EMPLOYMENT TRIBUNALS

Claimant: **Mr James Dunbar**

Respondent: **Abellio London Ltd**

Heard at: **London South via CVP** **On: 18 and 19 August 2022**

Before: **Employment Judge Ward**

Representation
Claimant: In person
Respondent: Ms L Simpson (counsel)

JUDGMENT

1. The claim is dismissed.

2. The dismissal of the claimant on 24 July 2020 was not for an automatic unfair reason.

REASONS

The issues

1. The claimant contends that he was unfairly dismissed on 24 July 2020. As he does not have the requisite 2 years employment history, the claim is for automatic unfair dismissal on the basis that the reason for his dismissal was due to not returning to the work place following a period of furlough due to concerns about contracting coronavirus. The respondent resisted the claim and contended that the dismissal was not for these reasons. The matter came before the Tribunal for a two day Hearing.

The applicable law

2. Employees have the right not to be dismissed if they refuse to work in unsafe conditions. S.100 of the Employment Rights Act 1996 (ERA) provides that where an employer dismisses an employee for a prohibited health and safety reason, the dismissal is automatically unfair.

3. The claimant does not have enough qualifying service to bring an ordinary unfair dismissal claim, the burden of proof is on the employee to show an automatically unfair reason for dismissal for which no qualifying service is required.

4. The applicable law is section 100(1) (d) and (e) of the Employment Rights Act 1996.

The issues

5. The Tribunal had to consider;

- Was the Claimant dismissed?
- What was the reason, or principal reason for the dismissal?
- Was it, as the claimant maintains, because;

- in circumstances of danger which he reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he (while the danger persisted) refused to return to his place of work, or

- in circumstances of danger which he reasonably believed to be serious and imminent, he took appropriate steps to protect himself or other persons from the danger?

In assessing this, are the criteria in s100(1)(d) or (e) of the Employment Rights Act 1998 made out?

Questions for the Tribunal under subsection (d)

- Was there circumstances of danger?
- Did the claimant believe the danger to be serious and imminent?
- Was that belief reasonable?
- Could the claimant have reasonably averted the danger?
- Did the claimant refuse to return to work (while the danger persisted)?
- And in so doing was that the reason for dismissal?

Questions for the Tribunal under subsection (e)

- Was there circumstances of danger?
- Did the claimant believe the danger to be serious and imminent?
- Was that belief reasonable?

- Did the claimant take reasonable steps to protect himself or others from danger?
- And in so doing was that the reason for dismissal?

Further;

- If the claimant was automatically unfairly dismissed, is there a chance he would have been fairly dismissed for a fair reason, or if a fair procedure had been followed?
- Did the claimant contribute to his dismissal by his own conduct, or blameworthy conduct?

The evidence

6. I heard evidence from Mr Darren Jackson a driver manager who referred the claimant to a disciplinary hearing, Mr Martin Moran the dismissing officer and the Claimant. The parties provided an agreed bundle of documents of 254 pages.

The relevant facts

7. The claimant commenced employment as a bus driver on 8 November 2019. After successfully completing the training he was allocated to route 344 a bus service from Clapham Junction station to Liverpool street. He explained that the conditions at work, the cleanliness of the cab and the communal areas for bus drivers were less than satisfactory. There was poor facilities and hygiene standards were not on a par with what he expected. Mr Jackson who drove occasionally in his role agreed that he had received complaints about facilities and the cabs but seemed to think they were ok. The claimant had raised some issues about the toilets but generally was something he tolerated whilst a new employee.

8. When the pandemic hit in March 2020 the claimant did not have confidence in the steps the respondent would take to reduce transmission of the virus. In cross examination this centred around the communal areas and facilities for the bus drivers, not the passengers which the claimant accepted the respondent had addressed. The concerns he explained to the Tribunal were the break areas and toilet facilities. In particular the social distancing of drivers when logging in for the day or generally congregating before or after shift without any degree of supervision. Mr Moran in evidence agreed that before the pandemic it would have been impossible for the drivers to socially distance but that after the pandemic it was possible, due to reduced numbers of drivers in the depot, but that it was marked still as a medium risk on the risk register. Mr Moran accepted that drivers could have still congregated but they had been sent guidelines not to. He had received no reports of socially distancing not working in the depot or of any breaches of this requirement.

9. The claimant's personal circumstances were that his wife was clinically vulnerable so on 9 March the claimant requested furlough from the Respondent.

10. On 23 June the respondent wrote to the claimant, advising of the steps that they had taken to implement a covid secure workplace, following Government and transport for London guidance. The letter confirmed that they would be in contact about a return to work. The claimant replied explaining that he couldn't return to work due to his wife's medical condition, his children not returning to school until September and the danger of infection would cause his family members including one of his children who was high risk.

11. Mr Jackson replied on 26 June explaining the measures that has been put in place and that drivers with clinically vulnerable family members were now being requested to return to work. This did not satisfy the claimant based on his experience of cleanliness and driver congregation in communal areas, before the pandemic. He did not believe that 2-meter distancing would be maintained, and Mr Moran confirmed this was not supervised, though weekly checks were undertaken. The claimant had not been on site at the depot since the measures had been introduced so could not provide any evidence on what the measures were at the depot and whether they were sufficient and been complied with.

12. In the letter of 23 June, the claimant requested an extension of his furlough due to his wife's conditions and concerns about driver to driver transmission at change over.

13. The respondent refused an extension and requested the claimant to return to work on 1 July. The claimant was disappointed by this response and replied on 30 June where he referred to the driver change over and the school situation. Confirming that the risk was too high for his family and that he wished to remain furlough until 2nd wave had concluded and virus was under control.

14. The claimant did not attend work on 1 July because he still had concerns about potential contamination and although he took into account the measures that the respondent had taken, he felt there was still too high a risk for him and his family.

15. He said that to return to work would create exposure to the virus placing his family at risk. He stated had it not been for the pandemic, he would be in work. The respondent made play of the fact that his subsequent letters did not refer to any issues in work and centred only on his family and home conditions. In cross examination the claimant said that the letters should be read as part of an entire process and that it clearly was about the workplace. When questioned about why he didn't make suggestions as to what the respondent

should do to enable him to return to work he explained that there wasn't anything the respondent could do, he needed time to create and make his home conditions safe in case he contracted the virus.

16. As a result the respondent commenced unauthorised absence proceedings. Further warnings were sent which the claimant replied to explaining his situation at home, the need for a decontamination space to be created and the return of his children to school. In his final response the claimant suggested a return date of 2 November 2020 which would provide time for him to secure alternative accommodation to enable an isolation area and more information about the virus. The claimant says this was a reasonable step.

17. A disciplinary hearing was held on 24 July the claimant requested that this meeting be held remotely, but as the request came in only half an hour before the hearing was scheduled to commence Mr Moran decided to proceed in the claimant's absence. Mr Moran felt making a request, at the 11th hour, to have the meeting held remotely, was not acceptable and should have been made earlier. He accepted that he could have postponed but he still continued. As the concerns raised by the claimant were surrounding contracting the virus it is a shame that a full conversation with the claimant about his concerns did not take place. Mr Moran confirmed that even if he had met with the claimant remotely he would have made the same decision.

18. Mr Moran considered the claimant's absence and the steps the respondent had taken to secure a covid secure workplace. He decided that the claimant had no good reason for absence, he was concerned with the virus generally rather than the measures the respondent had put in place, and the risk it posed to his family. Mr Moran considered that the claimant would only return to work when he assessed it was safe rather than the respondent. He considered that a return on 2 November in a further 4 months time was not reasonable given the measures the respondent had put in place. As a result he could not identify a health and safety risk to the claimant or his family as a direct result in returning to work and summarily dismissed the claimant for gross misconduct namely; unauthorised absence.

19. The claimant appealed the decision. A hearing took place remotely on 16 September by Mrs Achief (who no longer works for the respondent so was not in attendance as a witness). At the meeting the claimant was able to explain his concerns. Notes of the meeting were taken but they are not verbatim and the claimant says there are gaps in what was discussed. The appeal upheld the decision to dismiss.

20. The claimant was understandably concerned for the health of his family and this was only 4 months into the pandemic with much uncertainity. His comments about the steps that he and his family took, not leaving the house apart from the one walk a day and the fact none of his family have contracted

the virus shows his level of concern and vigilance. We know more about the virus now but back then the scale and size of the problem was really only just emerging. The claimant had in evidence the statistics (published after his dismissal) that the Battersea depot, which he was assigned to, had the second highest infection rates during the pandemic in London.

Conclusions

21. It is accepted by the Respondent that the claimant was dismissed for gross misconduct due to unauthorised absence. What the Tribunal has to determine is if the reason for the absence was as the claimant maintains, because; in circumstances of danger which he reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he (while the danger persisted) refused to return to his place of work, or in circumstances of danger which he reasonably believed to be serious and imminent, he took appropriate steps to protect himself or other persons from the danger?

22. The first matter to conclude is that s 100(e) does not cover a claim which relates to a refusal to return to the workplace. This is because s 100(d) and (e) are written in the Employment Rights Act, are linked by the word "or" which suggests that they are alternatives. Also subsection (d) is specific that it covers the situation of not returning to work so as agreed by the parties in *Rogers v Leeds Laser Cutting Ltd 2002 EAT 69* s100 (e) must cover some other step taken.

23. The respondent accepts that there was circumstances of danger and the Tribunal agrees this must be correct, the pandemic created circumstances of danger at work and elsewhere.

24. The claimant genuinely believed the danger to be serious and imminent. He could control the danger at large by remaining in his house but he could not control the risk of contamination in the workplace. His workplace constituted a greater risk as it was not in his control.

25. The facts about reasonable belief relate to the confidence the claimant had in the respondents covid secure measures. It was reasonable for the claimant based on his experience of the respondents cleanliness to have concerns about how the respondent would stringently adhere to the steps that were necessary to protect drivers. The claimant was confident in the steps taken to protect infection from passengers. It was driver to driver contamination that was his concern as first raised with the respondent when they advised him about a return to work in June 2020. Although the claimant did not experience how the measures had been implemented to know if they were being complied with. Based on his experience of driver change over it was reasonable for him to believe that a serious and imminent danger persisted.

26. The more difficult question is if the claimant could have reasonably averted the danger. The government guidelines at the time were to socially distance, wear masks and wash hands. Those steps the claimant could have reasonably taken. He was concerned about contaminating his house and family on return from work but taking these steps would have averted the danger. Although I sympathise with the claimants very difficult predicament there were steps that could have been taken. The fact the claimant did not feel these would have been sufficient cannot be the responsibility of the respondent.

27. The claimant could have taken steps to avert the danger which means that the danger did not persist when he refused to return. The reason for dismissal therefore was not refusing to return to work while a danger persisted (as it could have been averted) but unauthorised absence.

28. In relation the step the claimant took entirely reasonably to request an extension to the furlough and return to work on 2 November. For the reasons given above there were circumstances of danger that the claimant believed to be serious and imminent, and that belief was reasonable. The claimant took the step providing a proposed return date, to protect himself or others from danger. But the reason for the dismissal was unauthorised absence. His agreement to return in November was a compromise in an attempt to remain in employment but was not the reason for dismissal.

29. The S.100 ERA provides that an employee is to be regarded as having been automatically unfairly dismissed if the reason or principal reason for dismissal was one of the health and safety grounds listed in S.100(1). The Tribunal did not find that the reason was covered by section (d) or (e) and therefore the claim fails.

_____

Employment Judge Ward
Dated:26 September 2022