EMPLOYMENT TRIBUNALS

Claimant: Mr J Lafferty

Respondent: Phone Masters Limited

Heard at: Liverpool **On:** 9 and 10 May 2022

Before: Employment Judge Ganner
(sitting alone)

REPRESENTATION:

Claimant: Mr J Lafferty Senior (Grandfather, Lay Representative)
Respondent: Mr T Kenward (Counsel)

JUDGMENT

The judgment of the Tribunal is that:

1. The claim of automatic unfair dismissal based on section 104 of the Employment Rights Act 1996 (assertion of statutory right) is dismissed upon withdrawal.

2. The claim of automatic unfair dismissal based on section 100(1)(c)(i) of the Employment Rights Act 1996 (health and safety) is not well-founded and is dismissed.

3. Accordingly, the claims of unfair dismissal are dismissed in their entirety.

REASONS

Introduction

1. By an amended claim form the claimant claimed he had been unfairly dismissed from his post as a telephone line layer with the respondent from 18 June 2020. He claimed unfair dismissal on the grounds of asserting a statutory right

and/or relating to health and safety. At the outset of the hearing the claimant withdrew the first claim and the case proceeded on the health and safety claim only.

2. The right to claim unfair dismissal normally only arises once someone has been continuously employed for not less that two years at the date of termination. The two year requirement does not, however, apply to "automatically unfair" dismissals which includes certain health and safety activities under section 100 of the Employment Rights Act 1996.

3. By its response form the respondent resisted the complaint on the basis that the principal reason for dismissal was redundancy, not health and safety. Further or alternatively, it was disputed the matters relied on by the claimant fell within the terms of section 100 in any event.

The Issues

4. The issue for me to determine was: what was the reason or principal reason for the dismissal? Was it a health and safety reason falling within section 100 of the Employment Rights Act 1996 rendering it automatically unfair, or was it for the reason of redundancy?

Evidence

5. There was an agreed bundle of documents, and any reference to page numbers in these Reasons is a reference to that bundle.

6. I heard oral evidence from the claimant in person and by agreement, written evidence from his father, Paul Lafferty.

7. I also heard from the respondent's witnesses Mr James Taylor, the Operations Manager, and Ms Ellie Hennessy, the General Manager.

Relevant Legal Principles

8. The unfair dismissal claim was brought under Part X of the Employment Rights Act 1996. Section 100 renders a dismissal automatically unfair if the reason or principal reason is within the following:

> **(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that—**
>
> **(a) ….**
>
> **(b) ….**
>
> **(c) being an employee at a place where —**
>
> **1. there was no such representative or safety committee, or**
>
> **2. there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,**

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

9. The reason or principal reason for dismissal is derived from considering the factors that operate on the employer's mind so as to cause him to dismiss the employee. In **Abernethy v Mott, Hay and Anderson [1974] ICR 323**, Cairns LJ said, at p. 330 B-C:

> **"A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee."**

10. Since the claimant lacked the requisite two years' continuous service to claim ordinary unfair dismissal, he had the legal burden of proving, on the balance of probabilities, that the reason for dismissal was the automatically unfair one (**Smith v Hayle Town Council 1978 ICR 996, CA**).

Findings of Facts

11. The respondent is a small telecoms business based on The Wirral. It employs 32 people. The claimant had been employed (since 20 January 2019) as a cable layer and was part of a team working on Openreach's Customer Network Solution Unit ("CNS").

12. The COVID pandemic had a devastating effect on the respondent's business and the CNS contract was particularly affected. This was because India was in national lockdown and Openreach's planners were based on that continent and Openreach were not going to be able to issue new jobs. A document (109) entitled "Closure of Openreachs'Customer Network Solutions Unit" explained how "following a detailed review of our CNS business, including the products and services it sells, we've decided to close the CNS unit with effect from 1 April 2020 and instead direct new enquiries and orders to the relevant "business as usual" process across Openreach".

13. As a result of this downturn in work it was, on 8 June 2020 decided to place a number of employees (including the claimant) on furlough for a period of three weeks. The claimant had previously been furloughed in March 2020, returning to work on 28 April 2020. The email was sent by the Operations Director, Mr Alex Hennessy, and included the following paragraph:

> "We must forewarn you that if employees do not agree to be furloughed, we will have no option but to then consider redundancies. If that becomes necessary, which we sincerely hope is not the case, it could potentially affect all employees and the survival of the company in general." (178-179).

14. Unfortunately, given the financial impact of the Openreach situation, the respondent was left with no alternatives but to make redundancies.

15. The claimant had less than two years' service and had not accrued the requisite length of service to be entitled to a "fair" statutory redundancy payment. However, Ms Hennessy told me (and I accept) that she had three or four people in a

similar position to the claimant in terms of service and experience, and this number was dismissed from a “pool” of seven.

16. Likewise, Mr James Taylor stated that consideration was given to the claimant’s experience when making a decision regarding his position. He said the company had had to prefer and retain retained more “skilled up” employees who could work up poles and run cables to BT boxes and so forth.

17. On 18 June 2020, a joint phone call was made to the claimant by Ms Ellie Hennessy and Ms Carly McClure-Murray. The call was to advise the claimant that due to reasons beyond their control they were having to make him redundant. Due to the COVID situation it was not possible to invite the claimant into the office for a more formal meeting and so it had to be done over the telephone. The minutes of that call (180) indicate that the respondent had gone to great lengths to try and find alternative workstreams for him and other members of staff, but this had not been successful. The claimant was informed that a letter would be sent to him to confirm the redundancy.

18. On 19 June 2020, the aforesaid letter was sent and repeated the reason for the termination of employment was redundancy and that the decision was not taken lightly. Following much deliberation, the letter recited, it was felt that no viable alternative existed, and that the claimant’s position was no longer tenable within the company.

19. On 22 June 2020, the claimant sent a request for a grievance hearing, presenting for the first time an argument that he had been discriminated against for asserting a statutory right and for raising a health and safety issue. The respondent refused the request for such a meeting.

20. In response to the claimant's request for a grievance hearing the respondent replied by a letter dated 30 June 2020, reiterating that they had considered alternative employment for him but there was none available. The letter pointed out that the respondent had made another employee redundant on the same date as the claimant and that:

> “Unfortunately, redundancies continue to be a consideration in the company as we are still losing significant amounts of work. In fact, letters regarding possible redundancies have been sent to numerous members of staff this week.
>
> Even though the Coronavirus Job Retention Scheme remains available, unfortunately this is not a reason for the company to delay this difficult business decision. We carefully thought about whether we believe we would have enough work in the coming months to keep all staff for when the scheme ended. Unfortunately, we determined we will not have enough work and therefore postponing the decision would not deal with the problem we are facing as a small business.
>
> We do not accept your assertion that you have been discriminated against for raising a health and safety issue. As a company we take health and safety issues extremely seriously, as you know. The matter you refer to took place

in late May and was resolved quickly. You continued working for the company after that date for several weeks without any issues or raising any further concerns with us."

21. The claimant's representative sent a further letter (68C) on 3 August 2020 maintaining the position that a health and safety grievance had indeed arisen.

22. By a letter dated 21 August 2020 (69) the respondent maintained their position: there was no obligation to hold a grievance hearing post dismissal and reiterating that the business had been impacted by the difficult circumstances that had arisen as a result of the pandemic and that redundancies had been unavoidable.

23. The complaint made regarding health and safety related to the circumstances of 21 May 2020 when the claimant engaged in come cable laying work in Yorkshire, some 70 miles from his home on Merseyside. Unfortunately, he was unable to find a toilet whilst working. Due to the coronavirus pandemic, many pubs and cafes were closed. The claimant tried a local Tesco but was turned away. This was obviously an uncomfortable situation and he emailed work to tell them about the problem, that he was in the middle of Yorkshire and there was no where to go to the toilet. Mr Taylor telephoned the claimant to advise him to use his phone to search for the nearest toilet at other service stations, supermarkets, etc and the claimant used bad language to Mr Taylor, stating that he was treated like "sh**" by the company and he should not have been sent out to work.

24. Mr Taylor e mailed/called the claimant back asking him to call into to the office once he got home. The claimant told me he was unable to find a toilet on the return journey and had to wait until he reached his house.

25. There is a conflict of evidence as to what was said at the office meeting. The claimant maintained Mr Taylor was verbally aggressive towards him, suggesting his work was not up to standard with the meeting ending by Mr Taylor saying, "we will have a chat with senior management to see what they want to do with you". Mr Taylor, whilst accepting the meeting turned into an argument, denied being aggressive and maintained that he had conducted himself in a professional manner.

26. Ms Hennessy was cross examined by Mr Lafferty senior as to the true reason for the claimant's dismissal. The suggestion was that this was payback for the events of 21 May, and that it was this consideration that was in her mind when the decision to dismiss was taken. She insisted the reason was as per the telephone conversation and confirmatory letter the next day. She re iterated that the claimant had not ever mentioned the health and safety issue again after 21 May and that he had continued to work as normal. It was only raised (in the "grievance" letter of 22 June 2020) after he had been made redundant. She also stated the company did not employ any other employees to perform the claimant's duties and that his workstream had closed. I found her evidence credible.

27. I did not find it necessary to resolve any factual dispute as to events on 21 May.

Submissions

28. At the conclusion of the evidence both parties made an oral submission and Mr Kenward provided written closing submissions.

29. The claimant's submission was short. Mr Lafferty (senior) said this was all to do with the claimant raising health and safety concerns on 21 May 2020, and that I should place reliance on words used by Mr Taylor to the effect that "we will have a chat with senior management to see what they want to do with you". He says it is obvious that the later dismissal for compulsory redundancy was a device deliberately used in the dismissal of the claimant. He argued that the respondent was acting completely free of lawful accountability and found it irregular that the respondent had called for voluntary redundancies from the rest of the workforce. He considered this was payback and applauded the claimant as a truthful witness. He lay great emphasis on the nature of the pandemic and forcefully argued the employer had not acted in accordance with health and safety procedures and principles.

30. Mr Kenward for the respondent submitted that there was no burden on the respondent to establish the reason for dismissal but they in fact had done so by calling evidence and invited the Tribunal to find that redundancy was the genuine reason. He urged me to look to the documentary evidence including the minutes of the meeting at which the claimant was informed of his redundancy, the dismissal letter, the letter of reply to the claimant's grievance and other documents which reflected and demonstrated the reality of the situation, which was that the work carried out by the claimant had clearly diminished or was expected to diminish, thus fulfilling the requirements for a redundancy situation within section 139 of the Employment Rights Act 1996.

31. Mr Kenward thoroughly reviewed the evidence stating if the respondent had any problem with the claimant on 21 May it related to the manner and tone of his communications and certainly not that a proper issue was raised regarding toilet facilities this then leading to his dismissal. He said an issue arose whether the claimant had used reasonable means for communicating health and safety issues. However, that was a side issue. The respondent's case was the 21 May events were not part of the reasons for dismissal, which was redundancy. The claim should fail since the claimant was unable to discharge the burden of proof upon him to establish the requirements of his complaint.

Conclusions

32. I accept the evidence of Ms Hennessy that redundancy was the principal reason in her mind when she and Ms McClure-Murray took the decision to dismiss the claimant.

33. This is supported by the documentary evidence summarised in my factual findings which clearly show there was a need for redundancies based on a pandemic related and significant downturn in work particularly in relation to the Openreach contract which directly affected the claimant's position.

34. Being satisfied that this was the principal reason and not one related to health and safety, it follows that the claimant has failed by a considerable margin to prove

his case which was that Ms Hennessy and her colleague falsely gave redundancy, a bogus reason, as “payback” for the events of 21 May 2020.

35. There was in fact no direct evidence of the “prohibited” health and safety dismissal alleged by the claimant. I was therefore asked to infer this was the real reason from the circumstances and in particular Mr Taylor’s supposed threat to” have a chat with senior management to see what they want to do with you”. Even if I had found these words were said, that would not have proved that the dismissing officers had anything other than redundancy in their mind at the time they made their decision (Mr Taylor, of course, was not the dismissing officer.) My conclusion is that 21 May was nothing more than a distant background event and played no part in the decision made.

36. Even if the claimant had established the 21 May incident was the reason for dismissal, an issue would have arisen whether it fell within the terms of Section 100 of the Employment Rights Act 1996, namely whether he had used “reasonable means” for the purposes of communicating a health and safety matter. The respondent disputed he had done so. I made no finding on this point since the claim has failed on the basis of causation as found above.

37. For the above reasons, the claim for automatically unfair dismissal fails.

Employment Judge Ganner

Date: 21 June 2022

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

13 July 2022

FOR THE TRIBUNAL OFFICE