EMPLOYMENT TRIBUNALS

Claimant: Mr N Quelch

Respondent: Courtiers Support Services Ltd

Heard at: **via CVP** **On:** **21-22 September 2021**

Before: EJ Milner-Moore
Mr A Morgan
Ms J Woodhead

Representation
Claimant: In person
Respondent: Mr D Brown (Counsel)

RESERVED JUDGMENT

1. The claimant was unfairly dismissed by the respondent and the claims of automatic unfair dismissal (section 100(1)(d) and (e) Employment Rights Act 1996) and ordinary unfair dismissal (section 98 Employment Rights Act 1996) succeed.
2. The claimant was wrongfully dismissed by the respondent.
3. The claimant was subject to detrimental treatment contrary to section 44(1)(d) and (e) of the Employment Rights Act 1996.
4. The respondent made an unauthorised deduction from the claimant's wages.
5. The respondent unreasonably failed to comply with the requirements of the ACAS Code of Practice on Grievance and Disciplinary Procedures and compensation awarded is subject to a 20% uplift under section 207A of the Trade Union and Labour Relations Consolidation Act 1992.
6. The respondent is ordered to pay compensation in the total sum of £14,746.25 consisting of:
    a. Unauthorised deduction from wages - £1,595.08
    a. Wrongful dismissal/Breach of contract - £7,155
    b. Unfair dismissal – Basic award of £1,038.46 and Compensatory award of £500
    c. Injury to feelings - £2,000
    b. ACAS uplift - £2,457.71
7. The Employment Protection (Recoupment of Job Seeker's Allowance and Income Support) Regulations 1996 do not apply to the sums awarded above.

REASONS

Introduction

2. The claimant brought claims of:
    a. automatic unfair dismissal (section 100(1)(c),(d) and (e) Employment Rights Act 1996),
    b. detrimental treatment on grounds of health and safety action or disclosures (section 44(1)(c), (d) and (e) Employment Rights Act 1996,
    c. unfair dismissal,
    d. breach of contract (in relation to the failure to pay notice pay), and
    e. unauthorised deduction of wages (in relation to pay due for the period 8 July 2020 to 24 July 2020).
    f. additionally, the claimant sought a 25% uplift on any compensation awarded to reflect the respondent's alleged non-compliance with the ACAS Code of Practice in relation to Discipline and Grievance procedures (section 207A Trade Union and Labour Relation Consolidation Act 1992).

3. The issues arising for determination were set out in a case management order made by Employment Judge Gumbiti Zimuto at page 50 of the bundle.

Evidence

4. We received a bundle of approximately 500 pages and heard witness evidence from the claimant and Stuart Richards (the claimant's former line manager) and, for the respondent, Sue Ruston (the respondent's Head of Human Resources) and Jamie Shepperd (the CEO of the group of companies of which the respondent was a member).

The hearing

5. It is relevant to note certain matters which arose during the hearing. First, the case had originally been listed for three days but the listing had been reduced to two days. Accordingly, in order to ensure that we could complete the case in the time available, and without objection from the parties, we heard evidence and submissions concerned with both liability and remedy together. Second, the respondent objected to the admission of parts of Stuart Richards' statement on the basis that these detailed his engagement with the respondent's solicitors in relation to this hearing and so were subject to privilege. Having reviewed the relevant paragraphs, we considered that they were either subject to privilege or were irrelevant. We therefore disregarded paragraphs 30 to 34 of Mr Richards' witness statement. Third, on the second day of the hearing one of the members experienced difficulty with the CVP platform and lost connection on a couple of occasions. We halted the hearing on each occasion to enable the member to rejoin. I then read over the note of the evidence to ensure that the member had not missed any part of the evidence.

Facts

6. In light of the evidence before us we made the following factual findings

7. The claimant began his employment with the respondent on 25 June 2018 as a Compliance Assistant. The claimant performed well and progressed to the role of Compliance Analyst and received a pay rise to reflect his performance. The contract of employment stated that the claimant's place of work was the respondent's Henley office and provided for a 3 month notice period. At the date of his dismissal, the claimant was 25 years of age with two years' service and was earning £27,000 per annum a gross monthly salary of £2,250. He was enrolled in a defined contribution pension scheme to which the respondent contributed 6% of salary.

8. During the period at issue, the claimant lived in a one bedroom flat with his girlfriend X. X had asthma and a heart condition and was therefore classified as "*clinically vulnerable*".

9. The respondent is a company which provides financial services, personal wealth management and fund management advice to both companies and individuals. It is part of a group of companies of which Mr Shepperd is the CEO. The respondent had offices in Witney and Henley and employed approximately 104 employees spread across the two sites. Ms Ruston was the head of Human Resources for the respondent. She had known Mr Shepperd for a number of years and there was a long standing friendship between her family and Mr Shepperd's.

10. During February and March 2018, as reports began to circulate in relation to the Covid 19 pandemic, the respondent began to discuss how to manage its workforce and to prepare for a possible lockdown. On 18 March 2020, the claimant spoke to his line manager, Stuart Richards. He was visibly distressed and explained that he was anxious about the implications of the Covid pandemic for X given her medical conditions. It was agreed that the claimant could begin working from home. It is not disputed that, from that time, the claimant worked from home, that he did so successfully and that there were no issues of concern with his performance or his interactions with his colleagues.

11. On 19th March 2020, the government issued an instruction that, with effect from 23rd March 2020, all individuals should work from home due to the COVID-19 pandemic unless they had been classified as key workers/critical workers and they could not perform their work from home. The respondent took the view that its employees were critical workers because they worked in financial services. However, most of the respondent's employees could, and did, work from home during March and April 2020, with only a few individuals going in to the office to collect and forward mail.

12. In April 2020, the respondent held a board meeting which recorded that its employees were working from home successfully. However, the respondent was keen to get staff back to the office and began to plan for a return to office working. The respondent considered that there were a number of negative aspects to home working. Some individuals found it difficult to work from home due to issues with their home set up (experiencing difficulties with poor broadband speed, or working from laptops, or trying to combine work with homeschooling). Some staff reported that their mental health had

been negatively affected by the isolation of homeworking and some more junior employees missed ready access to managers. The respondent considered that ease of collaboration and communication between individuals was impaired and that there was a risk that a loss of "social capital" would occur, by which the respondent appears to have meant a friendly and collegiate atmosphere generated when employees met in person. The respondent also produced evidence concerning an error which had been made in one of the other group companies. A document had been misdirected, resulting in a delay in making an investment which caused financial loss to a client. The respondent ascribed this error to the fact that the junior member of staff who had made the mistake had not been in the office and so not able to easily check the position with colleagues. As a result, the respondent had to offer services to the value of £10,000 in compensation.

13. However, the claimant's line manager considered that the claimant was working entirely effectively and successfully from home and the respondent's witnesses accepted that this was the case. With the possible exception of the respondent's concerns regarding the potential for a future loss of social capital, there was no evidence that any of the negatives that the respondent had identified in relation to home working applied to the claimant's performance of his duties at home. The respondent's concern in relation to the claimant appears to have been that, if he were permitted to continue to work from home, this might open the respondent to charges of inconsistency or open the door to a flood of requests from other employees to do the same. In fact, that concern had little foundation as the respondent's evidence was that almost all of its employees had returned to the office without complaint. In addition, as will become clear, there were only a handful of employees whose circumstances were comparable to the claimant's.

14. It appears that the respondent originally envisaged that employees' return to the office would take place in four phases and that the claimant would return in the last phase. However, on 6 May 2020, the respondent announced to its employees a plan for a three phase return to the office. Phase one would commence on 12 May 2020, for any employees who wished to return at that time. Phase 2 was due to commence on a date "to be announced' and would apply to those employees who needed additional time to arrange childcare or safe travel to work before returning. Phase 3 would occur on a date "to be announced" and would apply to those persons who, due to their "individual circumstances", needed to return at a later stage. The claimant was placed in phase 3 in recognition of X's clinically vulnerable status. Although there was no official "phase 4", there was one individual whose return was delayed until September 2020.

15. The respondent asked staff for information about their individual circumstances. It produced a spreadsheet which summarised the position of each employee: indicating which phase they were scheduled to return in and what their individual circumstances were. Individual circumstances were broken down according to various sub categories: "shielding letter", "childcare concerns", "personal health issue" ,"person in the household with a health issue" and "public transport issues". The spreadsheet showed that there was one person who identified themselves as having a personal health issue and one person who had received a shielding letter. The

individual who was shielding was permitted to continue to work from home. The claimant was placed in the category "person in the household with a health issue" and was one of seven individuals in that category.

16. In May 2020 the respondent commissioned some advice from "Safety Services" an external health and safety consultancy. That advice was provided by phone and was not recorded. In addition, it took health and safety advice from Abbeygail Ruston (Ms Ruston's daughter) who held a health and safety qualification. The respondent appears to have regarded her as its appointed health and safety representative, although she had not been selected by the employees (as is required). On 12 May 2020, Sue and Abbeygail Ruston produced the respondent's first Covid risk assessment document, recording the respondent's arrangements for minimising the risk of Covid exposure as phase 1 staff returned to the office. The assessment identified risk areas and set out proposed mitigations including: deep cleaning, provision of PPE (hand sanitizer, wipes, masks and gloves), provision of guidance to employees about Covid safety measures in signage and emails, and maintaining 2m social distancing in seating and other arrangements and splitting the building in to bubbles across which there would be no movement of staff. One of the mitigations specifically identified was "*working from home for anyone with health issues or for mental well-being and communication kept open with SM and HR*". Although masks were made available employees were not required to wear them.

17. Following their return, the "phase 1" employees were allowed to engage in a trial of home working which was described in the risk assessment in the following terms: "*employees are entitled to work from office or home providing the appropriate manager is informed, in order that the whereabouts of all working employees is clear*". The respondent's witnesses explained that this trial did not involve employees working entirely at home but doing a mix of home and office work. It was intended to enable the respondent to assess whether it could in future offer more flexible working arrangements as a permanent contractual arrangement. The trial was offered only to phase 1 employees because they were the only individuals who were back in the office at that time.

18. On 1 June 2020, the phase 2 staff returned and on 2 June 2020 a second risk assessment was produced. It was in similar terms to the May risk assessment. Risk assessments were then produced by the respondent at regular intervals. On 23 June 2020, Mr Shepperd emailed the employees to inform them that the "*2 meter distancing rule is being reduced to 1 metre from the 4th July*" and that the return of phase 3 staff could begin from 6 July 2020. The email stated "*please note we may not be able to bring everyone back immediately as it will be dependent on a particular office layout*" and it was suggested that a rota may be necessary to address this. In fact, the respondent never did introduce a rota and all staff were asked to return in July, with some working at less than 2 metre distance.

19. On 24 June 2020, the government issued "*Covid Secure Guidance for Workplaces including Office and Contact Centres".* The guidance described Covid 19 as a public health emergency and stated that it constituted non statutory guidance which was issued to help employers comply with their legal obligations. It is relevant to record some specific parts of the guidance:

a. "*Employers have a duty to reduce workplace risk to the lowest reasonably practicable level by taking preventative measures*". It then went on to list the preventative measures which should be taken which included home working. *"Businesses… should make every reasonable effort to enable working from home as a first option*. *Where working from home is not possible, workplaces should make every reasonable effort to comply with the social distancing guidelines set out by the government (2m, or 1m with risk mitigation where 2m is not viable, is acceptable. You should consider and set out the mitigations which you will introduce in your risk assessments.")* The recommended mitigations included using back to back or side to side working, individuals working in bubbles and the use of screens.

b. *"Employers have a duty to consult their people on health and safety. You can do this by listening and talking to them about the work and how you will manage risks from COVID-19. The people who do the work are often the best people to understand the risks in the workplace and will have a view on how to work safely. Involving them in making decisions shows that you take their health and safety seriously. You must consult with the health and safety representative selected by a recognised trade union or, if there isn't one, a representative chosen by workers. As an employer, you cannot decide who the representative will be."*

c. "*Staff should work from home if it all possible. Consider who is needed to be on site; for example:*
    - *workers in roles for critical for business and operational continuity, say facility management or regulatory requirements and which cannot be performed remotely*
    - *workers in critical roles which might be performed remotely, but who are unable to work remotely due to home circumstances or the unavailability of safe enabling equipment*."

d. *"clinically vulnerable people, who are who are at high risk of severe illness ….. have been asked to take extra care in observing social distancing and should be helped to work from home either in their current role or in an alternative role. If clinically vulnerable individuals cannot work from home, they should be offered the option of the safest available on site roles, enabling them to still maintain social distancing guidelines ……..As for any workplace risk you must take into account specific duties to those with protected characteristics… Particular attention should also be paid to people who live with clinically extremely vulnerable individuals."*

e. Employers were required to share the results of their Covid risk assessment e.g. by publishing it on the website and to display a notice in an approved form setting out the *"five steps to safer working"* and confirming that the employer had complied with government guidance. The 5 steps to safer working were: conducting a risk assessment and sharing the results, cleaning , handwashing and hygiene measures, taking "*all reasonable steps to help people work at home*", taking "*all reasonable steps to maintain a 2m distance in the workplace*" and where 2m distancing was not possible doing "*everything practical to manage transmission risk*"

20. On 24th and 25th June 2020, Stuart Richards emailed Ms Ruston in relation to the proposal that the claimant should return to work in phase 3 ahead of 1st August 2020 when the "work from home" guidance was expected to be lifted. He explained that "[*X] has regular checkups re her heart to monitor with the expectation that it will need to be treated at some stage via an operation. This puts her at high risk and obviously it is a concern to her family and Nick. I know they have virtually not been out for three months. He is very anxious about returning to the office for the government advice for him is to work from home if he can, which he has proved exceptionally well I can trust him to do so. The advice obviously changes in August. For the record I would like Nick to continue working from home, as his manager I have full trust in him and I want to make sure he remains in the best mental health possible".*

21. Ms Ruston replied to say that she would be meeting with Mr Shepherd to discuss individual circumstances and would reply after she had done so. On 30th June, she emailed Mr Richards to say that the claimant would be expected to return to work on 6th July. Mr Richards replied that he was very disappointed by the decision and that "*this will be a very anxious time"* for the claimant and X. Mr Shepperd, who had been copied in on these email exchanges, replied making clear that Sue Ruston had argued in favour of the claimant being allowed to continue to work from home. Mr Shepperd's email made clear that it had been his decision that the claimant should return to the office and that the claimant could either return on 6th July or take annual leave for two weeks.

22. On 1st July 2020, Mr Shepperd issued a newsletter to all staff recording the respondent's success in operating during the pandemic. The newsletter also included some pictures showing a small celebration for an employee with 20 years' service. The picture showed four employees in a meeting room. The employees (who included Stuart Richards) were not observing social distancing and were from different office bubbles. The photographs therefore documented an apparent failure to comply with the arrangements put in place in the respondent's Covid risk assessment. The respondent's oral evidence was that the employees in question had been in the meeting room briefly to share some cake and refreshments and to enable photos to be taken.

23. On 1st July 2020, the claimant sent an email to Ms Ruston explaining that he was "*extremely anxious*" regarding his returning to the office and that the situation was negatively affecting his own mental health and that of his girlfriend. He asked for an explanation of the reasons for the decision. Sue Ruston replied later that day "*there are many aspects to the decision to ask you and others to return to work next week are part of as part of phase 3. A core part of Courtiers culture is the social environment created within the office space. Much of the success of working from home during lockdown has come from away before, whether that is the social bonds between courtiers employees and the compliance procedures that have developed over a number of years stop working from home will rate these benefits over time and introduce unforeseen risks. Courtiers' employee social capital has been built up in the office from face-to-face meetings with colleagues and clients, social chats over a sports event in the kitchen/water cooler, strolling down the street to buy a sandwich etc. at a distance. We are keen to build*

upon peoples investment and feel that it's important that we get to normal as much as he's safely possible, (the new normal). I understand that you are feeling very anxious about this, as you've been self isolating with Holly for many months now, but please be reassured that we have done everything we can think of to keep Courtier sites clean and best practice has been put in place to protect individuals. There are masks gloves antibacterial wipes et cetera available at the offices other than walking in no one apart from your team will be moving around your office or in the office, so just the three of you. Toilet door handles, flashes, taps have been wiped down after each use, restrictions on the kitchen use are in place and deep cleaning is taking place each night." She acknowledged that other employees had also felt anxious and identified another individual who had returned to work and who the claimant might find it helpful to talk to.

24. This email from Ms Ruston indicates that it was envisaged that the claimant would be working in an office with Stuart Richards and another colleague in the compliance team. That was a matter of concern to the claimant and because both these individuals had children who were due to return to school. The claimant was concerned at the increased risks to X that would result from his own exposure to his colleagues, and (indirectly) to their wider contacts.

25. In its ET3, the respondent had alleged that the claimant had been offered special arrangements for his return to work i.e. that he could work in the HR office with no one else present. It was also suggested that the claimant had never provided evidence of X's health status. The claimant denies both these allegations. We considered it unlikely that the respondent had offered to allow the claimant to work alone from the HR office. Such a proposal is not consistent with the arrangements described in the email from Ms Ruston. Ms Ruston's oral evidence on this point was tentative; she thought that she had discussed the point with Stuart Richards and that he would have informed the claimant of this. Stuart Richards' evidence made no mention of this proposed arrangement and he was not cross examined on the point. The claimant was, as was evident from his detailed grievance document, meticulous in his focus on the detail of the arrangements proposed for his return. Had that offer been made we considered that the claimant would certainly have addressed it in his subsequent email exchanges with the respondent. We also found that the respondent never asked for evidence of X's health conditions. The respondent had always simply accepted that X was clinically vulnerable and never sought to challenge that or enquire further. Had the respondent sought such evidence the claimant would have provided it.

26. On 2 July 2020, the claimant had a discussion with Stuart Richardson about his return to work. The claimant told him that he was extremely anxious about returning and had experienced a "*mini panic attack*". However, he agreed that he would come in to the office. Stuart Richards emailed Ms Ruston subsequently to describe the conversation and said that the claimant was "*not in a good way*" and was "*extremely anxious*" and had a mixture of "*stress, anxiety and anger*".

27. The claimant then spent the weekend reviewing government guidance. He had a change of heart about returning to the office and emailed Ms Ruston stating that he wished to continue to work from home "*since I began doing*

so on 19th March I have demonstrated that I am able to work from home and there is no aspect of my role which cannot be performed from home. Stuart has confirmed this to you and has been impressed at my level of productivity during this time. The government guidance for people who work in or run offices, contact centres and similar indoor environment states that "people who can work from home should continue to do so". This guidance is designed to ensure that people are "working safely during coronavirus" full. As such I will continue to follow this guidance by continuing to work from home successfully and therefore minimising the risk of transmission to myself and my clinically vulnerable partner". We considered it was clear from the emphasis that the claimant placed on compliance with the government guidance, that what the claimant was seeking was to work from home until the government guidance changed. During the hearing the respondent's witnesses gave evidence that they were doubtful that the claimant would have been prepared to return once the guidance changed. However, the evidence indicated that the claimant would have done so, as illustrated by the fact that he did later return to the office in September 2020 for his appeal hearing, by which time the guidance had changed.

28. There were further email exchanges between the claimant and Ms Ruston. She repeated that the claimant was required to return to the office but suggested that the claimant could book annual leave or look in to living separately from X if he remained concerned. She maintained that the respondent was providing a safe work environment. The claimant replied emphasising that it remained government guidance that people who would work from home should continue to do so and that he had demonstrated that he could do so successfully and that this would be the safest working arrangement for him.

29. On 6th July 2020, the respondent produced its phase 3 risk assessment which recorded at various points that the respondent would move to one metre working for phase 3. The risk assessment did not specifically identify any mitigations which the respondent intended to put in to place for employees who would be working less than 2 metres apart. On 7th July 2020, Sue Ruston wrote an email informing the claimant that he must return to the office or request annual leave or take sick leave. Her email stated that if he did not do so he would be placed on unpaid leave and might be subject to disciplinary action. The claimant continued to maintain that he should be permitted to work from home and that he was not willing to either take annual leave or unpaid leave.

30. On 8th July 2020, Sue Ruston wrote telling the claimant that he must return to the office, failing which he would be liable to be disciplined, his pay would be stopped and his systems access would be disabled so that he could no longer perform his role. The claimant did not return and the respondent disabled his systems access, preventing him from working and placed him on unpaid leave. The claimant emailed subsequently to make clear that he remained ready and willing to work for the respondent from home.

31. On 10th July 2020, the respondent wrote to the claimant to advise him that he was going to be subject to a disciplinary process for "*refusing to comply with the terms of your contract of employment as your contractual place of work is Courtier's premises; refusing to comply with reasonable*

management instructions to return to the office to work as of Monday, 6 July 2020".

32. The respondent has a disciplinary policy which states that unauthorised absence from work and refusal to act on reasonable instructions are capable of amounting to gross misconduct. It provides for a right to be accompanied at a disciplinary hearing and for the hearing to be rescheduled where the individual's proposed companion is unavailable, provided that the rescheduled meeting can take place within five working days of the original date. The policy provided for suspension on full pay where suspension was necessary. It stated that it was " *the company's policy that no employee will be dismissed for a first breach of discipline except in the case of gross misconduct for which the penalty will be summary dismissal.*"

33. On 13th July 2020, the claimant wrote requesting that any disciplinary hearing be held remotely. He also raised a lengthy grievance complaining that he had been adversely treated by the respondent because he had raised health and safety concerns. He complained of a number of matters including that the respondent had failed to consider his health and safety concerns and the impact on his mental health of being required return to the office and that he had been prevented from working and placed on unpaid leave. He asserted that the respondent had acted in breach of the ACAS code by imposing a disciplinary penalty (unpaid leave/suspension) ahead of any disciplinary process. He also identified a number of failings in the steps taken by the respondent to make the office Covid Secure. He referenced the "5 steps to safer working" and asserted that of these the respondent was non compliant with 4 out of 5 measures. The key omission that he relied upon was the respondent's failure to take "*all reasonable steps to help people work from home*". However, the claimant also identified a number of other matters and asserted, in particular, that the latest risk assessment indicated that the respondent was not "*taking all reasonable steps to maintain*" 2 metre distancing, because the phase 3 risk assessment appeared to envisage desks being placed 1 metre apart. He noted that the respondent had elected not to adopt a rota system (and to have less staff in the office so that 2 metres could be maintained) and had not identified any additional potential mitigations (such as screens) where individuals were working at less than 2 metres distance. Sue Ruston produced a commentary on the points raised by the claimant which appears to accept that some employees were working at less than 2 metre distance but that if anyone had objected or had reasons warranting this they had been "*kept at 2m or in offices on their own*". Ms Ruston accepted in her oral evidence that, at the time, additional mitigations such as screens had not been put in place because the respondent had been unable to source these. It was not clear why the respondent had not adopted a rota system as a means of ensuring that all employees could work at 2 metres apart.

34. Ms Ruston wrote informing the claimant that she proposed to deal with the grievance and disciplinary issues together. She acted as decision maker despite the fact that she had been closely involved with the decisions and actions that were central to both processes, i.e. the adequacy of the respondent's risk assessments and the instruction that the claimant must return to the office despite his concerns. She did not attempt to conduct any further investigation as she considered that the facts were fully established. She refused to conduct the disciplinary hearing remotely because she had

concerns that, without the respondent's knowledge, the claimant might have a third party in the room with him or might record the meeting. The claimant offered assurances on both fronts but Ms Ruston continued to insist on attendance in person. She did so in part because she felt convinced that if the claimant could be persuaded to attend the office for the disciplinary hearing he would be able to see the arrangements in the office for himself and his anxieties about returning would be allayed.

35. The claimant relies on the fact that the respondent did subsequently conduct a remote disciplinary hearing on a subsequent occasion and complains of the difference in treatment. However, we found that the facts of that subsequent case were significantly different. The disciplinary hearing in question took place during the December 2020 lockdown when the employee concerned was in Ireland and was unable to fly to the UK given the lockdown restrictions then in place.

36. The disciplinary hearing was rescheduled once, whilst the parties corresponded about whether it could be conducted remotely. It was then rescheduled for 21st July 2020 when the claimants chosen companion, Stuart Richards, was unavailable. The claimant requested that the disciplinary hearing be further rescheduled and reminded the respondent that its disciplinary policy made provision for a hearing to be rescheduled where an individual's companion was unavailable. However, his request was refused. The claimant did not attend the disciplinary hearing. Sue Ruston wrote to him on 24th July 2020, informing him that he had been dismissed for gross misconduct and that his grievance had been rejected. The reason for dismissal is recorded in the following terms "*This is on the basis of your failure to comply with the terms of your contract of employment and your refusal to follow a reasonable management instruction. This decision was not taken lightly but the business has lost all faith and trust in you. This is through your actions of being obstructive and unwilling to return to the office, despite the repeated requests*". Sue Ruston's letter addressed the points raised in the claimant's grievance and rejected these, maintaining that the respondent had put in place appropriate and safe arrangements for the return to the workplace and that the claimant had been unreasonably cautious.

37. On 29th July 2020, the claimant submitted an appeal against his dismissal and the rejection of his grievance. On 1st August 2020, the "work from home guidance" was withdrawn by the government. On 1st September 2020, the claimant's appeal was heard by Jamie Shepperd. The respondent required the claimant to attend the appeal hearing in person and he did so accompanied by Stuart Richards. During the appeal, the claimant maintained that he considered that the respondent had been wrong to require him to return to work when the government guidance was to work from home if you can, given that it was clear that he could work from home and given his individual circumstances. He maintained that once the position changed on 1st August 2020 he would have been prepared to return to work provided that appropriate Covid safe arrangements were in place. On 3rd September 2020 the claimant was advised by Mr Shepperd his appeal had been unsuccessful.

38. On 21st August 2020, the claimant obtained new employment and he began work in his new role on 21st September 2020 earning £29,000 per

annum. In the 8 week period from 28th July 2020, the claimant received Jobseekers Allowance.

Law

39. The claimant has sufficient qualifying service to bring a complaint of ordinary unfair dismissal under section 94 of the Employment Rights Act 1996. As a consequence, the respondent bears the burden of proving a potentially fair reason for dismissal. The respondent alleges that the claimant was fairly dismissed for misconduct or alternatively for "Some Other Substantial Reason". The claimant alleges that his dismissal was automatically unfair and contrary to section 100(1) (c) to (e) of the Employment Rights Act 1996.

40. Section 100 of the Employment Rights Act 1996 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,*
>
> *(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.*
>
> *[Words to be added to (e) in order to make legislation compliant with directive "or to communicate these circumstances by any appropriate means to the employer" Balfour Kipatrick ltd v Acheson]*
>
> *(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.

41. In the case of **Oudahar v Esporta Group Ltd** UKEAT/0566/10/DA the EAT set out the staged approach which should be adopted to the test in section 100 (e) (noting that the test of detriment in section 44 ERA is related and phrased in similar language). First, were there circumstances of danger which the employee reasonably believed to be serious and imminent? Second, did he take, or propose to take, appropriate steps to protect himself or others from the danger/or to communicate these circumstances by appropriate means? If so, it was necessary to consider what the reason, or principal reason, for dismissal was – was it because the employee took such steps (or proposed to take such steps?). If it was then the dismissal must be regarded as unfair. The EAT went on to state that "*the mere fact that the employer disagreed with an employee as to whether there were for example circumstances of danger or whether the steps were appropriate is irrelevant*". The EAT explained its reasons for reaching that conclusion noting that: the statutory provision "*directs the Tribunal to consider the employee's state of mind when he engaged in the activity in question"* and that this focus serves the purpose of the legislation which is the promotion of health and safety. In particular the EAT observed "*It serves the interest of health and safety that his employment should be protected so long as he acts honestly and reasonably in the specific circumstances covered by the statutory provisions. If an employee was liable to dismissal merely because an employer disagreed with his account of the facts or his opinion of the actions required the statutory provisions would give little protection*".

42. Detriment

44 Health and safety cases.

(1)An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground 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,

(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) An employee is not to be regarded as having been subjected to any detriment on the ground specified in subsection 1(e) 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 treated him as the employer did.

43. Section 98 of the Employment Rights Act 1996 sets out the applicable test for ordinary unfair dismissal:

General.

(1)In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a)the reason (or, if more than one, the principal reason) for the dismissal, and

(b)that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2)A reason falls within this subsection if it—

(a)relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b)relates to the conduct of the employee,

(c)is that the employee was redundant, or

(d)is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(4) the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a)depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b)shall be determined in accordance with equity and the substantial merits of the case.

44. In cases where misconduct is established as the reason for dismissal, the test in **BHS v Burchell** applies (did the employer have a genuine and reasonably founded belief in guilt, and was that belief formed following as much investigation as was reasonable). The role of the Tribunal in assessing the fairness of a dismissal is not to decide whether it would have dismissed but to decide whether the process followed, and the sanction of dismissal, fell within the range of reasonable responses open to a reasonable employer.

45. The respondent here maintained that the reason for the claimant's dismissal was either the claimant's misconduct in that he had failed to follow a reasonable management instruction in refusing to attend the office to perform his work or SOSR in that the claimant's refusal had led to a breakdown in trust and confidence. It is a well known principle that, in assessing the fairness of a dismissal in such a case, it will usually be relevant to consider (1) whether the employer had a legal right to require the employee to carry out the instruction? (2) whether the instruction was a reasonable one (3) whether the employee's refusal to comply was reasonable in the circumstances (**UCATT v Brain** 1981 ICR 542).

46. If a potentially fair reason for dismissal is established it is still necessary whether the dismissal was fair in all the circumstances and, in particular, whether the processes followed and the sanction of dismissal fell within the range of reasonable responses open to a reasonable employer. The claimant alleges that both the process followed and the sanction of dismissal were unfair. In particular the claimant alleges that the respondent failed to comply with the ACAS Code of Conduct such that a 25% uplift should be made to any compensation awarded.

47. The ACAS Code of Practice on discipline and grievance procedures provides:

5. It is important to carry out necessary investigations of potential disciplinary matters without unreasonable delay to establish the facts of the case. In some cases this will require the holding of an investigatory meeting with the employee before proceeding to any disciplinary hearing. In others, the investigatory stage will be the collation of evidence by the employer for use at any disciplinary hearing.

8. In cases where a period of suspension with pay is considered necessary, this period should be as brief as possible, should be kept under review and it should be made clear that this suspension is not considered a disciplinary action.

12. Employers and employees (and their companions) should make every effort to attend the meeting. At the meeting the employer should explain the complaint against the employee and go through the evidence that has been gathered. The employee should be allowed to set out their case and answer any allegations that have been made. The employee should also be given a reasonable opportunity to ask questions, present evidence and call relevant witnesses. They should also be given an opportunity to raise points about any information provided by witnesses. Where an employer or employee intends to call relevant witnesses they should give advance notice that they intend to do this.

16. If a worker's chosen companion will not be available at the time proposed for the hearing by the employer, the employer must postpone the hearing to a time proposed by the worker provided that the alternative time is both reasonable and not more than five working days after the date originally proposed.

27. The appeal should be dealt with impartially and, wherever possible, by a manager who has not previously been involved in the case.

48. The Tribunal's power to award an uplift is derived from s207A of the Trade Union and Labour Relations Consolidation Act 1972

"207AEffect of failure to comply with Code: adjustment of awards

(1)This section applies to proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule A2.

(2)If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—

(a)the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,

(b)the employer has failed to comply with that Code in relation to that matter, and

(c)that failure was unreasonable,

the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%.

49. Unauthorised deduction from wages

13 Right not to suffer unauthorised deductions.

(1)An employer shall not make a deduction from wages of a worker employed by him unless—

(a)the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b)the worker has previously signified in writing his agreement or consent to the making of the deduction.

(2)In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—

(a)in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

(b)in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

(3)Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

Submissions

50. Mr Brown produced helpful written submissions to supplement his oral closing submissions and the claimant made his closing submissions orally. We have addressed the key points arising from those submissions in the conclusions section. However, it is relevant to record one aspect of the respondent's submissions on health and safety dismissal/detriment in greater detail.

51. We were referred by the respondent to the first instance decision in the case of **Rodgers v Leeds Laser Cutting Ltd** and, in particular, to the

Employment Judge's conclusion in that case that the mere fact that Covid-19 has been described in regulation 3(1) of the Health Protection (Coronavirus) Regulations 2020 as a "*serious and imminent threat to public health*" was not in and of itself sufficient to establish circumstances of serious and imminent danger for the purpose of section 100(1)(d) and (e) as, otherwise, any employee could "*refuse to work in any circumstances simply by virtue of the pandemic*" even where safety measures were in place within the workplace. The decision is not binding on this Tribunal but warrants careful consideration nonetheless. It is relevant to note the following matters in relation to that decision. The Employment Judge did not go so far as to conclude that conditions pertaining to Covid-19 could never potentially amount to circumstances of serious and imminent danger. She simply found that they such circumstances were not present on the facts of that case. The **Rodgers** case involved work which could not be performed from home, in a large warehouse type space, typically occupied by around 5 staff. The claimant accepted that it was possible to socially distance at work and the Judge found that he had not identified, or raised, any specific concerns about the arrangements in his workplace but had simply announced an intention to remain at home "*until the lockdown eased*". The claim failed because the Judge found that the claimant did not in fact believe that there were circumstances of serious and imminent danger in the *workplace* (as opposed to in society more generally) and that given the nature of the workplace and the measures in place any such belief would not have been reasonable. The Judge considered that any dangers could have been averted by the claimant adhering to the workplace safety arrangements and that the claimant absenting himself from the workplace without communicating concerns to his employer did not constitute an appropriate step to protect himself.

Conclusions

What was the reason, or principal reason, for dismissal?

52. We did not consider that the respondent dismissed the claimant because he was raising concerns about the safety of the arrangements for the return to the office. The respondent was initially responsive to the claimant raising concerns, placing him in the phase for later return and at first endeavouring to reassure the claimant when he raised concerns. We did not therefore consider that the respondent was motivated to dismiss because the claimant had raised health and safety concerns.

53. We considered that the respondent dismissed the claimant because of his refusal on 8 July 2020 to return to work in the office. The respondent was, by that time, opposed to continuing to comply with the "work from home if you can" guidance and had formed the view that the arrangements that it had put in place were sufficiently safe that the claimant's concerns about his return to the office should not be accommodated. We considered that the respondent was motivated by the concern that, if it allowed the claimant to insist on continued home working in line with government guidance, this would set a precedent and might encourage other employees to make the same request. The respondent's witnesses referred at various points in their evidence to a concern about opening the floodgates and that if they were to allow the claimant to work from home they might have to do the same for

other employees. We consider therefore that the respondent dismissed the claimant because he was refusing to return to the office.

Automatic Unfair dismissal

54. We did not therefore consider that the claimant had established that, contrary to section 100(1)(c) ERA 1996 he had been dismissed because 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.

55. We did, however, consider that the claimant had established that, contrary to section 100(1)(d) and (e) ERA 1996 he had been dismissed because in circumstances of danger which he "*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"* and/or because *"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".*

56. We reached that conclusion for the following reasons. Covid 19 had been classified as a serious and imminent threat to public health in government regulations. Although the claimant was, due to his age and lack of any underlying health condition, less likely to become seriously unwell due to Covid there nonetheless remained a risk to the claimant's own health were he to contract the disease. In addition, were he to contract and transmit the disease to X there was reason to believe that, having been classified as clinically vulnerable, she would be at increased risk of experiencing the more serious effects.

57. The Government guidance at the relevant time was that people should work from home if they could. This was because the best means of reducing the risk of contracting and transmitting the disease was for individuals to minimise their contacts outside the home as much as possible. That advice also applied to critical workers. It was known that the Government intended to review that advice and that it would be withdrawn once rates of infection had dropped sufficiently, and the advice was withdrawn on 1 August 2021. Only where individuals could not work from home should they attend the workplace and, if they did so, employers were expected to take all reasonable steps to make the workplace Covid safe by complying with the social distancing guidance (2m, where this was not possible, 1m with additional mitigations).

58. It was clear from the evidence that the claimant was genuinely fearful of the risk that he would contract Covid and transmit it to X. He had spent the lockdown isolating with X in order to avoid that risk. He was concerned that returning to the office would increase that risk. He was concerned about sharing an office space with two colleagues with school age children and thereby increasing the number of contacts outside the home to which he was exposed. Unlike, the claimant in **Rodgers**, the claimant both had, and communicated, specific concerns about the health and safety risks posed by his return to the workplace. Most significantly, he was concerned that the

respondent was not complying with the central plank of Government guidance at that time (that employees should work from home where possible), although this was the measure which would best protect employees from contracting Covid and although it was possible for him to work from home perfectly successfully. Although the respondent had put a number of measures in place with a view to making the workplace Covid safe, the claimant had concerns about the adequacy of the arrangements and communicated these in his grievance. In particular, the last relevant risk assessment indicated that the respondent was not complying with the social distancing guidance because the assessment envisaged phase 3 employees would be working at less than 2 metre distance and it was unclear about what mitigations the respondent was putting in place. The claimant was also concerned that the arrangements which were said to be in place were not being properly adhered to, having seen photographs of employees (including Stuart Richards, with whom he was to share an office) who were neither social distancing, nor adhering to the bubble arrangements aimed at reducing the transmission risks in the workplace.

59. The respondent's submissions argued that the claimant was focussed not on any reasonable belief that there were circumstances of serious and imminent danger in the workplace but rather on his perception that in light of government guidance he was entitled to work from home if it was possible for him to do so. However, we did not accept that submission and did not consider that it properly characterised the claimant's position, which was that working from home would best reduce the risk of his contracting, or transmitting, Covid and that, given that he could do his work from home, it would be in line with government guidance for the respondent to permit this.

60. Applying the first limb of the **Oudahar** test, we consider that the claimant genuinely and reasonably believed that there were circumstances of serious and imminent danger were he to return to the office. He was particularly concerned that by attending the workplace, he would be at an increased risk of contracting Covid 19 and transmitting it to his clinically vulnerable partner, a risk which could be reduced if he remained working from home. Although the respondent had conducted risk assessments and put a number of measures in place, the claimant's concern regarding Covid risk in the workplace was reasonable, given the issues that the claimant had identified with the respondent's risk assessments, in particular, the respondent's unwillingness to comply with the Government guidance that individuals should work from home where possible and the respondent's apparent failure to make every reasonable effort to comply with the social distancing guidelines. The fact that the respondent had formed the view that, in light of the measures it had adopted, it would, nonetheless, be safe enough to ask employees to return to the office does not make the claimant's belief an unreasonable one.

61. Turning to the second limb of the test in section 100(1) (d) we considered that the claimant could not reasonably have been expected to avert the danger posed by the increased risk of Covid exposure arising from attending the office (his proposal that he should work from home having been rejected by the respondent) and that he had consequently refused to attend the office and had been dismissed for doing so.

62. We then considered the second limb of the test in section 100(1)(e) and did so by reference to the matters listed in section 102 as relevant to the assessment of whether the steps taken by an employee should be considered to be "appropriate". We concluded that the claimant had taken 'appropriate steps' to protect himself and X from the dangers posed by Covid 19 at that time by proposing to work from home until the Guidance changed. We considered that this was an appropriate step for him to take given his knowledge and the facilities and advice available to him at the time. His proposal reflected X's clinically vulnerable status, was consistent with government guidance, would not have impacted adversely on his ability to perform his work for the respondent and would have had the effect of reducing his risk of contracting Covid or transmitting it to X. Attending the office even with measures in place would have involved an increased risk which was avoidable. Applying the test at section 100(3), we considered that it was not negligent for the claimant to wish to continue to work from home and that a reasonable employer might not have dismissed him for wishing to do so.

63. In light of our conclusions and having found that the claimant's refusal to return to the office was the principal reason for his dismissal, it follows that his dismissal contravened section 100(1) (d) and (e) and was automatically unfair.

Ordinary Unfair Dismissal

64. Even if we are incorrect to consider that the dismissal was automatically unfair we would have found it to be unfair judged against the test set out in section 98(4) of the Employment Rights Act 1996. We considered that that the respondent has failed to show that there was a potentially fair reason for dismissal and that both the sanction and the procedures followed by the respondent fell outside the range of reasonable responses open to a reasonable employer.

65. Although the claimant was dismissed for his refusal to return to the office we did not consider that the refusal could properly be characterised as misconduct. We did not consider that, in the circumstances, the claimant could be considered to have unreasonably failed to comply with a reasonable management instruction. It was not reasonable for the respondent to instruct the claimant to return to the office when the government guidance was that employees who could work from home should do so and when the claimant could work successfully from home and without causing any difficulty to the respondent. Even if, the respondent's instruction that the claimant should return to the office had been a reasonable instruction we did not consider that the claimant's refusal to comply with the instruction was unreasonable given the claimant's genuine and reasonably held concern that to do so would increase the risks of his contracting Covid-19 and potentially transmitting it to his clinically vulnerable partner. This was particularly so given that what the claimant was requesting was to work for home until the guidance changed, which it was expected would occur within a few weeks.

66. Nor did we consider that the respondent had established that there was some other substantial reason for dismissal (SOSR) namely its loss of trust and confidence in the claimant due to his refusal to return to the office.

Whilst the respondent and the claimant had very different perspectives on whether it was safe for the claimant to return to the office, we did not consider that it could be said that trust and confidence had broken down. The claimant's insistence on continuing to work from home for so long as that reflected government guidance was not unreasonable given that he could do so successfully. Had the respondent offered that limited accommodation, trust and confidence could, and would, have been maintained.

67. Even had the claimant been guilty of misconduct or even if the respondent established that a loss of trust and confidence had occurred, we do not consider that it was within the range of reasonable responses open to a reasonable employer to dismiss in the particular circumstances of this case. Specifically, we considered that a reasonable employer would have had regard to the following matters and would have decided against dismissal. First, the claimant was an employee who had previously performed well and had been working diligently and successfully from home. Second, the claimant and his line manager both reported that the claimant was experiencing considerable stress and anxiety at the prospect of returning to the office, that was a significant mitigating circumstance and one that the respondent had expressly acknowledged as a relevant matter in its own risk assessment. Third, accommodating the claimant's wish to continue working from home until the guidance changed would have meant delaying his return to work by only a few weeks. (Even if the respondent was doubtful about whether the claimant would return after 1st August it would have been reasonable to wait and see what happened). Fourth, there was no evidence to suggest that allowing the claimant to continue to work from home for that period would have caused any difficulty for the respondent. The respondent's concern regarding a potential floodgates effect and the need for consistency was not a reasonable one in the circumstances, particularly given that its evidence was that all its other employees had returned without complaint, that there were only 7 individuals in comparable circumstances to the claimant and given that it was actively trialling regular home working for the phase 1 employees.

68. We also considered that the process followed by the respondent fell outside the range of reasonable disciplinary procedures in a number of respects. The claimant remained ready and able to conduct his work from home. However, the respondent prevented him from working and essentially suspended him without pay in circumstances where it had no contractual power to do so. The respondent moved straight to a disciplinary hearing without conducting any investigation in relation to matters that went to the reasonableness of the claimant's refusal of its instruction and to potential mitigating circumstances. As a result, it did not take up the opportunity to clarify the position in relation to the extent of the anxiety that the claimant was experiencing, or, in so far as the respondent was doubtful about these matters, to obtain evidence regarding X's health or confirmation that the claimant was prepared to return to work once the guidance changed. The respondent appointed Sue Ruston to deal with the disciplinary and grievance processes although she was self-evidently not in a position to give these matters impartial and independent consideration. She had been closely associated with the Covid-19 risk assessment which was under challenge in the grievance. Additionally, it was clear that Sue Ruston had attempted to persuade Mr Shepperd to allow the claimant to continue to

work from home and had been overruled. Given her subordination to Mr Shepperd it was unlikely that Ms Ruston would have felt able to reach a different conclusion during the disciplinary process. We also considered that it was unreasonable for the respondent to refuse to conduct the disciplinary hearing remotely given the claimant's evident anxiety about coming in to the office environment or to refuse to reschedule the hearing when his companion was unavailable. We considered that, given that it was Mr Shepperd's own decision (that the claimant must return to work in the office) that lay at the heart of the disciplinary and grievance processes, he was not in a position to give impartial consideration to any appeal against that decision. We considered that a reasonable employer would have made alternative arrangements for the appeal to be heard by another senior member of the organisation.

Detriment

69. The claimant alleged that he had been "victimised" due to raising health and safety concerns, having his IT access cut and his wages stopped and that these matters constituted detriments in contravention of section 44(1)(c)(d) and (e).

70. We did not consider that the claimant had been adversely treated because he had raised health and safety concerns but rather because he refused to return to the office when instructed. He did, however, have his IT access cut and his pay stopped and so was subject to detrimental treatment in this respect. We consider, for the reasons provided in connection with the complaint of automatically unfair dismissal, that such detrimental treatment was accorded to the claimant because of his refusal to return to the office and was in contravention of section 44(1)(d) and (e) ERA 1996. We also considered, for the reasons given above, that the claimant's refusal to return to the office until the work from home guidance changed was an appropriate step for him to take given his knowledge and the facilities and advice available to him at the time (section 44(2) ERA 1996) We considered, for the reasons given above, that it was not negligent for the claimant to insist on working from home until the guidance changed and that a reasonable employer would not have subjected the claimant to the detriments as a result (section 44(3) ERA 1996).

Breach of contract

71. Having found, for the reasons given above, that the claimant had not committed gross misconduct, it follows that his dismissal without the required period of notice was a breach of contract.

Unauthorised deduction from wages

72. We find that the respondent made an unauthorised deduction from wages in relation to the period from 8th to 24th July 2020. The claimant was ready and able to perform his contractual duties from home. The respondent chose to prevent him from doing so by withdrawing his IT access. The respondent had no contractual entitlement to withhold pay because the claimant was refusing to perform his duties from the office or to place the claimant on unpaid suspension.

ACAS uplift

73. The claimant sought a 25% uplift on grounds that the respondent had failed to comply with the ACAS Code of Practice. The claimant relied particularly

on the fact that the removal of his systems access and stoppage of pay amounted to a disciplinary sanction ahead of any disciplinary process, that the respondent had refused to reschedule the disciplinary hearing when the claimant's companion was unavailable or to conduct it remotely and that the appeal process had not been considered impartially.

74. This was not a case in which the respondent had made no attempt to follow a fair process. However, we considered that in a number of respects the respondent had failed to comply with the ACAS code. The Respondent had not attempted to conduct any investigation, though there were matters that could have been clarified through such a process (the extent of the claimant's anxiety, the details of X's medical condition and whether the claimant was prepared to agree to return once the government guidance changed). Sue Ruston's insistence that the meeting could not be conducted remotely and her refusal to reschedule the meeting due to the claimant's companion's unavailability essentially deprived the claimant of an opportunity to put his case at a disciplinary hearing, given that it was clear that the claimant was not prepared to return to the office at that time. The respondent failed to ensure that the appeal was dealt with impartially by a manager who had not previously dealt with the case. It was clear that Mr Shepperd had taken the decision which was at the heart of the dispute between the respondent and the claimant and he was not in a position to review matters impartially given that central involvement. The respondent made no effort to identify another senior individual to hear the appeal. We considered that these failings were unreasonable and that an uplift of 20% was just and equitable in the circumstances.

Contributory conduct /Polkey reduction

75. It follows from the findings that we have made and the conclusions that we have reached that we did not consider that it would be appropriate to make any reduction on the grounds that the claimant had contributed to his dismissal by blameworthy conduct nor to reflect the likelihood that had a fair disciplinary process occurred a fair dismissal would have been a likely outcome.

Remedy

76. **Unauthorised deduction from wages** – the claimant's July pay slip showed a deduction from wages of £1,595.08 in respect of his wages from 8 July to 24 July 2020. We awarded this amount as compensation.

77. **Breach of contract/wrongful dismissal** – the claimant was entitled to three months gross pay as compensation for his dismissal in breach of his contractual entitlement to three months' notice. We calculated this amount as follows:

    a. 3 x £2,250 = £6,750.00
    b. Employer's pension contributions on this amount at 6%= £405.00

78. **Unfair dismissal - Basic Award** - The claimant earned gross weekly pay of £519.25 and had 2 years service and was 26 at the date of his dismissal. He was accordingly entitled to a basic award of £1,038.46.

79. **Unfair dismissal - Compensatory award** - The claimant was unemployed for 8 weeks before obtaining new employment at a higher rate of pay. However he has been awarded 3 months' notice pay in respect of this period and could not receive compensation in respect of both loss of earnings and notice pay covering the same time period. We therefore calculated the compensatory award due to the claimant as follows:
    a. Loss of statutory rights = £500

80. The Claimant's schedule of loss included a claim for £1,500 for "loss of reputation" on the basis that the dismissal had adversely affected, and would in future affect, his ability to apply for new roles. However, there was no evidence before us to support a claim for stigma damages of that sort. The claimant had succeeded in finding new employment within 8 weeks of being dismissed and we did not consider that it would be appropriate to award compensation for this element of the schedule.

81. As the claimant is not receiving any compensation for unfair dismissal in relation to loss of wages the Employment Protection (Recoupment of Job Seeker's Allowance and Income Support) Regulations 1996 will not apply to the sums awarded.

82. **Injury to feelings in respect of the breaches of section 100 and section 44 ERA 1996** – the claimant had claimed £6,000 for injury to feelings in relation to such detriments. We considered the impact of the respondent's actions on the claimant. We noted that the claimant had been caused real distress and anxiety by the respondent's actions in requiring him to return to the office and then dismissing him for his refusal. However, the period of time during which the claimant had been affected by these events had been fairly short (between July and September 2020) and there was nothing to indicate that the claimant remained affected by these matters subsequently. We therefore considered that an award of £2,000 was just and equitable to reflect the injury to feelings caused to the claimant by the events in question.

83. **ACAS uplift :** Total award before ACAS uplift = £12,288.54 made up of

    a. Unauthorised deduction from wages - £1,595.08
    b. Wrongful dismissal - £7155
    c. Unfair dismissal - £1,538.46
    d. Injury to feelings - £2,000

84. Applying 25% uplift to £12,288.54 = £2,457.71

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Employment Judge Milner-Moore

6 December 2021

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RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON
7 December 2021
.....

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FOR EMPLOYMENT TRIBUNALS