EMPLOYMENT TRIBUNALS

Claimant: Ms M Herve

Respondents: (1) Mr A Goldstein
(2) Mr V Sareen

RECORD OF A HEARING

Heard at: London Central (via Cloud Video Platform) **On: 3, 4, 5, 6 and 7 October 2022**

Before: Employment Judge Joffe
Ms L Venner
Ms C Brayson

Appearances
For the claimant: Ms L Mankau, counsel
For the first respondent: Mr M Salter, counsel
For the second respondent: In person

JUDGMENT

1. The claimant was employed by both the first and second respondents.

2. The first respondent subjected the claimant to detriments because she made a protected disclosure, contrary to section 47B ERA 1996, by:
    a. Demanding that the claimant also resign from her post with the second respondent as set out in his email of 13 November 2020 and encouraging the second respondent to terminate the claimant's employment;
    b. Accusing the claimant of unprofessional conduct; malingering with respect to her sickness absence and threatening her in relation to

causing potential damage and loss to the business in his email of 19 November 2020;
c. Failing to pay the claimant wages, notice pay and holiday pay until shortly before the full merits hearing.

3. The claimant's remaining claims that the first respondent subjected the claimant to a detriment because she made protected disclosures are not upheld and are dismissed.

4. The claims that the second respondent subjected the claimant to detriments because she made protected disclosures are not upheld and are dismissed.

5. The first respondent subjected the claimant to a detriment, contrary to section 44(1)(d) ERA 1996, because she refused to return to her place of work in circumstances of danger which she reasonably believed to be serious and imminent and which she could not reasonably have been expected to avert by:
    a. Being critical of the claimant's work by referring to the quality of work being "lower" than usual; that they were not getting the "level of support" expected and a veiled threat in the event that she did not comply, as set out in the email of 5 November 2020;
    b. Demanding that the claimant also resign from her post with the second respondent as set out in his email of 13 November 2020 and encouraging the second respondent to terminate the claimant's employment;
    c. Accusing the claimant of unprofessional conduct; malingering with respect to her sickness absence and threatening her in relation to causing potential damage and loss to the business in his email of 19 November 2020;
    d. Failing to pay the claimant wages, notice pay and holiday pay until shortly before the full merits hearing.

6. The first respondent subjected the claimant to a detriment. Contrary to section 44(1)(e) ERA 1996, because she took an appropriate step in circumstances of danger which she reasonably believed to be serious and imminent to protect herself, her family and the public from the danger by:
    a. Being critical of the claimant's work by referring to the quality of work being "lower" than usual; that they were not getting the "level of support" expected and a veiled threat in the event that she did not comply, as set out in the email of 5 November 2020;
    b. Demanding that the claimant also resign from her post with the second respondent as set out in his email of 13 November 2020 and encouraging the second respondent to terminate the claimant's employment;
    c. Accusing the claimant of unprofessional conduct; malingering with respect to her sickness absence and threatened her in relation to causing potential damage and loss to the business in his email of 19 November 2020;
    d. Failing to pay the claimant wages, notice pay and holiday pay until shortly before the full merits hearing.

7. The first respondent subjected the claimant to a detriment, contrary to section 44(1)(c) ERA 1996, because she brought to his attention, by reasonable means, circumstances connected with her work which she reasonably believed were harmful or potentially harmful to health or safety, by:
    a. Demanding that the claimant also resign from her post with the second respondent as set out in his email of 13 November 2020 and encouraging the second respondent to terminate the claimant's employment;
    b. Accusing the claimant of unprofessional conduct; malingering with respect to her sickness absence and threatening her in relation to causing potential damage and loss to the business in his email of 19 November 2020;
    c. Failing to pay the claimant wages, notice pay and holiday pay until shortly before the full merits hearing.
8. The claimant's other claims under section 44 ERA 1996 are not upheld and are dismissed.
9. The claimant was constructively dismissed by the first respondent.
10. The claimant was unfairly dismissed by the second respondent contrary to sections 94 and 98 ERA 1996.
11. The claimant was automatically unfairly dismissed by the first respondent contrary to section 100 ERA 1996.
12. The claimant was unfairly dismissed by the second respondent contrary to sections 94 and 98 ERA 1996.
13. Had she not been unfairly dismissed by the first respondent, the claimant's employment by the first respondent would not have terminated fairly prior to April 2023.

RESERVED REASONS

Claims and issue

1. The issues were agreed between the parties and were as set out in the list below. They had in some respects to be tweaked to reflect the relevant legal tests when we came to consider our Conclusions. In addition to the liability issues, we were asked to consider any Polkey reduction at this stage.

    STATUS

    Employment Status (pursuant to s. 230 Employment Rights Act 1996 – "ERA 1996")

    (First Respondent)

    1. Was the Claimant engaged as an employee or worker pursuant to section 230 ERA 1996?

    2. Was the Claimant so engaged by the First Respondent or by the Second Respondent only?

CLAIMS

Whistleblowing – s47B and/or s103A ERA 1996 (Both Respondents)

Detriment and/or Automatic Unfair Dismissal

3. The Claimant relies on protected disclosures against the First Respondent:

(a) The email dated 29 September 2020 to the First Respondent wherein the Claimant raises health and safety concerns for her, her family and the public at large relating to Covid-19, and not wanting to breach government guidelines;

(b) The email dated 04 November 2020 to the First Respondent where the Claimant once again raises the same concern;

(c) The letter of resignation to the First Respondent dated 12 November 2020 where all the above issues are raised.

4. The Claimant relies on protected disclosures against the Second Respondent:

a) the letter of resignation dated 12 November 2020 that the Claimant sent to the First Respondent and copied to the Second Respondent where she raised health and safety concerns for her, her family and the public at large relating to Covid-19, and not wanting to breach government guidelines.

5. Did the Claimant make disclosures of information, as alleged above, which in her reasonable belief, tended to show that:

(a) a criminal offence has been committed, was being committed or was likely to be committed to contrary to s.43B(1)(a). The Claimant considered any breach of the government's guidelines to be a criminal offence;

(b) a person had failed, was failing or was likely to fail to comply with any legal obligation to which they were subject to contrary to s.43B(1)(b). The Respondent had legal obligations and duty of care towards staff in safeguarding their health, safety and wellbeing, of their families and by extension members of the public by not exposing them to unnecessary risk of harm. **[The claimant did not pursue this limb]**

(c) the health or safety of any individual has been, was being or was likely to be endangered contrary to s.43B(1)(d). As stated, the Claimant considered that her health, safety and wellbeing as well as that of her family, and public at large was potentially being endangered. that they had failed, were failing, and was likely to continue to fail to comply with a legal obligation to which it was subject such as their duty of care towards staff, safeguarding employees' health and not acting irresponsibly by subjecting them to bullying and harassment in accordance with their obligations under the Health and Safety at Work Act 1974 and/or the Management of Health and Safety at Work Regulations 1999, and/or discriminating against them contrary to the Equality Act 2010 (s.43B(1)(b)).

6. Were these disclosures made in the public interest?

7. Were the Claimant's disclosure made in accordance with s. 43C ERA?

8. Was the Claimant subjected to the following detriments by the First Respondent as a result of the protected disclosures?

(a) Being pressured to attend the workplace and put herself, her family and others at risk in September, October and November 2020 (relevant protected disclosure is Para 3(a) above);

(b) Being critical of the Claimant's work by referring to the quality of work being "lower" than usual; that they were not getting the "level of support" expected and a veiled threat in the event that she did not comply, as set out in the email of 5 November 2020 (relevant protected disclosures are Para 3(a) and (b) above);

(c) The actions of the First Claimant resulted in the decision to dismiss on 12 November 2020 (resignation) which constitutes a detriment relevant protected disclosures are Para 3(a) and (b) above);

(d) Being accused of mischaracterising reality and making untrue statements by letter dated 12 November 2020 (relevant protected disclosures are Para 3(a),

(b) and (c) above);

(e) Demanding that the Claimant also resigns from her post with the Second Respondent as set out in his email of 13 November 2020 (relevant protected disclosures are Para 3(a), (b) and (c) above) and/or encouraging, pressurising and inducing the Second Respondent to terminate the Claimant's employment;

(f) Being accused of unprofessional conduct; malingering with respect to her sickness absence and threatened with causing potential damage and loss to the business in his email of 19 November 2020 (relevant protected disclosures are Para 3(a), (b) and (c) above);

(g) Being subjected to stress and anxiety (relevant protected disclosures are Para 3(a), (b) and (c) above); [**Withdrawn by claimant as a separate head of claim]**

(h) Failing to pay her wages, notice pay and holiday pay (relevant protected disclosures are Para 3(a), (b) and (c) above);

(i) (i) Failing to issue her with a P45 (relevant protected disclosures are Para 3(a), (b) and (c) above), prior to 17 January 2022. **[Not pursued by claimant]**

9. Was the Claimant subjected to the following detriments by the Second Respondent as a result of the protected disclosure at Para 3(a) above?

(a) Being subjected to stress and anxiety; [**Withdrawn by claimant as a separate head of claim]**

(b) Failing to pay her wages, notice pay and holiday pay;

(c) Failing to issue her with a P45. **[Not pursued by claimant]**

10. Are there acts of detriments committed by the First and Second Respondents a series of continuing acts?

11. In determining whether the Claimant was automatically unfairly dismissed by the First and Second Respondents contrary to s103A, was the reason or principal reason for her dismissal that she had made the alleged protected disclosure(s)?

Health & Safety - s.44 and/or s.100 ERA 1996 (Both Respondents)

Detriment and/or Automatic Unfair Dismissal

12.Did the Claimant bring to the Respondents' attention, by reasonable means, circumstances connected with her work which she reasonably believed were harmful or potentially harmful to health or safety (s.44(c) and/or s.100(c) ERA 1996)?

13. Did the Claimant ever refuse to return to her place of work? If so, was the Claimant's refusal to return to her place of work undertaken in circumstances of danger which she reasonably believed to be serious and imminent and which she could not reasonably have been expected to avert, in accordance with s44(1A)(a) / s100(1)(d)?

14. If the Claimant did refuse to return to her place of work, was her refusal to return to her place of work an appropriate step undertaken in circumstances of danger which she reasonably believed to be serious and imminent to protect herself, her family and the public from the danger in accordance with s44(1A)(b) / s100(1)(e)?

15. Did the Claimant suffer detriments as result of carrying out the above activities – the detriments relied on are the same as those for the whistleblowing claims set out at Para 5 (a) – (i) above for the First Respondent, and Para 6 (a) (c) above for the Second Respondent?

16. Was the Claimant automatically unfairly dismissed by the First and Second Respondents as a result of the above actives (s.100 ERA 1996)?

Constructive Unfair Dismissal - ss95 - 96 Employment Rights Act 1996) - (First Respondent only)

17. Did the First Respondent act without reasonable and proper cause, act in a manner calculated or likely to destroy or seriously damage the mutual trust and confidence between employer and employee, in the following respects:

(a) Being pressured to attend the workplace during a lockdown, if this period was a time of national lockdown, and/or to break the law;

(b) Being forced to attend work despite it not being essential for her to do so;

(c) Requiring her to put herself and family at risk by travelling to / from work;

(d) Being dismissive of her concerns and being treated with hostility;

(e) Feeling disrespected despite dedicated service of more than 11 years;

(f) The dismissive email of 05 November 2020.

18. Did the First Respondent's conduct, as determined by the Tribunal, amount to fundamental and repudiatory breach of the implied contractual term of trust and confidence?

19. If so, did the Claimant resign in response to the alleged fundamental and repudiatory breach/es of contract?

20. If so, did the Claimant delay too long before resigning such that she had waived any such breach?

21. If the Claimant was constructively dismissed, was such dismissal unfair?

Unfair Dismissal – s94 Employment Right Act 1996 – (Second Respondent only)

22. Was the Claimant's employment terminated by the Second Respondent?

23. If so, what was the reason for the dismissal and which date did the dismissal take effect?

24. Did the Second Respondent consider and/or offer suitable alternative employment for the Claimant?

25. Was the Claimant's dismissal procedurally unfair?

Findings of fact

The hearing

2. We were provided with an electronic bundle and supplementary bundle running to something over 800 pages.

3. We heard evidence from the claimant on her own behalf and we also heard from her partner, Mr R Ahmed. For the first respondent, we heard from the

first respondent and his wife, Mrs S Goldstein. The second respondent gave evidence on his own behalf.

The parties

4. The first and second residents were co-founders of a financial services company called I V Capital Limited. They were later joined in this venture by a Mr Lipman and a Mr Mana.

5. The claimant is a woman aged at the time of these events in her very late forties. Her partner with whom she lives is of Bangladeshi descent and asthmatic. Both the claimant and her partner were conscious of the risks to the claimant's partner due to the pandemic and Mr Ahmed lost a number of family members and friends to covid.

6. In May 2009, the claimant commenced work as a personal assistant to the two respondents and Mr Mana. She worked two days a week for each of the respondents at their homes and one day a week for Mr Mana at the I V Capital Limited office. Her work for each of these individuals was entirely separate although she had an employment contract with I V Capital Limited for all of the work she was doing for the three individuals.

7. In terms of her duties, there appear to have been changes over time, but they included personal administration and management relating to the respondents' properties, household management, diary management, dealing with bills and travel arrangements and household staff. Because the claimant is a native French speaker and the first respondent is not, she also provided translations of documents in French. The first respondent has a property in St Tropez. The claimant was cross-examined at length about her description of her duties and it may be that what she described in some instances as 'management' might more aptly be described as managing administration. We did not consider anything turned on this. We did not consider that the claimant had deliberately exaggerated the importance of her duties.

8. In February 2012, the claimant left her employment and took up another role. She did not like her new job and returned to work for the respondents, having worked elsewhere for a month. There was a difference between the respondents and the claimant as to who suggested she return. We did not consider this to be a material dispute. Everyone involved seemed happy that the claimant returned to work with the respondents. At this point, Mr Mana dropped out of the arrangement and the fifth day was rotated between the two respondents and an additional day of leave. The employer remained I V Capital Limited and there was a written contract dated 26 March 2012.

9. The first respondent in his witness statement suggested that it was essentially an arrangement between the second respondent and the claimant and that he was to have such of the claimant's time as the second respondent did not require, but the contemporaneous documentation showed that the claimant was evenly split between the two roles.

10. In October 2014, I V Capital Limited ceased doing business. The claimant continued to work for the respondents, although not under any written contract. There was no evidence that the parties discussed who was the claimant's employer at this point or that there was a meeting of any sort about the matter.

11. It appeared that the respondents had the claimant arrange for her payslips to be provided by the second respondent through a payroll company he already used called Stafftax. Each respondent was to pay half of her salary directly. There was no expectation either would cover the other's salary payment if the other was late.

12. Neither respondent had any involvement with or control over the tasks the claimant performed for the other respondent. They each provided her with equipment to do their work and she performed the work at each respondent's home. She owed each respondent a duty of confidentiality in relation to the work she carried out for that respondent. If she wished to take holiday, she would arrange that with whichever respondent was affected by the leave and if she was sick, she would inform the respondent affected.

13. The claimant said that after many emails and conversations, she finally got a written contract some 14 months later in December 2015.

14. On 1 December 2015, the claimant and the second respondent signed an employment contract which named the second respondent as the claimant's employer. There was no evidence from any witness of a discussion about the contract; it appeared it was just given to the claimant and she signed it. The first respondent cut and pasted it from the contract the claimant had had with I V Capital Limited.

15. The second respondent said that naming him as the employer was a matter of administrative convenience as he already had a payroll company. Cross examined about this matter, the first respondent said 'somebody had to be the employer and it was him' and that 'it was certainly administratively convenient' for the second respondent to be the employer.

16. The first respondent in his statement sought to give the impression that the intention was for the second respondent to have the bulk of the claimant's time and that is why he was named as the employer but it was clear from evidence and contemporaneous documents that this was not the intention nor

what happened. We accepted that the second respondent was named as the claimant's employer because it was administratively convenient.

17. The first respondent suggested that there were yearly reviews of the claimant's pay held at the second respondent's flat but we saw an email from May 2018 where the claimant was asking for a pay review as she had not had one since 2015 so we accepted her evidence that there were no regular pay reviews.

18. During the first national lockdown in March 2020, the claimant worked remotely for each respondent. She said that approximately 10% of the work she carried out for the first respondent required her to be physically present at his premises. The first respondent said that it was more like 15 – 20% of her work. The work which required a physical presence was dealing with post and filing. Some payments were made by cheque through the post and the claimant was responsible for this task. The first respondent said there were some 100 – 150 items of post per month and the claimant said it was more like 100. This did not seem to us to be a material dispute. The filing was filing of documents concerned with financial affairs such as invoices and receipts.

19. It appeared to us that if we assumed that 15% of the claimant's work required a physical presence, that was in any event only approximately a couple of hours of her two (sometimes three) day working week for the first respondent.

20. We saw correspondence between the second respondent and the claimant in April 2020. He told her that he was unable to pay her salary at that point. The claimant was agreeable about waiting for her salary. She told the second respondent that she was only leaving her house rarely.

21. The second respondent was living in Paris and there was not a great deal of work for the claimant to do for him. She monitored emails on the days she worked for the second respondent and did some sporadic work, The impression the Tribunal got was that both were content with a holding position on her work pending developments.

22. On 19 May 2020, the claimant wrote to the second respondent:

I am still unable to go to Shawfield Street due to the lockdown but we can discuss when it is lifted.

I am not comfortable to take public transport but I am hoping to find a way as soon as I can.

23. The second respondent replied:
Thanks. I am ok with you not going to Shawfield Street at the moment. Let's see how things develop. I have asked Linda to go in twice a week on Monday and Friday for 4 hrs each.

Given the border controls, I think it is unlikely that we will be back before September but depends on what France does in relation to border controls. We will get the next announcement by 15th June.

I have not spoken with Ramy and Smadar recently but are they fine with you working remotely?

24. The claimant write to the second respondent:

Thank you, I am glad Linda goes to the house to check it.

The rules are very unclear in the UK, the message is stay at home but if you can go to work go to work!

I cannot walk or cycle and I am concerned to take public transport because not many travelers are taking precautions.

A lot of passengers arrive at Heathrow Airport every day but it does not seem to be anything in place right now to test or check them.

Ramy and Smadar are fine, I have been working remotely for them. But they want me to go to Eaton Square from this week and we are looking of how I could reach their place because the underground is not a safe solution for me or them.

25. It was put to the first respondent and Mrs Goldstein that there were discussions about the claimant coming to work by Uber at around this time. It was put that Mrs Goldstein had been prepared to pay for the Uber but when she learned the claimant now lived in Walthamstow said that she would pay half the costs. The claimant gave no evidence on this point.

26. Mrs Goldstein accepted that there was some sort of discussion about the claimant taking Ubers but not that she knew the claimant was living in Walthamstow or that there was a discussion about splitting the cost of the Uber. She said there must have been another reason why the Uber plan was not pursued.

27. The claimant began to attend the first respondent's house again in about late May 2020 on an ad hoc basis. The first respondent and family were in France during this period.

28. We saw a diagram of the office where the claimant worked drawn by the first respondent. There was a separate entrance to the office area. The first respondent and his wife had desks and undertook their own work in an area sectioned off with a glass partition. The first respondent spent more time working there than his wife. When they entered the office they would pass within two metres of the claimant.

29. The first respondent told us that the air conditioning controlled ventilation and that the claimant knew how to use it and adjusted it to her liking. He said that there was a Post it note with her preferred settings on the controls. The claimant said she was not told how to adjust the air conditioning and the Post it note belonged to the butler. We considered that the first respondent was mistaken about this matter and had an incorrect recollection of who had left the Post it note on the air conditioning controls.

30. When the Goldstein family was away, the only other person who would regularly be in that area would be the cleaner. The Goldsteins introduced more regular cleaning as a response to the pandemic.

31. There was some traffic in the corridor outside the office where the claimant worked of contractors and, possibly on occasions when the Goldsteins returned from France in the autumn, yoga and fitness instructors.

32. Down the corridor there was a lavatory primarily for the claimant's use but on occasion used by Mr Goldstein.

33. The Goldsteins accepted that they were not diligent about wearing masks when working in proximity to the claimant: 'It's our home'.

34. In June 2020, the extended Goldstein family went to their home in France.

35. We saw an email dated 22 June 2020 in which the claimant asked the second respondent if he wanted her to check his house as she would be in Belgravia. He replied that he should start paying her first and hoped to get that sorted very soon.

36. On 4 September 2020, the second respondent wrote to the claimant:

I hope you are well and had a good holiday.

I have not come back to you regarding payment of your salary because I have been struggling to complete my Eaton Square transaction. We were very close earlier in the month of August but unfortunately it did not happen. I am hopeful that it will be done next week.

In the meantime I have one request. Rebecca needs to set up a standing order or direct debit with CESU for Lily's social security payments. I understand that you have dealt with it in the past. Can I ask if you can set this up for Rebecca?

37. That seemed to us to give some flavour of how sporadic the work for the second respondent was.

38. The Goldsteins returned to London in September. The claimant said that they had gone via Paris and Zurich.

39. The first respondent said that there was a lot of post piled up when they returned and that the cleaner said the claimant had only attended the property twice whilst they were away. The claimant said that was not the case; she attended regularly although not every working day and there was no post left on her desk. She attended on 1 September but it appeared not later in September and it seemed to the Tribunal that a fair amount of post could have piled up by the time the Goldsteins returned from abroad if there tended to be 100 plus items per month.

40. On 28 September 2020, the first respondent emailed the claimant:
I would like to have a call tomorrow to discuss restarting being in [address] for some of your days. Please give it some thought so we can discuss this tomorrow.

41. The claimant replied:

I hope you are both well.

In advance of our conversation later today, I write to detail the following with regards to my working location going forwards in the current Covid-19 landscape since I suggest that we continue the current arrangement of me working from home but attending the office on a once a month basis to action each month's end. My reasons are as follows.

I have successfully been working from home since March 2020 with no sick or missed days to date so it is therefore a safe and proven avenue to continue with.

The current government guidance is for those, like myself, who can work from home to go back to working from home.

However, since month end is best carried out with me in the office, I therefore suggest (as clearly proven as being possible during recent months) that I still attend the office at the end of each month to file papers and pay bills. Indeed, I planned to attend the office, for this month's end, this Thursday 1st October 2020, as I presumed you are outside the quarantine period after your recent return from France.

We are all living and working in difficult Covid-19 changed times, and I am sure that you appreciate as much as I do that the most important is to keep each of our households safe, healthy and virus-free especially since I shall be commuting on the London Underground every time I attend your home.

This can of course be revisited as further governmental Covid-19 guidance is issued and the Covid-19 landscape is better under control.

I look forward to discussing the above further when we speak later.

42. The first respondent responded:

Thank you for your email. As you will be here on Thursday we feel it would be better to have this discussion in person.

We are very conscious of the risks the virus poses and we are at a much higher risk group than yourself. We certainly will not want to create undue risks for any of us. Having said this, we would need to find the best way forward that works for both sides.

43. The first respondent then sent a further email:
I forgot to include in my e mail confirmation that both Smadar and I are no longer in quarantine, as of today.

Separately, the only other person here when you will be is Maricar [the cleaner] who has no need to be in close proximity to you.

For the purpose of working with you when you are here adherence to social distancing can be maintained.

44. On 1 October 2022, there was an in person discussion between the first respondent, Mrs Goldstein and the claimant. The first respondent and Mr Goldstein stood at the claimant's desk during the discussion. They were not wearing face masks. Their position appeared to be that they were more vulnerable than the claimant. They are several decades older than the claimant. They said that they were not aware that the claimant had a partner. They made no enquiries as to the claimant's vulnerability or that of anyone in her household nor did the claimant explain her particular concerns.

45. The Goldsteins said that they could not accept an arrangement where the claimant only came in once a month and proposed that she come in every other week. The claimant agreed to that arrangement.

46. The first respondent says the arrangement became more flexible and the claimant could come in every week to ten days as the work required and she could choose the time of day. The claimant said that they did discuss varying her hours so she could avoid travelling on congested tubes but that was not what happened in fact.

47. On 6 October 2020, the first respondent emailed the claimant:

There is some confusion as to when you will work at [address].

My understanding is that you will be here once per week on Tuesday or Thursday (or Friday) at your choice. Smadar asked you to let her know which day you selected. I was under the impression - obviously not correctly - that you would come on Tuesday.

Please confirm what day you will be here this week.

Unless you decide to fix the same day for all weeks, please let us know in advance (on Fridays) what days you intend to be here in the following week so we can plan accordingly.

As we discussed, you can set your time of arrival and departure to see which times result in lower congestion on the tube.

48. The claimant replied:
My apology for the confusion. Our last conversation before you left the office for your party last week, you said that you will call me on Tuesday to confirm which date to come based on your schedules.

I will be coming on Thursdays outside congestion hours, as suggested with Smadar I will be at yours around 11am to avoid the busy underground and will be leaving at 4pm. Please be mindful if another lockdown happens I won't be able to travel.

49. The claimant said that at this point she would be given work late in the day by the Goldsteins when at their premises and end up having to stay late, She was conscious they were socialising, including having extended family for Friday night dinner. This was part of the context in which the failure to wear masks in her presence caused her concern.

50. On 4 November 2020, the claimant wrote to the Goldsteins:

I hope you are both well today.

With regards to the new Covid-19 lockdown that is due to start at midnight on Thursday 5th November 2020, having now considered the issue and taken advice (just like the first lockdown that we were all required to observe in order to keep ourselves safe) the UK government guidance is clear in relation to staying at home and working,

(https://www.gov.uk/guidance/new-national-restrictions-from-5-november):

"1. Stay at home

You must not leave or be outside of your home except for specific purposes. These include:

Work and volunteering

You can leave home for work purposes.....where you cannot do this from home."

Respectfully, I do not wish to act outside these new lockdown rules and break the law and I am confident that you would not wish to encourage to do so.

In addition to having attended on Tuesday this week, I will also attend again tomorrow in order to do any pressing matters before lockdown starts and then

will continue to work from home as during the much longer original previous lockdown period.

We are all living and working in difficult Covid-19 changed times, and I am sure that you appreciate as much as I do that the paramount consideration is to keep each of our households safe, healthy and virus-free

51. The claimant had taken some legal advice. It appeared that the claimant was at the Goldsteins' premises on 5 November 2020 but we heard no evidence as to what if any discussion there was about the claimant's email and the impending lockdown. The first respondent said that they probably did not discuss a risk assessment and in his subsequent email there is no mention of any discussion, which suggested to us that the topic was not raised.

52. On 5 November 2020, the first respondent wrote to the claimant:

The government guidance link you were kind enough to send us in the e mail below are the general guidelines for the lock down.

There are more specific guidelines that deal with working in other people's homes. You can find these here - https://www.gov.uk/quidance/ workinq-safely-durinq- coronavirus-covid-1 9/homes

The guidelines on working in other people's homes clearly envisage people working in other people's homes and discuss the details for doing so.

We are very attuned to the Covid-19 situation. As far as I know, we are in a higher risk group than you simply due to our age. So we take the matter of Covid risk extremely seriously.

We consider your work environment in our home (essentially the office and nearby toilet with an occasional journey to the entrances of 98) Covid-safe and compliant. In particular we note the fact the social distancing can be maintained to a very high degree and that there is almost no traffic at all in the house.

I will carry a formal Covid risk assessment of the house over the weekend, following the Government's guideline.

We certainly do not wish you to be exposed or for us to be exposed to any unnecessary risk. At the same time, life and work must go on as best it can and with compliance with the guidelines set by the government. We are very confident that working in our home does not expose you to such risk.

In addition to our home environment, we appreciate the issue of heightened risk of travelling on the underground during rush hour. This can be mitigated by arriving here (as you have been doing as of late) at 10:30 instead of 8:30 and leaving either earlier than you normally did (at 18:00) if work tasks permit, or much later if the completion of tasks require it.

Our view, based on the last few months is that while it is possible for you to perform some of the work tasks from your home, the quality of the support we get when you work remotely is lower than when you are on site. Our view is that we should divide the work so that some tasks can be done by working remotely but some tasks need to be done on site. To this end I propose that we continue with what we agreed earlier, namely alternate between on site and remote work. As you have indicated the Thursday is a better day for on site, so we can go with that. In terms of the third Friday, we propose we keep that on site. Having proposed that, we can be flexible in the sense that we can maintain a log of tasks and agree what tasks can be handled remotely and what tasks need to be performed on site.

In the event that the tasks immediately ahead of an on site day are tasks that can be done remotely as effectively,we will not need you to come in just for the sake of coming in.

Please consider this and we can have the discussion tomorrow or on Monday if you need more time to think about it.

Marie, these times are quite difficult for everyone and no one is spares [sic] some financial or other hardship. We have protected your position and pay with no discussion since the beginning of the epidemic. But it is unfair on us to pay the full amount and feel we are not getting the level of support upon which the conditions of employment were agreed. We feel we have compromised a lot and that further compromise in term of no on site work at all is not something that is fair on us or that we wish to engage in.

Please consider the situation carefully and we can then discussed [sic] the plans going forwards.

53. The first respondent said that he did a risk assessment but was not required by the governmnet guidance to do a written risk assessment. That was correct but we noted that the guidance did suggest that employees should be consulted with, which did not happen in a formal way. The first respondent said that they had discussed risk throughout; we had some sympathy with that position but considered that it is nonetheless incumbent on an employer to raise the matter clearly so an employee has an opportunity to bring up any concerns. In the claimant's case she would for example have had a forum in which to raise the concern about the Goldsteins not wearing masks had the matter been raised clearly with her in the context of a risk assessment.

54. It is relevant at this stage to say a bit more about the government guidance about workers in other people's homes which the first respondent was relying on. The document included a non exhaustive description of workers who work in other people's homes such as repair services and childcare providers as well as delivery drivers. The purpose of the document was to assist employers and employees to understand how to work safely, not to define the circumstances in which an employer is entitled to expect a home worker to attend during a lockdown. The document maintains the basic principle extant

at the time that people should stay at home where possible and should only travel to work if they cannot work from home. Those who need to visit other people's homes for their work could continue to do so. The test in general was one of necessity.

55. The November 2020 lockdown was expected at the time to last for a month.

56. On 10 November 2020, the claimant wrote to the first respondent:

I am emailing to inform you that I cannot come to work today, Tuesday 10th November 2020, because I have been feeling unwell and stressed since the end of last week.

I will update you later in the week after I have spoken to my GP.

57. There was no email from the first respondent in response to this email. His evidence about that was that he was probably expecting an update.

58. In 11 November 20220, the claimant sent the first respondent her sick certificate. The claimant's doctor had not included the stamp for the practice or his GMC number. The claimant later sent an updated version with the missing elements included.

59. 12 November 2020, the claimant sent her resignation letter to the first respondent. She had taken some legal advice:
Re: My Formal Resignation from Working for You and the Goldstein Household

I write to officially resign, with notice, my position as Personal Assistant to yourself and the Goldstein residence under my implied employment contract with you. My notice period is 8 weeks. For the sake of clarity, this resignation letter has no bearing to my employment with Mr Sareen.

I am resigning from you for the following reasons albeit this is not an exhaustive list:

• Due to the stress and anxiety caused by working for your household, I can simply no longer work for you.

• I feel pressured to attend your workplace during the current November 2020 UK Covid-19 national lockdown when I can adequately work remotely during this time as proven, having successfully done so, during the previous and longer March 2020 national lockdown.

• I do not want to break the law in respect of current national lockdown guidance especially since it is not essential that I attend your workplace. My

attendance in person feels required simply to placate your and Smadar' s wishes for me to be there.

• With your own comings and goings and me having to travel on public transport to and from your workplace, I do not feel that it is a safe environment and to date no risk assessment has been provided to me.

• I felt contempt, hostility and disrespect from Smadar and yourself for even airing my concerns above which have fuelled my loss of trust and confidence in yourselves.

• I have been in your employment for over 11 years and I feel that I have no choice now other than to resign. Indeed, I have felt disrespected and unappreciated for so long now and the prospect of returning to your workplace quite frankly fills me with dread. I always had the choice whether to offer my services and work for you both and now I choose to resign.

Treating people with humanity, respect and compassion is all important to me.

The final straw for me was your email dated 5 th November 2020. I felt very hurt, disappointed and disrespected after so many years of dedicated service to you both to receive such a critical email about my work and my pay when all I requested was that I did not wish to go against UK governmental national Covid-19 lockdown guidance and law to attend your residence to work. And for the sake of clarity even though I always received pay review praise for the work I did for you, I have not had a pay rise since 2015. Since you felt the need to impress your feelings/dismay in your email, allow me to say the following:

• To date, I have always made myself available to you, Smadar and the rest of your family and I did my level best to deal with all your requests and tasks whether here or abroad.

In all my 11 years of employment I have never been late for work and my sick days until now have been minimal.

• Smadar never gave me any positive feedback regardless of how well and hard I worked. I will only have memories of her criticism, bullying and indiscreet manner.

• As for being paid, every month was the same demeaning experience of having to remind or chase you to pay my wages. You may never have had to chase a party to pay you but having had to do so every month felt like having to beg you just to receive pay that I had rightfully earned. This always felt at its highest as a statement of power and position; at its lowest, simply disrespectful and uncaring.

• I felt that my work was never good enough for both of you regardless of how many times I worked early or late or through my lunchtimes and breaks especially once Philip resigned and when the workload and your demands increased.

All the above has directly caused and resulted in me now suffering and being medically diagnosed with work related anxiety and stress indeed, I have been signed off for the next month as sick by my doctor with work related stress - see his attached GP Sick Note dated 11 th November 2020. For the sake of clarity, while I am signed off sick, I am not allowed to deal with any of your emails, messages nor work so please respect this for any such enquiries/requests will go unanswered.

Finally, since I have formally been signed off work and have now resigned and I do not know when I will be well enough to return during my notice period, I shall today return you, via guaranteed recorded delivery, all work related materials, namely, my memory stick containing your work files as well as the set of your house keys that I hold. I request in return that you send me, via the same manner, my desk lamp to my home address of 67 Falmer Road, London, E17 3BH. Thank you.

60. On 12 November 2020, the first respondent wrote to the claimant:

I am in receipt of your letter dated 12/11/2020 in which you informed me you no longer wish to work here.

First, I am sorry to hear that you are unwell and wish you a speedy recovery.

As you know, the employment contract that covers your work here is the contract between Vipin and you. That contract envisages you working some of the time in my house, which reflects the reality exactly.

In your letter you refer to an "implied contract" with me. I do not know whether or not an implied exists. My view would be that to the extent there an implied contract exists, the provisions of such a contract are exactly the same as those stated in your contact with Vipin. If you are in agreement with that, kindly confirm this to me and we may then proceed on that basis.

For the avoidance of doubt, what I am saying is that if you can confirm that you agree that if there is an implied contract, the provisions of the implied contract are the same as the provisions of your contract with Vipin, that may allow for a basis to proceed.

Kindly let me know regarding this point.

In your letter you make statements that are either completely subjective, mischaraterise [sic] reality or are simply untrue. Such statements cannot be accepted as factual or correct. Fortunately, there is no requirement to state or agree any of these statements and there is no reason for me to respond other than to say that I do not accept these statements as correct.

Regarding any property you may have left in the office here, I will search the space you used and any property belonging to you will be return to your home address as you request.

61. The first respondent's evidence was that he felt he was being 'set up' by the claimant and that seemed to the Tribunal to account for the tone of this email; he thought that the claimant was going to pursue him legally and reacted to that.

62. On 13 November 2020, the first respondent wrote to the claimant:

I have spoken with Vipin this afternoon and he reported that he had spoken with you earlier today and you agreed to his suggestion that the cleanest and easiest way to execute formally your decision to stop working here is for you to resign under the contract, thereby terminating the contract now and following the relevant clauses without any additional complexity. Vipin and you can then enter into new agreement should both of you wish to do so.

In order to implement this we need to receive from a signed resignation addressed to Vipin, informing him of your wish to terminate your employment pursuant to clause 3.2 of the employment contract, with effect from 12/11/2020.

The letter can be a single sentence letter. The contract does not require you to give any reason for the termination, nor does it require you to give no reason.

Once we receive this letter we will be able to follow the correct formal process.

All items of property belonging to you which I found in the office after a thorough check of your area have been posted to you today. The Tracking Number is FWGD1 392396GB.

63. Both respondents gave evidence that what was reported in this email reflected the telephone conversation they had had. The claimant's evidence was that what the first respondent wrote did not accurately reflect the conversation she and the second respondent had. She said she never agreed to resign from the second respondent's employment but only from the first respondent's. She had no reason to resign from the second respondent and liked her job; this was of course the middle of the pandemic and the claimant had had legal advice. We accepted her account which accorded with what she had said in her resignation letter. It is possible that the second respondent genuinely came away from their phone call believing the claimant had agreed to what was being suggested; he may have suggested it and the claimant did not rebuff the notion in entirely clear terms. We note the two had an amicable relationship and the claimant would not have wanted to fall out with him.

64. On 18 November 2020, the claimant wrote to the first respondent:

I write to reclarify my position having again spoken to my employment lawyer, especially since, as you are fully aware, I am currently suffering from work related stress and anxiety.

For the sake of clarity, I maintain and re-iterate my original position, as noted in my 12.11.20 resignation letter to you, that I am resigning from you and the Goldstein employment only and not from Vipin and his employment, which I am entitled to do.

If I were to resign from both employers at this time, I would be in effect making myself unemployed and would lose all my employment rights that I have accrued over many years. Voluntary unemployment may also hinder me for various reasons including any eligibility and receipt of unemployment state aid.

Finally, since I am only resigning from your employment, please let me know whether you prefer to pay my 8 week notice period in lieu, as well as any owed days of holiday, in order to immediately terminate my employment with you and the Goldsteins. Thank you

65. The first respondent then wrote to the second respondent:

Marie's response is not at all what you thought she agreed to.

I am happy to continue pursuing this matter with her on my own which may turn confrontational. I just want to touch base with you before I begin anything in case you have other ideas.

Please call at your convenience so we can have the discussion.

66. He wrote further, attaching the claimant's contract:

I think this is the same as the unsigned version I have. (I did not verify word for word.)

Please consider what it would mean to terminate her contract. Potentially for cause, as she is refusing to fulfil the employment condition of working in my house. There is no such thing as resigning from 1/2 a job and keeping the other.

I think if I were to become unfriendly to her and the contract remain unterminated she (=her lawyer) will drag you in.

67. The claimant wrote to the second respondent:

Following our earlier conversation and my continued employment with you only (and no longer for the Goldsteins), we can simply agree to amend the following details of our existing employment contract (dated 01.10.14 but signed 01.12.15 - see attached) since this method causes no change to either of us and can be dealt with easily:

1. I am your employee and my sole employer is yourself and your household. [The Goldsteins are no longer my employer and all references to them are to be removed];

2. My revised pay is £27,500 (Twenty Seven Thousand Five Hundred Pounds);

3. Place of work is 20, Shawfield Street London SW3 4BD, if not working remotely;

4. The above changes are a revision of my existing employment contract (dated 01.10.14 but signed 01.12.15 - see attached) and therefore my employment rights flow and continue unbroken from it.

Any future revisions can be agreed amongst ourselves in due course or on your return to the UK.

If you do not wish to accept the above revised contract terms, then our current employment contract will simply continue to stand as is.

As for the outstanding wages that you still owe me, from March 2020 to date, as agreed and out of loyalty and courtesy to you and your household, I shall continue to be patient for their payment, and for the delay compensation you spoke of, as long as I reasonably am able to.

Thank you and I look forward to receiving your reply

68. On 19 November 2020, the first respondent wrote to the claimant:

You walked off the job with no forewarning, no discussion and without any form of handover that is necessary for us to maintain business continuity.

Such conduct is unacceptable, unprofessional and contradicts norms of normal and reasonable business behaviour.

You sent us a note purporting to be a doctor's note but one not containing the name of the doctor or his contact information. You claimed sickness due to "stress" as the reason for both not being able to work indefinitely as well as not communicating with us about work. {Although you seem perfectly capable of communicating normally when it comes to dealing your own interests.)

Marie, I request and expect you to engage in a proper handover of your responsibilities so that we will not suffer any damage as a result of business discontinuity caused by your abrupt departure.

Kindly find attached a list of items that we require you to supply in order to provide for a proper handover. The list may not be exhaustive and I reserve the right to amend it. It may also require your physical attendance in Eaton Square.

I expect you to cooperate fully and in good faith in an orderly handover process. This includes providing all information requested which is required for someone else to take over your work streams.

It would also include making yourself available by telephone for a certain period of time to answer questions that might arise and to which only you might know the answers.

Kindly advise when you will comply with this request. A proper response may also require you to come to show us the precise locations of certain items.

Until you advise me about the handover, I will reserve my position on all matters going forward.

69. On 20 November 2020, the second respondent wrote to the claimant:

Following on our conversation yesterday and my objective to resolve the matter of your resignation in a smooth and amicable manner, I outline below my views and questions and ask you to comment on them.

1) Your current contract has two functions and these are working for me and working for the Goldstein family. You have now decided that you want to stop carrying out one of the two functions and want to continue with the rest ofthe contract. I do not believe that this works. You can't as a matter of principle decide unilaterally to disregard one part of the contract and expect to continue with the rest. As a matter of contract law, I just don't think that can be valid. I understand that you have taken advice on this but I do not believe that the advice is correct. It is after all one single employment contract. I think the only way to deal with this would be to resign thus terminating the whole contract and separately entering into another contract with me which obviously need to have different terms as my requirements have changed significantly.

2) You have said that you are trying to protect your rights under the employment contract and hence you have resigned the way you have. What rights are you trying to protect? I also cannot see how those obligations in their entirety can fall upon me even if the the way you propose the contract to continue was valid.

3) I think it is important to recognise that the part of your current employment function as it pertains to me and documented in the employment contract as such, does not really exist anymore and have not done so for some time.

4) Lastly, just for your information, the Goldstein family feels that there needs to be a proper handover of your tasks to them and that they will write to you separately on that.

70. The second respondent forwarded this email to the first respondent who suggested that they wait and see what response came back and: 'My view would be, if nothing comes back or Marie persists in her position, is that the contract should be terminated for cause.' He said that he had not checked but believed that their exposure would be the claimant's eight week notice period and that it would be illogical for the claimant to litigate for that sum. He said

that the second respondent 'will need to follow the process prescribed by law which as I recall required a meeting or two etc.'

71. The second respondent did not take the action proposed by the first respondent. He told the Tribunal that he was unwell with bronchitis and asthma for four to six weeks from December 2020 and that is why he did not write further. In fact he did not write further on the issue even when he was well but sent the claimant some work to do sporadically.

72. The claimant was signed off work sick until January 2021 but after that she contacted the second respondent to start work again and to ask for her unpaid wages. She continued to do a very limited amount of work for the second respondent, as before. The second respondent did not write further to say she was no longer employed and the two corresponded in January and February 2021 about her pay and payslips. The claimant asked for her outstanding pay up to February 2021 and also for her payslips. The second respondent said he would update her on her pay and assisted her in accessing payslips. He did not suggest she no longer worked for him or was not entitled to pay for these periods.

73. On 11 May 2021 the claimant discovered from speaking with HMRC that a P45 had been issued in respect of her employment with the second respondent indicating a termination date of 30 November 2021. She received official confirmation of that on 8 June 2021. We saw records from Stafftax which showed that the second respondent had requested the P45 on 24 March 2021. On 31 March 2021, the claimant carried out some work for the second respondent.

74. On 8 June 2021, the claimant wrote to the second respondent saying she was confused and hurt by what she had found out about the P45 and indicating that she would be presenting a claim against him in the Employment Tribunal.

75. We heard some evidence from the first respondent about whether he had an ongoing need for the claimant's services in any event. He told the Tribunal that he had found out that various tasks the claimant had done in relation to his French property using paper forms and cheques could be done digitally. He had less need for her translation skills as he could use Google translate for example. He was now able to do himself many or all of the written tasks the claimant had carried out in French. He had not replaced the claimant and had no intention to do so. He had not found a solution to physically filing hard copy documents.

Law

<u>Employment status: who is the employer?</u>

76. In Clark V Harney Westwood and Riegels and ors, the EAT gave guidance as to how to assess who an employee's employer is in cases where there is a dispute:

52. In my judgment, the following principles, relevant to the issue of identifying whether a person, A, is employed by B or C, emerge from those authorities:

a. Where the only relevant material to be considered is documentary, the question as to whether A is employed by B or C is a question of law: Clifford at [7].

b. However, where (as is likely to be the case in most disputes) there is a mixture of documents and facts to consider, the question is a mixed question of law and fact. This will require a consideration of all the relevant evidence: Clifford at [7].

c. Any written agreement drawn up at the inception of the relationship will be the starting point of any analysis of the question. The Tribunal will need to inquire whether that agreement truly reflects the intentions of the parties: Bearman at [22], Autoclenz at [35].

d. If the written agreement reflecting the true intentions of the parties points to B as the employer, then any assertion that C was the employer will require consideration of whether there was a change from B to C at any point, and if so how: Bearman at [22]. Was there, for example, a novation of the agreement resulting in C (or C and B) becoming the employer?

e. In determining whether B or C was the employer, it may be relevant to consider whether the parties seamlessly and consistently acted throughout the relationship as if the employer was B and not C, as this could amount to evidence of what was initially agreed: Dynasystems at [35].

53. To that list, I would add this: documents created separately from the written agreement without A's knowledge and which purport to show that B rather than C is the employer, should be viewed with caution. The primacy of the written agreement, entered into by the parties, would be seriously undermined if hidden or undisclosed material could readily be regarded as evidence of a different intention than that reflected in the agreement. It would be a rare case where a document about which a party has no knowledge could contain persuasive evidence of the intention of that party. Attaching weight to a document drawn up solely by one party without the other's knowledge or agreement could risk concentrating too much weight on the private intentions of that party at the expense of discerning what was actually agreed.

[Per Choudhury P]

Health and safety dismissals

77. An employee is automatically unfairly dismissed if the reason or principal reason for dismissal is one of the health and safety reasons set out in section 100 Employment Rights Act 1996.

78. Tribunals should take a two stage approach under section.100(1)(e). Firstly:

- Were there circumstances of danger that the employee reasonably believed to be serious or imminent?

- Did he or she take or propose to take appropriate steps to protect him or herself or other persons from the danger?

The second stage is to consider whether the employer's sole or principal reason for dismissal was that the employee took or proposed to take appropriate steps. If so the dismissal would be automatically unfair: Oudahar v Esporta Group Ltd [2011] ICR 1406, EAT.

79. The 'circumstances of danger' are not limited to dangers in the workplace itself: Harvest Press Ltd v Mr T J McCaffrey [1999] IRLR 778, EAT.

80. Subsection 100(1)(e) is to be read with words inserted as follows: '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 or to communicate these circumstances by any appropriate means to the employer' in order to comply with EU Directive No.89/391: Balfour Kilpatrick Ltd v Acheson and ors [2003] IRLR 683.

81. Subsection 2 of section 100 provides: '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.

82. Subsection (1)(c) provides that an employee will be automatically unfairly dismissed where the sole or principal reason for the dismissal is that, in circumstances where there is no safety representative or safety committee, the employee brought to the employer's attention by reasonable means circumstances connected with her work which she reasonably believed were harmful or potentially harmful to health and safety.

83. Subsection (1)(d) provides that an employee will be automatically unfairly dismissed where the sole or principal reason for the dismissal is that in circumstances of danger which the employee reasonably believed to e serious and imminent and which she could not reasonably have been expected to avert, the employee took one of a number of types of action including refusing to return to her place of work.

84. The respondent referred us to the case of Rodgers v Leeds Laser Cutting Ltd 2022 EAT 69 in which the EAT decided that the tribunal had permissibly concluded that the claimant did not believe his workplace presented any greater risk than the risks at large in the pandemic and that he did not

reasonably believe there were circumstances of danger which were serious and imminent.

Health and safety detriment

85. An employee has a right not to be subjected to a detriment by any act or deliberate failure to act by his or her employer done on the ground that the employee has taken one of a number of types of action relating to health and safety. These include at s 44(1)(c) bringing to an employer's attention by reasonable means circumstances connected with the employee's employment which the employee reasonably believed were harmful or potentially harmful to health and safety. Under this limb of s 44(1), the employer must either not have a safety representative or committee or it must not be reasonably practicable for the employee to raise the matter in question by way of the safety representative or committee.

86. Under section 44(1)(e) Employment Rights Act 1996, it is unlawful for an employer to subject an employee to detriment because in circumstances of danger which the employee reasonably believed to be serious and imminent, he or she took (or proposed to take) appropriate steps to protect himself or other persons from the danger .Section 44(1)(d) makes it unlawful to subject an employee to detriment on the ground that in circumstances of danger which the employee reasonably believed to be serious and imminent and which she could not reasonably have been expected to avert, the employee took one of a number of types of action including refusing to return to her place of work

Protected disclosures

87. Section 43B(1) ERA 1996 defines a qualifying disclosure as a disclosure of information which in the reasonable belief of the worker making the disclosure is in the public interest and tends to show one of a number of types of wrongdoing. These include '(b)that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject' and '(d) that the health and safety of any individual has been, is being or is likely to be endangered.'

88. To be a protected disclosure, a qualifying disclosure must take place in circumstances prescribed by other sections of the ERA, including, under section 43C, to the worker's employer.

89. Guidelines as to the approach that employment tribunals should take in whistleblowing detriment cases were set out by the EAT in Blackbay Ventures (trading as Chemistree) v Gahir (UKEAT/0449/12/JOJ):

89.1 each disclosure should be identified by reference to date and content

89.2 the basis upon which the disclosure is said to be protected and qualifying should be addressed

89.3 if a breach of a legal obligation is asserted:

each alleged failure or likely failure to comply with that obligation should be separately identified; and

the source of each obligation should be identified and capable of verification by reference for example to statute or regulation

89.4 the detriment and the date of the act or deliberate failure to act resulting in that detriment relied upon by the claimant should be identified

89.5 it should then be determined whether or not the claimant reasonably believed that the disclosure tended to show the alleged wrongdoing and, if the disclosure was made on or after 25 June 2013, the claimant reasonably believed that it was made in the public interest.

90. There is a number of authorities on what a disclosure of 'information' is. It must be something more than an allegation; some facts must be conveyed: Cavendish Munro Professional Risks Management Ltd v Geduld [2010] ICR 325. There is no rigid dichotomy between allegations and facts. A statement must have sufficient factual content and specificity such as is capable of showing one of the matters listed at s 43B(1): Kilraine v Wandsworth LBC [2018] ICR 1850.

91. There is little authority on the issue of what 'likely' means in the various limbs under s 43B(1). In Kraus v Penna plc [2004] IRLR 260, the EAT interpreted 'likely' as meaning 'probable or more probable than not' and said that there must be more than a possibility or risk that an employer might fail to comply with the relevant legal obligation. We note that more recent authorities on the meaning of the word 'likely' in other employment law contexts such as in the context of the definition of disability under the Equality Act 2010 have adopted a lower test for likelihood; in respect of the definition of disability, 'likely' means 'could well happen' but accept that for these purposes we must apply the guidance in Kraus v Penna.

92. The burden of proof is on the worker to show that he or she held the requisite reasonable belief. The tribunal must look at whether the claimant subjectively held the belief in question and objectively at whether that belief could reasonably be held. The allegation need not be true: Babula v Waltham Forest College [2007] IRLR.

93. The reasonableness of the worker's belief is determined on the basis of information known to the worker at the time the decision to disclose is made: Darnton v University of Surrey [2003] IRLR 133.

94. Factors relevant to the issue of whether a worker reasonably believed that a disclosure was in the public interest include:

94.1 the number in the group whose interests the disclosure served (the larger the number, the more likely the disclosure is to be in the public interest)

94.2 the nature of the interests affected (the more important they are, the more likely the disclosure is to be in the public interest)

94.3 the extent to which those interests are affected by the wrongdoing disclosed (the more serious the effect, the more likely the disclosure is to be in the public interest)

94.4 the nature of the wrongdoing disclosed (the disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing)

94.5 the identity of the alleged wrongdoer (the larger and more prominent the alleged wrongdoer, the more likely the disclosure is to be in the public interest)

(1) Chesterton Global (2) Verman v Nurmohamed [2017] IRLR 837.

95. A worker has a right not to be subjected to a detriment by any act or deliberate failure to act on the part of his or her employer done on the ground that the worker has made a protected disclosure under s 47B ERA 1996.

96. Under section 103A ERA 1996, if the sole or principal reason for a dismissal is that the employee made a protected disclosure, the dismissal will be automatically unfair.

Causation of detriment / burden of proof

97. Where the employee complains of detriment under various provisions of the ERA 1996, including and s 47B and s 44, the tribunal will consider the complaint under s 48. S 48(2) provides that it is for the employer to show the ground on which any act or deliberate failure to act was done.

98. The worker must show:

92.1 that he or she made a protected disclosure / act falling within s 44 and

92.2 that he or she suffered less favourable treatment amounting to a detriment caused by an act, or deliberate failure to act, of the employer

92.3 a prima facie case that the disclosure / s 44 act was the cause of the act or deliberate failure to act which led to the detriment.

(International Petroleum Ltd v Osipov & others 2017 WL 03049094, EAT and Serco Ltd v Dahou 2017 1RLR 81, CA)

99. Once the worker has done that, the employer must show:

99.1 the ground on which the act, or deliberate failure to act, which caused the detriment was done

99.2 that the protected disclosure played no more than a trivial part in the application of the detriment (Fecitt v NHS Manchester [2012] ICR 372, CA).

Constructive dismissal

100. Section 95(1)(c) of the Employment Rights Act 1996 provides that an employee is taken to be dismissed by his employer if "the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct".

101. It is established law that (i) conduct giving rise to a constructive dismissal must involve a fundamental breach (or breaches) of contract by the employer; (ii) the breach(es) must be an effective cause of the employee's resignation; and (ii) the employee must not, by his or her conduct, have affirmed the contract before resigning.

102. If a fundamental breach is established the next issue is whether the breach was an effective cause of the resignation, or to put it another was, whether the breach played a part in the dismissal. In United First Partners Research v Carreras 2008 EWCA Civ 1493 the Court of Appeal said that where an employee has mixed reasons for resigning, the resignation would constitute a constructive dismissal if the repudiatory breach relied on was at least a substantial part of those reasons.

103. In this case the claimant claims breach of the implied term that the employer should not, without reasonable and proper cause, conduct itself in a way that is calculated or likely to destroy or seriously damage the relationship of mutual trust and confidence that exists between an employee and her employer. Both limbs of that test are important. Conduct which destroys trust and confidence is not in breach of contract if there is reasonable and proper cause.

104. It is irrelevant that the employer does not intend to damage this relationship, provided that the effect of the employer's conduct, judged sensibly and reasonably, is such that the employee cannot be expected to put up with it: Woods v Car Services (Peterborough) Limited [1981] ICR 666. It is the impact of the employer's behaviour (assessed objectively) on the employee that is significant - not the intention of the employer (Malik v BCCI [1997] IRLR 462. It is not however enough to show that the employer has behaved unreasonably although "reasonableness is one of the tools in the employment tribunal's factual analysis kit for deciding whether there has been a fundamental breach": Buckland v Bournemouth University Higher Education Corporation [2010] IRLR 445.

105. The breach of this implied obligation of trust and confidence may consist of a series of actions on the part of the employer which cumulatively amount to a

breach of the term, though each individual incident may not do so. In Omilaju v Waltham Forest LBC [2005] ICR the Court of Appeal said that the final straw may be relatively insignificant but must not be utterly trivial: "The test of whether the employee's trust and confidence has been undermined is objective."

106. A breach of the implied term of trust and confidence is necessarily a repudiatory breach of contract: Ahmed v Amnesty International [2009] ICR 1450.

107. In Kaur v Leeds Teaching Hospitals NHS Trust 2018 EWCA Civ 978 the Court of Appeal listed five questions that it should be sufficient ask in order to determine whether an employee has been constructively dismissed;

a. What was the most recent act (or omission) on the part of the employer which the employee says cause, or triggered, his or her resignation?

b. Has he or she affirmed the contract since that act?

c. If not, was that act (or omission) by itself a repudiatory breach of contract?

d. If not, was it nevertheless a part of a course of conduct comprising several acts and omissions which viewed together amounted to a (repudiatory) breach of the implied term of trust and confidence? (If it was, there is no need for any separate consideration of the previous possible affirmation).

e. Did the employee resign in response (or partly in response) to that breach?

108. It is of course somewhat artificial to require an employer who denies having dismissed an employee to show a reason for the dismissal. The Court of Appeal addressed this problem in Berriman v Delabole Slate Limited [1985] ICR 546 where the Court said that, in the case of a constructive dismissal, the reason for the dismissal is the reason for the employer's breach of contract that caused the employee to resign. This is determined by analysis of the employer's reasons for so acting, not the employee's perception (Wyeth v Salisbury NHS Foundation Trust UK EAT/061/15).

Polkey reduction

109. Section 123(1) ERA provides that

'…the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in the all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.'

110. A tribunal will be expected to consider making a reduction of any compensatory award under section 123(1) ERA where there is evidence that the employee might have been dismissed if the employer had acted fairly (see Polkey v AE Dayton Services 1988 ICR 142; King and ors v Eaton (No.2) 1998 IRLR 686).

111. The authorities were summarised by Elias J in Software 2000 Ltd v Andrews and ors [2007] ICR 825, EAT. The principles include:

in assessing compensation for unfair dismissal, the employment tribunal must assess the loss flowing from that dismissal, which will normally involve an assessment of how long the employee would have been employed but for the dismissal;

if the employer contends that the employee would or might have ceased to have been employed in any event had fair procedures been adopted, the tribunal must have regard to all relevant evidence, including any evidence from the employee (for example, to the effect that he or she intended to retire in the near future);

there will be circumstances where the nature of the evidence for this purpose is so unreliable that the tribunal may reasonably take the view that the exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on the evidence can properly be made. Whether that is the position is a matter of impression and judgement for the tribunal;

however, the tribunal must recognise that it should have regard to any material and reliable evidence that might assist it in fixing just and equitable compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence;

a finding that an employee would have continued in employment indefinitely on the same terms should only be made where the evidence to the contrary (i.e. that employment might have been terminated earlier) is so scant that it can effectively be ignored.

112. As Elias J said in Software 2000:

‘The question is not whether the tribunal can predict with confidence all that would have occurred; rather it is whether it can make any assessment with sufficient confidence about what is likely to have happened, using its common sense, experience and sense of justice. It may not be able to complete the jigsaw but may have sufficient pieces for some conclusions to be drawn as to how the picture would have developed. For example, there may be insufficient

evidence, or it may be too unreliable, to enable a tribunal to say with any precision whether an employee would, on the balance of probabilities, have been dismissed, and yet sufficient evidence for the tribunal to conclude that on any view there must have been some realistic chance that he would have been. Some assessment must be made of that risk when calculating the compensation even though it will be a difficult and to some extent speculative exercise.'

Submissions

113. We received written and oral submissions from the parties and considered these carefully in reaching our conclusions.

Conclusions

STATUS

Employment Status (pursuant to s. 230 Employment Rights Act 1996 – "ERA 1996") (First Respondent)

Issue 1. Was the Claimant engaged as an employee or worker pursuant to section 230 ERA 1996?

2. Was the Claimant so engaged by the First Respondent or by the Second Respondent only?

114. It was agreed between the parties that the claimant was employed by the second respondent. The only issue for the Tribunal was as to whether she was employed also by the first respondent.

115. We considered the principles in Clark. At the inception of the changed relationship in October 2014 (when the relationship with IV Capital ceased), there was no written contract. The arrangements were entirely consistent with the claimant being employed individually by each respondent to do the work she did for that respondent and for which she was separately paid by that respondent. As a matter of administrative convenience the second respondent issued payslips in his name but it seemed to us, looking at the whole factual matrix, that it was clear that the claimant had a separate employment relationship with each respondent.

116. We asked ourselves whether that situation changed when the written contract was produced in December 2015 and concluded it did not. The contract was drafted to reflect what was on the payslips but it was a 'sham' in the sense that it did not reflect the underlying agreement between the parties which is that the claimant had entirely separate obligations to each respondent to perform entirely separate work in return for payment obligations which resided solely with each respondent separately in relation to the work they required the claimant to do. The contract as drafted and signed reflected the

administratively convenient arrangement which had been made in relation to the claimant's payslips without affecting the underlying employment relationships.

CLAIMS

Whistleblowing – s47B and/or s103A ERA 1996 (Both Respondents)

Detriment and/or Automatic Unfair Dismissal

3. The Claimant relies on protected disclosures against the First Respondent:

(a) The email dated 29 September 2020 to the First Respondent wherein the Claimant raises health and safety concerns for her, her family and the public at large relating to Covid-19, and not wanting to breach government guidelines;

(b) The email dated 04 November 2020 to the First Respondent where the Claimant once again raises the same concern;

(c) The letter of resignation to the First Respondent dated 12 November 2020 where all the above issues are raised.

4. The Claimant relies on protected disclosures against the Second Respondent:

a) the letter of resignation dated 12 November 2020 that the Claimant sent to the First Respondent and copied to the Second Respondent where she raised health and safety concerns for her, her family and the public at large relating to

Covid-19, and not wanting to breach government guidelines.

Issue: Did the Claimant make disclosures of information, as alleged above, which in her reasonable belief, tended to show that:

(a) a criminal offence has been committed, was being committed or was likely to be committed to contrary to s.43B(1)(a). The Claimant considered any breach of the government's guidelines to be a criminal offence;

…

(c) the health or safety of any individual has been, was being or was likely to be endangered contrary to s.43B(1)(d). As stated, the Claimant considered that her health, safety and wellbeing as well as that of her family, and public at large was potentially being endangered. that they had failed, were failing, and was likely to continue to fail to comply with a legal obligation to which it was subject such as their duty of care towards staff, safeguarding employees' health and not acting irresponsibly by subjecting them to bullying and harassment in accordance with their obligations under the Health and Safety at Work Act 1974 and/or the Management of Health and Safety at Work Regulations 1999, and/or discriminating against them contrary to the Equality Act 2010 (s.43B(1)(b)).

117. The first and second disclosures clearly contained information but, whether the communications were viewed separately or together, it was not information which tended to show any of the relevant types of wrongdoing. The first communication is a proposal to carry on with an existing arrangement and the second communication is a request to comply with the law, not information which tends to show that there was an existing or prospective breach of the law, criminal offence or endangerment of health and safety.

118. The third disclosure contained information and an assertion that there would be a breach of the law at a time when it was well known that breaches of lockdown rules could give rise to criminal offences.

119. The first respondent argued that the claimant could have had no reasonable belief that a criminal offence would be committed if she attended work. The claimant had not conducted research into the matter and she did not make reference to a criminal offence in her emails.

120. The claimant told the Tribunal that she believed it would be a criminal offence for her to attend work during the lockdown. We considered that this was in accordance with general knowledge and advice available at this point during the pandemic – that it could be a criminal offence to leave home during lockdown if an individual did not have a legitimate reason for doing so.

121. Even with the guidance which the first respondent referred her to, we considered that the claimant could reasonably have believed, given the limited proportion of her work which required her physical presence, that the test of necessity was not satisfied. There is clearly a question of degree in cases where some work can be carried out remotely and some cannot, but it must be relevant to consider the proportion of work which cannot be carried out remotely and the importance of the work overall. In circumstances where it was some 15% of the work which could not be carried out remotely, where the lockdown was expected to be relatively short, where the work was opening post and performing filing for the first respondent and where at least some of that work could have been taken on by the Goldsteins themselves during that period insofar as they considered there was urgency, we concluded that the claimant reasonably believed that a criminal offence would be committed.

122. She also, we concluded had a reasonable belief that her health and safety and that of her partner would be at risk if she travelled to the Goldsteins' home during a lockdown which had been imposed due to the rise in cases. No vaccinations were available to the public at this point. Public transport was perceived by the claimant reasonably to present risks and she reasonably also received the Goldsteins to present a risk to her given that they did not always wear masks.

Issue: 6. Were these disclosures made in the public interest?

123. The question here is in fact whether the claimant reasonably believed the disclosures were made in the public interest.

124. We considered the Chesterton guidance. It is true to say that the number of people immediately affected (the claimant and her partner) was small, however the context was that the rules in question were designed to prevent exponential spread of a life-threatening virus. The number of people potentially affected by individual breaches of the rules was in fact very large. The nature of the interests engaged – the health and safety of the claimant, her partner and other members of the public - was of the highest importance. Although we did not conclude that the first respondent was deliberately endangering the claimant's safety, we concluded that he could not reasonably believe it was necessary for her to attend his home during the November 2020 lockdown and that he was prioritising his own convenience over her more significant concerns. So although the first respondent was not a large or high profile employer, we concluded that the claimant had a reasonable belief that her disclosures were in the public interest.

Issue: 7. Were the Claimant's disclosure made in accordance with s. 43C ERA?

125. We concluded that the first respondent was the claimant's employer and it follows that her disclosures were protected disclosures.

Issues 8. Was the Claimant subjected to the following detriments by the First Respondent as a result of the protected disclosures?

(a) Being pressured to attend the workplace and put herself, her family and others

at risk in September, October and November 2020 (relevant protected disclosure is Para 3(a) above);

126. We concluded that there was no protected disclosure at this stage so the claimant could not have been subjected to a detriment as a result of any such disclosure.

Issue: (b) Being critical of the Claimant's work by referring to the quality of work being "lower" than usual; that they were not getting the "level of support" expected and a veiled threat in the event that she did not comply, as set out in the email of 5 November 2020 (relevant protected disclosures are Para 3(a) and (b) above);

127. This claim fails for the same reason, that there had been no protected disclosure at that point.

Issue (c) The actions of the First Claimant resulted in the decision to dismiss on 12 November 2020 (resignation) which constitutes a detriment relevant protected disclosures are Para 3(a) and (b) above);

128. Since we found that the resignation email was the only protected disclosure, we did not have to consider this claim further.

Issue (d) Being accused of mischaracterising reality and making untrue statements by letter dated 12 November 2020 (relevant protected disclosures are Para 3(a), (b) and (c) above);

129. In this letter the first respondent was responding to the account the claimant had given of events which he disagreed with. The claimant's email had made a number of accusations against the first respondent and his wife which the first respondent understandably took issue with. The first respondent correctly understood that the claimant was seeking to pursue legal action against him. He told us he wanted to be on the record as not accepting her allegations.

130. We concluded that this could not properly be regarded as a detriment by the claimant. The reasonable employee would expect that her employer might disagree with allegations she was making. The tone of the response did not seem to us to go beyond what would reasonably be expected in such a defence so as to make it a detriment. Had the first respondent used more intemperate language than he did, it might have crossed the line.

131. We did not uphold this claim.

Issue: (e) Demanding that the Claimant also resigns from her post with the Second Respondent as set out in his email of 13 November 2020 (relevant protected disclosures are Para 3(a), (b) and (c) above) and/or encouraging, pressurising and inducing the Second Respondent to terminate the Claimant's employment;

132. The first respondent did tell the claimant she should resign from her post with the second respondent and we considered that he was at the very least encouraging the second respondent to terminate the claimant's employment. Both respondents believed at this point that the second respondent was the sole employer and , it appears from the first respondent's correspondence, wanted the claimant to resign in order to limit any liability they might have to her.

133. This was clearly something which the claimant reasonably considered put her at a disadvantage since she of course wished to retain her role with the second respondent at time when a new job was likely to be difficult to find.

134. There seemed to us to be ample facts to establish a prima facie case that the first respondent behaved in this way because of the protected disclosure. He told the Tribunal that he felt he had walked into a legal trap which had been set for him and had been set up. He made efforts as a result to reduce or

extinguish any liability, including any liability which might arise from the protected disclosure which the claimant had made.

135. The first respondent did not satisfy us that his behaviour was not materially influenced by the protected disclosure. In effect his evidence was in terms that he was seeking to extricate himself from the legal trap represented by the claimant's email of resignation.

136. We upheld this claim.

Issue: (f) Being accused of unprofessional conduct; malingering with respect to her sickness absence and threatened with causing potential damage and loss to the business in his email of 19 November 2020 (relevant protected disclosures are Para 3(a), (b) and (c) above);

137. We considered that a reasonable employee would consider herself at a disadvantage in what appeared to be an insinuation that she had produced a fake medical certificate (essentially an allegation of malingering) and in respect of the tone of this email. The claimant had not simply walked off the job as alleged; she was unwell, and to accuse her of unprofessional behaviour was unfair. It would have been perfectly appropriate for the first respondent to politely and even firmly ask the claimant to engage in a handover once she was well but this email went significantly beyond such a reasonable request. The reference to reserving his position on matters going forward was vague and intimidating and we considered intended to be so. We concluded that there was a detriment.

138. We considered that what was going on in this email was much the same as what was going on in respect of the previous detriment. The first respondent was angry about the 'trap' he felt the claimant was getting and was looking to scare her off from bringing any claims, including claims connected with her protected disclosure, which we concluded played a material role in the first respondent's decision to send an email in these terms.

139. We upheld this claim.

Issue (h) Failing to pay her wages, notice pay and holiday pay (relevant protected disclosures are Para 3(a), (b) and (c) above);

140. These sums were not paid to the claimant when they were owed, as the first respondent accepted. That was clearly a detriment.

141. The first respondent's explanation for not paying the sums owed at the time was that he felt the claimant had wronged him by walking off and been hostile to him. He believed she was not due her notice pay. He did not initially understand the legal position. Later he said that he tried to settle her claims and felt he did not get a reasonable response. He was asked why he did not pay for the claimant's notice period, given that she had resigned with notice

(albeit being unwell during that period) and he said that he was not a lawyer but felt, as a businessman, that she was not entitled to the money. Ultimately he paid the sums shortly before the hearing he said because it was suggested that he should reduce the list of issues to be decided.

142. It was clear to the Tribunal that the sums were not paid, as the first respondent said, because he felt the claimant had wronged him by resigning and it was clear that he felt the things she had said in her resignation email were 'hostile' to him. That of course included, significantly, the protected disclosure. We were satisfied that the protected disclosure played a material role in the first respondent's decision not to pay these outstanding sums to the claimant until shortly before the full merits hearing.

143. We upheld this claim.

Issue: 9. Was the Claimant subjected to the following detriments by the Second Respondent as a result of the protected disclosure at Para 3(a) above?

(b) Failing to pay her wages, notice pay and holiday pay;

144. We note that the second respondent had not paid the claimant's wages for some time before the protected disclosure. The disclosure was not a disclosure relating to anything the second respondent had done and we saw no evidence at all that suggested he resented the disclosure. The second respondent throughout was saying he did not have cash to pay the claimant and we concluded that this was the reason throughout for not paying the sums owed to the claimant. He either genuinely had difficulties with cash flow or preferred to spend his money on other things.

145. We did not uphold this claim.

Issue: 11. In determining whether the Claimant was automatically unfairly dismissed by the First and Second Respondents contrary to s103A, was the reason or principal reason for her dismissal that she had made the alleged protected disclosure(s)? Health & Safety - s.44 and/or s.100 ERA 1996 (Both Respondents)

146. The protected disclosure we found occurred occurred in the course of the claimant's resignation email and none of the detriments we found predated the resignation. It therefore follows as a matter of chronology and causation that the reason or principal reason for the claimant's constructive dismissal by the first respondent cannot have been the protected disclosure.

147. We did not uphold this claim.

148. We return to the issue of whether the claimant was automatically dismissed by the second respondent below.

<u>Detriment and/or Automatic Unfair Dismissal</u>

Issue: Did the Claimant bring to the Respondents' attention, by reasonable means, circumstances connected with her work which she reasonably believed were harmful or potentially harmful to health or safety (s.44(c) and/or s.100(c) ERA 1996)?

149. We considered the emails of 29 September and 4 November 2020. The claimant was in essence saying that if she travelled to work the two households would be exposed to one another's germs and any that the claimant picked up travelling by public transport.

150. Being at the first respondent's home was clearly a circumstance connected with the claimant's work.

151. The first respondent argued that the danger was not connected with the claimant's work and that she had general concerns about covid which were restricting her movements. Insofar as the risk related to travel to work, an employer could not be held liable for dangers presented by travel to the workplace.

152. We considered that this was a misunderstanding of the statutory protection. The section is not concerned with ascribing liability to an employer for the outcome of dangerous conditions; it is simply protecting from repercussions the employee who raises concerns about dangers. In those circumstances, we could see no reason why, reading the statute purposively, it would not cover circumstances of danger connected with travelling to work. Some examples might be a female nightclub worker who raises a concern about having to travel home in the small hours of the morning or an employee who points out a dangerous paving stone outside the employer's premises. An employee who reasonably raises concerns about dangers connected with work in this broader sense is entitled to protection from detriment or dismissal.

153. Given the state of the pandemic in November 2020 and the lack of a vaccine generally available to the public, we concluded that the claimant reasonably believed that the circumstances were harmful or potentially harmful to health and safety.

154. The claimant sent two perfectly polite emails. We had no doubt that she used reasonable means to bring the matter to the first respondent's attention.

Issue: 13. Did the Claimant ever refuse to return to her place of work? If so, was the Claimant's refusal to return to her place of work undertaken in circumstances of danger which she reasonably believed to be serious and imminent and which she could not reasonably have been expected to avert, in accordance with s44(1A)(a) / s100(1)(d)?

155. In her email of 4 November 2020, the claimant did refuse to return her place of work after 5 November 2020.

156. Were there circumstances of danger which the claimant reasonably believed to be serious and imminent? The facts of the pandemic at that time undoubtedly presented circumstances of danger.

157. The first respondent suggested that the circumstances were similar to those in Rodgers and the claimant could not have had a reasonable belief that the circumstances of danger connected with attendance at her workplace were serious and imminent. We did not agree with that analysis. Unlike the claimant in Rodgers, the claimant had concerns that related to the specific circumstances of her employment: the risks presented by travelling to the premises in public transport and the risks presented by the lack of social distancing and mask wearing by the Goldsteins in particular. The danger was one she could reasonably believe to be serious in circumstances where a lockdown was commencing and the government was requiring people to stay at home to avoid exposure to the virus where possible. There were no vaccines available to the general public and case numbers were rising rapidly. The danger was imminent because the claimant was being required to attend work during the lockdown. She could not avert the dangers herself, although there were some steps she could take to mitigate the risks such as wearing a mask on public transport.

158. We accept that some people would not have regarded the circumstances as ones of serious and imminent danger. Responses to the pandemic varied greatly depending on people's individual circumstances and personalities and vulnerabilities. There is a range of reasonable responses to the perception of danger in these circumstances. Given the circumstances at the time and the information available to her, we consider that the claimant had an entirely reasonable belief that the danger was a serious and imminent one.

Issue: 14. If the Claimant did refuse to return to her place of work, was her refusal to return to her place of work an appropriate step undertaken in circumstances of danger which she reasonably believed to be serious and imminent to protect herself, her family and the public from the danger in accordance with s44(1A)(b) / s100(1)(e)?

159. We considered that the step was a reasonable one. The claimant was weighing up a danger she reasonably believed was serious against a requirement by the first respondent to attend work at his home to carry out tasks which were not of critical importance in terms of timing and which represented a relatively small part of her overall duties.

Issue: 15. Did the Claimant suffer detriments as result of carrying out the above activities – the detriments relied on are the same as those for the whistleblowing

claims set out at Para 5 (a) – (i) above for the First Respondent, and Para 6 (a) (c) above for the Second Respondent?

(a) Being pressured to attend the workplace and put herself, her family and others at risk in September, October and November 2020

160. As a matter of causation, it was clear to us that the first respondent pressured the claimant to come into work because he wanted her to carry out work in his home for his convenience, not because she raised health and safety concerns. This complaint is logically backwards. The claimant raised health and safety concerns and ultimately refused to attend work because the first respondent was requiring her to attend work.

161. We did not uphold this claim.

Issue: (b) Being critical of the Claimant's work by referring to the quality of work being "lower" than usual; that they were not getting the "level of support" expected and a veiled threat in the event that she did not comply, as set out in the email of 5 November 2020 (relevant protected disclosures are Para 3(a) and (b) above);

162. We concluded that the reason the first respondent complained about the quality of the claimant's work was because she was refusing to come into work. He had not previously raised any issue with her. The whole tone and import of this email was that the first respondent was dissatisfied with the claimant saying she would not continue to attend work during the lockdown. There was a 'threat' in the sense that there was a suggestion that the first respondent had not been obliged to continue to pay the claimant at her existing rate with the implication that that situation might not continue if the claimant did not attend work. The whole intention of the email was to persuade the claimant to change her decision not to attend work.

163. We concluded that there was a detriment because a reasonable employee would feel that she had been subjected to a disadvantage in having performance concerns raised in this way. It was not the claimant's fault that she had been unable to provide certain kinds of support during parts of the pandemic and so it was unfair to use that fact and a veiled threat to reduce her pay to pressure her into attending work during a lockdown.

164. We upheld this claim.

Issue (c) The actions of the First Respondent resulted in the decision to dismiss on 12 November 2020 (resignation) which constitutes a detriment relevant protected disclosures are Para 3(a) and (b) above);

165. Our decision that the first respondent was the claimant's employer means that this issue is not appropriately considered as a detriment complaint.

Issue: (d) Being accused of mischaracterising reality and making untrue statements by letter dated 12 November 2020 (relevant protected disclosures are Para 3(a), (b) and (c) above);

166. We found when considering this issue in the connect of the public interest disclosure claims that this was not a detriment and we do not uphold this claim.

Issue: (e) Demanding that the Claimant also resigns from her post with the Second Respondent as set out in his email of 13 November 2020 (relevant protected disclosures are Para 3(a), (b) and (c) above) and/or encouraging, pressurising and inducing the Second Respondent to terminate the Claimant's employment;

167. As we discussed in relation to this issue in the context of the public interest disclosure claims, the first respondent felt wronged by what the claimant had done and concerned he was being set up for a legal claim. We concluded that a material part of the course of events that led to that feeling on the first respondent's part (and to the actions he took as a result) was the claimant raising health and safety concerns and refusing to attend work during the lockdown period.

168. We upheld this claim.

Issue: (f) Being accused of unprofessional conduct; malingering with respect to her sickness absence and threatened with causing potential damage and loss to the business in his email of 19 November 2020 (relevant protected disclosures are Para 3(a), (b) and (c) above);

169. For similar reasons we upheld this claim. This was part of the first respondent's response to feeling wronged and set up by the claimant due to the sequence of events starting with her raising concerns about attending his premises.

Issue: (h) Failing to pay her wages, notice pay and holiday pay (relevant protected disclosures are Para 3(a), (b) and (c) above);

170. Again, for similar reasons we upheld this claim. This was part of his response to feeling wronged and set up by the claimant due to the sequence of events starting with her raising concerns about attending his premises.

Constructive Unfair Dismissal – ss 95 - 96 Employment Rights Act 1996) - (First Respondent only)

Issue: 17. Did the First Respondent act without reasonable and proper cause, act in a manner calculated or likely to destroy or seriously damage the mutual trust and confidence between employer and employee, in the following respects :

(a) Being pressured to attend the workplace during a lockdown, if this period was a time of national lockdown, and/or to break the law;

(b) Being forced to attend work despite it not being essential for her to do so;

(c) Requiring her to put herself and family at risk by travelling to / from work;

(d) Being dismissive of her concerns and being treated with hostility;

(e) Feeling disrespected despite dedicated service of more than 11 years;

(f) The dismissive email of 05 November 2020.

18. Did the First Respondent's conduct, as determined by the Tribunal, amount to fundamental and repudiatory breach of the implied contractual term of trust and confidence?

171. We considered whether the first respondent's actions were calculated or likely to destroy the relationship of trust and confidence. We did not consider that his actions were calculated to have that effect. His interpretation of the government guidance was, we concluded, wrong. It was not in any real sense 'necessary' for the claimant to come into work during the lockdown because the majority of her work could be done remotely, the lockdown was only anticipated to be for a limited period and there was no evidence that the work was time critical. Travelling on the underground at this time clearly exposed the claimant and her family to a heightened risk; such travel was being discouraged by the government unless necessary.

172. Was the conduct likely to destroy trust and confidence? We considered that it was. The claimant was being pressed to attend work during an ongoing public health emergency because it would be more convenient to the first respondent for her to do so. Of course it is the part of the role of a personal assistant to relieve his or her employer of administrative tasks but to insist the claimant attended work when the first respondent was aware of her (reasonable) concerns to avoid what seemed to us to be only moderate inconvenience was likely to make the claimant feel that she was not valued. The message was that the first respondent valued her health and safety less than his own convenience. The first respondent had been made aware of her concerns about public transport but had taken no action to assist her, for example by offering to fund a taxi.

173. The first respondent's letter of 5 November 2020 suggested that there was some flexibility but did not relax the requirement she attend work despite the changed circumstances of the lockdown. Overall there was a lack of empathy and flexibility on the first respondent's part. He unreasonably raised the concern about the quality of support and suggested that the claimant's pay would not be protected unless she continued to attend his premises. Her concerns were dismissed. The claimant rightly considered that this was a disrespectful way to treat an employee who had given good service for over a decade.

174. Did the first respondent have reasonable and proper cause for what he did? We concluded that he did not. His interpretation of the guidance was wrong in our view and was unreasonably wrong, distorted by his desire that the claimant should attend work and save him from some inconvenience. It was not reasonable to insist the claimant attend work during the November 2020 lockdown.

Issue: 19. If so, did the Claimant resign in response to the alleged fundamental and repudiatory breach/es of contract?

175. It was not suggested that there was some alternative reason for the claimant's resignation and it was clear from the evidence that she resigned because of the course of conduct by the first respondent, in particular the insistence that she attend his premises during the lockdown.

Issue: 20. If so, did the Claimant delay too long before resigning such that he had waived any such breach?

176. There was no appreciable delay; the claimant resigned within days and there was no waiver of the breach.

Issue: 21. If the Claimant was constructively dismissed, was such dismissal unfair?

177. No potentially fair reason for the dismissal was put forward by the first respondent and we could see none on the evidence.

Issue: 16. Was the Claimant automatically unfairly dismissed by the First and Second Respondents as a result of the above activities (s.100 ERA 1996)?

178. Was the reason or principal reason for the repudiatory breach of contract by the first respondent the fact that the claimant had brought to his attention the health and safety concerns and/or the fact that the claimant refused to return to work? We concluded that it was the latter. It was the claimant's email saying that she would not continue to attend work during the lockdown which provoked the first respondent to send his email wrongly insisting that she should attend in terms which we found breached the implied term of trust and confidence.

179. In those circumstances we upheld the claimant's complaint of both ordinary unfair dismissal against the first respondent and her complaint of automatically unfair dismissal under section 100 ERA 1996.

180. We return to the issue of whether the second respondent automatically unfairly dismissed the claim from her separate employment with him below.

Unfair Dismissal – s94 Employment Right Act 1996 – (Second Respondent only)

Issue: 32. Was the Claimant's employment terminated by the Second Respondent?

181. Given our finding that the claimant was separately employed by each respondent, her resignation from the first respondent's employment did not terminate her employment with the second respondent and in fact the second respondent continued to treat the claimant as an employee. Although the second respondent applied for the claimant's P45 in March 2021, he took no steps to inform the claimant that he was dismissing her and her dismissal was therefore effective from the date she became aware of it, ie not earlier than 11 May 2021 when she was informed by HMRC of the P45.

Issue: 33. If so, what was the reason for the dismissal and which date did the dismissal take effect?

182. No potentially fair reason was put forward for the claimant's dismissal. The second respondent simply maintained that the claimant had resigned. His erroneous and unreasonable belief that the claimant had resigned, even if genuine, would not be a fair reason for dismissal. We considered that the second respondent may not have had a need for a PA by this point and his financial affairs probably made it undesirable for him to keep paying a PA he did not really need but we were unable to find that the dismissal was by reason of redundancy. The second respondent was adamant that the claimant had resigned and we accepted that he was genuinely confused as to what the proper analysis of the situation was.

183. It follows that the dismissal by the second respondent was unfair, there being no potentially fair reason for it, It was not however automatically unfair as the second respondent's reason or principal reason was neither the claimant's protected disclosure nor any of the actions taken by the claimant in relation to health and safety.

Issue: 34. Did the Second Respondent consider and/or offer suitable alternative employment for the Claimant?

184. We heard no evidence on this point given the second respondent's position that the claimant had resigned.

Issue 35. Was the Claimant's dismissal procedurally unfair?

185. The second respondent followed no procedure at all and the claimant's dismissal was therefore procedurally as well as substantively unfair.

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186. So far as the first respondent was concerned, we carefully considered his evidence that he was now carrying out the claimant's work himself. The submission was made on his behalf that he would have dispensed with the claimant's services by early 2021.

187. We noted however that the claimant had been employed for some 11 years to carry out the first respondent's personal admin. He is a wealthy individual who understandably preferred to delegate a lot of this work. He clearly valued the convenience and appears to have had no criticism of the claimant's performance. His insistence that the claimant attended his premises seemed to us to demonstrate how little he wished to carry out tasks such as opening the post.

188. Had the claimant continued to attend and not resigned, the first respondent would have had no reason to investigate whether he could perform some tasks himself using online translation tools or perform some transactions in relation to his French property digitally. It seemed to us that there was a great difference between not replacing the claimant after she left and actively dismissing her had she not resigned. In the former case, we could well see how the first respondent might have hesitated to employ someone new and unknown during an ongoing pandemic and decided instead to investigate whether he could undertake the claimant's tasks himself. In the latter case, we could see no reason why the first respondent would not have continued to enjoy the claimant's services, which relieved him of a substantial admin burden.

189. We concluded that the claimant would not have been dismissed by the first respondent during the period for which she has claimed compensation ie up to April 2023.

190. So far as the second respondent is concerned, we did not hear evidence specifically directed to this issue and we concluded it would be appropriate to hear further evidence and submissions at the remedy hearing.

Employment Judge
Joffe
London Central Region
12/11/2022

Sent to the parties on:
14/11/2022

For the Tribunals Office