EMPLOYMENT TRIBUNALS

Claimant: Mr J Branson

Respondent: Cova Security Gates Ltd

Heard at: London South **On:** 20th June 2022

Before: Employment Judge Reed, Ms Beeston and Ms Goldthorpe

Representation
Claimant: In person
Respondent: Mr Williams, Solicitor

RESERVED JUDGMENT

The claims for unfair dismissal and detriment pursuant to s44(1)(c) Employment Rights Act 1996 are dismissed.

The claim for wrongful dismissal is dismissed upon withdrawal by the Claimant.

REASONS

Introduction

1. This is a claim that revolves around Mr Branson's dismissal from the Respondent. In summary, Mr Branson alleges that he was dismissed (and also suffered a detriment in the way that he was treated by Mr Conway, a manager at the Respondent) because he raised certain health and safety issues. This is denied by the Respondent, who say that he was dismissed for other reasons, that he was not subject to a detriment by Mr Conway, and in the alternative that this was unrelated to any health and safety issue raised by Mr Branson.

Claims and issues

2. The Claimant has brought claims for unfair dismissal, detriment pursuant to s44(1)(c) Employment Rights Act 1996 (i.e. detriment on the basis that he had made health and safety disclosures) and wrongful dismissal.

3. The issues were identified at a preliminary hearing on 21st April 2022 and confirmed at the beginning of this hearing as follows:

Unfair dismissal – s 100(1)(c) Employment Rights Act 1996

1) Did the Claimant bring to the Respondent's attention by reasonable means circumstances connected with his work which he reasonable believed were harmful or potentially harmful to health and safety. The Claimant relies on the following disclosures:
    i. Spoke to supervisor Kestutis Zaliausaas on or around 10/12/20 and told him that step ladder use was breaching HSE guidance.
    ii. Told the production manager Kevin Conway misuse of step ladders was not in conformity with instructional video in same week of work on or around 10/12/20.
    iii. Sent an email on 10/1/21 to Kevin Conway at 18:10 which indicated that the Respondent ought to have made all its staff isolate pursuant to government guidance.
    iv. Sent WhatsApp messages to Kevin Conway on 11/1/21 indicating that staff should have self-isolated following a positive covid test by a member of staff.
    v. On 18/1/21 to Kevin Conway expressed concern that Covid guidance had not been followed in respect on self-isolation and deep clean.

2) The Respondent states the s100(1)(c) has no applicability because there was a H&S representative and it was reasonably practicable to raise the matters through him or her and/or the Claimant did not utilise reasonable means and/or did not have a reasonable belief.

3) Was the sole or principal reason for the Claimant's dismissal the disclosures above / The Respondent states that the Claimant was dismissed for capability or conduct unrelated to any alleged H&S raised.

Detriment – s 44(1)(c) Employment Rights Act 1996

4) Did the Claimant bring to the Respondent's attention by reasonable means circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health and safety. The Claimant relies on the following disclosures:
    i. Spoke to supervisor Kestutis Zaliausaas on or around 10/12/20 and told him that step ladder use was breaching HSE guidance.
    ii. Told the production manager Kevin Conway misuse of step ladders was not in conformity with instructional video in same week of work on or around 10/12/20.
    iii. Sent an email on 10/1/21 to Kevin Conway at 18:10 which indicated that the Respondent ought to have made all its staff isolate pursuant to government guidance.

iv. Sent WhatsApp messages to Kevin Conway on 11/1/21 indicating that staff should have self-isolated following a positive covid test by a member of staff.
v. On 18/1/21 to Kevin Conway expressed concern that Covid guidance had not been followed in respect on self-isolation and deep clean.

5) The Respondent states that s44(1)(c) has no applicability because there was a H&S representative and it was reasonably practicable to raise the matters through him or her and/or the Claimant did not utilise reasonable means and/or did not have a requisite reasonable belief.

6) On the ground that, at least in part, the Claimant made the disclosures above was the claimant subject to the following detriment:

On 18/1/21 the Claimant was approached by Kevin Conway on the shop floor and subject to criticism in front of co-workers about issues raised and was told other staff didn't want to work with him.

7) If any of the claimant's complaints succeed, what is the appropriate remedy:
i. In respect of an award for injury to feelings;
ii. In respect of any award for injury to health;
iii. In respect of compensation for financial losses; and
iv. In respect of interest on the above awards.

4. As anticipated at the preliminary hearing the claim for wrongful dismissal had been resolved between the parties and was withdrawn by the Claimant at the beginning of this hearing.

Procedure, documents, and evidence heard

5. This has been a remote electronic hearing by video.

6. The Tribunal heard evidence from the Claimant and the following witnesses on behalf of the Respondent: Jonathan Trott, Kevin Conway, Ross Meeten and Lewis Ellmers. There was a tribunal bundle of 457 pages.

7. At the beginning of the hearing the Respondent made an application pursuant to Rule 50 of the Employment Tribunal Rules to anonymise the identity of one of the Respondent's clients on the basis that it was commercially sensitive information. The Claimant resisted this application on the basis that the identity of the client was relevant to his health and safety disclosures and the Respondent's reaction to them. Essentially, he said that the Respondent had prioritised completing work for this client over his health and safety concerns. The size and nature of the client was therefore relevant to both the reasonableness of his actions and in assessing the Respondent's actions.

8. The application was refused. The application under Rule 50 amounted to no more than an assertion that the information was commercially sensitive. There was no evidence as to adverse consequences for either the Respondent or its client. Requiring anonymisation would have complicated the hearing and

potentially hampered the Claimant, who was a litigant in person, in presenting his case. In addition, the principles of open justice weighed against any anonymisation.

Relevant Law

Unfair Dismissal

9. S94 of the Employment Rights Act 1996 establishes that an employee has the right not to be unfairly dismissed by his employer. The precise nature of this right is defined by other provisions in the ERA, which have also been subject to extensive commentary in case-law.

10. Of particular relevance to this case are s108 ERA and s100. S108(1) provides that that s94 will not apply to an employee who has less than two years' service. This is then subject to a number of exceptions contained in s108(3). Broadly, these relate to dismissals that are unfair because the reason or principal reason for the dismissal is one of the automatically unfair reasons identified in statute. The reason for dismissal in this context is the factor or factors operating on the mind of the decision-maker which causes them to make the decision to dismiss (see *Abernethy v Mott, Hay and Anderson* [1974] ICR 323).

11. This means that, where (as in this case) it is accepted that a Claimant does not have two years' service with an employer the reason for dismissal is of vital importance. It is only if the employer is found to have dismissed for one of the automatically unfair reasons that the claim will succeed. Otherwise it will be dismissed on the basis that the employee lacks the necessary qualifying service.

12. This also means that there is no consideration of what is often referred to in this context as 'ordinary unfair dismissal' under s98(4) ERA. Where qualifying service is established, s98(4) requires a Tribunal to consider whether a dismissal is fair or unfair. This involves scrutiny of an employer's decision to dismiss and the procedure used to reach that decision. This is not relevant to a claim where the employee lacks qualifying service. If an automatically unfair reason is established the qualifying service requirement is disapplied and the dismissal is automatically unfair. If not, the claim must be dismissed for lack of qualifying service.

13. S100 provides for a number of automatically unfair reasons related to health and safety matters. All fall within the exceptions to the two year qualifying requirement. The Claimant relies in particular on s100(1)(c).

> **100 Health and safety cases**
>
> (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) having been designated by the employer to carry out activities in connection with preventing or reducing risks to health and safety at work, the employee carried out (or proposed to carry out) any such activities,

(b) being a representative of workers on matters of health and safety at work or member of a safety committee—

(i) in accordance with arrangements established under or by virtue of any enactment, or

(ii) by reason of being acknowledged as such by the employer,

the employee performed (or proposed to perform) any functions as such a representative or a member of such a committee,

(ba) the employee took part (or proposed to take part) in consultation with the employer pursuant to the Health and Safety (Consultation with Employees) Regulations 1996 or in an election of representatives of employee safety within the meaning of those Regulations (whether as a candidate or otherwise);

(c) being an employee at a place where—

(i) there was no such representative or safety committee, or

(ii) 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,

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

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

(2) For the purposes of subsection (1)(*e*) whether steps which an employee took (or proposed to take) were appropriate is to be judged by reference to all the circumstances including, in particular, his knowledge and the facilities and advice available to him at the time.

14. Since the Claimant does not have the requisite qualifying service the burden of proof is on him to establish that he was dismissed for an automatically unfair reason (see *Maund v Penwith District Council* [1984] ICR 143).

Detriment

15. S44 ERA establishes that employees have the right not to suffer detriment because they have done certain protected acts relating to health and safety. The Claimant relies in particular on s44(1)(c).

44 Health and safety cases

(1) 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—

(a) having been designated by the employer to carry out activities in connection with preventing or reducing risks to health and safety at work, the employee carried out (or proposed to carry out) any such activities,

(b) being a representative of workers on matters of health and safety at work or member of a safety committee—

(i) in accordance with arrangements established under or by virtue of any enactment, or

(ii) by reason of being acknowledged as such by the employer,

the employee performed (or proposed to perform) any functions as such a representative or a member of such a committee,

(ba) the employee took part (or proposed to take part) in consultation with the employer pursuant to the Health and Safety (Consultation with Employees) Regulations 1996 or in an election of representatives of employee safety within the meaning of those Regulations (whether as a candidate or otherwise);

(c) being an employee at a place where—

(i) there was no such representative or safety committee, or

(ii) 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,

16. The concept of detriment in this context is given a wide interpretation and includes any treatment that a reasonable employee might consider a detriment (see Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337.

17. For a detriment claim to succeed, the Tribunal must conclude that the detriment was ‘done on the ground’ of the protected act. This requires consideration of an employer’s decision making process, both conscious and unconscious. A detriment claim may succeed on the basis on unconscious bias; it does not require a deliberate or intentional decision to subject the employee to a detriment. The burden of proof is on the employer to show the ground on which an act or omission was done.

Findings of fact

18. The Tribunal has considered all the oral evidence and the documentary evidence in the bundle to which we were referred. The facts that we have found to be material to are conclusions are as follows. All findings of fact are made on the balance of probabilities (that is that they are more likely than not to have occurred).

19. The Claimant began working for Cova Security Gates Ltd on 7th December 2020. The Respondent manufactures security gates for commercial clients. These are large, heavy-duty gates, which are powered by heavy motors. Their manufacture inevitably raises a number of health and safety issues. It is

common ground that the Claimant had a certain amount of health and safety training, although the quantity and quality of this training was in dispute.

20. During the relevant time, the Covid pandemic was ongoing and much of the subsequent events revolve around the Respondent's approach to dealing with the pandemic.

Disclosures related to ladders

21. From early in his employment the Claimant was concerned about the safety of the ladders used at the Respondent's. In summary his concern was that the Respondent's practice was to use smaller step ladders to work on gates, when the lay out of the premises and the size of the gates meant that the smaller ladders could not maintain three points of contact with the ground. The Claimant's view, based both on the safety videos he had watched as part of his training at the Respondent's and his previous experience, was that this was not safe since three points of contact were required to keep the ladder properly stable. Instead, he believed, larger ladders or alternative methods, such as a mobile staircase should have been used.

22. The Respondent's position was that use of the smaller ladders was safe and that there were alternatives available that the Claimant could have used if circumstances required it. The Claimant disputed that, saying that he had not been shown the alternatives and that, in any event, the layout of the premises meant that it would not have been practical to use them, since there was not room.

23. The Claimant's evidence was that he spoke to his colleagues, in particular to Mr Kestutis Zaliausaas, his supervisor and to Kevin Conway, the Production Manager about his concerns. He says that he told them both that the Respondent was breaching health and safety rules by using inappropriate ladders. He says that Mr Conway told him that the current working method was 'silly' but that it was 'how we have to do it at the moment'

24. Mr Zaliausaas did not give evidence because he had left the Respondent's employ. Mr Conway says that he does not recall the Claimant raising these points and says that, if a serious issue had been raised with him, he would have taken it seriously and dealt with it.

25. On balance, the Tribunal accepts that the Claimant raised concerns about the use of ladders. In particular, we conclude that he spoke about the ladders with both Mr Zaliausaas and Mr Conway. In giving evidence it was plain that the Claimant felt strongly that the Respondent's use of ladders was not correct. It was a matter that concerned him and he is more likely to have an accurate recollection of events than Mr Conway on this issue.

26. We do not find, however, that Mr Conway was dishonest in saying that he did not recall these discussions. Rather, we find that the Claimant sought to raise his concerns tactfully – as one might expect a relatively new employee to do so. It would have been only one of many matters that Mr Conway was dealing with at the time and he did not believe that the Claimant's concerns were justified. The conversation no doubt seemed much less important to him at the

time than it does to the Claimant at this stage of proceedings. We concluded that the Claimant mentioned concerns. Mr Conway, who felt that there was no real safety issue with the ladders, sought to reassure him and the matter was left there. It would have been only one of many conversations Mr Conway had at this time in the course of his work and it is unsurprising that he does not recall it over a year later.

27. Mr Trott's evidence was that he was unaware of any health and safety concerns being raised about ladders until after the Claimant had been dismissed. The Tribunal accepted his account. The Claimant did not suggest that he had spoken to Mr Trott directly. Given our conclusion that Mr Conway did not regard the issue as a serious problem it would be natural that he did not discuss it with Mr Trott.

Disclosures relating to Covid

28. It is agreed between the parties that the Claimant made a number of disclosures related to covid. It is useful to set out, briefly, the surrounding circumstances at the relevant time.

29. The events of this claim occurred at the end of 2020 and the beginning of 2021. The first vaccination against covid had been approved for use in December 2020 and the vaccination programme was beginning to roll out. The second national lockdown in response to covid had run between 5th November 2020 and 2nd December 2020. After this lockdown ended cases began to rise again and a third lockdown began on 4th January. This ended on 29th March 2021. Outside of the lockdowns there remained restrictions on both individuals and businesses in order to reduce the risk of covid and there was also government guidance in place.

30. In addition to the general worries that anyone might have had about covid, the Claimant had particular reason to be worried. He was living with other people, one of whom had medical circumstances that meant they were at particular risk. He was also concerned that he had children who lived with a previous partner and, if he was at particular risk from covid, that might have implications for his ability to see them.

31. The Claimant was therefore particularly worried to ensure that he did not place his family at risk and that his workplace operated safely. These are both natural concerns.

32. The Respondent took a number of steps in order to minimise the risks of covid during the relevant time. Employees who could work remotely were sent home. Office workers who needed to work in the office were socially distanced. There was more frequent cleaning. Employees were instructed to socially distance and, in areas that this was not possible, such as the toilet area, only one employee was permitted to be in that area at any one time.

33. Much has been made in evidence of the way in which the Respondent dealt with the covid pandemic and whether they fully followed government guidance at the time. It is important to recognise that much of this is not directly relevant to the matters before the Tribunal, which are set out above in the list of issues

and in the summary of relevant law. Most importantly, it is not the Tribunal's role to decide whether the Respondent dealt with the covid pandemic in the best possible way, whether it fully complied with government guidance or whether another approach to the pandemic might have been better.

34. The Respondent's general approach to covid, however, is relevant in judging some of these relevant issues. First, it is relevant to assessing the reasonableness of the Claimant's disclosures. Second, it is relevant to assessing the Respondent's motives and response. It is therefore appropriate to reach some general factual findings.

35. Overall, the Tribunal concluded that the Respondent took covid seriously and did its best to operate a safe working environment and to comply with government guidance, while also operating its business.

36. There is contemporaneous evidence of the steps they took, for example in the HR email to all staff of the 3rd November 2020 (page 220) requiring those who could work from home to do so and requiring those who needed to come in to coordinate to minimise the number of people on site at any time. Similarly, we have the memo of the 8th January 2021 (page 222) which reiterated the need to stay at home when possible and requiring those working from home to get permission from a director before attending. The memo also refers to other measures including the need to follow testing procedures, increased cleaning, social distancing, and mask wearing.

37. Both Mr Conway and Mr Trott also gave evidence of the measures that were in place at the time, including additional cleaning, social distancing and restrictions on visitors.

38. At the same time, the nature of the Respondent's business was such that it could not continue without employees attending the premises to manufacture its gates. Both Mr Conway and Mr Trott gave evidence about how they saw this. Both said they felt that this could be done safely in the context of there being a relatively small number of staff spread out through relatively large premises.

39. The Tribunal accepts the Claimant's evidence that there were occasions when the guidance was not followed to the letter. In particular, the Respondent's guidance to its employees was that 2 metre social distancing should be maintained. Mr Conway accepted in his evidence that he could not guarantee that this was always followed, although he said he saw people generally compliant and said that staff took covid seriously. It would, however, require considerable discipline to maintain social distancing to such an absolute degree in the context of manufacturing work. The Claimant's account of social distancing guidance rules slipping when it was necessary to hand over tools or for him to be shown a particular task is a convincing one. The Tribunal therefore accepts that there were occasions on which the guidance was not followed precisely.

40. On 7.1.21, Ross Meeten, the operations co-ordinator for the Respondent was phoned by his partner and learned that she had tested positive for covid. He left the premises by the nearest door and walked around the building to the car park, where he attempted to call Mr Conway. When he could not get through,

he took steps to book a covid test before trying again. Having reached Mr Conway they spoke outside in the car park, maintaining social distancing. Mr Meeten then went to have his test.

41. Mr Meeten gave detailed evidence as to these steps and the Tribunal found it a useful illustration of Mr Meeten and Mr Conway's approach to the pandemic – and therefore the general attitude within the Respondent at the time. Both were conscious of the need to maintain social distancing. Mr Meeten had a clear recollection of exiting the building from the nearest available door and walking around the building to the parking lot, rather than taking a shorter route that would have meant remaining indoors. Both Mr Meeten and Mr Conway described maintaining social distancing in the parking lot despite being outside.

42. Mr Branson was concerned when he learned of Mr Meeten's situation. He had had contact with Mr Meeten in the course of his duties and, as detailed above, was concerned about the possibility of covid. Although, on the 7.1.21, Mr Meeten's test results had not been received, it was a natural inference that he was likely to have covid.

43. Mr Branson, having discussed the situation with his partner, decided that he would take the next day, which was a Friday off, as a precaution. There was some dispute about whether this was communicated to Mr Conway. Mr Branson said that he spoke to him on the 7th, while Mr Conway said that he did not recall this. On balance we accept Mr Branson's evidence: it would be a natural step for an employee to take in the circumstances and Mr Branson is more likely to have an accurate recollection than Mr Conway.

44. On Saturday 8.1.21 Mr Branson sent a WhatsApp message to Mr Conway asking whether anything had been heard from Mr Meeten or if anyone else had been ill. Mr Conway called Mr Branson a few hours later and told him that Mr Meeten had tested positive but that everyone else was fine.

45. At this stage Mr Branson remained concerned and expressed those concerns to Mr Conway. Mr Branson's evidence was that Mr Conway told him that they were 'safe' because they were in a 'bubble'. Mr Branson said that they could not be in a safe bubble because it had been breached.

46. On the 10.1.21 Mr Branson wrote an email to Mr Conway setting out his concerns about the Respondent's approach to covid (page 71). Broadly, he expressed the view that employees were in close contact during their work (i.e. within 2 metres for 2-5 minutes, sometimes more) and that this meant that they were at risk of contracting covid. In these circumstances, and given the vulnerabilities of his family, he said this meant that returning to work would mean that he wasn't able to see his children. Although it is not stated directly, the clear implication of the email is that, in the circumstances, the Respondent should have sent all employees home to self-isolate. Mr Conway forwarded that email to Mr Trott.

47. On the 11.1.21 there were WhatsApp messages between Mr Branson and Mr Conway (page61-64). Mr Branson sent guidance about dealing with covid from both Brighton & Hove City Council and gov.uk to Mr Conway. Mr Conway replied with similar guidance. There was some agreement that the guidance

was not always consistent or clear. Mr Conway said that he had spoken with Mr Trott and they were considering the position.

48. Mr Conway then replied by email on the same day (page 73) with a summary of the steps the Respondent had taken in relation to covid and their policy on isolation. Although this was sent by Mr Conway, it had been drafted by Mr Trott. In essence, he said that if the social distancing rules had been followed employees should not be considered close contacts for the purposes of isolation / contact tracing, but there was a level of personal responsibility and that if Mr Branson felt he had not complied he would need to self-isolate and take a test.

49. Mr Branson decided that he was not in a position to return to work, given his concerns about covid and telephoned Mr Conway on the 11.1.21 to inform him.

50. On 12.1.21 Mr Branson returned to the WhatsApp conversation (page 64-66). He referred to the guidance they had both been reading and raised a particular concern that 'track and trace' should have contacted the Respondent in response to Mr Meeten's positive test. He also sent Mr Conway a copy of the Isolation Note that he had received from the NHS.

Other workplace concerns

51. Before dealing with events upon Mr Branson's return to work, it is convenient to deal with the other concerns that the Respondent's witnesses detailed with Mr Branson and his work.

52. Mr Conway gave evidence that, within a week of Mr Branson beginning work he had heard complaints about Mr Branson's attitude. He said that when other employees tried to teach Mr Branson he would criticise the way that the Respondent operated and suggest that there was a better way to do things. Mr Conway said that he spoke to Mr Zaliauskas about this. Initially they felt that Mr Branson was trying to fit in and that it was best to give him chance to settle.

53. Mr Ellmers' evidence and his interaction with Mr Branson during his cross-examination was particularly revealing in terms of the relationships between Mr Branson and his colleagues. Mr Branson plainly felt that, between the two of them, he was the more senior engineer and entitled to respect because of his career experience. Mr Ellmer equally plainly felt that Mr Branson had been a new employee who needed to learn from the more established workers at the Respondent and to defer to them. Mr Branson was frustrated that his suggestions for improvements had not given more consideration. Mr Ellmer clearly felt that it was presumptuous for a new employee to be, as he saw it, criticising established working methods in their first weeks in a new job. Mr Ellmer said that he had lost interest in helping to train Mr Branson. This followed from Mr Branson suggesting, sarcastically, that Mr Ellmer should teach him how to suck eggs and knocking a tool out of Mr Ellmer's hand.

54. We bore in mind that the Tribunal's environment is a different one to the workplace. Witnesses are placed under different pressures, meaning that they may react differently. Nonetheless, we found that these exchanges were

consistent with the other evidence before us, in particular Mr Conway's account of the complaints he had received about Mr Branson.

55. Mr Conway also gave evidence that Mr Zaliauskas had raised further concern about Mr Branson being uninterested in his work and looking for another job rather than being committed to working for the Respondent. Mr Conway said that he had a conversation with Mr Branson in which he confirmed that he would take a better role if one came along.

56. Both Mr Conway and Mr Ellmers agreed that Mr Branson was technically capable.

57. Mr Conway and Mr Trott agreed that they had had conversations about Mr Branson's performance and attitude prior to Christmas 2020. Mr Trott also said that he had some informal conversations with HR who were 'keeping an eye on his progression'. He said that he did not wish to take any formal action in December, in part to give Mr Branson a chance and partly because he felt that doing something shortly before Christmas would be not be fair.

58. Mr Branson's evidence was that he was not a difficult employee or unreceptive to feedback. He did make suggestions for improvements to working practices, but that, in his view, was part of his role.

59. It is not necessary, for the purposes of this case, to deal in detail with Mr Branson's performance in work or seek to resolve every dispute of fact between the parties. What is important, in the context of this case, is what was in the mind of the key decision makers – Mr Conway and Mr Trott in early January 2021 in respect of Mr Branson's work. In summary this was that he was a technically proficient employee, but he was not fitting in well with the team and there were problems that would have to be addressed if matters did not improve.

Return to work

60. Mr Branson remained off work, on the basis that he was self-isolating, until the 18.1.21.

61. When he returned, he learned that there had been at least one other case of covid within the workplace. In the context of his earlier concerns, this was distressing. He expressed his concerns to both Kestutis Zaliauskas and Ross Meeten. As noted above Mr Zaliauskas did not give evidence, having left the Respondent's employment. Mr Meeten, also who observed the conversation with Mr Zaliauskas, describes him as being argumentative and aggressive in both conversations. He said that he was frustrated and became increasingly argumentative when Mr Zaliauskas and Mr Meeten tried to reassure him. Mr Meeten described his tone as irate.

62. The Tribunal accepted Mr Meeten's characterisation of these conversations. In the context of his previous concerns it was understandable that he was frustrated. Mr Meeten was also sufficiently concerned by Mr Branson's conduct to go immediately to Mr Conway, which tends to confirm that his behaviour was

out of the ordinary. He told Mr Conway that Mr Branson was causing disruption and venting his frustration.

Conversation with Mr Conway

63. It is common ground between the parties that Mr Conway came to speak to Mr Branson twice on the 18.1.21 and that these conversations lead to Mr Branson leaving the premises. The content of these conversations, however, is disputed.

64. Mr Conway said that he came out to speak to Mr Branson in response to Mr Meeten's complaint. He said he told Mr Branson that colleagues had complained to him about Mr Branson's behaviour that day. In response, Mr Branson expressed his frustration with the way covid had been dealt with. Mr Branson was frustrated at not being informed that there had been another colleague who had tested positive. Mr Conway said that he explained that Mr Branson had not been told since he was already in his period of self-isolation when that colleague had received his result. In his evidence Mr Conway describes Mr Branson as becoming very angry, shouting and 'coming right up to me'. He says that he was intimidated and taken back. He said that, as they spoke, Mr Branson began to calm down.

65. Mr Conway said that he then began to raise the other concerns that had arisen with Mr Branson's behaviour and attitude. He said that Mr Branson's temper again rose and he became angry. He described his colleagues as 'back stabbers', which Mr Conway said he found shocking. He said that the way Mr Branson's was behaving made him think that the situation might escalate to something physical, although he accepts Mr Branson took no physical action.

66. Mr Branson's account of this conversation is different. He describes himself as raising reasonable concerns and being frustrated with Mr Conway who was evasive. He says that initially Mr Conway denied that there had been another positive test, but then had to backtrack. Mr Brandon accepted that he might have raised his voice, but denied being intimidating. He accepted that Mr Conway raised other concerns, but his recollection of the conversation is of his concerns about covid.

67. Part of Mr Branson's claim is that, in raising these issues on the shop floor, Mr Conway was subjecting him to a detriment. He says that it was in public and that other employees were able to overhear what should have been a private conversation. The Tribunal accepted that other employees would have been in a position to observe the conversation and to overhear at least some of what was being said. It was the type of conversation that, generally, we would expect a manger to have in private rather than on the shop floor.

68. Mr Conway detached himself from the conversation and went to ring Jon Trott. Both Mr Conway and Mr Trott agree that Mr Conway expressed concern about Mr Branson's behaviour and suggested he should be removed from the premises.

69. Mr Conway went back to speak to Mr Branson. Mr Branson's evidence was that Mr Conway said that he had spoken to Mr Trott and that, if Mr Branson felt it

was not safe in the workplace it would be better for him to leave. Mr Conway's evidence was that he and Mr Trott had agreed that Mr Branson should be asked to leave and that he escorted him from the premises. Mr Trott agreed that this was the decision they had reached on the phone.

70. Mr Conway then emailed Mr Trott an account of his conversations (page 84). He and Mr Trott agree that he did so at Mr Trott's request. This summarises his account in a similar fashion to his evidence, although it's tone suggests a rather less serious situation than Mr Conway's evidence to the Tribunal. It refers to Mr Conway's 'unease about having him working around people where there could be a high potential for conflict', but does not discuss in terms what has led to this unease. There is a disjunct, at least of tone, between Mr Conway's oral evidence, that he felt intimidated; that Mr Brandon was shouting and aggressive, and the more general sense of unease expressed in writing.

71. After Mr Branson's departure Mr Conway changed the access codes to the premises so that Mr Branson would not be able to gain access.

72. On balance the Tribunal preferred Mr Conway's account of these conversations to Mr Branson's. We concluded that Mr Branson had behaved aggressively in response to Mr Conway raising his concerns with his performance. We find that he was not physically aggressive and did not intend to be. We also conclude that Mr Conway did not feel in any immediate physical danger from Mr Branson. Rather, he viewed Mr Branson's behaviour as an employee relation issue, all be it a serious one. He saw Mr Branson as responding inappropriately and aggressively to what he believed was justified feedback on his attitude in the workplace.

73. The most significant factor in reaching this conclusion was how Mr Conway and Mr Trott behaved following the conversation. We accepted that changing the access codes was an unusual step that would not normally be taken following an employee leaving – and certainly not because an employee had chosen to go home to self-isolate. Similarly, we infer from Mr Trott's instruction to produce a written account of the conversations that the possibility of dismissal or some other significant disciplinary action was being seriously contemplated at that stage. Mr Branson also accepted that he was escorted from the premises by Mr Conway. All of this suggests action a series of events more serious than merely offering Mr Branson the opportunity to leave if he felt at risk of covid.

74. It was, at the very least, less than tactful for Mr Conway to proceed directly from a difficult conversation about health and safety matters with an agitated employee to raising unrelated performance related concerns with that same employee. It inevitably gave the impression that there might be a link between Mr Branson raising health and safety matters and the performance concerns that Mr Conway then began to discuss. Furthermore, it meant that Mr Branson was not in the best frame of mind for what would have been, even under different circumstances, a difficult conversation. It was also unwise to have a conversation of this nature on the shop floor, rather than taking Mr Branson aside.

75. On balance, however, the Tribunal accepted Mr Conway's evidence that when he brought up his concerns, he was not motivated by Mr Branson having raised health and safety issues. As detailed above, these were concerns of relatively

long standing in the context of Mr Branson's period of employment, which because of the Christmas break and Mr Branson's self-isolation had not been addressed. It was perhaps thoughtless of Mr Conway to seek to address these concerns there and then, but the Tribunal concluded that it was not the result of either malice towards Mr Branson or because Mr Branson had raised health and safety concerns.

Decision to dismiss

76. After Mr Branson had left the premises Mr Conway wrote up his account of his conversations with Mr Branson, as requested by Mr Trott. They also spoke by phone. Mr Trott was meeting by phone with members of the Respondent's board that afternoon. In evidence he recalled discussing the situation with them, although he was not sure if this was before or after he made the decision to dismiss Mr Branson.

77. When asked about the difference in tone and emphasis between the oral conversations described by himself and Mr Conway and the written account Mr Conway had provided, Mr Trott said that his view had been that Mr Conway was trying to be professional. He had accepted the email because he just wanted something on file, but had relied on the conversations he had had with Mr Conway. He said that, had he realised the matter would have ended in a Tribunal he would have done things differently.

78. The Tribunal accepted Mr Trott's evidence that he was the person who made the final decision to dismiss, rather than either making it jointly with Mr Conway or with others.

79. Mr Branson was emailed a letter of dismissal on the 19.1.21 written by Mr Trott (page 85-86). The letter refers to matters that 'came to a head following your return to work'. It refers to Mr Branson raising health and safety concerns, in what Mr Trott suggests was unfounded speculation about the motives of the Respondent. It then goes on to say that Mr Branson had become agitated in the workplace, accused his colleagues of being grasses or backstabbers and that the decision to send him home was made out of concern for their safety. Finally, Mr Trott refers to having further feedback from Mr Conway to the effect that Mr Branson was not interested in a long term role with the Respondent.

80. The central question in this case is why Mr Trott reached the decision to dismiss. Two possible reasons have been put forward by the parties. Mr Branson suggests that it was him raising health and safety issues in relation to both the use of ladders and covid. Mr Trott suggests that it was a combination of Mr Branson's aggressive behaviour on the 18th January to Mr Conway, which Mr Conway had reported to him and the more general concerns that had been raised about Mr Branson's performance and attitude in the workplace.

81. On balance the Tribunal accepted Mr Trott's evidence as to the reasons for dismissal. It is important, in our view, to appreciate the situation from his point of view at the time.

82. In his evidence Mr Trott indicated that, to him, the decision was a straightforward one. He had been hearing that Mr Branson was a potential

problem before Christmas, when he returned in January he was told by Mr Conway that he had caused a disturbance in the workplace, was behaving disruptively and aggressively. He said that Mr Conway told him that Mr Branson was 'kicking off' or words to that effect. He had in mind that Mr Branson was on probation. To him, it was obvious that things were not working out, it seemed unlikely that Mr Branson's attitude was going to improve. It seemed to him that the time had come to cut the Respondent's losses and move on.

83. Mr Branson no doubt feels that this view was unfair to him and that it considerably simplifies a much more complicated situation, in particular in that the attitude of some of his colleagues towards him was unjust.

84. It is also the case that the fact that the decision being made so soon after Mr Branson made health and safety disclosures raises that possibility that there was a connection between them. We concluded this was not the case, because there was compelling evidence, that we accepted, that the relationship between Mr Branson and his colleagues had begun to break down in December, before any of the covid related disclosure occurred. This had been communicated to Mr Trott and was already in his mind before Christmas. We also accepted Mr Trott's evidence of what Mr Conway had told him about Mr Branson's behaviour. We are satisfied that it was the combination of these factors which lead to his dismissal to dismiss, rather than any of the health and safety issues that Mr Branson had raised.

Conclusions

Existence of a health and safety committee or representative

85. The Tribunal was not provided with detailed evidence as to the existence of a health and safety representative or safety committee. The respondent's evidence – in particular that of Mr Conway – was the health and safety matters should be reported to Mr Conway. At some stages it appeared to be suggested that Mr Conway was the health and safety representative.

86. In so far as this was being suggested this is not a tenable position. A health and safety representative, for the purposes of s100 ERA is not a manager or staff member responsible for health and safety. Rather, it is an employee representative, appointed under the Health And Safety at Work Act 1977, Safety Representatives and Safety Committees Regulations 1977, the Health and Safety (Consultation with Employees) Regulations 1996 or a representative / committee that is treated as a practical matter as equivalent to those appointments. The function of such a representative is to represent the workforce's position on health and safety matters to management. It is inherently incompatible with being the manger with responsibility for health and safety.

87. In the absence of any evidence of such a body or individual, the Tribunal concluded that there was not one in existence at the Respondent. If one had existed, either Mr Conway or Mr Trott would have been able to give evidence about it.

88. In any event, even if we had concluded that such a representative existed, we would have found that it was not practicable for the Claimant to raise any of his concerns with such a committee or representative, since no one had told him about such an individual or body or given him any indication that such a procedure was available.

Disclosures

89. In relation to the disclosures (i) and (ii) to Mr Zaliauskas and Mr Conway in relation to the Claimant's concerns over the use of ladders, the Tribunal concludes that he did, in the absence of a representative or safety committee, bring to his employer by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health and safety.

90. It is important to recognise that it is not the Tribunal's role in a case of this nature to decide whether the Respondent's mode of working was the best one. It is not for us to decide whether the Claimant or Mr Conway was correct so far as the proper use of ladders at the Respondent's premises is concerned.

91. Rather, we must decide whether the Claimant raised reasonable concerns in a reasonable way. We concluded that he did. His concerns about the use of ladders were cogent and based, in part, on the training videos he had viewed as part of his induction. He raised them to his immediate supervisor and to Mr Conway who was responsible for dealing with such matters.

92. In relation to the disclosures (iii), (iv) and (v) we also conclude that Mr Branson did, in the absence of the representative or safety committee, bring to his employer by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health and safety. Again, it is not for us to decide whether Mr Branson was right or wrong in relation to the Respondent's approach to covid. Rather we must focus, as before, on whether he raised reasonable concerns in a reasonable way. We find that he did so. Mr Branson was raising reasonable concerns about the methods taken against covid and expressing a reasonable view about what the Respondent should be doing differently.

Unfair dismissal: Reason for dismissal

93. The Tribunal has concluded, however, that the above disclosures were not the reason that Mr Branson was dismissed.

94. So far as disclosures (i) and (ii) were concerned, these could not have formed any part of Mr Trott's decision to dismiss. The Tribunal concluded that he had no knowledge that they had been raised, since Mr Conway had not passed them onto him.

95. So far as disclosures (iii), (iv) and (v) were concerned, Mr Trott was aware of them, because he had discussed the concerns raised with Mr Conway

96. We are satisfied that what was in Mr Trott's mind when he decided to dismiss Mr Branson was a) the history of concerns with Mr Branson's attitude and performance in work that had been raised prior to Christmas 2020 and b) Mr Conway's account of Mr Branson's aggressive attitude when these matters had been raised with him on 18.1.21.

97. It follows from this conclusion that Mr Branson was not unfairly dismissed.

Detriment

98. The Tribunal concluded that Mr Conway's approach to Mr Branson on the shop floor to discuss his performance was capable of amounting to a detriment. As noted above the definition of detriment is wide and must include anything that a reasonable employee could reasonably object to. Dealing with performance issues and criticising an employee in the relatively public environment of the shop floor was something that a reasonable employee could object to. It was not a deliberate attempt on Mr Conway's part to disadvantage or upset Mr Branson, but that does not prevent it being a detriment.

99. We have concluded, however, that Mr Conway was not motived in approaching Mr Branson by him having raised health and safety concerns as set out in disclosures (i), (ii), (iii), (iv) and (v).

100. It follows from this conclusion that Mr Branson was not subject to a detriment contrary to s44 of the Employment Rights Act 1996.

Employment Judge Reed
20 October 2022