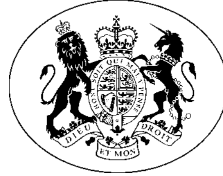
Case Number: 1304523/2021



EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms S Backhouse	**v**	**Right Choice Insurance Brokers Ltd**

Heard at: Birmingham **On**: 8 to 10 August 2022

Before: Employment Judge Broughton
Ms E Shenton
Mr R Virdee

Appearances:
For Claimant: in person
Respondent: Mr C Joseph, HR

JUDGMENT

The Claimant's claims of unfair dismissal and automatically unfair dismissal failed and were dismissed on 10 August 2022.

REASONS

The facts

1. The claimant was employed by the respondent from 7 August 2017 as a customer service specialist based in Redditch.

2. We heard that she had a few medical conditions and the respondent had been quite flexible in taking steps to accommodate these. For example, without going into the details, she was allowed to work from home one week a month.

3. The claimant said her children had left home and so she lived alone.

4. From the outset of the covid 19 pandemic, the claimant and many of her colleagues were required to work from home. The claimant returned to working from the office on17 June 2021.

5. From the time of her return, the claimant said she had concerns about the respondent's covid compliance. That said, she acknowledged that she did

not raise these with the respondent and she continued to work from the office.

6. That said, on Monday 21 June 2021, the claimant was allowed to work from home on health grounds.

7. The next Monday, the claimant said that her daughter had covid and that she needed to self-isolate. The respondent supported this and the claimant worked from home.

8. After her isolation period, on Monday 12 July 2021, the claimant asked to work from home, as it was the day after the Euro football finals. She was allowed to do so.

9. Then, on 13 July 2021, the claimant said that her son had covid and she would need to self-isolate. Again, the respondent supported this and allowed her to work from home.

10. That was followed, we imagine, by the claimant's regular, monthly week of working from home.

11. In August 2021, the respondent was looking for extra weekend cover and wanted the claimant to increase her Saturday working to every other week. She asked if she could do this from home because, on the weekends, she tended to visit her partner in London. A trial of this arrangement was agreed to commence in October 2021.

12. On Monday 30 August 2021, after her regular monthly week of working from home, the claimant said she needed to work from home as she was stuck at her partner's home in London.

13. On Monday 13 September 2021, the claimant said she had tested positive for covid and needed to isolate. She was, again, allowed to work from home.

14. It was subsequently pointed out to the claimant, albeit after her employment ended, that she would have been at lower risk for a period after having covid. She then asserted that she had actually misread her lateral flow test and hadn't been positive after all.

15. In any event, after self-isolating, the claimant then had her regular week working from home again and was due to return to the office on Monday 4 October 2021.

16. On 2 October 2021, VK, one of the respondent's managers, set up a WhatsApp group to advise staff to take a lateral flow test before coming into the office on Monday 4 October. It was said that this was because some colleagues had been exhibiting cold symptoms.

17. Within an hour, apparently, a manager, JC, tested positive for covid.

18. The next day, the claimant learnt that another colleague had tested positive.

19. On 4 October 2021, at 9.24 a.m, the claimant contacted a colleague to ask him to tell VK that she would not be in as she was unwell. It was unclear why she did not contact VK direct.

20. In any event, the claimant was informed that both VK and the colleague she had contacted had also tested positive and were off sick.

21. In a message to her partner shortly thereafter the claimant said that she may speak to HR and insist on working from home.

22. On 5 October 2021, at 8:47 AM, the claimant contacted VK asking if she could work from home as she said she was not comfortable going into the office. The claimant said she believed VK was working from home, although it was unclear why as she had been informed that she was off sick.

23. Nonetheless, VK replied and said everyone who was in the office had tested negative.

24. The claimant replied saying she still didn’t want to risk coming in and was told, incorrectly as it turned out, that she may be able to choose to work from home albeit with a 20% pay reduction.

25. The claimant then said that she feared that some colleagues in the office may be asymptomatic. She was told that this was why everyone had taken a test.

26. The claimant disputed this saying, wrongly, that the others had taken tests on Friday and Saturday. She also said that nobody had tested that morning, albeit seemingly with no evidence to support that. Nonetheless, the claimant believed that other co-workers may have been exposed to covid and become infectious prior to any infection showing up on a test.

27. She was told that “most did” test which was unfortunate as we heard that, in fact, everyone had tested, as was subsequently confirmed by email. That said, VK was off sick and, as she later confirmed, had no idea of the details of what had been going on in the office.

28. In any event, the claimant confirmed that she would, reluctantly, attend the next day.

29. The respondent, it appears, had been fairly flexible about working during the pandemic but, like many other employers, had reached a point where they wanted staff to return to the office. They produced statistics to show higher staff efficiency when doing so. At this time the government was also encouraging a return to the office. It seems that the respondent had

decided to draw a line in the sand and adopt a consistent policy to encourage such a return.

30. At around 6:30 PM on 5 October 2021, the 1st manager who had tested positive, sent an email to all staff about the situation, confirming that all staff were required to work from the office and to test daily.

31. The email referenced the possibility of staff opting to work from home albeit subject to approval and a 20% pay reduction. We heard that this offer was made in error and referenced a pre-existing offer made to certain admin staff in the respondent's Romford office.

32. It was common ground that, on the numerous occasions that the claimant had been allowed to work from home for various reasons, no such reduction applied to her nor had it ever applied to Redditch staff.

33. Indeed, we heard that the 20% pay reduction was an entirely voluntary arrangement for the Romford admin staff. When there were individual circumstances leading to employees needing to work from home, or receiving approval to do so, this would be on full pay.

34. Nonetheless, it is regrettable that this wasn't clarified to the claimant at the time, as the respondent readily acknowledged. In any event, the claimant repeatedly rejected such a proposal.

35. Later that evening, after 8pm, seemingly after doing further research, the claimant again contacted VK, who she knew was off sick, asking if any specialist cleaning had been carried out after the positive tests.

36. The claimant received a reply detailing the normal cleaning processes to which she replied "So we didn't have any specialist cleaning carried out? Did we even tell the cleaner she was being exposed to the virus and she needed to be wearing PPE"

37. The claimant asserted that those were rhetorical questions that were, in fact, disclosing information about the respondent not having met their cleaning obligations.

38. It seems to us, however, that VK, who was off sick, had merely provided a general response to a specific question which the claimant followed up with further questions.

39. The claimant was clearly unaware what, if any, additional cleaning may have been done.

40. This was confirmed, effectively, by VK's response stating that she had no idea what had happened in the office since the weekend because she and her family were so unwell.

41. The claimant said that she chose to work from home the next day, 6 October 2021, albeit acknowledging that she hadn't received approval to do so. She claimed that this was because she hadn't received the assurance she had sought from VK. That seemed, at best, premature, given VK couldn't possibly have given the information requested and no further attempts to establish the cleaning position were made by the claimant at the time.

42. That said, we note that, in a text to her partner early that morning, the claimant said, in relation to the requirement to be in the office, that "they can fuck right off".

43. At 9.14 am, CP, the respondent's facilities manager, emailed all staff, asserting that the offices were deep cleaned every morning, that everyone should be doing lateral flow tests and also providing a link to the relevant government guidance.

44. It was not until several hours later that the claimant emailed CP asking what a "deep clean" meant. She was told that this referenced antibacterial cleaning products and that everyone in the office was testing negative.

45. The claimant responded, at 14.53. asserting that the guidance required more rigorous cleaning and that she did not feel safe to return.

46. JC then emailed the claimant saying she believed there was no reason for her not to return. The claimant replied saying she would not feel safe until 14 days after the last confirmed case.

47. The claimant reiterated her desire to work from home but said she would not accept a 20% reduction in pay and, indeed, that she would seek legal redress if such were imposed.

48. Then CP emailed the claimant again, enclosing the relevant government cleaning guidance following an outbreak and asserting that it had all been complied with. That said, CP did suggest that PPE was no longer required for cleaners.

49. The guidance actually suggested gloves and an apron after an outbreak. We did not hear from CP, but it seems to us that this would be normal cleaning attire which may explain her response.

50. The claimant, however, seemingly sought to view this as an acknowledgement that the guidance had not been followed.

51. Mr Joseph, the respondent's head of HR, then emailed the claimant saying he understood her concerns but that he, too, believed all government guidelines have been followed. He said he couldn't create an exception to the policy of now requiring people to return to working from the office. This was a common problem for employers at the time.

52. Mr Joseph made clear, however, that he would not seek to force a return to the office and the claimant could take unpaid leave. He did not expressly correct the 20% pay reduction offer for working from home but the claimant had rejected that anyway.

53. The claimant replied, asking again whether the post outbreak cleaning guidelines had been complied with, notwithstanding the earlier confirmation she had received from CP. This again appeared to demonstrate that the claimant, whilst she may have had her suspicions, did not know what cleaning measures may have been in place.

54. The claimant said she believed that there was an imminent risk to her health and safety and she referenced s44 and s100 Employment Rights Act 1996, having spoken to ACAS.

55. She asserted that she would not return to the office until she had evidence of the cleaning carried out or 14 days had passed since the last positive test.

56. Mr Joseph replied that CP had sent the correct guidelines and the respondent was following procedure. He said that the claimant was welcome to speak to ACAS or any other outside agency as a result.

57. It was unclear whether the respondent had, in fact, complied with all the guidance. That said, they clearly told the claimant that they had. She, perhaps understandably from some of the responses, said she remained unconvinced. We do know that when the claimant subsequently reported the perceived issues to the relevant bodies, after her resignation, no action was taken.

58. Nonetheless, it appeared that the claimant had decided she was not going to return to the office before she started to focus on potentially equivocal replies from the respondent about the cleaning.

59. Mr Joseph then called the claimant. It was common ground that the conversation went around in circles, each party reiterating their previous position.

60. Mr Joseph confirmed that the claimant was double vaccinated and also expressed his view that, as 3 further days had now passed, with cleaning every day, there was little or no risk from office surfaces.

61. It was not in dispute that Mr Joseph then made a reference to disciplinary action. The claimant said that she was told that Mr Joseph could “if he chose to” discipline her.

62. The claimant said, in her claim form, that she understood this to be a threat that she could be disciplined for having raised the concerns.

63. In the list of issues, it was recorded as a threat to discipline her if she continued to raise health and safety concerns.

64. Before us, the claimant said that she understood that she was being threatened with disciplinary action if she were to speak to ACAS or other outside bodies.

65. In any event, all of those seemed to us to be unlikely. Each variation was incompatible with the contemporaneous emails both before and after.

66. Moreover, the use of the phrase “if he chose to” suggested a context where Mr Joseph was saying that he could, in theory, discipline the claimant but he was not going to. Indeed, that was his evidence.

67. Mr Joseph said that the context of his comment was an attempt to persuade the claimant of his view that the company were acting reasonably. He said it was a general reference to the fact that a refusal to attend work can often be treated as a disciplinary matter.

68. As a result, he was saying that whilst he could, potentially, discipline the claimant he was not going to due to the covid situation.

69. That explanation seems entirely plausible, likely and consistent with the contemporaneous emails.

70. As such it clearly wasn’t a threat, whether the claimant perceived it as such or not.

71. The phone call ended.

72. Nothing further happened until the next day at 3:49 pm when the claimant resigned by email saying she believed she had been constructively dismissed. She referenced her cleaning concerns and what she considered to be the unacceptable options she was offered.

73. She also referenced the mention of disciplinary action “if Mr Joseph chose to” “regarding this matter” saying she felt bullied.

74. Mr Joseph replied reiterating that he believed government guidance had been followed, that the options offered were fair and that no threat had been made, explaining the context of his comment.

75. He reiterated that he could not make an exception for one employee. We acknowledge that similar situations were a challenge for many employers at the time.

76. The claimant was paid for her notice period despite having resigned with immediate effect. Her effective date of termination of employment was 3 November 2021.

77. In a further email exchange, Mr Joseph, having learnt of the claimant's recent covid episode, observed that, in his view, it was almost impossible to contract the virus again so quickly. He also referenced the other times the claimant had been allowed to work from home when she had stated that she needed to self-isolate.

78. The claimant responded saying that there was no favour in allowing her to work from home when isolating. She also claimed that she had recently discovered that she hadn't had covid after all, as she had apparently misread her lateral flow test.

79. Those are the facts as we have found them.

Issues and law

80. The issues were set out by EJ Hindmarch at an interim relief hearing on 28 October 2021 and were confirmed by the parties at the outset of this hearing.

81. The claimant claimed that she had been constructively dismissed under s95(1)(c) Employment rights Act 1996 (ERA) and that her dismissal was unfair under s98 ERA.

82. Specifically, she claimed, in the issues at least, that she had been threatened with disciplinary action, by Mr Joseph in the phone call on 6 October 2021, if she continued to raise health and safety concerns.

83. She asserted that the alleged threat was a breach of the implied term of trust and confidence allowing her to treat herself as dismissed.

84. The claimant would also need to show that this was the reason for her resignation and that she did not delay too long or otherwise affirm the contract, albeit those two issues were not in material dispute.

85. She further asserted that such dismissal was automatically unfair as, she said, the sole or principal reason for it was that she had made one or more protected disclosures (s103A ERA) and/or raised issues about a risk to health and safety (s100(1)(c) ERA).

86. The claimant relied on 6 alleged protected disclosures, as defined in s43B ERA, in the list of issues but acknowledged before us that, even on her case, only one of those contained a disclosure of information, that being her WhatsApp message to VK on 5 October 2021 at 20:29.

87. She sought, before us, to rely on a further alleged disclosure, being her email to CP at 14.53 on 6 October 2021.

88. In relation to the alleged disclosures, the claimant needed to show that she

    a. disclosed information and

b. that she reasonably believed the disclosure was
    i. made in the public interest and
    ii. tended to show that the health and safety of any individual had been, was being or was likely to be endangered

89. There was no dispute that, if the above tests were met, any such disclosure was made to the claimant's employer.

90. For the purposes of the s100 claim, there was no dispute that the employer did not have a health and safety representative or committee. The only dispute between the parties was whether the claimant reasonably believed she was informing her employer of circumstances at work that were harmful, or potentially harmful, to health and safety.

91. In either case, the claimant would need to show that the disclosure(s) and/or circumstances raised were the principal reason for the alleged threat and that she was entitled to treat herself as dismissed as a result.

92. There were no detriment claims before us.

Decision

93. Turning first to the remaining alleged protected disclosure from the list of issues.

94. This was a WhatsApp exchange between the claimant and VK on the evening of 5 October 2021. The claimant had asked VK what specialist cleaning had taken place as a result of the outbreak.

95. VK, who was off sick at the time, had replied detailing the respondent's normal daily cleaning during covid.

96. The claimant responded

    "So we didn't have any specialist cleaning carried out? Did we even tell the cleaner she was being exposed to the virus and she needed to be wearing PPE"

97. The claimant said that these questions were rhetorical and amounted to a disclosure of information. Effectively, she says she was informing VK of the cleaning requirements and asserting that they hadn't been met.

98. However, it seems to us that, in context, the claimant had asked, by text and outside working hours, a specific question of a manager who was off sick. She received a general reply, that perhaps indicated the question had not been understood, and followed up with more specific questions based on her understanding of the cleaning requirements following an outbreak.

99. This was effectively confirmed by VK in her further response when she said that she had no idea what steps may have been taken as she was off sick and she and her family had been very unwell.

100. At this stage, therefore, being absent from the office herself, the claimant couldn't possibly know what cleaning may have taken place. The final reply from VK confirmed that she didn't know either and so the claimant's questions remained unanswered.

101. It was not unreasonable for the claimant to ask but, receiving a general response from a manager who was off sick, without more, was insufficient to form a reasonable belief that the guidelines had not been followed and that, as a result, health and safety may have been endangered.

102. In those circumstances, we do not accept that this text message amounted to a protected disclosure. It was a question, possibly based on an assumption or genuine concern, about whether aspects of the specific cleaning requirements had been adhered to.

103. If the concern was genuine, it was surprising that the claimant did not enquire further either that evening or the following morning. Instead, having originally indicated that she would attend the office the next day, she chose not to, without receiving any approval, claiming this was because she had not received the reassurance sought from VK.

104. In fact, having received further information about the respondent's covid compliance on the morning of 6 October 2021, it was several hours before the claimant raised the cleaning issue again.

105. As mentioned, the claimant also sought to rely on a further alleged disclosure that was not identified in the list of issues, being her email to CP at 14.53 on 6 October 2021.

106. In that email, the claimant said that more rigorous cleaning was required after an outbreak than CP had previously indicated had been done. She set out her understanding of the cleaning requirements and said she didn't feel safe returning to the office.

107. Setting out the guidance was a disclosure of information but, of itself, didn't tend to show a health and safety risk. The question for us is whether the claimant's stated belief that guidance had not been followed was reasonable.

108. We note that the claimant had no actual knowledge of what had been done or not done. In fact, she continued to ask even after being told that all guidelines were followed.

109. We would acknowledge, however, that some of the respondent's responses were equivocal and could, perhaps, have given rise to a

genuine concern on the part of the claimant. Whether that was enough to make her assumption, in relation to a potential cleaning failure, amount to a disclosure of information tending to show a health and safety risk was less clear.

110. Moreover, the claimant's email was principally, if not solely, related to her own safety and/or her desire to work from home. As a result, it was arguably not made in the public interest, even though there would be such an interest.

111. We are, however, prepared to accept that, in all the circumstances, this email could have amounted to a protected disclosure, albeit that conclusion becomes somewhat academic.

112. That is because, Mr Joseph, who allegedly made the threat of disciplinary action, was not aware of that specific email to CP and so it cannot have been the reason for any of his subsequent actions.

113. In any event, the claimant was bringing to her employer's attention, by reasonable means, circumstances connected with her work, that she said were potentially harmful to health and safety. As a result, s100 ERA was potentially engaged.

114. Whatever her motives, and with some reservation, we are prepared to accept that the claimant believed there was a health and safety risk and, given the lack of clarity in some of the respondent's responses, that belief was reasonable, albeit not until the afternoon of 6 October 2021.

115. It was not in material dispute that, by that stage, the claimant was raising health and safety concerns and Mr Joseph became aware of that.

116. For completeness, whilst not part of the issues, it cannot be said that the claimant was dismissed for refusing to return to work whether she reasonably believed there was a serious and imminent danger, or otherwise.

117. Mr Joseph made it clear that she could stay at home.

118. It appeared that the claimant had decided that she was not going to return to the office prior to raising her cleaning concerns. That does not, however, of itself, mean those concerns were not genuine.

119. That said, we do not understand why the claimant did not simply stay at home and, for example, raise a grievance about her pay and the situation generally. We also do not understand why she did not raise any issues with the relevant agencies, such as the local authority or Health and Safety Executive, until after her resignation.

120. Nonetheless, there was a lack of clarity in some of the respondent's communications and, on occasion, inaccuracies (such as regarding a pay

reduction to working from home) that were not corrected. It is, at least, possible that the full post outbreak cleaning requirements were not followed.

121. We are prepared to accept, therefore, that, at least in part, the claimant's concerns were genuine and reasonably raised.

122. However, the claimant's claims were all based on an alleged threat of disciplinary action by Mr Joseph, in a phone call on 6 October 2021.

123. The claimant's case in relation to the context of the alleged threat was inconsistent, varying from it relating to

a. her having already raised concerns or
b. if she were to raise further concerns or
c. if she were to approach an outside agency

124. In addition, she did not suggest that Mr Joseph had said that he would discipline her, merely that he could, if he chose to.

125. We would acknowledge that could still amount to a threat although it seemed to us that it was far more likely that the context advanced by Mr Joseph was the correct one.

126. We accept that he was discussing, in general terms, the potential for disciplinary action when employees refused to attend work and contrasting that with the respondent's decision not to do so during the pandemic. He was endeavouring to illustrate his view that the respondent was trying to be reasonable and understanding.

127. In that context, it was not an unreasonable comment and certainly fell well short of a breach of trust and confidence.

128. That version of events was entirely consistent with his emails before and after the telephone call and seem to us to also be more plausible.

129. Even if the claimant was genuinely unclear about what was said she didn't seek to clarify it and her next communication was her resignation email the following day.

130. She did raise the issue in her resignation but did not accept Mr Joseph's clarification in response.

131. Any failings on the part of the respondent up to that point were not expressly relied on by the claimant but, in any event, we do not accept that they amounted to conduct calculated or likely to destroy trust and confidence. They were largely errors in communication.

132. In any event, the claimant only relied on the alleged threat to justify her resignation. As we do not accept that the alleged threat was made, it

cannot have amounted to the breach of trust and confidence claimed, nor can any such breach have been the reason for the resignation. For completeness, it also could not have been a “final straw”.

133. As a result, even if the claimant believed the threat had been made and that was the reason for her resignation, whilst she clearly did not delay too long, her claim for constructive dismissal must fail.

134. In the absence of a constructive dismissal, the claimant’s claims of automatic unfair dismissal must also fail.

Employment Judge Broughton

Date: 23 August 2022