



EMPLOYMENT TRIBUNALS

Heard: By Video **On:** 23 February 2022

Claimant: Mrs Bridget Regnante

Respondent: Essex Cares Limited

Before: Employment Judge Fowell

Ms S Collins

Ms C Earwaker

Representation:

Claimant Mr Guiseppe Regnante (husband)

Respondent Mr I Wright instructed by S A Law LLP

JUDGMENT ON LIABILITY

The unanimous decision of the Tribunal is that:

1. The claimant's dismissal was unfair.
2. The claimant suffered a detriment at work on health and safety grounds.
3. The claimant did not suffer a detriment on the ground that she made a protected disclosure.
4. The dismissal was in breach of contract.
5. Compensation will be assessed at a separate remedy hearing, to take place at **10.00 am on Monday 9 May 2022.**
6. The following case management orders are made for that hearing:
 - a. Any further documents which the parties have in their possession or control relevant to remedy should be provided to the other party by 4pm on **Friday 11 March 2022**

- b. The respondent has responsibility for preparing a bundle of documents relevant to remedy, if the volume of new material exceeds 30 pages. The index for that bundle of documents is to be agreed by 4pm on **Friday 25 March 2020** and a copy provided to the claimant within 7 days.
- c. The parties may provide further witnesses statements and an updated Schedule of Loss about remedy, provided that they are provided to the other party by 4pm on **15 April 2022**.

REASONS

Introduction

1. The case arose in the early days of the Covid pandemic. When the first wave of Covid cases hit Mrs Regnante was alarmed by the risk to her husband, who had recently had cancer. He was categorised as “clinically extremely vulnerable” so she did not want to go into the office and risk bringing the infection home. For the first few weeks of lockdown she was allowed to work from home but during April 2020 the company insisted that she return to the office or take 12 weeks’ unpaid leave. She resigned in response.
2. Her main complaint therefore is of constructive dismissal, but she also complains that her dismissal was automatically unfair on health and safety or whistleblowing grounds, having complained about the risks to her, and that she suffered detriments at work for the same reasons; also that her notice pay was incorrect.

Procedure and evidence

3. In addressing these issues we heard evidence from Mrs Regnante and three former colleagues;
 - a. Ms Susan Heys, who worked as a Call Centre Operator;
 - b. Ms Natalie-Sian Bailey, whose title had been Local Business Manager; and
 - c. Ms Lucy Harvey, another Administrator like Mrs Regnante.
4. On behalf of the company we heard from:
 - a. Mr Lawrence King, the Admin Team Leader;
 - b. Mr Lukasz Wojciechowski, the Deputy Manager and Mr King’s line manager;

- c. Ms Dominique Saxelby, Head of HR; and
 - d. Ms Sue Cranford, the Registered Manager.
5. There was also a main bundle of 374 pages and an additional bundle of 15 pages from Mrs Regnante. Having considered this evidence and the submissions on each side, we make the following findings.

Findings of Fact

6. Essex Care Limited work on behalf of Local Authorities providing care and equipment to people in their homes. It is a large company with over a thousand staff. Mrs Regnante was based in their Worthing office and she was there for about five years until her resignation in April 2020. She enjoyed her role and it was about five minutes' walk from home.
7. Her husband was unfortunately diagnosed with stomach cancer in July 2018. He had to have extensive chemotherapy. A major operation followed in January 2019 in which his stomach and spleen had to be removed, after which he had further extensive chemotherapy. Happily, he recovered over the following few months, and indeed he represented Mrs Regnante at this hearing. Those events were traumatic for Mrs Regnante however, and no doubt for him. They left a lasting legacy of anxiety, which was heightened by the outbreak of the pandemic in early 2020. At that point he received a letter from the NHS advising him that he was clinically extremely vulnerable and to do all he could to avoid infection.
8. It is useful to remind ourselves about how things stood in March 2020. After some initial guidance by the government, a national lockdown was announced by the Prime Minister on 23 March. We were provided with a copy of the text in the bundle. The key passage stated:

“From this evening I must give the British people a very simple instruction - you must stay at home.

Because the critical thing we must do is stop the disease spreading between households.

That is why people will only be allowed to leave their home for the following very limited purposes:

- shopping for basic necessities, as infrequently as possible
- one form of exercise a day - for example a run, walk, or cycle - alone or with members of your household;
- any medical need, to provide care or to help a vulnerable person; and
- travelling to and from work, **but only where this is absolutely necessary**

and cannot be done from home. [Emphasis added]

That's all - these are the only reasons you should leave your home.

...

If you don't follow the rules the police will have the powers to enforce them, including through fines and dispersing gatherings."

9. He went on to announce the closure of many businesses, such as shops selling non-essential goods. People were forbidden to meet more than one other person in public and it ended:

"And therefore I urge you at this moment of national emergency to stay at home, protect our NHS and save lives."

10. The text was published together with more detailed guidance to the same effect. It explained:

Some people are particularly vulnerable to poor outcomes following coronavirus infection for medical reasons because of underlying health conditions – this group who are clinically vulnerable – see section 6 – are advised to take particular care to minimise contact with others outside their household.

There is a further group of people who are defined, also on medical grounds, as clinically extremely vulnerable to coronavirus – that is, people with specific serious health conditions. They are advised to adopt shielding measures to keep themselves safe by staying at home and avoiding all contact with others, except for essential medical treatment or support.

11. Then in section 4

Going to Work:

With the exception of the organisations covered above in the section on closing certain businesses and venues, the government has not required any other businesses to close to the public – indeed, it is important for business to carry on.

Employers and employees should discuss their working arrangements, and employers should take every possible step to facilitate their employees working from home, including providing suitable IT and equipment to enable remote working.

Sometimes this will not be possible, as not everyone can work from home. Certain jobs require people to travel to, from and for their work – for instance if they operate machinery, work in construction or manufacturing, or are delivering front line services.

...

Employers who have people in their offices or onsite should ensure that employees

are able to follow the Guidance for employers and businesses including, where possible, maintaining a two metre distance from others, and washing their hands with soap and water often for at least 20 seconds (or using hand sanitiser gel if soap and water is not available).

12. Finally, at section 6, referred to above:

6. Clinically vulnerable people

If you have any of the following health conditions, you are clinically vulnerable, meaning you are at higher risk of severe illness from coronavirus. You should take particular care to minimise contact with others outside your household.

Clinically vulnerable people are those who are:

- aged 70 or older (regardless of medical conditions)
- under 70 with an underlying health condition listed below ...

As above, there is a further category of people with serious underlying health conditions who are clinically extremely vulnerable, meaning they are at very high risk of severe illness from coronavirus. You, your family and carers should be aware of the guidance on shielding which provides information on how to protect yourself still further should you wish to.

13. Clearly, the thrust of this guidance was to stay at home unless it was absolutely necessary to go out, and to take additional care above and beyond this general level of precaution where someone in the household was vulnerable or clinically extremely vulnerable.
14. The immediate reaction by the company was to allow Mrs Regnante to work from home, although the other administrators – of whom there were four in the office – were all required to come in. As a care provider, the company was providing a front-line service, even though Mrs Regnante and others were in an administrative or support role. The companies' managers, including Mr King and Mr Wojciechowski were well aware of her husband's condition and told her that she did not need to bring in his shielding letter.
15. So great was Mrs Regnante's concern about the risk of infection to her husband that they began living in separate areas of their home. Fortunately for them it was big enough for them to have separate bedrooms and bathrooms, but clearly this was a huge disruption to normal family life. He did not leave home at all, and she went out as little as possible, getting groceries from Tesco nearby when it was quiet, as permitted by the government guidance. (She did not get things delivered to the house as there was a three week waiting list and she felt that other vulnerable people may be in greater need.) But after each shopping trip she would wash everything and then have a shower.

16. Working from home was not straightforward. She had a company laptop which should have allowed her to access to emails and the shared drive, although this was not always working. Phone calls were not routinely diverted to her at home, so she could not pick them up in the normal way, although this must have been a matter of choice or policy. Diverting phone calls is a simple procedure and colleagues were in the office to take them. She had a mobile phone which she used to make outgoing calls as required, and she was given a range of admin or computer based tasks to complete. She felt that things were working reasonably well in those initial few weeks and there was good teamwork between her and her colleagues in the office.
17. We heard a good deal of evidence about what she could and could not do from home. Her estimate was that she could do 85% of her normal role, whereas the company's estimate was about 50%. However, it is clear that there was plenty of work that she could usefully do, with a sensible division of labour, even if that meant that those in the office spent more time on the phone or on other client-facing tasks.
18. An example given of the difficulties caused is that she could not make folders for new customers, but her view was that this was a five-minute job, and she could email colleagues in the office to ask them to do it. According to Mr King's statement the other problems were not being able:
 - a. to do the early rota from 07:00 – 08:30 in the mornings;
 - b. to distribute staff uniforms and PPE;
 - c. to distribute mobile phones to care staff as required;
 - d. to record their visits on an inhouse software app called CACI; and
 - e. to deal with device issues and arranging for mobile phones to be fixed.
19. This appears to us a limited range of tasks. Access to the software app could no doubt have been arranged. The rest involves interacting with other member of staff for these various and occasional purposes. It is difficult to avoid the impression that the company simply felt that she should be working back in the office on the same basis as everyone else, in the interests of fairness – a point they have emphasised - rather than any particular or pressing work requirement.
20. On the evening of 5 April 2020, a Sunday, Mrs Regnante was called in to carry out an evening shift for the call centre, which was also run from the Worthing office. This is not something she had been asked to do in the past, and it is particularly surprising that this should have been asked from her during the pandemic. However, she went, at least for a few hours, then went home. On arrival she emailed Mr King at 23.55 that evening to explain her concerns (p.168):

Hi Lawrence,

When you rang me today to ask me to do the Call Centre shift, I was a bit taken aback that you asked me, given the fact that I am social distancing for 12 weeks due to Giuseppe being at high risk and shielding. He does not leave the house at all and I go out only for a walk, to go to get groceries (when I am now wearing a mask and gloves to protect me) and to get any medication he needs.

I said 'yes' as I thought it would only be myself and Sue and we could easily keep our distance, but also I was caught on the hop and didn't have time to think. A little later, I thought that I could touch infected surfaces and felt ill at ease, but then I thought, I will do this shift and no others, and remember to wash hands, use hand gel and be generally very careful. Then I arrived in at the Office at 6pm, to find that I was covering for Helen, who is now in self-isolation due to constant coughing on Saturday and that her son is in the Covid-19 Ward at Worthing Hospital.

I thought of phoning you to say that I was going home (and I probably should have) but I didn't and was also thinking that I can't leave Sue on her own. I don't know what you were thinking asking me to come to the Office with this whole situation going on. I am now terrified that I will bring/already have brought it into the house.

I cannot come to the Office again to do Call Centre shifts. I need to protect Giuseppe.

Regards,

21. We note the use of the word "terrified." It was one she used several times in her evidence and we do not doubt her strength of feeling. She was upset at points in recalling these events and we have no doubt that her concerns were genuine and acute. Mr King may not have appreciated this however. His response (p.167) was quite blunt:

Hi Bridget,

Thank you for your email.

Firstly, I gave you the option to come into the office yesterday to work in the Call Centre. You can easily practice social distancing (as you know you can work from the back office where you can work alone listening to the phone ringing) and it is easy to distance yourself from CCA's coming into the office. The only CCA whom is coming into the office going forward until further notice is CL who will be making books in the OT room.

Secondly, I am very concerned that you feel coming to an empty office is a concern but, as you stated on the phone, going to Tesco to do a weekly shop is still something you continue to do.

I have attached guidance which you would have received due to Giuseppe shielding. It refers to what you should be doing in your household as well the expectation for yourself to continue to attend work.

We have been following the guidelines set out by the government and by allowing you to work at home, during normal office hours, is more than acceptable.

As you know, the country is on a standstill and as Key Workers, we all need to work together to get through this.

For this reason, if the service requires you to work in the Call Centre, we will continue to request this from you. You are part of the Admin/ Call Centre team and this is a suitable expectation.

If you would like to discuss this further, or do not feel this email is acceptable, I will happily refer you to Lukasz.

Kind regards

22. It does not seem from this that he regarded her concerns as entirely genuine. There is a clear lack of patience being shown, and the threat to escalate things to his manager, Mr Wojciechowski.
23. Things proceeded however without further dispute, for a few days at least. On Tuesday 14 April 2020, the day after Easter Monday, Mrs Regnante reported that she had IT issues. There was no specialised IT support immediately available. Mr King made some suggestions but the problem – which seemed to concern her wife – continued. It was eventually reported to IT by Mr King that Friday.
24. During that week, he became increasingly impatient of these home-working issues. On Wednesday (15th) he sent her a spreadsheet to complete so that he could see what she was doing all day. On the Thursday he contacted HR (Yvette) to express his concerns as follows (p.184a):

Hi Yvette,

I spoke to Bridget today who is currently shielding with her husband who had a major operation last year. Her husband received a letter but Bridget did not.

Currently, Bridget has been working from home however, after your conversation with Lukasz and Sue yesterday, I explained to Bridget this morning that she can social distance whilst working from the office (working in the back office on her own).

Bridget does not feel this is suitable as 'she is in a different position to other office staff and needs to protect her husband'.

I informed Bridget that this is the case for all staff and as she personally has not got a letter, there is no reason why she cannot work from the office safely.

I gave Bridget the option of working from the office paid whilst occasionally working from home, or having the time off unpaid.

Bridget stated that she would like to discuss this further with yourself as she feels this is not appropriate."

25. As this shows, he was clearly unhappy with the current arrangement and felt that she should be back in the office. It seems from this that he had spoken to Mrs Regnante that day, and that is confirmed by her own email later on to him, Mr Wojciechowski and Ms Cranford (p.181) later that day:

"I had a conversation with Lawrence this morning regarding my personal situation with regards to working from home, which resulted in Lawrence stating I had the following 2 options:

- Work from home some of the time; work from the back Office the remainder of the time
- Take unpaid leave

I phoned Lawrence later to ask if he felt I could not fulfil my role at home and he said that wasn't the case and that the options given to me were based on equality and fairness across the Company as a whole. I told him I would speak to Yvette in HR.

I spoke to Yvette and she did say that as a Company, ECL were trying to be as fair to everyone as possible but that specific decisions about employees' individual situations were made at a local level. She advised therefore I get in touch with my own Managers.

I need to know exactly why I cannot work from home on a full time basis. As Giuseppe is at very high risk of becoming seriously ill if infected, I cannot risk becoming infected and feel that coming to work would leave me exposed to potentially contaminated surfaces and it is difficult to social distance all of the time, with the best of intentions. As I am in a different position therefore to most other members of the team, I don't understand how 'fairness' or 'equality' has anything to do with it. So if there is another reason or reasons as to why I'm being asked to work from the Office, then please let me know. I cannot make such a big decision without knowing what is going on.

26. These messages encapsulate the views on each side. The position adopted by Mrs Regnante seems to us entirely reasonable. Mr King however was annoyed that she was not working in the same way as the others, while she could not see what the fuss was about. It is not clear to us why this was such a concern and it does not seem that there was any complaint from other member of staff.
27. There is no doubt that measures were being put in place to make the office as safe and compliant as possible. That was no easy task. 15 people worked there, in what amounts to four offices, a kitchen, store room and other spaces. Everyone was sitting at their normal desks and there was no ability to add extra dividers or space. What could be done was done however. Ms Cranford helpfully listed the measures taken as follows:

- a. hand sanitiser units were placed around the office;

- b. masks, antibacterial wipes, tissues and hand cream were available;
- c. social distancing signs were placed on the floor to remind people to stay 2m apart;
- d. staggered start times were introduced to avoid people coming and going through the narrow passages and stairwell at the same time;
- e. staff were told to wipe down their workstations and equipment
- f. goggles/visors were provided
- g. she and Mr Wojciechowski came in at 6am each morning to personally carry out cleaning tasks;
- h. no food preparation was allowed in the kitchen;
- i. windows and doors were kept open;
- j. no fans, heaters or air conditioning units were allowed;
- k. hand washing signs were present in the kitchen and toilets;
- l. the number of staff in each room was restricted;
- m. there were temperature checks and PPE for new starters;
- n. each evening the office cleaners came in;
- o. care staff met in the car park in full PPE when returning or collecting files.

28. There was some dispute about when all these measures were put in place. Mrs Regnante says that there was little evidence of any precautions when she came in for her evening shift, although many of them would not have been apparent to a visitor, such as the morning and evening cleaning routines. We do not doubt that the managers made a major effort to keep the office functioning in very difficult circumstances, in order to maintain a vital service to vulnerable people. That said, it is quite a small office for so many and it may well have been difficult to maintain social distancing throughout the day.

29. Some other members of staff had concerns about this too. Susan Heys resigned and her last day in the office was 30 March. Her account was that she was not able to keep to the 2 metre distance because her desk was only 4ft from the client "book making bench" and that those care staff who could not work in the community, due to their own covid issues, were told to come into office to make up books at the bench beside her.

30. It may be that the full package of measures was not in place by the time she left,

but none of those steps could completely address the social distancing issue. We are not in a position to make a definite finding on the distance between each person, but it seems to us that Mrs Regnante's concerns about working there were understandable, given the number of people and the limited space available.

31. The view that it was appropriate for Mrs Regnante to come back into the office was based on internal guidance being applied across the company (see page 70). We heard little about how this guidance was prepared but it appears to be based on more general government guidance. It divides staff into a number of categories as follows:

- a. The shielding – i.e. the clinically extremely vulnerable
- b. The vulnerable – as per the original government guidance quoted above
- c. The social distancing – which includes people like Mrs Regnante where a family member living in the same household is categorised as shielding or vulnerable.

32. The guidance in this last category gives two options:

If they can fulfil their role remotely, they can work from home, or

Attend work in a non-frontline role where social distancing can be observed.

33. The company took the view that she could not fulfil her role remotely and therefore that she should attend work and observe social distancing. In short, the fact that her husband was clinically extremely vulnerable made no difference.

34. As part of measures to identify the relevant category the company also developed a pre-assessment questionnaire, largely piloted by Ms Saxelby. This was sent to Mrs Regnante by Mr King on Friday 17 April, the same day that IT support was being arranged for her. She replied later that day with the completed form. It asked a number of questions such as:

Can the employee work from home and complete all the normal responsibilities and activities of their role?

35. To this, she replied Yes. She later accepted that she could not do everything but this shows that she was determined to avoid coming back to work. It also posed various questions about her work area, and it would not have been obvious how to respond, whether as a home worker or as someone in the office. Examples included:

Does the individual have a workspace that is completely separate to all other office workers?

...

Are there hand washing/sanitizing facilities available in the employee's immediate work area?

36. She sent the form back, but Mr King was not satisfied with some of her answers and replied within the hour stating, for example, that the answer about being able to complete all her tasks should have been a 'no'. The other answers about facilities in the office should have been a 'yes' given the efforts made to make the office safe. In total he challenged nine of her answers, setting out his reasons in red and at some length, ending

"Please send me back your revised assessment by the end of the day."

37. Given that this was at 14.48 on a Friday, he was making this a major priority. He did not however call her to discuss the form or her concerns about returning to the office generally.

38. She found this approach hurtful and unnecessary. At 16.33 she replied by email to say that she was not going to change her answers, although she added in blue her own comments to his ones in red. As to fulfilling her role she said she could start at 7.00 am if need be and emphasised that she could do other tasks to make up for the ones that she could not do from home, like making up customer folders. Her email concluded:

"With my attached comments in mind, could you please advise me as to the point of this whole exercise we are carrying out, as I feel that I am being pressurised into a decision which you know I cannot make nor could I accept, in view of my particular circumstances."

39. This made clear what the result of insisting on a return to the office would be. The following week began on Monday 20 April. Mr King took up the issue again that morning (p.210). Again, he chose to communicate by email and in quite blunt and uncompromising terms

Hi Bridget,

Please note that you are not permitted to share emails with 3rd parties, in this case your husband, as this is considered a serious information governance breach. I will have to report this in accordance with ECL policy and procedures.

I have been in contact with HR and they confirmed that if there is no NHS letter to prove you are shielding, then you are not shielding.

A Site Risk Assessment has been carried out in the Worthing office and, with no unmitigated risks, it is sufficient for you to work in the office.

You will need to come to work effective from after your lunch break today recognising social distancing. If you decide that you do not want to go ahead with this, then you will be on unpaid leave until you feel safe to return to work.

As per the guidance you were provided with, you will be working in the back office whilst following government guidelines on Social Distancing. You can also wear all the PPE you feel will help you feel more safe when working in the office. There is also NHS guidance on how to live with someone whom is shielding.

Can I ask you think about this and let me know by 13:00 today with your decision.

40. So, she was expected to come straight back in after lunch that day, with no room for discussion. She responded to say that she did not agree, was taking advice, and would not be in. He replied that afternoon to say that she should be in the next morning at 08.30 to discuss her options which were:

1. That you do not want to work in the New Tyne Office [i.e. the Worthing Office] so you will be on unpaid leave for 12 weeks or more from tomorrow. Your laptop will need to be returned to the office

2. You will work in the Worthing office full time and conduct social distancing at all times and you will be fully supported to do so.

3. If your concern is around mixing with the general public and then going home, we can arrange for you to stay in a hotel for the period in which you are most concerned, whilst you are working in the Worthing office

41. This was the first mention of a hotel. She replied at more length that evening stating that it was not appropriate to leave her husband and go to live in a hotel.

42. There was no resolution that week, although there were various exchanges about the ongoing IT issues. Nothing further was said about a return to the office until the end of the week. It does not appear that any HR advice was sought until the situation was referred to Ms Saxelby on the Thursday of that week, 23 April. She then had a telephone discussion with Mr King that afternoon (p214). The following morning he emailed her to say (p.217):

Hi Dominique,

Bridget emailed me this morning stating that IT have asked her to drive to Brentwood (2 hour drive) to get her internet working.

When I asked who will be taking her, she confirmed in the email thread below that her husband, who is shielding, will be driving her to Essex.

This is very concerning considering they should not be leaving their home.

43. Mrs Regnante did indeed drive to Brentwood, although Mr Regnante stayed in the car the whole time, despite the length of the journey. Mr King's comments appear to suggest that he felt she was exaggerating the problem with her husband and so there was no good reason why she could not return to the office. That was not however put to her at this hearing, and indeed it was accepted that she had a very genuine concern. This trip to Brentwood in fact shows that she was prepared to

go to some lengths to sort out her IT issues so as to be able to carry on working from home.

44. Ms Saxelby then drafted a letter (p.222) for Mr King to send to Mrs Regnante inviting her to a meeting at 2pm in the office the following Tuesday, 28th, to discuss the options available to her “and what additional adjustments we can make to facilitate you being able to complete your full role as Administrator as safely as possible.” It then went into some detail about the precautions which had been put in place. It ended:

Our aim is to facilitate a way of working that enables you to fulfil your full role effectively and that allows for working from home as often as is practical. Please be aware that if you do not attend this meeting further action may be taken. Given that I believe our aims are aligned, I trust that this would not be necessary.

45. The proposal was that Ms Saxelby would join the meeting by Skype. She was herself in the category of clinically extremely vulnerable. However this option was not given to Mrs Regnante, who declined to attend. She was simply not prepared to take the risk of going back into the office, and was also aggrieved about the way this had been dealt with, with little or no personal discussion and after about a month of working from home.

46. Ms Saxelby sent her a more conciliatory email on Monday 27 April, sympathising with her position. Mrs Regnante replied at 16.59 thanking her, but said:

I understand that some adjustments will have been made to make working on site safer and that these changes may well limit the spread of the virus, if it does eventually manifest itself in the Office. However, with COVID-19 being such an infectious disease, I don't believe we can be certain of not contracting it if it is present around us. With my husband having two vital organs missing (affecting his immune system) and having had chemotherapy in the past 12 months, I will not take the chance of this happening. I know there probably are people working across the Company who live with people who are Shielding and who work at ECL sites. However, this is very much their call to make and we are all different.

As the Government advice from the beginning has been very clear, i.e. that people must work from home, unless it's absolutely not possible to do so, I hoped that my Managers would be able to accommodate me with this situation, by making some changes to work tasks to make it possible.

In view of the above and the fact that we have not been able to come to a satisfactory conclusion on the matter, and having sought further advice, it appears we are approaching the issue from different perspectives. As a consequence, I have no alternative but to reluctantly hand in my Notice, in order to protect my husband from any risks that attending the Office would entail. I do not have confidence that the measures put in place at the Worthing Office will be effective, due to its size and the amount of people working in the said environment.

Please note that I am giving 1 month's Notice, with effect from today 27th April 2020. I expect that I will be able to work my Notice period of 1 month from home.

47. There were some further exchanges, but Mrs Regnante had made her mind up, and so she completed her notice period, working from home as before. We asked her why she did not take the option of 12 weeks' unpaid leave instead, and she responded that she felt the trust had gone by that stage. Again, she felt aggrieved at the way she had been treated.

Applicable Law

48. Constructive dismissal is not a term used in the Act, but section 95(1) gives the legal definition of a dismissal, and it includes where:

“(c) ... the employee terminates the contract under which [she] is employed (with or without notice) in circumstances in which [she] is entitled to terminate it without notice by reason of the employer's conduct.”

49. So there have to be circumstances justifying the employee in downing tools and walking out. In legal terms, there has to be a fundamental breach of contract by the employer. In cases of constructive dismissal that usually means a breach of what is known as the implied duty of trust and confidence. According to the House of Lords in the case of **Malik v BCCI** [1997] UKHL 23 that happens where an employer conducts itself “in a manner calculated or likely to destroy or seriously to damage the relationship of trust and confidence”.

50. After that, the next question is whether she did in fact resign in response to this behaviour rather than for some other reason, although this was not in fact suggested here.

51. Other complaints concern “detriments” at work, relating to health and safety or whistleblowing. A detriment for these purposes is simply some unfavourable treatment at work before Mrs Regnante resigned. Section 44 of the Act deals with health and safety situations and provides that

“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 -

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

52. (Although other sub-sections were referred to in the case management order, this was the only one relied on.)

53. The whistleblowing provisions follow a similar format. By section 43B:

- (1) ... a “qualifying disclosure” means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—

...

- (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject, or
- (d) that the health or safety of any individual has been, is being or is likely to be endangered,

54. This clearly overlaps extensively with the earlier health and safety provisions, and section 47B gives the right not to be subject to a detriment for making such a disclosure.

55. There are very similar provisions at sections 100 and 103A which deal with dismissals on grounds of health and safety and for whistleblowing respectively, but these are more difficult to apply in the case of a resignation or constructive dismissal. They are quite straightforward in cases where, for example, an employee is dismissed for refusing to return to work in dangerous circumstances. Such a dismissal is automatically unfair, regardless of length of service and regardless of the process followed by the employer.

56. The point is perhaps academic here. There is only one right in question, the right not to be unfairly dismissed. Sections 100 and 103A simply state that a dismissal for one of the reasons given is “deemed” to be an unfair dismissal. In a case involving resignation, the entry requirement for these sections to apply is that there has been a constructive dismissal, i.e. a fundamental breach of contract by the employer and a resignation in response. Once that entry requirement has been met, those sections do not then add anything on the facts of this case.

57. There have been some recent first instance decisions relating to Covid and although these are not binding, they are of some assistance. We were referred to **Gibson v Lothian Leisure** (ET/4105009/2020). There, Mr Gibson was employed as a restaurant chef. The restaurant had to shut in March 2020 because of the lockdown restrictions and Mr Gibson was furloughed. In April 2020, the restaurant asked him to 'come in and help out for a bit' in the expectation that some of the lockdown restrictions would be lifted. Mr Gibson was reluctant to do so. He lived with his father who had several medical conditions including a brain tumour, colitis and Addison's disease and was shielding during the lockdown. Like Mrs Regnante, he was worried that the workplace was not safe and that if he caught coronavirus, he could pass it on to his father. The company did not provide any PPE for staff and, according to Mr Gibson, had no intention of adopting measures to create a COVID-secure working environment. The employer's response was to tell to him to 'shut up and get on with it'. He refused to return to work and was

dismissed. The tribunal was satisfied there were circumstances of danger which were serious and imminent at the time Mr Gibson raised his concerns.

58. In **Ham v ESL BBSW** (ET/1601260/2020) Mr Ham was dismissed in March 2020 from his job with a cleaning services company when he refused to deliver equipment to the home of his manager who, along with her daughter, was self-isolating with coronavirus symptoms. He offered to drop the equipment to another location, where it could be stored securely. He was summarily dismissed for, among other things, failing to follow a reasonable management instruction. In his internal appeal against his dismissal, Mr Ham expressed concern for his and his family's health. The employment tribunal concluded that his dismissal was for the principal reason that he had raised health and safety concerns, and hence automatically unfair contrary to section 100 of the Employment Rights Act 1996.
59. The employment tribunal noted that it was unfortunate that the events in the case coincided with the then very recent announcement of the lockdown and the accompanying nationwide uncertainty and lack of knowledge as to the consequences of the pandemic, which will have caused huge uncertainty for many employers and that the manager was very recently in post. It acknowledged that these factors no doubt contributed to the manager's reaction to Mr Ham's legitimate concerns but, while understandable, they were not excusable. It was inconceivable, they held, that an employee being instructed to go to the home of two self-isolating individuals with suspected coronavirus symptoms during late March 2020 was not raising legitimate health and safety concerns or taking appropriate steps to protect himself.

Conclusions

60. These cases are a reminder of the conditions at that time and the need to view things in light of the situation as it then stood. As already noted, the thrust of the government guidance was that the population in general, and Mrs Regnante in particular, should have stayed at home unless absolutely necessary.
61. That guidance also placed an obligation on the employer to help her with that and to discuss things with her. It does not seem that much was done to facilitate her working from home. She had some IT equipment, which was problematical, and the onus was put on her to sort it out. That put her in the difficult position at one stage of a long drive to Brentwood, at a time when police were stopping cars thought to be making unnecessary journeys, and the company then sought to use that journey as a reason why she should be able to work in the office.
62. Our view is that the vast majority of her tasks could have been done at home. There were IT issues, but once they were resolved there ought to have been plenty that should could do. A fair interpretation of the government guidance would have meant that she was an obvious candidate to work from home. She did so satisfactorily for several weeks, working well with her immediate colleagues,

and they were not unhappy with the arrangement.

63. The company appears to us more concerned with fairness arguments, which essentially boil down to asking, "Why should she get away with being at home?" We cannot say that their own guidance is wrong, although it should have been given a common sense interpretation in line with the general position of the country, but they also seem to have adopted a strict interpretation of it, and taken the view that unless she could do absolutely all her work from home, she needed to be in the office. That does not seem to us to be justified.
64. Their patience ran out in April 2020, mainly over IT issues. The issue of the spreadsheet to record her activities then shows a concern about her not working hard enough. That view is compounded by the various comments about her going to Tesco.
65. Indeed, the emphasis placed by the company on getting her back into the office seems to us out of all proportion to the benefit to be gained by the company. This also seems to be an agenda of Mr King's. It is particularly surprising that the company would go to the extreme of suggesting that she go to live in a hotel, with all the expense that entails, just so that she can be back in the office from time to time. Fundamentally, she was an administrator, working in a support role, with a clinically extremely vulnerable husband, who was able to do most of her work from home.
66. We are satisfied that these were circumstances of danger here, despite the precautions taken. It has to be remembered that the risk to Mr Regnante, if he caught Covid, was very serious. For most people the risks of catching Covid would be manageable, but to take an example, few people would want to take a plane journey with a 1% chance of it crashing. Even a 1% chance of bringing Covid into the house would quite reasonably be viewed as an unacceptable risk. Clearly the situation at the Worthing office was much better than that faced by Mr Gibson in his restaurant, but Covid precautions can only reduce rather than eliminate the risk, and so we accept that this danger remained. That is no different from the case of Mr Ham, quoted above, who only had to deliver items to an address.
67. In those circumstances, we view her refusal to return to the office as reasonable, although in fact she resigned before this was put the test of a disciplinary hearing or similar. Consequently, if she had been dismissed for her refusal to return to work in the office, we have no doubt that that would be an automatically unfair dismissal on health and safety grounds. Does it make any difference that she resigned instead?
68. The first point to note is that she was given an ultimatum. There was no option to stay working from home. The only discussion to be had was about how much time she spent in the office.

69. Secondly, the other options were stark. The first was 12 weeks without any pay at all. Most people would be in serious financial difficulty if they had no pay for that length of time. The other option was to stay at a hotel. This would probably cost more than her wages. The combined effect of these options was, on the one hand, that the company was happy to do without her work altogether for 12 weeks and was not particularly concerned about the effect that had on them or her, and on the other hand that it was prepared to go to extreme lengths, with such a hotel bill, to ensure that she carried on working. The two approaches are quite inconsistent and the upshot seems to be that they were prepared to insist on her working from the office regardless of the cost or consequences, for her or for the company.
70. Finally, however, there is the way in which this was handled. As we have already shown, the tone of the various emails from Mr King was quite hostile. There was a marked lack of sympathy, in a situation where any manager would want to tread carefully, and a lack of any flexibility. There was no real recognition anywhere that Mrs Regnante genuinely believed she was putting her husband's life at risk if she came into the office. The difficulties of working from home seem to have been exaggerated and escalated unnecessarily. And more than all that, there was a simple lack of personal communication, by phone or video call, to see how she was getting on, and to talk through the situation.
71. In those circumstances we are satisfied that there were a number of breaches of the duty of trust and confidence. The only ones we need to make findings about are the alleged breaches recorded in the Case Management Order, i.e.:
- a. Requiring her to attend work or take unpaid leave in circumstances in which the Claimant was living with her husband who was shielding on health grounds as a result of the Covid-19 pandemic and in which the Claimant had valid concerns that the precautions against the spread of Covid-19 taken by the Respondent in the workplace were inadequate; and
 - b. In exchanges between the Claimant and the Respondent on the subject of site risk assessments, the Respondent improperly seeking to require the Claimant to change her answers to questions so that the Claimant would be required to attend the workplace.
72. Clearly they did require her to return to work, both in the final ultimatum and the previous emails from Mr King, demanding her return after lunch on 20 April and then again the following morning. Similarly, Mr King did apply pressure on her to change her answers so that the company could better insist on her return. It was more than an invitation to review her responses, especially when seen against the tone and content of the earlier messages. In all the circumstances, given the prevailing Covid situation and guidance, her situation, and the unsympathetic way in which all this was handled, we are satisfied that these were both fundamental

breaches of contract. The first was an unreasonable insistence on a particular course of action, regardless of the serious consequences to her and without any good business reason; the second was a simply part of the process for bringing that about. It also follows that each of these was also a detriment on ground of health and safety, under section 44(1)(d).

73. As to the whistleblowing, although the accusation that things changed for the worse following her email complaint on 5 April about having to go back into the office on the Sunday evening, it was not put to Mr King or any of the respondent's witnesses that this was the reason for later events. They were not asked about this email, and it was not in fact mentioned during the evidence at all. In those circumstances, we simply cannot uphold that complaint. In any event, it adds little to the health and safety complaint.
74. As to the breach of contract claim, the sum claimed is £92.10. The company elected not to dispute this, rather than take up any time on it unnecessarily, and so we uphold that complaint too, in that amount.

Employment Judge Fowell

Date 23 February 2022

Judgment & reasons sent to parties: 28 February 2022

FOR THE TRIBUNAL OFFICE