EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Mr Robert Armstrong **v** **UPW Industrial Applications Ltd**

Heard at: Watford (by CVP) **On**: 30 June & 1 July & 15 August 2022 with written submissions submitted by 12 September 2022

Before: Employment Judge Alliott (sitting alone)

Appearances

For the Claimant: In person
For the Respondent: Ms E Afriyie (solicitor)

JUDGMENT

The Judgment of the Tribunal is that:

1. The claimant's claim for wrongful dismissal is well founded.

2. The claimant's claims for automatically unfair dismissal, arrears of pay, unpaid expenses, notice pay and holiday pay are dismissed.

REASONS

Introduction

1. The claimant was employed by the respondent on 1 April 2019. By 2020 he was Engineering Manager responsible for one other employee, namely Mr Russell Pietersen. On 2 June 2020 the claimant was summarily dismissed for gross misconduct. By a claim presented on 13 August 2020, following a period of early conciliation from 17 June to 17 July 2020, the claimant brings a complaint of automatically unfair dismissal, s.100 ERA 1996 (Health & Safety Cases) and claims for breach of contract (notice pay), holiday pay and arrears of pay.

The issues

2. S.100 (Health & Safety Cases)

   2.1 Was the claimant an employee at a place where:-

      (i) There was no health & safety representative; or
      (ii) There was such a representative but it was not realistically practicable to raise matters by those means.

   2.2 Did the claimant bring to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health and safety.

   2.3 What was the reason, or if more than one, the principal reason for dismissal? Was it because the claimant had brought to his employer's attention circumstances as set out in paragraph 2.2 above?

   2.4 Did the claimant's conduct entitle the respondent summarily to terminate his contract of employment?

   2.5 Is the claimant owed wages/expenses/accrued holiday entitlement not taken at the time of dismissal?

   2.6 In his closing submissions the claimant has sought to advance for the first time a case of automatically unfair dismissal for making a protected disclosure (s.103A ERA). This has never been part of the claimant's case and the respondent has had no opportunity to meet it. Consequently, in my judgment, such a claim is not before me.

The law

3. I have the wording of section 100(1)c (ii) of the ERA 1996 which are not recited here.

4. Mr Afriyie has cited the case of Oudahar v Esporta Group Ltd (2011) to me in support of the proposition that to apply s100 properly, the Tribunal must consider the following two points:
   - First, the tribunal must consider whether there were circumstances of danger which the employee reasonably believed to be serious and imminent, whether he took or proposed to take appropriate steps to protect himself and whether he took or proposed to take appropriate steps to communicate those circumstances to his employer by appropriate means.
   - Second, if these criteria were made out, the tribunal should ask whether the employee's sole or principal reason for dismissal was that the employee took or proposed to take such steps.

5. Mr Afriyie also cited to me the case of Accattatis v Fortuna Group (London) Ltd [2021] and I have noted his submissions to the effect that an employee expressing unspecific anxieties about their working environment or travel arrangements is not sufficient.

The evidence

6. I had a bundle running to 162 pages.

7. I had written statements and heard evidence from the following:

   7.1 The claimant.
   7.2 Mr Russell Pietersen (a colleague)
   7.3 Mr Roger Wiltshire (the respondent's managing director)
   7.4 Ms Kerina Slater (the respondent's customer services manager)
   7.5 Mr Mark Hancock (the respondent's production engineer)

The facts

8. The claimant has less than two years' continuous employment. Consequently, he cannot bring a claim of "ordinary" unfair dismissal.

9. The claimant's claim has developed as follows:

10. In his claim form, s.8.1, he has ticked the unfair dismissal box and added:

> "Dismissed for gross misconduct whilst on furlough for agreeing to look after my son full time whilst his mother was at work.
>
> Accused of refusing to go back to work when all I had requested was childcare contingency."

11. In s.15 of his claim form he adds, referencing Mr Wiltshire,

> "Uses sub-standard equipment ignores health and safety completely."

    In this section he also makes allegations about Mr Wiltshire to the effect that he is "defrauding the furlough scheme", "makes people work illegal hours" and "underpays all of his staff". He concludes: "Nice man he is not".

    It is noticeable that the allegation concerning ignoring health and safety is made in the context of attacking Mr Wiltshire as an employer and not in connection with his dismissal.

12. Attached to the claim form is a document titled: "Brief outline of my case".

    This sets out the claimant's childcare responsibilities and complains generally about the provision of PPE and the operation of the furlough scheme. In relation to events shortly before his dismissal he states as follows:

"Friday 29 May

Called by general manager who again asks me to work no mention of ending furlough.

I decline due childcare reasons I say his mum is free from 19 July but has returned to work full time as her school is opening soon. I offer to come back to work on that date or sooner if his school placement becomes available agree to return the company vehicle in case they need it for another engineer.

I return the vehicle late Sunday evening to avoid crowds on trains

Put keys on desk lock office and go home from Woking to north London on the train.

I'm upset as they will not listen to my needs or compromise on working hours or attendance.

The boss calls me at 22.22 pm

I ignore his call as I know I will unleash hell on him for being a selfish greedy unfair boss.

Monday June 1st

Again, asked to return to work despite having returned the van to head office as requested.

Expected to travel into central London on public transport with No PPE issued no tools or equipment to carry out the task at hand.

For health and safety reasons I refuse as well as my child care commitments that are ongoing."

13. Further he states:

"I believe my dismissal was contrived due to the fact I was raising questions about health and safety in the past and going forward for protection against Covid19 virus."

14. He then asserts at least four reasons for his dismissal being:

Raising questions about health and safety
Not agreeing that money and the company come before his family
Supporting a co-worker
Not agreeing to be complicit in working whilst on furlough.

15. At the preliminary hearing heard on 18 February 2021 Employment Judge Cassel recorded the issue as follows:-

"His claim for unfair dismissal is based on the provisions of s.100(c)(ii) of the Employment Rights Act 1996 in that he brought to his employer's attention by reasonable means circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health and safety. He will give evidence that on or around 16 March 2020 he spoke to Mr Wiltshire and Ms Natalie Jacobs of the respondent and complained that he had symptoms of Covid19 as did the operator who

> reported to him, Mr Russell Pietersen, while working for the respondent. He asked to cease work but was told by Mr Wiltshire to carry on, which he did, following which he was placed on furlough. He felt unwell but was told to return to work and in mid-May 2020 he complained to Mr Wiltshire that in order to return to his place of work he needed a safe system in place with appropriate personal protection equipment (PPE) but was told that he had to use the respondent's PPE which he complained was insufficient to protect him from further risk to his health and safety and that of Mr Pietersen. He believes as a result of raising these concerns he was subsequently dismissed. He will provide full particulars of the allegations and I made an order accordingly."

16. Employment Judge Cassel went on to order further information as follows:-

> "The claimant is to provide to the respondent, and copy to the Tribunal, by 5 March 2021 the following details:
>
> > In respect of the claim of unfair dismissal for health and safety reasons, what information or what circumstances connected with his work were brought to the attention of the respondent providing full details of what was said, when it was said, by whom it was said and the identity of any witnesses present."

17. Notwithstanding this order, no such further information document has been placed before me during this hearing.

18. On 16 March 2020 the claimant was working, along with Mr Pietersen, at the Bank of Canada in Bishopsgate. There were approximately 100 workers from other companies on site. The claimant states that he did not observe any of the workers wearing masks. The claimant refers to having rubber gloves and hand sanitiser but refers to the gloves being defective.

19. The claimant's witness statement is compiled largely by reference to text messages he has produced. On 19 March 2020 he reported to Mr Wiltshire that he and Mr Pietersen thought that they may have contracted Covid. He texted:-

> "In reality we should be self-isolating as should all the staff on this site."

20. Mr Wiltshire replied asking for confirmation of number of units commissioned which elicited the response from the claimant:

> "No mention of our health concerns then!"

21. I take judicial notice of the fact that when the Prime Minister announced the National lockdown on 23 March 2020 reference was made to a clear and imminent threat to public safety. Consequently, I find that on 19 March the claimant did, by reasonable means, bring to his employers' attention circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health and safety, namely that he and his colleague, Mr Pietersen, might have symptoms of Covid and consequently should be self-isolating.

22. On 20 March 2020 the claimant was called away to another job. In his witness statement he refers to Mr Pietersen reporting to Mr Wiltshire that

there was still no infection control or PPE being worn by employees at the Bank of Canada site.

23. The claimant has produced a group (work colleagues) WhatsApp chat from 22 March 2020 which prompted the claimant to post a chat on 23 March 2020 asking people to be serious and stating:-

> "Some of us have friends and family currently dying from this disease it's no joking matter. Where work is concerned we must think very carefully about self-imposed isolation."

24. In any event, also on 23 March 2020, the National lockdown was announced by the Prime Minister. All employees of the respondent were informed by Mr Wiltshire that the company would be engaging in the Government furlough scheme with immediate effect. The claimant was informed by the respondent to go home and wait. His evidence is that he was told verbally that all visits to sites and locations were suspended.

25. On 20 April 2020 the claimant sent a WhatsApp message to Mr Wiltshire suggesting a proprietary spray for sanitising equipment. In my judgment this was just a helpful suggestion and in no way constituted the claimant bringing to his employer's attention circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health and safety.

26. The claimant's van was fitted with a tracker that enabled Mr Wiltshire to see where it was geographically located. There are some WhatsApp text exchanges between the claimant and Mr Wiltshire as to why he was in Suffolk and not at home observing the lockdown. There is a suggestion the claimant may have turned off his tracker at some point, the suggestion being that he wanted to prevent his whereabouts being known. There is a discussion as to whether or not he is using his van for private use as intended.

27. On 23 April 2020 the claimant was informed by Mr Wiltshire that he may be asked to commission a job in North London. His response was as follows:

> "I am in Suffolk. I am staying here til I'm done what I'm doing which is a few days from now. Of course, if you'd like me to go there then return here I could do that."

28. There is no mention of the claimant being concerned about inadequate PPE. It is clear that he is in Suffolk due to childcare commitments and when he offered to do a return trip he was told 'no it would be a waste of money'.

29. On 4 May 2020 Mr Wiltshire asked the claimant if he would do a half-day job in Tunbridge Wells. The claimant texted as follows:-

> "To avoid furlough confusion I could go in my own van to do the job for you and nobody would know different? Of course I wouldn't be working for you. I would do it for the client who would pay you or some ways around it."

30. Mr Wiltshire replied:

> "Of course that's what I was thinking"

and ended with a "smiley face".

31. In my judgment this exchange represents the claimant suggesting a way that he could work whilst remaining on furlough and Mr Wiltshire agreeing. Far from the claimant being reluctant to work round the furlough rules, in my judgment he is making an active suggestion as to how it could be accomplished best. There is no complaint that he could not return to work due to inadequate PPE.

32. On 10 May 2020 Mr Wiltshire sent a message to all the workforce referencing the Prime Minister encouraging manufacturing and construction back to work. However, he refers to the respondent not having the same level of business to come back to, that the respondent would not be asking anyone to start tomorrow and that the return to work would be as and when.

33. On 19 May 2020 Mr Wiltshire sent a message to all the workforce emphasising that staff should be contactable whilst on furlough. The claimant responded that the internet signal was very bad where he was. Also, on 19 May 2020 the claimant informed Natalie Jacobs as follows:-

> "I'm currently looking after my son full time as his mother is not coping well.
>
> We have had a police investigation to deal with and I have been sorting out solicitors etc.
>
> We are living in a caravan in Suffolk.
>
> The company van is parked in Hatfield at my friend's house off the road.
>
> If you need me to come back I will need notice as I have agreed to take care of Jack whilst this goes on."

Again, the reason being advanced for not returning is childcare commitments and not a lack of adequate PPE or an unsafe working environment.

34. On 26 May 2020 Natalie Jacobs messaged the claimant and Russell Pietersen saying the respondent needed one of them to go back to the Royal Bank of Canada for one day that week to fit two further systems and check another system. The claimant responded:

> "I have my son til Friday."

35. Consequently, Natalie Jacobs asked if Mr Pietersen could do it and the claimant talked to him. He offered to get his van to Mr Pietersen and was told that the van was needed back at the office.

36. Later on 26 May Mr Wiltshire sent a message to the team which included the following:-

> "I need to make sure you are all aware that when the company needs you back it is not a discussion. You are all still employed and are required to turn up at work the day we request. If you decide not to come back then we respect that decision but all payment stops the day you make that choice should you make it. We are duty bound to pay the days you work in full but not for days you are on furlough. …
>
> Anyone not able to come into work for any reason will be on unpaid leave with immediate effect."

37. The claimant responded as follows:-

> "It's not a privilege Roger
>
> It's a Government subsidy
>
> We are either on furlough or we are not.
>
> Which is it?"

38. The claimant then sent an image of Government guidance and continued:

> "Check employment law before threatening to not pay us
>
> Livid
>
> Not even the decency of a phone call."

39. Ms Kerina Slater refers to other members of staff reporting the claimant as aggressive and rude. This WhatsApp chat certainly indicates that the claimant could be forceful. Indeed, his WhatsApp identification is "Bob (Scary)"

40. On 29 May 2020 the claimant was called by his General Manager and asked to work. The claimant declined due to childcare reasons and his account is set out above in paragraph 10.

41. The claimant returned the van on Sunday 31 May 2020 and, as already quoted, refers to ignoring a call from his boss at 22:22 pm.

42. On 1 June 2020 the claimant was texted by Mr Wiltshire at 18:50 hours and told he was needed on site on Tuesday next (ie on 9 June 2020).

The claimant replied:-

> "I am unable to work until the schools take my son back. His mother is a teacher keyworker. Her parents are dead. My mother is 87 has dementia. I have explained all of this in an email to yourself and Natalie. Government guidelines allow for me to educate and look after my son as his parent during furlough. I am sorry I cannot be of

any assistance. My electrical qualifications also need to be updated but that's another story."

43. In his witness statement the claimant references this exchange and states:-

"I informed Mr Wiltshire that I was not comfortable undertaking the job giving the health and safety concerns, as well as the fact that I was still caring for my son."

44. By contrast Mr Wiltshire states:-

"Mr Armstrong never gave any other reason for his inability to return to work other than his childcare commitments."

45. I do not accept the claimant's evidence that he raised health and safety concerns when refusing to return to work on 1 June 2020. I prefer the evidence of Mr Wiltshire on this issue. I find that the claimant is a confident individual who is not reticent in expressing his views in clear and strong language. I find that if health and safety concerns were genuinely a reason for him not returning to work then he would have included this in his text message response to Mr Wiltshire. I find that the claimant's refusal to return to work was due to the fact that he had childcare commitments during the holidays. I place greater reliance on what was said at the time rather than what has been advanced in support of a tribunal claim in circumstances where the claimant cannot complain of unfair dismissal.

46. In his witness statement Mr Wiltshire says as follows:-

"Following the refusal to come to work on 1 June 2020, the decision was made that we could not continue with Bob being off indefinitely. We needed someone to undertake the work, and we needed him to be available at least some of the time. Mr Armstrong was dismissed for his refusal to work."

47. On 2 June 2020 the claimant states that he was informed by a text from Mr Wiltshire that he had been sent a letter terminating his employment. The copy of the letter of dismissal dated 2 June 2020 in the bundle refers to the claimant's employment being terminated with immediate effect on the grounds of gross misconduct. It states:-

"The reason for the company taking this decision results from your refusal to come off furlough without an acceptable reason and return to work as is now required by the company. There is sufficient work for you to do to enable your return to work and I am disappointed that you have refused to comply with this reasonable instruction which would enable the company to start its return to normality as the current work restrictions ease."

48. The letter goes on to state:-

"Your leaving details are as follows:

1. Your last day of service with the company will be today, 26 May 2020.
…"

49. I was told that the email version of this dismissal letter sent to the claimant had changed the date to 26 May 2020 to 2 June 2020.

50. In my judgment, the fact that there was clearly an earlier draft of a dismissal letter referencing 26 May 2020 is significant. It suggests that the letter was drafted on 26 May 2020 and that the dismissal of the claimant was being seriously contemplated following something that had happened on or before that day. The early exchange on 26 May 2020 about the claimant not returning to work appears innocuous – Mr Russell Pietersen is suggested as being able to do the job. However, the claimant's response to Mr Wiltshire later was in quite strong terms and could be taken as offensive 'back chat' to his boss.

51. On 2 June 2020 the claimant emailed Mr Sean Molyneaux, HR manager, saying:-

> "Apparently my employment has been terminated as I am unable to work due to the fact I am caring for my son.
>
> His mother is a school teacher and back at school.
>
> He has specific requirements from his school which cannot be met at this time due to Covid19.
>
> Government advice is if a parent can do childcare they should do to prevent pressure on services.
>
> I have not done anything except follow Government advice and I am being told my employment is being terminated.
>
> Can you please explain the company's position as I am completely unable to understand how this can be correct?"

Again, it is noticeable that the claimant does not complain that he has been dismissed for declining to return to work for Health and Safety reasons.

52. On 3 June 2020 the claimant chased a response and Mr Molyneaux replied on 3 June 2020 as follows:-

> "I have spoken to Roger about the situation. He has advised me of a WhatsApp message sent to you confirming a willingness to support you where the company can. However, your refusal to come off furlough and undertake some work has not been helpful to the company which is trying to restart its operations whilst observing the restrictions and recommendations put in place by the Government. Roger is willing to have a further conversation with you to try and resolve the issues both you and the company have. I would recommend that you call him again to discuss and see if you can reach an amicable solution."

53. The claimant appealed. I have no appeal document or grounds of appeal.

54. The appeal meeting was held on 19 June 2020. It was attended by Mr Wiltshire and Natalie Jacobs. The claimant did not attend.

55. The appeal was adjourned to 28 June 2020 due to the discovery of a glasses case which allegedly had a "crack pipe" in it in the glove compartment of the van that the claimant had returned on 31 May 2020. This was relied upon as a further justification of the summary dismissal of the claimant.

56. Notwithstanding that the claimant was summarily dismissed, he was paid for the whole of June. The claimant has not produced a schedule of loss. I do not have his contract of employment showing his notice period. He was clearly paid in excess of his statutory notice period. The claimant gave no evidence either in his witness statement or orally about notice pay, arrears of pay, outstanding expenses or accrued holiday entitlement not paid and makes no reference to these claims in his closing submissions. He has not proved any of these claims. Even if I conclude that his conduct was not sufficiently serious to warrant summary dismissal and that his dismissal was therefore wrongful, he has no claim for notice pay as he has been paid.

Conclusions

57. The respondent is a small company and did not have a health and safety representative.

58. In March 2020 the claimant did bring to his employers' attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health and safety, namely that he might have Covid and should be self-isolating.

59. I find that on a number of occasions prior to his dismissal it had been suggested to the claimant that he might like to come back to work but that on each occasion he had declined on the basis that he was caring for his son.

60. I find that, whilst Mr Wiltshire was prepared to accommodate the claimant's needs to an extent, this was frustrating to him as he was endeavouring to get his business back to operating normally.

61. I find that the inclusion of the date of 26 May 2020 in the dismissal letter in error is significant. I find that the dismissal of the claimant was being actively contemplated as of that date and the only evidence I have before me as to why suggests that the probability is that it was due to a perception that the claimant had replied in intemperate terms to Mr Wiltshire's WhatsApp message that employees were required to return to work when required. As such I am not convinced that the principal reason for the claimant's dismissal was his refusal to return to work on 1 June 2020. I find that the principal reasons were not only the claimant's refusal to return to work, but also the way he had expressed himself to Mr Wiltshire on 26 May.

62. I find that the claimant's health and safety disclosures formed no part of the reason for his dismissal, let alone the principal reason. The claimant's disclosure in March 2020 prior to furlough is unlikely to have still been a matter of concern to Mr Wiltshire in June 2020 given what happened

between those dates. Had Mr Wiltshire wanted to dismiss the claimant for such disclosures he could have acted earlier. As such, I find that the claimant was not automatically unfairly dismissed.

63. I find that dismissing the claimant for back chat and refusing to return to work when he had child care commitments that had been previously raised with his employer was unfair as I would expect a warning at first instance. However, the claimant cannot present a complaint of unfair dismissal.

64. I find that the claimant's claim of wrongful dismissal is well founded as his conduct was not sufficiently serious to justify summary termination of his contract of employment. However, he has no claim for damages arising as he was paid for his notice period.

65. I find that the claimant has failed to prove any claims for arrears of pay, outstanding expenses or accrued holiday entitlement not paid.

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Employment Judge Alliott

Date: 5 December 2022

Sent to the parties on: 5 December 22

For the Tribunal Office