of discord that was not amenable. I find on the balance of probabilities that he did not make any mention of Ms Rendina’s performance, of complaints from clients or her attendance record. On reaching that conclusion I note that the letter of dismissal handed to her later that day, (copied at page 54) makes no reference to performance, complaints or attendance. As the reason for dismissal, it says no more than,

“I explained that the level of discord between us, you and I, was such as to make your position in the practice untenable.”

I find that letter, written by Dr White, accurately and comprehensively summarises what he said to Ms Rendina as to the reason that she was dismissed.

47. In fairness I should also quote the final paragraph of that letter which reads:

“Subsequent to the meeting you said that you were not happy about the way the practice was responding to the Coronavirus outbreak “for 2 or 3 weeks” and asked if this was my reason. I said “No”. ”

48. I find as a fact that during her employment, Ms Rendina was late just once, when the train she relied upon was cancelled.

49. I note that Ms Rendina acknowledges that after her employment with the respondent had been terminated, she obtained further employment with another veterinary practice from which she was subsequently dismissed for the stated reason of lateness and client complaints. Although Ms Rendina disputes that those were genuinely the reasons for her dismissal, she acknowledges they were the reasons given by her employer at the time.
50. Dr White explains the final payment for notice and holiday pay made to Ms Rendina by reference to a document he produced at the time, reproduced in the bundle at page 142. He told me in evidence that he keeps record of the holiday taken by his vets by notes made in the daily electronic diary and a spreadsheet he produces from time to time. He told me that the document he produced which is at page 142 utilised information from these sources, which were not reproduced in the bundle. To that extent, it might be described as a self-serving document. Although Ms Rendina asserts that she has not been paid the correct amount of holiday pay, she does not provide any evidence or make any assertions as to how much holiday she had taken and how much had accrued due but had not been taken. I find that the document at page 142 accurately reflects the respondent's records, which is not to say that it accurately reflects the correct amount payable to Ms Rendina.

Conclusions

51. The respondent had no representative of workers on matters of Health & Safety at work nor a Health & Safety Committee.
52. The spread or potential spread of Coronavirus at ones workplace is a Health & Safety concern. The spread of the virus would be harmful or potentially harmful to the health & safety of fellow employees and visitors to the premises, such as clients.
53. Ms Rendina expressed to the respondent, concerns she had that inadequate arrangements were being made, prior to the meeting on 24 March 2020, (she said in evidence that she was perfectly happy with the arrangements after that meeting) to protect herself, her colleagues and visitors to the premises from the potential transmission of the Covid-19 virus. Her concerns were with regard to social distancing, hand sanitisation, cleaning of surfaces, restricting numbers of people in the building and minimising contact with people, such as clients. These were concerns which Ms Rendina reasonably believed to be harmful or potentially harmful to health and safety.
54. Ms Rendina conveyed her concerns reasonably by way of a reasonably worded email on 23 March 2020 and by speaking in a reasonable and polite fashion to Mrs Young. She also raised her concerns in a measured and reasonable way in the meeting on 16 March 2020 and in the meeting on 24 March 2020.

55. Ms Rendina considered there to be serious and imminent danger from the spread of Coronavirus. However, the only sense in which she actively took steps, was when she avoided undertaking certain procedures on the morning of 24 March 2020. On her own evidence, this was so as to give her time to consult with the RCVS. I therefore find that the reason for her taking those steps was not the protection of herself or others from danger but to establish from her regulatory body what her position was with regard to what amounted to emergency procedures.
56. The requisite circumstances required by s.100(1)(c) are made out but those required by s.100(1)(e) are not.
57. The question then arises whether the reason or principal reason that Ms Rendina was dismissed was because she brought those matters to her employer's attention? On the evidence of the transcripts of the meeting on 24 March, it is clear that Dr White was very irritated by Ms Rendina. That is consistent with his demeanour in evidence.
58. The wording of the dismissal letter and in particular, the reference to the, "level of discord between us" corroborates that Dr White was irritated. I find that the cause of that irritation was Ms Rendina raising concerns about the arrangements in place to protect herself, her colleagues and visitors to the premises from the spread of the Coronavirus.
59. The evidence offered up by the respondent in support of its contention as to the real reasons for dismissal, namely client complaints, lateness and not completing records correctly is extremely poor and notably sparse. The allegations of Ms Rendina's failings in relation to the vaccination record and the history print outs at pages 49 and 50 were hopelessly unconvincing. Those documents were printed out, as Dr White said, in January 2021 which gave credibility, it seemed to me, to the claimant's assertion that these documents were the result of a retrospective trawl for evidence and that this is all that could be found.
60. There was no evidence of the claimant being late either for work or for appointments. Nor was there any evidence of customer complaints, other than Ms Rendina's own acknowledgement of the one complaint, about which she received reassurances from Dr White at the time.
61. The one point which gave me cause to pause and reflect, not a point made in closing submissions, was the claimant's acknowledgement that she was dismissed from subsequent employment due to poor timekeeping and too many client complaints. That lends some credibility to the respondent's assertion that these were problems when she was in their employment as well. However on balance, having regard to the foregoing, this was not enough to convince me that the reason for dismissal was anything other than that Ms Rendina had raised with her employer issues of concern she reasonably believed were harmful or potentially harmful to Health & Safety, namely the potential spread of the Coronavirus. I find that was the

reason for her dismissal and her complaint of automatic unfair dismissal therefore succeeds.

62. I turn now to the claim for notice pay and holiday pay. Ms Rendina had been employed for 10 weeks and had therefore accrued an entitlement to $(28 \div 52 \times 10)$ 5.5 days holiday. She had taken holiday on 1 February 2020 only. In the document at page 142, Dr White somewhat bizarrely purports to deduct half a day for 30 March, (when she had worked a shift and had been dismissed), one day for 31 March, (when she was serving her notice and had been told not to come into work) and 1-6 April i.e. during her notice period, when she had been told not to come into work. Ms Rendina had not booked holidays for the afternoon of 30 March, 31 March or 1-6 April 2020. She did not take holiday on those dates. That therefore leaves her accrued due and untaken holiday of 4.5 days. She is entitled to payment in that respect.
63. In terms of notice pay, Dr White purported to deduct one day for 30 March 2020, the day on which notice was served. If the employee has worked on the day of service, it does not count towards the calculation of the notice period. That day should not have been deducted.
64. Dr White then purports to deduct one further days' pay, being an erroneous balance due from the claimant for over taken holiday pay, (which the respondent would not have been permitted to deduct in any event even if she had taken more holiday than had accrued due). The respondent therefore paid Ms Rendina for 3 days' notice when she was entitled to payment for 5 days. She is therefore owed two days further pay in lieu of notice.
65. Ms Rendina's claims for holiday pay and notice pay therefore succeed.

Remedy

66. I note that Ms Rendina's witness statement contains evidence relating to remedy, as does the bundle, including a schedule of loss. No further case management orders relating to remedy would appear to be necessary. The schedule of loss indicates that the quantum of Ms Rendina's claim is very modest indeed. I would very much hope that a remedy hearing is not necessary. If there is any unreasonable conduct in negotiations regarding possible settlement, the party responsible may face an order for costs if as a result, a remedy hearing is necessary.

Employment Judge M Warren

Date: 14 September 2021

21 September 2021

Sent to the parties on:

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For the Tribunal Office



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REASONS

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he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety,

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(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.*

11. In the case of Balfour Kilpatrick Limited v Acheson [2003] IRLR 683 the EAT identified three requirements to be satisfied in respect of a case pursuant to s.100(1)(c), namely:

- 11.1 It must have been not reasonably practicable to raise issues of Health & Safety through a Health & Safety Representative or Committee;
- 11.2 The employee must have brought to the employer's attention by reasonable means something he or she reasonably believed to be harmful or potentially harmful to Health & Safety, and
- 11.3 The reason or principal reason for dismissal must be that the employee asserted that right.

12. In respect of a claim pursuant to s.100(1)(e) the EAT clarified in Oudahar v Esporta Group Limited UKEAT/0566/10 the tribunal must consider:

- 12.1 Whether the criteria in sub-section (e) had been met namely whether in circumstances of danger the employee reasonably believed to be serious and imminent he or she had taken or proposed to take appropriate steps to protect him or herself or others from danger and if so,
- 12.2 Whether the sole or principal reason for dismissal was that the employee proposed to take such steps?

13. In a case where a claimant does not have the requisite 2 years continuous service to bring a claim for, "ordinary" unfair dismissal pursuant to s.98 of the ERA, but is relying upon one of the reasons for dismissal that would

render such dismissal automatically unfair and for which 2 years' service is not required, the burden of proof lies with the claimant to show that the automatically unfair reason was the reason for dismissal, see Smith v Hayle Town Council [1978] ICR 996 CA.

14. In calculating a period of notice to terminate employment, where an employee has worked on the day that notice was served, the period of notice begins to run on the following day, see West v Kneels Limited [1987] ICR 146 EAT.
15. Workers are entitled to 5.6 weeks paid holiday per year pursuant to the Working Time Regulations 1998. For a full time employee, that works out at 28 days holiday a year, including Bank Holidays. A worker is entitled to paid holiday. When employment is terminated, the worker is entitled to receive payment for any holiday entitlement which has accrued during the holiday year but had not been taken by the date of dismissal.

Facts

16. The respondent company is a Veterinary Practice operating from two locations and employing approximately 15 people at the relevant time. Dr White is the only Director of the company and is the principle shareholder. Mrs Young is the Practice Manager.
17. I was not referred to any evidence about the existence of either a Health & Safety Committee or an appointed Health & Safety Representative. No point in this regard was put to Ms Rendina. When I asked Dr White about the existence of a Health & Safety Committee or Representative, he said to me that Health & Safety was Mrs Young's responsibility. He made reference to the staff handbook, which was not in the bundle. I find that there was no Health & Safety Committee or appointed Health & Safety Representative.
18. By letter dated 30 December 2019, Ms Rendina was offered employment as a full time Veterinary Assistant commencing 20 January 2020 on a 3 month probationary period.
19. Subsequently, Ms Rendina was provided with a contract of employment which provided:
 - 19.1 At clause 2.1:

"At any time during your probationary period your employment may be terminated by one weeks' notice in writing from the company."
 - 19.2 At clause 6.1, that her salary was to be £29,000 per annum payable by equal monthly instalments.
 - 19.3 At clause 11.2, that she was entitled to 8 days holiday a year in addition to UK bank and public holidays. One assumes that this is

a typographical error and her contractual entitlement was the statutory minimum of 28 days, (inclusive of bank holidays).

20. Ms Rendina's employment commenced on 20 January 2020.
21. On two occasions during the first two months of her employment, Dr White told Ms Rendina that he was satisfied with her progress.
22. There was one complaint about Ms Rendina in the early weeks of her employment, from a client who was known to have complained about other vets. Dr White assured Ms Rendina that she was not to worry about it and that some clients looked for ways to try and get their money back.
23. Ms Rendina is of joint nationality, both Italian and British. She has family in Italy. It will be recalled that the Coronavirus in Europe emerged first in Italy and there were worrying and distressing reports from Italy during late February and early March 2020.
24. During early March 2020, there were news reports of the virus spreading in the United Kingdom.
25. On 16 March 2020, (the day the Government asked people to avoid non-essential contact and travel) Ms Rendina asked Mrs Young if she could wear a mask at work as she was particularly concerned, given that she suffered from asthma. Mrs Young said that she would have to speak to Dr White about that.
26. That evening, there was a meeting of all staff in the practice chaired by Dr White. In this meeting:
 - 26.1 Dr White said that Covid-19 was like cold and flu and was being over hyped by the press.
 - 26.2 Dr White said that there was no need for signs or notices at the practice and no need for hand sanitisers or wipes.
 - 26.3 Ms Rendina suggested consultations should be limited to one person in attendance only. Dr White rejected that suggestion.
 - 26.4 Ms Rendina asked Dr White if she could wear a mask and he agreed, provided that she explained to clients that this was because she was vulnerable.
27. After this meeting, Ms Rendina expressed to Mrs Young her concerns about the lack of measures being put in place to provide protection to Ms Rendina, her work colleagues and visiting clients, from the spread of Coronavirus. Mrs Young conveyed to Dr White that Ms Rendina had expressed these concerns.

28. At one o'clock in the morning on 23 March 2020, Ms Rendina sent an email to the practice from her home using the email address, info@roystonvets.com. She could not use the respondent's internal emailing system because she was not at work. It is the email address used by the respondent's clients. The respondent denies receiving this email, citing IT problems at the time which meant that sometimes emails were not received. The respondent produced no evidence to corroborate their assertion that they had IT problems and that some emails were not received. I did not find Dr White's nor Mrs Young's evidence in this regard credible. I find that the respondent did receive Ms Rendina's email and that Mrs Young and Dr White were aware of it.
29. In the email of 23 March 2020, Ms Rendina explained she had attended a webinar organised by the British Veterinary Association, (BVA) regarding Covid. She proceeded to pass on information regarding the recommendations made to veterinary practices by the BVA, including for example minimising contact with clients and colleagues, working from home where possible, delaying routine work, only provide an emergency service, ask client's to practise good hygiene and put arrangements in place for cleaning all surfaces. The information she provided was cut and pasted from the BVA website. She concluded her email as follows:

"I hope you have found this email useful, I am asking you if you could please consider putting the measures advised by the BVA into place during the upcoming months, I know it will really impact the business and hope that the scheme put in place by the Government will be able to offer some support. I also hope that we are able to work as a team and come out of this stronger and more united. I have been increasingly concerned about Covid-19, especially as I am aware of the severity of situation my friends and family in Italy find themselves in and can't help but worry about them, and miss them, constantly.

I am also aware that I must stay as healthy as possible in the event that I may need to look after my Grandmother living alone in the UK, as the rest of my family members are currently blocked abroad. I apologize if I may have come across as "unfriendly" lately, it is a very difficult time."

30. That evening the Prime Minister announced the first lockdown. After the announcement, Dr White sent the following text message to the respondent's staff:

"Following the Government's announcement earlier this evening I want you to know that we will be open "as normal" tomorrow. Please come into work at your normal time. The situation is very dynamic and may change at short notice. I appreciate your understanding and co-operation in these very unusual times. David"

31. In evidence, Dr White confirmed that that was an accurate recital of the text message he had sent. In his witness statement at paragraph 6 he had asserted that the text informed staff that there would be changes made to their working practices in light of the announcement. Details of those changes would be forthcoming. He would not accept in cross examination the above text as quoted did not say that. This is one of a number of

examples of why it is I did not always find the evidence of Dr White credible.

32. On arrival at work the next morning, (24 March 2020) Ms Rendina found that work in the respondent's practice continued as normal and that she was expected to see booked in clients and patients as normal. Ms Rendina was uneasy and wanted time to consult with the Royal College of Veterinary Surgeons, (RCVS) the regulatory body of vets. She therefore avoided some procedures that she was scheduled to undertake that morning which she saw as non-essential. She avoided them by telling Dr White that she was not happy undertaking them, as a newly qualified vet, in the clinical sense. She did not reveal to him at the time that her concern was the Coronavirus situation. Dr White acknowledged in evidence that he surmised though, that this was her motive.
33. Ms Rendina was subsequently able to speak to the RCVS and in her mind, she received confirmation that carrying out routine procedures might be a breach of the Veterinary Code of Practice, depending upon the circumstances.
34. After that telephone call, Ms Rendina revealed to Mrs Young why she had avoided the procedures that morning. Mrs Young passed that information on to Dr White.
35. During the evening, Dr White held a practice meeting with all staff. Ms Rendina covertly recorded the meeting. It does her no credit that she did so. However, the recording is admissible evidence and a transcript has been prepared, which is in the bundle. In cross examination, Dr White would not accept that the transcript was an accurate representation of what was said at that meeting. Dr White has had the benefit of legal representation, the recording has been available to him and his lawyers to listen to and the transcript has been open to them for review. There has been no objection as to the transcript's accuracy. This is another example of why it is I did not always find Dr White's evidence credible.
36. In the meeting to begin with, two nurses expressed their concern that they were being expected to undertake routine work. The point is discussed.
37. At the top of page 121 Ms Rendina said:

“The suggestion would be if it’s to be emergency only to have the minimum staff for emergency only practice, which means only the ones that are going to actually be dealing with the emergency, and whoever can work from home. And just be little staff as possible. So social distancing, can be maintained at all times, and only deal with emergencies, or put repeat prescriptions that can be then given to the client, or, you know, encouraged to do something like telemedicine, where, basically, where you can do phone consults or Skype consults, so you can still talk to the client and reassure them and triage the patient over the phone before deciding to let them in. If it’s an emergency, let them in. Of course, if it isn’t, then you don’t.”

Dr White responded by asking who decides whether it is an emergency or not?

38. At the top of page 122, Ms Rendina suggests that at that point in time, only farm vets, vets working in the food supply chain and vets carrying out emergency treatment, were considered key workers.

39. At the top of page 125 one can see Dr White said to those present:

“For various reasons, I had wind of what you guys might say. So I’ve been confirmed to the RCVS. And they denied saying what you have just told me. Ok, and it’s certainly not on the website.”

40. At the bottom of that page, Ms Rendina said:

“I spoke to them and I specifically asked if I carryout routine procedures, is that against the Code of Conduct? And they said in this situation, it would be deemed as misconduct.”

41. In the middle of page 126 when one can see that Ms Rendina made reference to the BVA webinar. Dr White is recorded as responding:

“I know what you are saying, but you are not listening to what I said.”

42. In the second paragraph of page 127 Dr White is recorded as having said:

“There is an awful lot of worry out there. Some of it is real, and some of it is hyped up. In fact, I would argue that most of it is hyped up.”

43. In response one of the nurses replies:

“People are dying of something that’s literally is becoming worse and worse daily, otherwise the Government wouldn’t be doing this”.

To which Dr White responds:

“No, incorrect.”

Ms Rendina responds:

“How do you explain Italy?”

After some comments by the nurse, Dr White then said:

“Can I just rattle off some statistics to 98.8% of the people who are diagnosed with Coronavirus, had inter current conditions, some of them up to three in the inter current conditions.”

44. At the top of page 130 one can see that Dr White said in response to others speaking of the pressure on the NHS and people dying from the virus:

“But I think you were misinformed. There’s not a huge amount of misinformation out there. At the moment you listen carefully to what the officials are saying. And they see people are dying with Coronavirus, not from Coronavirus.”

Ms Rendina responds:

“I can’t listen to this, but no, no, we have to play our part. We have to play a part in avoiding transmitting this disease to people and by doing that we have to stop routine things because that’s the way which we are playing our part.”

To which Dr White responds:

“Absolutely not, Charlotte, absolutely not. You are trying to dictate to me you, Charlotte you are trying to dictate to me how I should live my life separately and independently of what ...”

45. There then follows more sensible discussion on how the practice undertake emergencies only, that decisions on what are emergencies should be down to the individual vet and how that will be organised in terms of shifts. The meeting finishes with Dr White saying that he will put some proposals together.

46. On 30 March 2020, Dr White met with Ms Rendina without warning at the end of her shift. He informed her that she was dismissed. He said that they had reached a level of discord that was not amenable. I find on the balance of probabilities that he did not make any mention of Ms Rendina’s performance, of complaints from clients or her attendance record. On reaching that conclusion I note that the letter of dismissal handed to her later that day, (copied at page 54) makes no reference to performance, complaints or attendance. As the reason for dismissal, it says no more than,

“I explained that the level of discord between us, you and I, was such as to make your position in the practice untenable.”

I find that letter, written by Dr White, accurately and comprehensively summarises what he said to Ms Rendina as to the reason that she was dismissed.

47. In fairness I should also quote the final paragraph of that letter which reads:

“Subsequent to the meeting you said that you were not happy about the way the practice was responding to the Coronavirus outbreak “for 2 or 3 weeks” and asked if this was my reason. I said “No”. ”

48. I find as a fact that during her employment, Ms Rendina was late just once, when the train she relied upon was cancelled.

49. I note that Ms Rendina acknowledges that after her employment with the respondent had been terminated, she obtained further employment with another veterinary practice from which she was subsequently dismissed for the stated reason of lateness and client complaints. Although Ms Rendina disputes that those were genuinely the reasons for her dismissal, she acknowledges they were the reasons given by her employer at the time.
50. Dr White explains the final payment for notice and holiday pay made to Ms Rendina by reference to a document he produced at the time, reproduced in the bundle at page 142. He told me in evidence that he keeps record of the holiday taken by his vets by notes made in the daily electronic diary and a spreadsheet he produces from time to time. He told me that the document he produced which is at page 142 utilised information from these sources, which were not reproduced in the bundle. To that extent, it might be described as a self-serving document. Although Ms Rendina asserts that she has not been paid the correct amount of holiday pay, she does not provide any evidence or make any assertions as to how much holiday she had taken and how much had accrued due but had not been taken. I find that the document at page 142 accurately reflects the respondent's records, which is not to say that it accurately reflects the correct amount payable to Ms Rendina.

Conclusions

51. The respondent had no representative of workers on matters of Health & Safety at work nor a Health & Safety Committee.
52. The spread or potential spread of Coronavirus at ones workplace is a Health & Safety concern. The spread of the virus would be harmful or potentially harmful to the health & safety of fellow employees and visitors to the premises, such as clients.
53. Ms Rendina expressed to the respondent, concerns she had that inadequate arrangements were being made, prior to the meeting on 24 March 2020, (she said in evidence that she was perfectly happy with the arrangements after that meeting) to protect herself, her colleagues and visitors to the premises from the potential transmission of the Covid-19 virus. Her concerns were with regard to social distancing, hand sanitisation, cleaning of surfaces, restricting numbers of people in the building and minimising contact with people, such as clients. These were concerns which Ms Rendina reasonably believed to be harmful or potentially harmful to health and safety.
54. Ms Rendina conveyed her concerns reasonably by way of a reasonably worded email on 23 March 2020 and by speaking in a reasonable and polite fashion to Mrs Young. She also raised her concerns in a measured and reasonable way in the meeting on 16 March 2020 and in the meeting on 24 March 2020.

55. Ms Rendina considered there to be serious and imminent danger from the spread of Coronavirus. However, the only sense in which she actively took steps, was when she avoided undertaking certain procedures on the morning of 24 March 2020. On her own evidence, this was so as to give her time to consult with the RCVS. I therefore find that the reason for her taking those steps was not the protection of herself or others from danger but to establish from her regulatory body what her position was with regard to what amounted to emergency procedures.
56. The requisite circumstances required by s.100(1)(c) are made out but those required by s.100(1)(e) are not.
57. The question then arises whether the reason or principal reason that Ms Rendina was dismissed was because she brought those matters to her employer's attention? On the evidence of the transcripts of the meeting on 24 March, it is clear that Dr White was very irritated by Ms Rendina. That is consistent with his demeanour in evidence.
58. The wording of the dismissal letter and in particular, the reference to the, "level of discord between us" corroborates that Dr White was irritated. I find that the cause of that irritation was Ms Rendina raising concerns about the arrangements in place to protect herself, her colleagues and visitors to the premises from the spread of the Coronavirus.
59. The evidence offered up by the respondent in support of its contention as to the real reasons for dismissal, namely client complaints, lateness and not completing records correctly is extremely poor and notably sparse. The allegations of Ms Rendina's failings in relation to the vaccination record and the history print outs at pages 49 and 50 were hopelessly unconvincing. Those documents were printed out, as Dr White said, in January 2021 which gave credibility, it seemed to me, to the claimant's assertion that these documents were the result of a retrospective trawl for evidence and that this is all that could be found.
60. There was no evidence of the claimant being late either for work or for appointments. Nor was there any evidence of customer complaints, other than Ms Rendina's own acknowledgement of the one complaint, about which she received reassurances from Dr White at the time.
61. The one point which gave me cause to pause and reflect, not a point made in closing submissions, was the claimant's acknowledgement that she was dismissed from subsequent employment due to poor timekeeping and too many client complaints. That lends some credibility to the respondent's assertion that these were problems when she was in their employment as well. However on balance, having regard to the foregoing, this was not enough to convince me that the reason for dismissal was anything other than that Ms Rendina had raised with her employer issues of concern she reasonably believed were harmful or potentially harmful to Health & Safety, namely the potential spread of the Coronavirus. I find that was the

reason for her dismissal and her complaint of automatic unfair dismissal therefore succeeds.

62. I turn now to the claim for notice pay and holiday pay. Ms Rendina had been employed for 10 weeks and had therefore accrued an entitlement to $(28 \div 52 \times 10) = 5.5$ days holiday. She had taken holiday on 1 February 2020 only. In the document at page 142, Dr White somewhat bizarrely purports to deduct half a day for 30 March, (when she had worked a shift and had been dismissed), one day for 31 March, (when she was serving her notice and had been told not to come into work) and 1-6 April i.e. during her notice period, when she had been told not to come into work. Ms Rendina had not booked holidays for the afternoon of 30 March, 31 March or 1-6 April 2020. She did not take holiday on those dates. That therefore leaves her accrued due and untaken holiday of 4.5 days. She is entitled to payment in that respect.
63. In terms of notice pay, Dr White purported to deduct one day for 30 March 2020, the day on which notice was served. If the employee has worked on the day of service, it does not count towards the calculation of the notice period. That day should not have been deducted.
64. Dr White then purports to deduct one further days' pay, being an erroneous balance due from the claimant for over taken holiday pay, (which the respondent would not have been permitted to deduct in any event even if she had taken more holiday than had accrued due). The respondent therefore paid Ms Rendina for 3 days' notice when she was entitled to payment for 5 days. She is therefore owed two days further pay in lieu of notice.
65. Ms Rendina's claims for holiday pay and notice pay therefore succeed.

Remedy

66. I note that Ms Rendina's witness statement contains evidence relating to remedy, as does the bundle, including a schedule of loss. No further case management orders relating to remedy would appear to be necessary. The schedule of loss indicates that the quantum of Ms Rendina's claim is very modest indeed. I would very much hope that a remedy hearing is not necessary. If there is any unreasonable conduct in negotiations regarding possible settlement, the party responsible may face an order for costs if as a result, a remedy hearing is necessary.

Employment Judge M Warren

Date: 14 September 2021

21 September 2021

Sent to the parties on:

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For the Tribunal Office