



EMPLOYMENT TRIBUNALS

Claimant: Ms M Moore

Respondent: Ecoscape UK Limited

Heard by: Employment Judge Johnson

Hearing dates: 27 April and 27 May 2021

Representatives:

Claimant: Mr C Atkinson (solicitor)

Respondent: Mr S Brockwicz-Lewinski (counsel)

JUDGMENT

1. The complaint of automatically unfair dismissal is not well founded and is dismissed.

CORRECTED REASONS

Introduction

1. The claimant was employed by the respondent from 21 January 2019 until her employment terminated on 2 September 2020. She presented a claim form to the Tribunal on 3 November 2020 following a period of early conciliation from 17 August 2020 until 17 September 2020 and brought a complaint of unfair dismissal arising from section 100 of the Employment Rights Act 1996 ('ERA') and which did not require 2 years continuous employment in accordance with section 108 of the ERA.
2. The respondent presented a response resisting the claim.
3. The case was listed for a final hearing on 27 April 2021 and which was listed to be heard by me. However, there was insufficient time to conclude the

hearing and I relisted the case for a further day on 27 May 2021 in order that the hearing could be concluded. Despite this additional time, there was insufficient time for an oral judgment to be given and this reserved judgment has been prepared consequently.

List of issues

4. Was the Claimant dismissed?
 - a. Did the R act in repudiatory breach of contract, in particular by failing to implement a safe system of work and safe working practices?
 - b. Did the C resign in response to that breach?
 - c. Did the C waive that breach?
5. What was the reason, or principal reason for the dismissal?
 - a. Was it, as the claimant maintains, because in circumstances of danger which she reasonably believed to be serious and imminent and which she could not reasonably have been expected to avert, she (while the danger persisted) refused to return to her place of work, or in circumstances of danger which she reasonably believed to be serious and imminent, she took appropriate steps to protect herself or other persons from the danger?
 - b. In assessing this, are the criteria in s100(1)(d) or (e) made out?
 - i. Were there circumstances of imminent danger?
 - ii. Did the Claimant believe there were circumstances of serious and imminent danger?
 - iii. Was that belief reasonable?
6. If the claimant was automatically unfairly dismissed, is there a chance she would have been fairly dismissed for a fair reason, or if a fair procedure had been followed?
7. Did the claimant contribute to her dismissal by her own conduct, or blameworthy conduct? The Respondent says that the claimant did not do enough to attempt to return to work.
8. Insofar as the C makes out any of the allegations above, to what compensation is she entitled?

Evidence used

9. Ms Moore was the only witness who gave evidence in support of her case as claimant.

10. The respondent called Ms Ewa Sikora who was the Business Development Manager and Office Manager, and Mr Gary Farrell who is the managing director. On the first day of the hearing on 27 April 2021, it was only possible to hear the evidence of Ms Moore AND MS SIKORA. ~~Ms Sikora and Mr Farrell's~~ evidence was not heard until the second day on 27 May 2021 AND FOR REASONS GIVEN BELOW, MS MOORE WAS PERMITTED TO BE RECALLED TO GIVE ADDITIONAL EVIDENCE.
11. Before the second day started, Mr Brochwicz-Lewinski made an application for permission to admit a supplemental statement from Mr Farrell. He confirmed that the statement had been prepared when it became clear to him that the evidence heard so far in the hearing, would require a significant number of supplemental questions by way of examination in chief relating to primarily the ability of the respondent to allow Ms Moore to work from home. Mr Atkinson was permitted some time to consider the statement and to take instructions from Ms Moore. He helpfully agreed to the statement being added and this served to avoid additional supplemental questions of Mr Farrell. However, I agreed that it would be in the interests of justice to allow Mr Atkinson to recall Ms Moore to answer a few specific questions arising from this supplemental statement which could not have anticipated on the first day of the hearing.
12. There was an agreed hearing bundle which was provided in electronic form and was slightly more than 350 pages in length. A few additional pages were provided at the beginning of the hearing, but their introduction was uncontroversial.

Findings of fact

Introduction

13. The respondent company Ecoscape UK Limited ('Ecoscape'), was founded by Mr Gary Farrell, who is the sole director of the company. He created the business in 2013 and explained that it was a supplier of '*environmentally friendly recycled wood plastic composite decking, cladding, fencing and balustrade systems*'. At the time when the claimant Ms Moore worked for Ecoscape, the business employed approximately 20 employees.
14. Ecoscape appeared to work from a warehouse site with employees who worked in the physical shipping of the products to customers. There was also a separate office, where Ms Moore worked with Ms Sikora and occasionally other office based employees. It was open plan, but with a separate office where Mr Farrell worked. Prior to the Covid 19 pandemic, all of the office staff worked at the Ecoscape premises
15. Ms Moore started working for Ecoscape from 21 January 2019. Her work involved organizing sales and administration support in the office.

The start of the Covid 19 pandemic

16. On 23 March 2020, the Prime Minister made an announcement to the public and ordered that there be a national lockdown, which was envisaged would control the spread of Covid 19 among the UK population.
17. Mr Farrell decided that he would have to close the business from 24 March 2020 and looked to furlough Ecoscape's staff, although he accepted that at that time, he was not clear as to how the lockdown would work. He informed Ecoscape's employee by WhatsApp message on 23 March 2020, but explained that some employees, including Ms Moore would need to attend the office on 24 March 2020 '*to tie up loose ends*'.
18. Ms Moore replied to this message on 23 March 2020 and informed him that she was uncomfortable coming into work given the situation regarding Covid 19 and Mr Farrell said that this was fine. It was an understandable reaction and the situation nationally at this time was uncertain and people were naturally frightened.

Furlough

19. The government had announced the introduction of the Coronavirus Job Retention Scheme ('CJRS') and Mr Farrell decided on 26 March 2020 that he would furlough almost all of Ecoscape's employees including Ms Moore. She was sent an email by Ms Sarah Gledhill who was Ecoscape's accountant on 26 March 2020 informing her of the intention to furlough her and its implications in relation to work and pay. Ms Moore acknowledged the email on the same day and gave her consent to being furloughed.
20. However ultimately, Ms Sikora was not furloughed because she was still making calls to customers and suppliers, so that they knew what Ecoscape was doing. This was a necessary step to ensure that the impact that lockdown had on the supply chain was ameliorated as far as possible.
21. Ms Sikora confirmed that she tied up these '*loose ends*', by working from home. She described these duties as being '*limited*' and amounted to advising customers by phone or email of the position concerning their orders. I accept that while Ms Sikora was working from home during this time, she was not fulfilling all of the duties which were carried out at Ecoscape's office and that her work could perhaps be described as a '*damage limitation exercise*' and was no doubt something which was being repeated by businesses across the country at that time.

The reopening of the Ecoscape business

22. Mr Farrell quickly noticed that businesses involved with construction, including gardening and building, and some of which were in competition with Ecoscape, were open. This was permitted by the recently introduced government rules concerning lockdown. Not surprisingly, Mr Farrell decided that Ecoscape should reopen, once certain steps were taken in order that the workplace complied with the government guidance in place.

23. The hearing bundle included Ecoscape's coronavirus policy which was implemented on 23 March 2020, a risk assessment dealing with social distancing, personal protective equipment ('PPE'), staggered start and finish times, hand washing, cleaning and training.
24. It was not unreasonable for the business to reopen at this point as there was no suggestion that the reopening was contrary to the government lockdown at that point. Naturally, employer's were encouraged to allow staff to work from home were possible and if not, ensure that the necessary protective measures and social distancing were maintained.

Ms Moore's reaction to Ecoscape's reopening

25. Ms Moore was contacted by Ms Sikora of the reopening date by WhatsApp on 25 March 2020. In her replies, Ms Moore was very clear in her view that reopening was *'selfish and irresponsible'* and *'...people don't understand the way this thing can spread'*.
26. A further message from Ms Sikora to Ms Moore was sent on Sunday 12 April 2020 and informed her:

'Gary decided to open again on Tuesday and operate as normal, but with limited staff and no cash transactions. I am going back in is [sic] the yard staff...I will keep you updated if Gary decides we need the team back w/c 20th. He is also going to send us a questionnaire on how we self-isolate...'

Ms Moore acknowledged the email but did not express any clear opinion at this stage and asked to be informed of how things developed.

27. The business reopened on 14 April 2020 and during the morning, Ms Sikora sent Ms Moore a further WhatsApp message at 11:28:

'Very busy at work – I have taken 15 orders this morning – need one person back, there's a bit of flexibility between you and Nicole, wanted to check with you first. What's your position?'

Ms Moore replied shortly afterwards that *'...I don't really feel comfortable about coming back in so by all means ask Nicole...'* Ms Sikora did not take any issue about this reply, but warned Ms Moore that Mr Farrell would be asking all employees back *'shortly'*.

28. As the week progressed, Ms Sikora approached Ms Moore again and sent a further WhatsApp message on Friday 17 April 2020 at 11:49 and sent her the following message:

'...Gary asked to confirm with you that we'd like you to return to work on Monday and resume normal working hours. That means as of Monday you are no longer furloughed. We will have to include a Saturday too as there is only two of us alternating. Safety measures are put in place – masks, anti

bac gel provided and no customers entering the office. We are obviously sat 2m apart from one another too. Please let me know if there is any questions or you can call us if you want to discuss...'

Ms Moore replied at 15:00 and her reply was not positive:

'...I'm struggling with coming back into the office. I appreciate Gary has given us mask etc it's just other people I don't trust to be careful as I have been over the last 4 weeks, it only takes 1 person to have it and not show symptoms then we all could potentially end up with it considering we all share a toilet and a canteen I can't see how it can be made to be completely risk free. I've also got to consider Lozs health and well-being I would never forgive myself if I brought it home.

Is there any way we can make it so I can work from home. I don't have a problem working I welcome something to do I just have a concerns [sic] being in the workplace in a situation I can't control.

I know everyone has their own views on the current situation and it's not my intention to cause any issues but I feel it's important to be honest about how I'm feeling'.

29. Ms Gledhill wrote to Ms Moore on 17 April 2020 that furlough was ending. Her letter included the following comments:

'We think that we can you back to work as normal on Monday 20th April 2020 and will expect you to return to work immediately unless agreed otherwise.

We have assessed that the work that you undertake will not involve you being within a 2 metre distance of anybody, and therefore you can work safely within the guidelines set by the government.

We would encourage you to follow the guidelines for hand-washing. Posters will be displayed around the work place.

If you have any concerns please speak with Ewa [Sikora] or Gary [Farrell] immediately.'

30. Ms Sikora spoke with Mr Farrell and informed Ms Moore that he would contact her directly. He sent her a WhatsApp message in which he attempted to reassure Ms Moore that it would be safe to return to work. He explained that government guidelines permitted their industry to reopen, that competitors were open, customers wanted to use Ecoscape and the need to *'...keep the business going'*. He stressed an increase in hygiene with the provision of hand sanitizer, masks, social distancing and not allowing customers on the premises. He did said that he could not accept Ms Moore's request to work from home because *'[w]e can't have one rule for one and another rule for others. It's simply not fair among other staff members. If you had an underlying health issues we would address this differently'*. He concluded with the following proposal:

'If you still feel uncomfortable after the procedures we have put in place. We will allow you to take time off as holiday or unpaid leave (we didn't have to offer this but if you feel so unsafe the option is there).'

31. Ms Moore accepted this proposal and informed Mr Farrell that she would cancel 5 days previously booked holiday and would use those for the absence, with the remainder being unpaid leave. She concluded in her message accepting Mr Farrell's offer by stating that *'...I think I will feel better once the cases have levelled off in our area'*. This reply suggested to me that Ms Moore did plan to return to the workplace in the relatively near future, once the level of Covid 19 cases in the local area reduced. Ms Moore was not required to shield by the NHS at this time due to underlying health issues applying to her or to close family members. Not surprisingly, given the evolving circumstances and the exceptional situation that employers and employees had been placed in by Covid 19, no immediate steps were taken about Ms Moore's concerns regarding a return to the workplace.

The respondent's attempts to get the claimant to return to work in May 2020

32. Mr Farrell confirmed that all of the Ecoscape employees had returned to work by early May 2020. He sent a WhatsApp message to Ms Moore on 4 May 2020 and by this time she would have been taking unpaid leave. Not surprisingly, Ecoscape was enjoying the boom which was taking place at the time with home improvements being made during lockdown and he informed her that they were very busy. Indeed, they had become so busy that they had taken another person on to work in the office. He told Ms Moore that: *'When you feel comfortable in coming back to work can you try and provide 1-2 weeks notice so I can make arrangements.'* I found that the implications of this message were that temporary office worker would need to be given notice to leave if Ms Moore wanted to return to work and it was clear that she remained employed by Ecoscape at this time. Ms Moore acknowledged this message and did not raise any concerns, nor indicate when she planned to return to work.
33. By 12 May 2020, the government was reporting a falling number of Covid infections and Mr Farrell messaged Ms Moore once again. He asked if she would come back to work on Thursday 14 May 2020. He followed up this message with an email and he attempted to provide reassurance of the measures which had been put in place in the workplace. In particular, he referred to a new workstation distanced from her colleagues by 2 metres, that she would have access to her own stationary, additional hygiene measures were provided including hand sanitizer being available.
34. Ms Moore replied on 12 May 2020 and explained that she had read the government's guidance published on 11 May 2020. She remained with *'a high level of anxiety surrounding returning to work within the shared office and how this is a safe environment'*. She also referred to HSE guidance and the government guidance that businesses should *'...make every reasonable effort to enable working from home as a first option.'* She asked Mr Farrell to confirm what efforts had been made by Ecoscape in respect of

working from home '*...as a first option?*' No reply was received from Ecoscape by the morning of 14 May 2020 and at 6:59, Ms Moore informed the business that she would not return to work that day as requested.

35. Mr Farrell provided a reply at 8:53 and explained why it would not be possible to offer home working. He referred to:

- *'Taking data protection into consideration payments cannot be taken safely*
- *Deliveries cannot be organized and scheduled efficiently*
- *Vital communications with other staff members would not be possible*
- *Servicing incoming calls which is a vast proportion of your job is not possible*
- *Discussing/altering quotations with customers calling the office would be made impossible*
- *Printing and working off architectural plans in A3 wouldn't be possible*
- *Using systems like Palletways, Tuffnells etc. is not possible remotely.'*

He referred to the fairness to staff again and the risk assessment which had been completed and that he felt the '*working environment is as safe as it can be and all other members of staff are back in the office*'.

36. Ms Moore remained anxious about Covid 19 and the following day on 15 May 2020, sent an email to say that she would not be returning to work due to the previous concerns that she had raised. Mr Farrell tried to call her and texted her asking for Ms Moore to call into work. In the absence of any reply, he sent an email at 5:36pm referring to her '*unauthorised absence*'. The usual reassurances which had previously been given, were restated and an explanation was sought from Ms Moore as to what worried her and an offer to put extra measures in place was also made. She was finally informed that she must return to work on Monday 18 May 2020 '*...to avoid disciplinary proceedings*' and if not coming into work, to advise her manager on or before 7am '*...as further explained in the handbook provided to you*'. By this date, Mr Farrell was no longer prepared to accept the ongoing absence through unpaid leave and required Ms Moore to return to work. Ms Moore on the other hand, was unwilling to return to work unless it was with home working being permitted.

37. Ms Moore sent an email on Monday 18 May 2020 at 6:46am explaining that she would not return to work '*...due to ongoing health and safety concerns with anxiety re covid 19 as previously stated*'. Finally, she said that '*I am aware that company policy is to call in each morning but at this stage I would not feel comfortable doing so. As a result all further communication to be via email or letter*'. It was not entirely clear why Ms Moore made this request and in evidence simply said '*I didn't want to phone in*'. While it was understandable that she was anxious about returning to work, this response appeared to be less connected with concerns about health and a worry that she would have to enter into a discussion where she would have to answer questions regarding ways in which she could return to work. My finding is that on balance of probabilities, by this date, Ms Moore would not enter into

any negotiation concerning her position with Ecoscape and had closed her mind to the possibility of a sensible compromise. This is surprising given the offer made the previous week by Mr Farrell for additional measures to be put in place.

38. Mr Farrell replied that evening and reminded her that her absence was being treated as unauthorized leave. He noted that Ms Moore had not provided an explanation of her concerns regarding returning to work and that Ecoscape would only correspond with her in writing. While Ms Moore had provided a general explanation that she did not feel safe returning to work, there was no precise explanation of what the real issues were and what steps might assist her in returning to work. When put to her in cross examination that she could have come into the workplace to see the measures put in place for herself, she said that she felt her safety was at risk. She accepted that working from home was the only measure that she would accept so that she would return to work at this point and this was confirmed in a further email that she sent to Mr Farrell on 19 May 2020.
39. While Ms Moore's decisions by this stage were not supported by any medical recommendations or requirements, I find that she had reached a point where she was understandably very frightened about the risks of Covid. She was also aware that many people were working from home and as an office based employee, she thought it would be easy to allow home working in her case. But her unilateral decision to countermand company policy and not phone in, suggested she had made her mind up and was not willing to engage in any further discussions. I concluded by finding that by this stage, she would not return to work unless she was allowed to work from home and would not tolerate anything short of that measure.

Grievance and Ecoscape's reaction

40. On 19 May 2020, Ms Moore also commenced a grievance against Ecoscape. Essentially, she explained that she was unhappy with her treatment, that Ecoscape were in breach of their health and safety obligations to her and that her request to work from home had been refused despite it being feasible and contrary to government guidelines. She also suggested that she was being punished for things that she said to Ms Sikora at the beginning of lockdown by WhatsApp.
41. Mr Farrell replied by email on 20 May 2020 seeking an explanation as to the health and safety breaches and added '*...[c]an you please help me find a solution by informing me of the which area you feel is unsafe?*' He restated the reasons which he had given earlier which he felt explained why work could not be done at home and noted that nobody in her job as a sales executive/admin has been able to work from home since Ecoscape opened in 2013. Despite being unhappy with some of the comments which had been made in her emails to Ms Sikora, Mr Farrell said that if he had decided to punish her, he would have commenced a disciplinary process. He concluded by inviting her to a grievance meeting and he also suggested that Ms Moore could see the measures which had been put in place at

Ecoscope. Alternatively, he was willing to meet by video and enclosed an invitation letter with the email for 29 May 2020.

42. Ms Moore replied by email on 24 May 2020 and said that she would not feel safe coming into work and requested a meeting by video call. She acknowledged that she was not in a vulnerable group at risk from Covid 19, but mentioned for the first time that she had asthma. She explained that she was not signed off sick from work because '*...I am ready, able and willing to work from home*'. She said that she did not need to attend work to identify that Ecoscope were in breach of health and safety obligations and said that she had not been given an explanation as to all of the reasonable steps taken by her employer to allow her to work from home. Her reply was lengthy and referred to a number of sources of advice, but the thread which ran through her email was an insistence that she be allowed to work from home.
43. The grievance meeting took place as planned on 29 May 2020 and Mr Farrell provided a note of what was discussed in an email sent later that day. Ms Moore was allowed to attend the grievance by video. It was a lengthy note and although not a verbatim minute, covered submissions from Mr Farrell, Ms Moore and Ms Sikora. There was lengthy discussion recorded involving the feasibility of Ms Moore working from home. A number of tasks were identified which were part of her job role, but which Ms Sikora felt were problematic for home working, such as taking payments from customers. While Ms Moore expressed a willingness to take on more of the tasks which might be capable of being carried out of work, such as telephone calls, the concern of management in this small office environment was whether there would be sufficient capacity at busy periods with work 'carved up' in this way.
44. It was noted that Ms Moore's concern appeared to be about the local spikes in Covid 19 at the relevant time. Mention was made of asthma, although Ms Moore seemed somewhat confused as to its seriousness and did not feel it necessary to obtain a note from her doctor concerning this condition. A discussion also took place concerning the provision of a separate office at the workplace for her and even the provision of a separate printer. Mr Farrell was recorded as confirming the numerous measures he had put in place in the workplace concerning personal protection. Mr Farrell promised an outcome decision regarding the grievance by 3 June 2020.
45. A decision email was actually sent on 4 June 2020 and which concluded by stating that, '*Ecoscope UK cannot – at this moment in time – facilitate you working from home*'. A more detailed explanation was given within the email but in summary there were concerns regarding data protection, additional costs, distractions. The paper heavy workload and the need to adapt a number of processes were identified. While in some respects, the reasons given were unenlightened, I was also aware that as a small business with a relatively small 'back office', which involved the supply of 'building type' services, home working was more difficult to accommodate than would be the case with a larger and more office-based employer. Ms Moore was

reminded of the steps take by her employer in the email, including steps specifically designed to accommodate her concerns. She was also offered the possibility of varying her contract to a part time contract covering evenings and weekends so she could avoid as many other staff as possible. The email provided Ms Moore with a right of appeal.

46. Ms Moore decided to appeal the decision not to uphold her grievance and gave notice of this by email dated 8 June 2020. She stated that she believed she remained in danger of catching Covid 19 at work and that Ecoscape had not been able to explain why she could not work from home. She sent a further email the same day requesting a copy of the risk assessment which had been prepared by Ecoscape and which Ms Moore had not yet seen.
47. Mr Farrell arranged for an independent appeal hearing officer to be appointed from Peninsula Business Services because he had heard the original grievance hearing and as director, was the most senior manager in Ecoscape. This was confirmed in a letter sent to Ms Moore on 15 June 2020.
48. The appeal hearing was heard by Ms Georgina Shepherd on 18 June 2020 and she produced her report on 25 June 2020. The decision was sent to Ms Moore on 26 June 2020. It confirmed that the appeal was heard by video conference and identified all of the relevant documents from the grievance process which had been generated by the parties. It outlined the basis of her appeal which asserted that she believed herself to be in serious imminent danger, she had concerns about the lack of risk assessment, that she could work remotely and this would be consistent with government guidance.
49. Ms Shepherd dealt with each of the grounds of appeal and concluded by dismissing the appeal in its entirety. She recommended that Ms Moore should be provided with a copy of the risk assessment, which Ecoscape had said would be disclosed when she returned to work. Its ongoing non-availability had clearly been an issue for Ms Moore. Minutes of the appeal hearing were also included as a separate appendix to the appeal decision.
50. I found that talking into account the respondent's size, it behaved reasonably in how it conducted the grievance. It allowed Ms Moore to participate remotely, had a full hearing and appeal with reasonably detailed notes or minutes and afforded her every opportunity to put her case. My main criticism of the respondent was the way in which it held onto its risk assessment and not surprisingly, Ms Shepherd concluded that it should be provided to Ms Moore without requiring her to return to work. After all, this document may well have served to explain why the respondent felt that appropriate measures had been put in place, although my previous findings would suggest that this would still not have persuaded Ms Moore to return to the workplace.

Ms Moore's sickness absence

51. Ms Moore acknowledged the report, but on 30 June 2020 advised Mr Farrell that the outcome had left her stressed and she needed to speak with her GP. He reminded her in an email sent the same day that she was expected back in work the next day and her message *'leaves the entire team in a very difficult position'*. Ms Moore was provided with a fit note by her GP on 1 July 2020 and was signed off with stress-related problems and anxiety until 15 July 2020. This was extended until 29 July 2020 and then again, to 5 August 2020.
52. In the meantime, Ms Moore discovered that she was not receiving SSP. Ms Gledhill explained in her email which she sent to Ms Moore on 31 July 2020 that to qualify for SSP payable by Ecoscape, she had been paid £120 average weekly pay to 1 July 2020. Due to her unpaid absence from work since she refused to return to work, she was unable to qualify, and she needed to apply to Jobcentre plus instead. This was an inevitable consequence of the impasse reached between employer and employee, with no decision being made regarding her continued employment, but her refusal to return to work meaning that she would not receive pay once she had exhausted her holiday entitlement. Her sickness postdated this period and any claim for SSP would be based upon her immediate historic period of pay, which was nil due to her nonattendance at work because of her concerns regarding Covid rather than ill health absence.

Resignation

53. On 5 August 2020, Ms Moore sent a letter to Mr Farrell giving notice of her resignation in response to a breach of contract by Ecoscape, *'...being the non-payment of wages coupled with the rejection of my grievance which has been a breach of the implied term of trust and confidence with the last straw being the threat of disciplinary action.'* She went on to say *'I am providing you with notice of 4 weeks and my last day of employment will therefore be 2nd September 2020'*. She asked to be placed on furlough during this notice period.
54. Mr Farrell replied on 6 August 2020 and accepted her resignation and her notice period. He disputed the reasons given for the resignation and explained that he could not re-furlough Ms Moore because there was work available for her to do. Her effective date of termination was 2 September 2020 as agreed.

The Law

55. An employee is excluded from the right to bring a complaint of ordinary unfair dismissal in accordance with section 108 of the Employment Rights Act 1996 ("ERA"), if they have not been continuously employed for a period of not less than 2 years ending with the effective date of termination.

56. However, a complaint of automatic unfair dismissal under section 100 ERA is not subject to this requirement.

57. Section 100(1) ERA provides that an employee who is dismissed shall be regarded as unfairly dismissed if the reason (or if more than one, the principal reason) for the dismissal is among other things,

(d) in circumstances of danger which the employee reasonably believed to be serious and imminent and which they could not reasonably have been expected to avert, they left (or proposed to leave) or (while the danger persisted) refused to return to their place of work or any dangerous part of their place of work, or

(e) in circumstances of danger which the employee reasonably believed to be serious and imminent, they took (or proposed to take) appropriate steps to protect themselves or other persons from the danger.

Each of the paragraphs constitutes an independent ground of automatically unfair dismissal.

58. Section 100 also provides:

(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 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.

59. Mr Brochwicz-Lewinski referred me to a recent judgment in the Employment Tribunal in the case of *Mr D Rodgers v Leeds Laser Cutting Limited (Case No: 1803829/2020)*. Although he acknowledged that as a first-tier authority this was not a decision which might be binding upon me, he explained that it helpfully referred to the legal principles which should be applied when determining a case involving a complaint of automatic unfair dismissal contrary to section 100 ERA. This was the basis upon which I referred to this case and I did not seek to compare the factual background in that case, with the facts in the case which I had to decide.

Discussion

Did the claimant reasonably believe there were circumstances of serious and imminent danger?

60. In considering this question, it is necessary to take into account the objective and subjective belief which I find to be present at the material time. This means, did the claimant believe the circumstances were of serious and imminent danger and was that belief objectively reasonable? Each of these points is considered in turn below.

Did the claimant believe there were circumstances of serious and imminent danger?

61. Having considered her witness evidence and contemporaneous messages and emails at the material time, I was left with no doubt that Ms Moore had and continues to have significant concerns regarding Covid 19. I have taken into account the developing circumstances and that the position regarding Covid during the Spring and Summer 2020 would have been different to how it is perceived following the roll out of mass vaccinations in the UK. The relevant time in this case predates these welcome developments and fear was particularly heightened during this time.

62. The tone of Ms Moore's emails clearly displayed to me a significant level of concern and indeed, fear. She struggled to come to terms with Mr Farrell's understandable decision to reopen Ecoscape with his competitors and other businesses in the building trade reopening before he did.

63. However, this was not a case involving an employee who had been told to shield by the NHS or who had been throughout the lockdown period alluding to specific health concerns. She did ultimately refer to asthma within her grievance, but it appeared to be half hearted and she was reluctant to suggest that it was much more than stress related and relieved using the standard inhalers provided by a GP. Her ultimate reference to her GP was in respect of her stress and anxiety and that appeared to arise from her frustration with the refusal by Ecoscape to allow her to work from home. She did not rely upon GP letters or notes concerning her asthma and additional risks to her arising from Covid 19.

64. Ms Moore's concerns were recognised by her employer and Ms Farrell did look at what adjustments could be made to the workplace to support a return to work. This included not only the typical measures of restricting access to the office and the usual sanitization processes, but even looking at providing her with a separate office. She was invited to come in and look at the proposed changes to the facilities, but she was reluctant to do so. This suggested to me that her fear was not only significant, but she was anxious that she might have been presented with convincing evidence that a return to work would be feasible with appropriate protective measures put in place.

65. Having considered all the circumstances and the way in which Ms Moore articulated her concerns, her real issues were not with the workplace in any specific way, but a more general fear about being required to leave the home and her perception that danger was everywhere. I also find that with the government's recommendation that employees should work from home

wherever possible, she concluded that she would work from home without properly considering whether it was feasible in her particular job.

Was the belief objectively reasonable?

66. Taking into account the reasons already given above, I am not able to accept that Ms Moore's belief that circumstances existed in her workplace at Ecoscape, was a belief that could be objectively reasonable.
67. I would add again, that I have taken into account the circumstances existing at the material time in Spring and Summer 2020 in relation to Covid.
68. The reopening of Ecoscape was not done without risks being assessed and the need for increased levels of hygiene and social distancing being addressed. It is unfortunate that Mr Farrell did not disclose the risk assessment when asked to do so, although I doubt that it would have made a material difference to Ms Moore's decision regarding a return to work.
69. Mr Farrell did try to engage with Ms Moore in numerous messages and while there were concerns regarding the original configuration of the office, he did his best to accommodate her concerns and even going so far as to offer her a separate room with her own equipment such as a printer. The staggered shifts was another feature designed to reduce movement within the office at a single moment in time and I must conclude that appropriate measures were put in place, which rendered Ms Moore's belief not to be objectively reasonable.

Could the claimant reasonably have been expected to avert the dangers?

70. Under these circumstances, Ms Moore could have averted the dangers arising from Covid by following the general hygiene guidance provided to all members of the public and the particular measures provided by her employer when returning to work.
71. Sufficient and adequate hygiene measures were in place and Ms Moore could have socially distanced by using the office that she was allocated and attending the shifts on a staggered basis. There is no suggestion that any particular concerns that she might have would not be addressed and apart from her not being provided with her own toilet, reasonable concerns would be addressed. She could have limited her contact with others, been able to social distance and was even offered part time work at different times of day to other employees if this was what she preferred.
72. Ultimately, there was no willingness to visit the workplace, to explore compromises and it remained to Ms Moore, 'homeworking or nothing'. This was an unreasonable way of averting any danger given the measures being offered by her employer.

Did she take appropriate steps to protect herself or other persons from the danger?

73. In addition to the half-hearted references to her asthma, Ms Moore did make some reference to her partner, but ultimately, there was no evidence available to suggest that she was required to shield and not attend work.
74. She refused to return to work and while making reference to local spikes in Covid which undoubtedly existed at the material time in certain areas of the North West, this represented a general fear about the region where she lived rather than the workplace. The workplace was not required to close and Mr Farrell continued to offer the safety measures referred to above.
75. As I have already mentioned, she could have embraced the measures proposed by Mr Farrell and could have taken advantage of the separate office and staggered hours of work to restrict social contact to protect both her and her family. Simply removing herself from work was not an appropriate step.

Did she take appropriate steps to communicate these circumstances to her employer by appropriate means?

76. Ms Moore was consistent in explaining that she was frightened from the moment lockdown commenced and this continued once Ecoscape started to reopen.
77. She clearly communicated these concerns via messages to Ms Sikora and more importantly to Mr Farrell. She was also able to raise a grievance and an appeal to the grievance concerning the refusal to work from home and her belief that this was an appropriate safety measure to take in her place.
78. While this might be the case and she has clearly maintained her arguments concerning her belief that her workplace was not safe and she should be permitted to work from home, a point was reached where her employer had taken all reasonable steps to address her concerns. By the time the grievance had been exhausted, she had been afforded a lengthy period of time to consider returning to work and to agree appropriate measures to protect her while at work.
79. Her employer had responded to her communications, reacted patiently and allowed her time to regain her confidence. They engaged with her on a regular basis and it was her decision to unilaterally refuse to engage with Ecoscape on a daily basis. Ultimately, she was left with a belief that it was not safe to return to work, but one which would not take a measured reasonable approach towards adjustments being made to support her returning to work.

The resignation

80. There may have been circumstances of danger across the UK during the relevant time in relation to Covid, but this was not particular to Ms Moore's workplace and if anything, this workplace was from the evidence available,

being managed as safely as could reasonably be expected with good hygiene and social distancing and limited human contact.

81. Ms Moore's decision to resign alluded in her email dated 5 August 2020 to the non-payment of wages, the rejection of my grievance being a breach of the implied term of trust and confidence with the last straw being the threat of disciplinary action.
82. The grievance did relate to safe working practices and her belief that she should work from home. But I am satisfied that the grievance was dealt with properly and followed a reasonable process. She clearly felt frustrated but was unwilling to compromise and acknowledge the steps being offered by her employer. I am satisfied that the way Ecoscape dealt with Ms Moore, was not a repudiatory breach of contract. The nonpayment of wages was understandable given her refusal to return to work and under the circumstances it was something which was done to allow Ms Moore time to reflect, rather than commence a disciplinary process.
83. The decision to resign was prompted because Ms Moore could see that she was running out of options and the conclusion of the grievance indicated that she would not be allowed to work from home. But the conclusions reached by her employer were overall reasonable and included measures and compromises designed to accommodate her concerns. Although she resigned because of the perceived breach, it did not amount to a repudiatory breach which would justify a reasonable employee's resignation.

Conclusion

84. For the reasons given above, the complaint of automatically unfair dismissal is not well founded and must be dismissed.

· Employment Judge Johnson

Date: 17 August 2021

Corrected on: 17 February 2021

JUDGMENT SENT TO THE PARTIES ON

23 August 2021

Corrected Judgment sent on

21 February 2022

FOR THE TRIBUNAL OFFICE