EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4105346/2020 (V)

Held by CVP on the 14th and 15th September 2021

Employment Judge Hendry

Mr H Nesterovas	**Claimant** **In Person**
MacDuff Shellfish Scotland Ltd	**Respondent** **Represented by:** **Ms S Mackay, Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that the claimant has not demonstrated that he was automatically unfairly dismissed contrary to section 100(1)(d) or (e) of the Employment Rights Act 1996 and accordingly his claim is not well founded and is dismissed.

REASONS

1. The claimant raised proceedings against his former employers MacDuff Shellfish Scotland Ltd (MacDuff) on 2 October 2020 following his dismissal by the Company on 15 June 2020. The claims initially pursued were for unfair dismissal and disability discrimination. The disability discrimination claim was later withdrawn.

2. The respondent company opposed the claim for unfair dismissal arguing that it did not come within the ambit of section 100 of the Employment Rights Act 1996 and that the claimant had been unfairly dismissed because of breaches of their attendance policy essentially by failing to keep in touch as required and alerting managers just prior to his shifts that he was ill.

3. The case proceeded to a strike out hearing on 18 March 2021. That application was unsuccessful and the case proceeded to a full hearing on 14 and 15 September.

Evidence

4. The Tribunal had the benefit of a joint bundle (**JB p1-412**). The Tribunal heard evidence from the claimant on his own behalf. Thereafter, the respondent company called as witnesses, Gillian Hutchison, Health and Safety Manager, Silvia Kucerova Head of HR, Duncan Watt Head of Operations/Appeal Manager and Jerome Jones Head of Production/Dismissing Officer.

Facts

5. The claimant is a 29 year old man. He is a Lithuanian national. He has lived and worked in Peterhead for a couple of years. He has a good command of English. He initially worked for the respondent company through an agency but was employed directly by them on 20 May 2019. The claimant was

employed to work as a Hygiene Operative or cleaner at their production facility in Mintlaw where shellfish is processed.

6. The claimant received a statement of terms and conditions of employment (**JB p116-125**). He was also aware that the company had a handbook which contained various policies including the absence management policy (**JB 126(a) to 126(e)**). It required personal notification of absence or continued absence. In terms of the policy (Paragraph 3.0) if the employee did not have a telephone it was their responsibility to make alternative arrangements for reporting absences.

7. The claimant was initially paid £8.51 plus £0.30 per hour shift allowance. He worked the "back shift" as part of the cleaning squad. His role involved the cleaning of production lines and processing areas. The production lines and processing areas were not in use when cleaned. The claimant was part of a relatively small squad. The work was generally solitary with an operative being given particular tasks to do on their own.

8. The Head of the hygiene squad was a Mr Jakub Zylowski who was known to the claimant.

9. The respondent company were, at the time of these events, a subsidiary of a large Canadian Company "Clearwater". They employed approximately 380 staff in total with various sites throughout Scotland. They had a dedicated HR function headed up by Ms Kucerova.

10. The claimant was in the habit of driving to work from Peterhead. He would give lifts to other employees who worked with him. The claimant lived in a flat in Peterhead. He shared with 4 or 5 other people. The occupants had their own room but shared kitchen and toilet.

11. The Group of companies that the respondent belongs to became aware of Covid at an early stage due to their worldwide operations. On 28 February

the respondent's managers received an email from the CEO of Clearwater Seafoods Ltd setting out an Action Plan to tackle Covid when it spread to Scotland.

12. On 6 April the claimant reported COVID symptoms to Mr Zylowski. He was then asked to self-isolate as per the internal company policy.

13. The respondent company were proactive in the light of the COVID pandemic. They began preparations putting in health and safety measures at an early stage. They liaised with the Canadian Company, took advice including advice from a virologist. They carefully studied Government guidelines and Regulations as they developed. They decided to close down most of their operations in April. This was partly due to the necessity of putting into effect control measures to allow staff to work safely at the factory but also because the Coronavirus pandemic had hit their markets in China and elsewhere quite badly. The factory never fully stopped operating.

14. On 20 April the respondent furloughed 11 hygiene operatives including the claimant. He was sent a letter confirming this both in English and in Lithuanian (**JB p126(k)**).

15. The respondent company wanted to ensure that employees arrived at the factory safely. They arranged for a minibus driven by Mr Zylowski to pick up the Hygiene Operatives. The bus allowed for social distancing.

16. The pandemic caused concern amongst the respondent's staff many whom had come from Eastern Europe. The respondent tried it's best to reassure staff that it was putting in place safety measures.

17. On 6 May Mr Zylowski was told by other employees that they believed that the claimant had travelled home to Lithuania by car.

18. On 6 May Mr Zylowski text the claimant advising him that he was due back to work the following Monday (11 May) at 10 o'clock (**JB p137**). The claimant responded to Mr Zylowski on 8 May advising that he had damaged his phone battery and was in the process of finding another phone to buy but was using his laptop. He ended the message with "*So everything will go back to normal as it used to be before lockdown?"* ending with a smiling face emoji. Mr Zylowski responded *"No we are still working in small team until further notice".*

19. On 11 May the claimant was formally recalled from furlough via letter posted to his home address (**JB p128**). The letter stated:

> *"MacDuff Shellfish (Scotland) Ltd is closely monitoring the situation regarding the COVID-19 Coronavirus and we are committed to doing everything we can to maintain a safe and healthy workplace such as handwashing, frequent disinfection of surfaces, social distancing rules, non essential visits are prohibited at our land based processing facilities, staggered shifts.*
>
> *We are relying heavily on WHO and the UK Government in establishing safe working conditions and will continue to make our best efforts to keep the workplace safe."*

The letter concluded by inviting anyone that wanted further information or clarification to contact the author Ms Kucerova.

20. On 11 May the claimant emailed Ms Kucerova advising that he had renewed symptoms of enhanced fever and had been told by NHS to self-isolate and attached the self-isolation note (SIN). His email was acknowledged by Ms Kucerova. She wrote: *"Please keep in touch in relation to your health situation. Once your self-isolation period is completed and you will not display any symptoms, we will discuss your return to work plan".* She did not immediately hear further from him.

21. On 22 May the claimant emailed Ms Kucerova (**JB p134**).

> *"I am writing to discuss my concerns over working during this Coronavirus pandemic. Since my nature of work does not give me the opportunity to work from home and I am not an essential worker and there is a substantial risk to catch the virus while going to work and while at work, especially because we can't maintain 2m Government imposed social distance while driving to work by car with colleagues (reminder that we don't have any other option because our shift usually start 9-10pm and there is no public transport then), I am claiming my right to ask to be put on fourlough job retention scheme until there is a vaccine or immune antibody test widely available and it is sure I will not catch and spread the virus. This is especially the case because currently I am in the situation that I live with someone in the same household who is considered highly vulnerable to COVID-19 by Government, although we put every measure possible to not meet and connect at home, but obviously the risk of spreading the disease to the vulnerable is high. I will be kindly waiting for your comments and possible solutions to this problem."*

22. Ms Kucerova was surprised at the terms of the email. It had been clear from contact with Mr Zylowski that the claimant was aware that a minibus would be made available to transport workers to the production facility and in any event the claimant had his own car and could drive there alone. Ms Kucerova responded on the same date (**JB 135/136**):

> *"I would like to provide an update on the current status of our business activities relative to the impact of the COVID-19 (Coronavirus) pandemic.*
>
> *At Macduff Shellfish, Clearwater we are working hard to adapt our operations to protect the health and safety of our employees and support food production. Our priority is to protect the health and safety of our employees, family members, suppliers, partners, customers, and the communities in which we operate, and we are taking all necessary measures to ensure that we fulfil that priority. We are monitoring the spread of the virus globally and are taking steps to protect the business and our team members during this difficult and uncertain time. Over the last five weeks, we have proactively adopted increasing health and safety measures in our offices, plants, and vessel operations utilizing the best information available from our public health authorities.*
>
> *As you know, we temporarily suspended some production lines, however we are operational and at present, we are confident that we can handle the challenges of the current situation, while keeping the commitments we have to you.*

In order to prevent the spread of the virus, ensure business continuity as best as possible and provide peace of mind to our employees, we have made the decision to:

- *Ask many of our global team members to work remotely during this period along with taking all possible precautions to protect the health and wellbeing of our employees who are coming onsite to work. We are making every effort to minimize contact opportunities between individuals and reinforce hygienic measures, in line with local and international health recommendations.*
- *From the COVID 19 Action team to respond to any unforeseen issues and concerns from our employees, suppliers and the customers, given the global nature of our business. This team has been operational for some time and are committed to regular communication and needs assessments with our regional and onsite teams.*
- *Invoke a non-essential, global travel ban for all employees, and ban all travel to those countries stated as being high-risk. We have also made it a requirement of employees to report all travel to high-risk countries to the Company immediately. All business-critical travel needs prior approval from a member of our executive leadership team and it is considered on a case-by-case basis.*
- *All non-essential visits are in use with restrictions, Perspex separation screens are being explored to enable separation to continue longer term.*
- *All employees have been advised to follow the COVID-19 hygiene rules which are displayed across the facilities.*
- *HR support line for all internal team members, providing them with the opportunity to discuss any concerns they might have surrounding the pandemic.*

I understand that you may have questions regarding the Company and COVID-19. I therefore, encourage you to come to see me on Monday, 25th May 2020 at 7pm to discuss clarity on the current situation, as well as any updates with regards to changes in policy "COVID 19 control measures.

In addition, as a key worker (Cat 3) you are now eligible to book COVID 19 testing in the mobile unit in Peterhead, happy to discuss more details further. In relation to your transport, I would like to confirm that we continue to provide the discretionary company transport and the 2m social distancing is in place. However, I would like to stress that the way to work and from work is the employee's responsibility.

Unfortunately, the vaccine is not in place and it can take months or years to develop it, however as I previously mentioned, I am happy to discuss all your concerns in person.

Furthermore, based on our records, you live on 15 Maiden Street, Peterhead, AB42 1EE where you are currently renting a single room, so if any changes, I would really appreciate if you could advise me or Linda Burnett, HR Advisor about your new address. I have been also advised that you are currently in Latvia, so as per our internal policy, you are required to advise your line manager and you must self-isolate for 14 days before you return to work. Can you please advise if this is the case, if not, I look forward to seeing you on ***Monday at 7pm****. Please await for me at the reception area. Also, Head of H&S will attend the meeting to ensure that you will have all required information."*

23. The claimant did not attend the proposed meeting nor did he make contact with Ms Kucerova to arrange alternative means of communication.

24. On 26 May Ms Kucerova instructed an HR adviser Linda Burnett to send the claimant an "AWOL letter" which was posted and emailed. It stated:

"I am extremely concerned to note that you failed to report for work on Monday 25th May 2020.

As you know, you were recalled from furlough leave and expected to make a return to work on Monday 11th May 2020.

You e-mailed Silvia Kucerova, Head of HR, on 11th May 2020 to advise that you had a fever and you were instructed, in line with Company policy, to self-isolate for a 14-day period. On Friday 22nd May, Silvia received another e-mail from yourself highlighting some concerns you had in relation to returning to work during the COVID 19 pandemic. Silvia responded to your e-mail the same day with a detailed reply and invited you to meet with her at 19:00 hours on Monday 25th May to provide more clarity on the current situation, as well to provide any updates with regards to changes in policy COVID 19 control measures.

Unfortunately, you have failed to respond to Silvia's e-mail and telephone calls to your mobile phone number. Moreover, your Line Manager, Jakub Zylowski, Hygiene Manager, has attempted to make contact with yourself on numerous occasions, to no avail.

You have failed to contact the Company to advise of the reasons for this period of unauthorised absence or its likely duration, which is in breach of the Company's absence reporting policy. Absence from work without permission and without good reason is regarded as a

serious matter, which could result in disciplinary action up to and including dismissal.

I should be grateful if you would contact me as soon as possible, and by 28th May 2020 at the latest, to let me know why you have failed to report for work, why you have failed to contact HR or your line manager and when you expect to return to work."

The H.R. Adviser reported to Ms Kucerova on 29 May that she had not had any response. As a consequence Ms Burnett was instructed to write to the claimant again (**JB p142**). She wrote:

"To date I have not received any contact from you, nor have I received any confirmation for the reason for your ongoing absence. Please note that your current period of absence is being treated as unpaid until I receive information on the reasons for your absence."

She then invited the claimant to a formal disciplinary hearing on 2 June. On 1 June the claimant responded (**JB p143**):

"I have sent you these notes before 23rd of May but they probably didnt go through because of internet issues. I have told you already that i am self isolating because i still have coronavirus sypmtoms and i live with someone who is shielding according to government advice so i cannot work. I dont know by whom you have been advised that i am in Latvia?? How is this even possible with planes not operating and strict bans included on all travel. Regarding your response with my legal fourlough i will be advised with Citizen Advise regarding this matter with the possibility of going to employement tribunal to resolve this issue. Also, there was information that while most of the employees are on the fourlough scheme, others are working and it may be considered discriminatory with regards to other employees who have to work, also because according to coronavirus law you cannot rotate employees on the fourlough, which is a breach of law.

I will be waiting for your prompt response, otherwise i will have to raise this issue with local authorities to start investigation for breaching employees rights and employeement laws during this coronavirus oubreak."

25. The claimant created two self-isolation notes covering 23 May to 29 May, and from 29 May to 4 June (**JB p144/145**).

26. The claimant did not attend the disciplinary hearing nor make any contact with the respondent until 1 June when he wrote referring to the Notes "*They probably didn't go through because of internet issues. I have told you already that I am self-isolating because I still have Coronavirus symptoms and I live with somebody who is shielding according to Government advice so I cannot work. I don't know by whom you have been advised that I am in Latvia?? How is this even possible with planes not operating and strict bans included in all travel."* This prompted a response from Ms Kucerova on 2 June (**JB p146**). She indicated she had not received any emails or telephone calls and reiterated that the claimant had been emailed to attend a meeting on 25 May. Ms Kucerova had arranged for Ms Julie Hutchison the Head of Health and Safety to attend that meeting and explain the safety measures to the claimant. Ms Kucerova indicated that failing to attend the meeting, not contacting HR and his Line Manager about his continued absence was unacceptable. She indicated that the actions were in breach of the company's Absence Reporting Policy which stated that if someone was not fit to attend work they must contact HR one hour before the shift is due to commence. She said that emails and or txt messages were not acceptable She acknowledged the email and the SINs but reiterated that he was required to contact HR to provide an update of his current health situation. The disciplinary meeting was rescheduled. She pointed out that the claimant could arrange a test at a mobile COVID Testing Centre in Peterhead if he was concerned that he still had COVID symptoms.

27. There was no further contact from the claimant at this point and the respondent wrote to him again on 9 June asking him to attend a disciplinary hearing on 12 June (**JB 149**). On 10 June the claimant emailed:

> *"I have allready told Jakob before that i broke my phone and didnt fix it yet so i am only contactable on this email adress. Regarding isolation Notes, they are all up to date, just didnt go through when i sent them because of poor internet connection. I have allready told that i am experiencing the same syptoms to this date and i also live*

with the person who is shielding so i very clearly stated all my concerns and reasons for not attending work and staying on the fourlough. I see you dont understand the seriuosness of the situation and how my attendance to work might put someone else at risk, therefore i ask you once again keep on the fourlouhg government backed scheme so i can come back to work once the situation in Scotland regarding coronavirus is maintained and controlled, because now there is no guarantee that i wont catch the virus by coming even to the scheduled so called "disciplinary meeting". You, as an employer have no right to request anyone to participate in the face to face meetings if one is experiencing the symptoms and/or living with someone vulnerable. If we dont solve this situation normally in a understanding and friendly manner i will have to go to court and/or employment tribunal to further investigate this situation. I hope we will find the solution and you stop sending me emails that i am breaching company rules, since i am not, because you have all government approved notes regarding my absence. And also you have stopped paying even the statutory sick pay and this is concerned as illegal, because i have already advised you i am sick, send you notes, and notes should be only sent if employer requested it formally."

The claimant had obtained further isolation notes covering the periods 4 June to 10 June and 10 June to 16 June (**JB p153/154**).

28. Ms Burnett emailed the claimant on 10 June writing that she was concerned to hear that the claimant was still suffering from COVID and that if they had known this he would not have been asked to return to work or attend a hearing.

29. She also forwarded the claimant information in relation to sickness policy and the absence reporting process she wrote:

"I do understand and sympathise with your situation, your requirement for self-isolation has been ongoing for an unusually long period of time, it is an extremely difficult time for everyone and as your employer, we have a duty of care to ensure that you are receiving adequate support and to discuss options with you. I must stress this issue is about your failure to make contact with the Company to discuss your health situation in the correct and timely manner.

> *Due to the fact you have stated your mobile phone is broken phone and that you are only contactable over the internet we invite you, and are happy to connect with you, over a Skype, Microsoft Teams or Go to Meeting call. If you don't have any of the aforementioned applications, please download one and advise me of the one you are selecting. I will then send you the meeting invite/link which will enable us to speak together face to face. We require confirmation of the application you will be using by 17:00 hours on Friday 12th of June 2020."*

The letter was emailed and posted. The claimant did not attend. Accordingly, the respondent wrote to him on 15 June (**JB 160**) ending his employment because of a failure to follow the company Absence Reporting Policy.

30. The claimant responded on 16 June (**JB p161**). He wrote:

> *"I have told you numerous times that my only way right now of contacting the company is via email, because my phone is broken at the moment and I cannot buy another one due to the self-isolation. Also, I cannot download your suggested applications because my internet connection is not the best at the place I currently live, that is the same reason why some isolation notes have reached you later than expected though you as an employer have all the notes sent to you up to this date and further, justifying my absences from work with legal NHS notes which are the same thing as the doctor sick notes due to this pandemic. With regards to this, you have no right to terminate a contract because of the unprecedented and contious situation which I have fully explained to you."*

31. Ms Kucerova responded on 16 June (**JB p161**) advising the claimant that if he wanted to appeal he should do so by 22 June. The claimant appealed (**JB p164**) and on the basis that he thought it was unfair to terminate his employment as he had sent in all the necessary SINs covering his absence and that he had internet connection problems.

32. An appeal hearing was arranged for 26 June 2020. He was invited to the appeal (**JB 167**) The disciplinary policy was once more sent to him. The claimant attended the meeting by telephone conference call. The meeting

was minuted (**JB 182-187**). It was conducted by Mr Duncan Watt Head of Operations. The claimant was asked what his grounds of appeal were and he stated that he was ill and had sent in all the isolation notes on time adding *"Maybe I was late with one but this was due to internet connection."* The background to the case was discussed and the various communications examined. He was asked if he had received the letters at his home address and responded *"No I just received emails".* When asked to confirm his address he said that he had changed address in Peterhead around the end of April and not updated the Company. He was asked why he had not sought medical attention given that he had been experiencing COVID for an extended period. He said that it was too high risk to go out. It was put to him that he was advised on two occasions that he could get a mobile test. He responded *"I'm not going out at all. I could catch it on the way back home."*

33. Mr Watt did not accept that the claimant's excuses were genuine. He was particularly perturbed at the failure to follow the absence procedures and keep in touch with the company. He did not accept that the SINs had been submitted on time.

34. The claimant was given an outcome of the appeal on 7 July (**JB 192/193**). Mobile testing allowed those with Covid to be tested without leaving their vehicles.

35. The claimant was upset by his dismissal. The Adviser, Ms Burnett had given him her personal telephone number and he texted her on 13 July *"Are you fucking idiots?"* This would have been treated as a serious breach of the respondent's policies.

36. The respondents arranged for the IT Department of "Clearwater" the parent company to examine their IT system and prepare a report. It confirmed that the SINs were not received by the respondent company at the time they were allegedly sent by the claimant. They ascertained that the email dated 23 May was received on the 1 June. The email dated 29 May from the claimant was received on 1 June, the email of 4 June received on 10 of June.

37. The claimant emailed the respondent on 9 July "*I have one main question, are you crazy incompetent or what. How can you dismiss a person if he is vulnerable and is shielding according to Government instructions*."

38. The claimant used his internet while absent to access the Cloud and watch films and television.

Witnesses

39. I found the respondent's witnesses wholly professional, credible and reliable witnesses. They gave their evidence in a clear and measured manner. One of the aspects of the background that came across clearly was that they had made considerable efforts to both put in place protective measures and controls for their workplace and spent time explaining these control measures to their staff to reassure them that the factory could operate safely. They were proud of the work they had done and were surprised that if the claimant's fears had been genuine he had not contacted them to discuss those measures.

40. I regret to say I did not find the claimant a particularly credible witness. It must have been clear to him the respondent company took their absence management policy very seriously. I accepted that it was necessary to have such a robust policy in place to allow the factory to operate efficiently and to allow managers notice of who is available for a particular shift. The correspondence with the claimant sets out very clearly these concerns that in the light of those he seems to make very little effort to respond to them. It was also puzzling that if the claimant's fears about Covid were genuine why he had not made contact with them to discuss matters.

41. In many cases it is the absence of evidence that provides an insight into events. Such was the case here. The claimant had no answer or at least no

satisfactory answer to why he had not either repaired his telephone (it needed a new battery), borrowed one or purchased one. He knew the importance of the absence policy yet wanted to keep contact with his employers to a minimum preferring to use email. He said he was concerned about the person shielding in the flat, yet no evidence was led from that person nor was any correspondence from him produced to corroborate the claimant's understanding that he had severe asthma and used an inhaler.

42. The internet difficulties he said he had also seemed odd given that he was apparently able to access the Cloud and watch films without any difficulty throughout his period of absence.

43. Overall, I found I could place no trust in his evidence.

Submissions

44. Ms Mackay helpfully provided the Tribunal with a number of up to date and recent authorities in relation to the way in which it should approach a claim for automatically unfair dismissal under section 100 of the Employment Rights Act. She reminded the Tribunal that it was up to the claimant to show that this exception to the general rule applied to him (***Smith v Councillors of Hayle Town Council*** [1978] IRLR 413). She observed that the claimant in his evidence had not really addressed the requirements of the section or whether he was relying on section 101(d) or (e). In any event the tests as set out in the case of ***Oudahar v Esporta Group Limited*** [2011] IRLR 730 is a two-stage test. Firstly, the Tribunal should consider whether the criteria set out in the provision has been met as a matter of fact. If the criteria are made out then the Tribunal should ask whether the employer's sole or principal reason for dismissal was the employee had taken or proposed to take such steps. If it was then the dismissal must be regarded as unfair. If the Tribunal found that the dismissal was unfair then Ms Mackay indicated that the claimant's own actions had contributed significantly to his dismissal and his

behaviour following dismissal would not have been tolerated and led to his dismissal in any event.

45. She then took the Tribunal through the evidence highlighting matters which impacted on the claimant's credibility. He had been given every opportunity to raise his concerns and discuss them but had not taken those opportunities up. He was reminded on at least two occasions about the possibility of getting a mobile COVID test and he didn't go. It was plainly incorrect of him to say that he might catch it going there because he could have used his own car. In any event he didn't research the matter or try and contact anyone through the internet to find out what was involved. In relation to the SIN notes they were clearly late. It was odd that there was no text (explanation) with at least a couple of these submissions. He just did not keep in touch as he should have and in these the claimant did not make any reference to actually being unwell. We had she submitted no evidence about the person shielding in the flat other than from the claimant and there were strong indications that the claimant was in fact in Lithuania. She pointed to the email dated 1June (**JB 147**). Ms Kucerova had discussed it with the IT Department. An explanation why the SIN was timed at 18:06hrs and the email to Ms Kucerova 16:20 hrs was that he had generated the SIN in Lithuania and there was a 2 hour time difference.

46. The respondent clearly dismissed the claimant because of breaches of the absence policy. They did not dismiss him because of actions he had taken because of health and safety issues.

47. The claimant in response reminded the Tribunal about his position. He had no telephone. He could not make direct contact with the respondents. He was highly concerned about the COVID risk. No-one knew much about the pandemic at the time. It was a potentially fatal disease. He focused on the submission of the SIN notes. In his view these prevent any reasonable employer from dismissing him even if they were late they had come in covering the entire period in question. There was no basis to suggest he was

in Lithuania. There were strict lockdowns throughout Europe and planes were not flying. The initial reference to being away from Peterhead makes reference to Latvia and not Lithuania. He feels that no reasonable employer would have acted the way these employers did. They should have taken account of the fact that it was impossible in his view to safely socially distance in the factory and circumstances showed that he was entitled to take steps to protect his own health and the health of the vulnerable person he was living with at that time.

48. The claimant in response highlighted that the whole period was a time of uncertainty about Covid and how it could infect people. He was sceptical about the control measures put in place. He was concerned that the condition, which was a serious one and had led to the deaths of many people, was infectious. He could catch it by going out. He believed that he had provided SIN notes that covered the period and this meant that he should not be dismissed. He was obeying Government guidelines. He had thought that what he provided was sufficient.

Discussion and Decision

49. The Employment Rights Act 1996 (The Act) provides protections to employees in relation to the raising of health and safety matters. The Sections is in the following terms:

"

100 Health and safety cases.

(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—

(a) …..

(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."

50. The Tribunal accepted that it should consider a two-stage test as provided for in ***Oudahar*** which was set out as follows by the EAT:

''24. *In our judgment employment tribunals should apply section 100(1)(e) in two stages.*

25. Firstly, the tribunal should consider whether the criteria set out in that provision have been met, as a matter of fact. Were there circumstances of danger which the employee reasonably believed to be serious and imminent? Did he take or propose to take appropriate steps to protect himself or other persons from the danger? Or (if the additional words inserted by virtue of ***Balfour Kilpatrick*** *are relevant) did he take appropriate steps to communicate these circumstances to his employer by appropriate means? If these criteria are not satisfied, section 100(1)(e) is not engaged.*

26. Secondly, if the criteria are made out, the tribunal should then ask whether the employer's sole or principal reason for dismissal was that the employee took or proposed to take such steps. If it was, then the dismissal must be regarded as unfair.

27. In our judgment the mere fact that an employer disagreed with an employee as to whether there were (for example) circumstances of danger, or whether the steps were appropriate, is irrelevant. The intention of Parliament was that an employee should be protected from dismissal if he took or proposed to take steps falling within section 100(1)(e)."

51. It was not clear whether the claimant was seeking the protection of Sections 100 (1)(d) or (e) of the Act. There is some overlap between the sections but Section (d) makes reference specifically to a situation where the employee ''*refused to return to his place of work''* which is the situation here. It could be argued that refusing to attend work was, however, an appropriate step in

terms of Section 100 (1) (e) of the Act. I do not regard the matter as having any practical consequences as both Sections require to be analysed in the same manner.

52. It is up to the claimant to show that he comes within the protection of the Act. The first test is whether the danger is serious and imminent. There was no evidence that the claimant was particularly vulnerable to the disease. Nevertheless, I do not dismiss the claimant's belief that Covid was a serious condition that it posed a threat to life. It has to be recalled that there was a national lockdown where the presumption was that employees would not go to work unless their jobs were essential. It was not challenged that the claimant's job fell into this category. I had more difficulty with the concept of the danger being imminent or about to happen.

53. The protection in the Act seems aimed at someone at work who comes across a dangerous situation such as for example finding exposed asbestos in the work environment. That sort of situation would almost certainly amount to one that was serious and the danger to employees would be imminent or about to happen. However, the claimant was written to by the respondent on the 22 May. In that letter they addressed his concerns in some detail. By that point he would have been aware that to protect himself, fellow employees and the others in his flat he could get a test to confirm if he had the condition and at work he would be in a small team, generally working on his own with control measures in place. He did not query or dispute the terms of that letter nor has he led evidence that the controls put in place were in some way ineffective. At this point he could not be said to believe that any danger was imminent if he had returned to the workplace rather he argued that his continuing Covid symptoms precluded his return. It is noteworthy that his position at the appeal stage was to argue he had sufficiently complied with the absence process not that he would not return because of any imminent danger.

54. I do not accept his evidence on that matter. He was allegedly suffering symptoms for an extended time but surprisingly did not take a test nor was there any evidence that this matter led him to try and take medical advice.

55. If the claimant had been successful in coming within the terms of the either Section the claimant would in my view still have failed. The principal reason for dismissal was that he failed to comply with the absence policy. Her did not telephone his shift manager to discuss his condition and when he was likely to return. He did not keep in touch as he was required to do nor allow the HR department to address any of his concerns. He did not submit the SIN notes on time and did not comply with the requirements contained in Section 10 of his contract of employment which provided that when absent through illness: "*It is your responsibility to keep your manager advised of the status of your illness and to provide the appropriate sickness certification"*.

56. In the circumstances the claimant's application must fail and is dismissed.

Employment Judge J Hendry

Date of Judgement 5 October 2021

Date sent to parties 5 October 2021