Case No: 1307468/2020

EMPLOYMENT TRIBUNALS

Claimant: **Mr B Wadrup**

Respondent: **Hancox Gas and Plumbing Ltd**

Heard at: **Midlands West (by CVP)**

On: **28 29 July And 25 August 2022 (in chambers) And 5 January 2023**

Before: Employment Judge Woffenden
Members: **Mr K Palmer**
Mr R Virdee

Representation
Claimant: Mr Rozycki of Counsel and In Person (5 January 2023)
Respondent: Mr Bheemah of Counsel

JUDGMENT having been sent to the parties on 6 January 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1 The claimant was employed by the respondent as a plumbing gas and heating engineer from 1 May 2019 to 22 May 2020 when he was summarily dismissed. On 26 August 2020 he presented a claim to the employment Tribunal in which he claimed unfair dismissal which he said was brought under sections 100 and 44 Employment Rights Act 1996 ('ERA') and for notice pay.

Evidence

2 There was an agreed indexed and paginated bundle of documents of 310 pages . We heard from the claimant and on behalf of the respondent we heard

from Mr Hancox (the respondent's Managing Director and Ms Kim Plotnek (the respondent's part time book keeper) .

Issues

3 After discussion the agreed issues to be determined by the tribunal were as follows:

Automatic Unfair Dismissal – section 100(1)(c) ERA 1996

3.1 Did the claimant bring to the respondent's attention by reasonable means circumstances that he reasonably believed were harmful or potentially harmful to health or safety?

The claimant relies on the circumstances of the prevailing coronavirus pandemic which he asserts were harmful or potentially harmful to his vulnerable son. He asserts that he had brought this to the respondent's attention, as follows:

3.1.1 By way of a What's App message to the respondent's Mr Hancox of 2nd April 2020;

3.1.2 In a telephone conversation with the respondent's Mr Hancox in around mid-April 2020;

3.1.3 In the course of the 'return to work' meeting on 21 May 2020.

3.2 If yes, was this the reason (or principal reason) for the claimant's dismissal?

Automatic Unfair Dismissal – section 100(1)(d) ERA 1996

3.2 Did the claimant reasonably believe that there were circumstances of danger?

3.3 If yes, what were those circumstances?

The claimant relies on the circumstances of the prevailing coronavirus pandemic and alleges an absence of PPE and/or individual job-specific risk assessment.

3.4 Did the claimant believe that the circumstances of danger were serious and imminent?

3.5 If yes, was it reasonable for the claimant to believe that the circumstances of danger were serious and imminent?

3.6 Could the claimant reasonably have been expected to avert the serious and imminent circumstances of danger?

3.7 Did the claimant refuse to return to work after his furlough leave ended? If yes, why?

3.8 What was the reason or principal reason for the claimant's dismissal?

Detriment – section 44(c) ERA 1996

3.9 Did the claimant bring to the respondent's attention by reasonable means circumstances that he reasonably believed were harmful or potentially harmful to health or safety?

The claimant relies on the circumstances of the prevailing coronavirus pandemic and alleges an absence of PPE and/or individual job-specific risk

3.10 If yes, did the respondent subject the claimant to the following detriment:

i. Subjecting him to a return to work meeting on 21 May 2020?

3.11 If yes, what was the reason that the claimant was subjected to detriment?

Detriment – section 44(d) ERA 1996

3.12 Did the claimant reasonably believe that there were circumstances of danger? If yes, what were those circumstances?

The claimant relies on the circumstances of the prevailing coronavirus pandemic and alleges an absence of PPE and/or individual job-specific risk assessment.

3.13 Did the claimant believe that the circumstances of danger were serious and imminent?

3.14 Could the claimant reasonably have been expected to avert the serious and imminent circumstances of danger?
3.15 If yes, did the respondent subject the claimant to the following detriment:
ii. Subjecting him to a return to work meeting on 21 May 2020?
3.16 If yes, what was the reason that the claimant was subjected to detriment?
Wrongful dismissal
3.17 It was conceded the respondent was not entitled to summarily dismiss the claimant on account of gross misconduct. To what period of notice was the claimant entitled (1 week or one month).

Fact finding

4 Mr Hancox set up the respondent company in 2014 .The claimant applied for a job at the respondent in response to an advert placed by Mr Hancox on the internet. The respondent's letter of offer to him dated 11 March 2019 said the respondent would give the claimant 1 months' notice of termination.
5 A contract of employment which was dated 4 December 2019 provided that the claimant was entitled to statutory notice only but it was neither signed nor dated by either party and there was no evidence about how or when it came into existence.
6 The claimant's normal hours of work were 8 am to 4.30 pm Monday to Friday with a 30 minute break for lunch. His salary was £30000 a year.
7 The claimant's partner was a head of department at a school and they had a child (d o b 17 May 2016) . The child's tonsils and adenoids were removed on 11 August 2019 and on 27 April 2020 he was diagnosed with peripheral cyanosis . He had had (or was suspected to have had) pneumonia. The family's GP had advised that he be regarded as vulnerable.
8 Mr Hancox and the claimant had a friendly informal working relationship. Mr Hancox regarded the claimant as a good engineer. It was orally agreed between Mr Hancox and the claimant early on in the claimant's employment that he could use the respondent's vehicle to deliver and collect his son from nursery.
9 The requirement for employees to wear PPE was not new as far as the respondent was concerned. The respondent used to provide PPE routinely for its engineers prior to the pandemic (masks gloves gel and in some cases eye protection).PPE is kept in engineers' vans and if they did not have any ,it could be acquired for them.
10 The respondent placed the claimant on furlough from 29 March 2020 .
11 However on 1 April 2020 in an exchange of WhatsApp messages Mr Hancox asked the claimant if he wanted to do a call out job at the Spire private hospital in Solihull .The claimant replied he was in difficulties because his partner had 2 Skype meetings and asked if he could go the following day. Mr Hancox said he would make enquiries and let him know and that he understood the claimant had to look after his child . The claimant responded that he was 'bored out of his head.' He subsequently confirmed to Mr Hancox on 2 April 2020 he was able to attend and Mr Hancox thanked him ,explaining that there was no one in the hospital at the time to which the claimant responded "Oww sound then " and 'Not gonna lie was abit worried about rona'. Mr Hancox said he had attended with a dust mask on and wire gloves and that the place was virtually empty .He advised the claimant to wear both commenting 'cant be too safe can you enit? .The claimant responded "Nah that's it its more bringing it home than if I do" .Mr Hancox said 'yes that's it'.
12 Mr Hancox completed a risk assessment and a method statement ('RAMS') for the Spire job having carried out a site visit a few days before. The document had a specific section about Covid which stated :' Engineers will

ensure to observe the guidelines laid out by the Government whilst working. This includes abiding by the social distancing guidance (staying 2 metres apart) wearing the recommended PPE such as masks gloves eye and ear protection and regular handwashing.' We accept Mr Hancox's evidence that RAMS are produced by the respondent as a matter of course for commercial jobs ,that they have to be sent to the customer in advance of the work so they can be accessed by site operatives and work cannot be carried out and engineers would not be allowed on site without RAMS .If RAMS stated the engineer would be wearing PPE and the engineer turned up without it they would be sent away. The respondent sent RAMS for the Spire job to Spire on 1 April 2020.

13 The claimant did the work at the Spire hospital on 2 April 2020 and in the afternoon of that day Mr Hancox sent him a WhatsApp to inquire whether it was 'all good'. The claimant replied by describing the difficulties he had encountered but none of them related to the absence of PPE or a risk assessment or anything else about the prevailing coronavirus pandemic. The Spire job was the last work the claimant did for the respondent.

14 On 10 April 2020 the respondent issued all engineers with written 'Back to Work' advice. Under the heading 'Engineers Safety on Site' it said 'for the majority most works over the next 2-3 weeks will take place in a commercial environment which means minimal people on site and plenty of ability to observe the social distancing guidance ,wherever possible please ensure you protect yourself with the recommended PPE such as masks, gloves eye and ear protection – you should have this on board in your vehicles or at the unit but if your supplies are running low please let us know and we can ensure its provided for you. Regular handwashing is also advised . Please let us know if you feel your safety is not being respected on site at any time , or if there's any further steps we can take.' A link was provided to the latest government guidelines on social distancing with specific advice on social distancing and in work activity. Mr Hancox ended the advice with the following: 'Hopefully this information has been helpful going forward ,lets all ensure we stay safe and well. The date on which engineers were to return to work was 13 April 2020.

15 On Saturday 11 April 2020 the claimant sent a text to Mr Hancox in which he said 'U got 5 mins to talk mate.'

16 The claimant's evidence in his witness statement was that during the telephone conversation (the date of which he did not identify) that followed he raised the following :

1 although back to work advice had referred to social distancing and PPE no risk assessments for individual jobs were included and no PPE was to be provided to staff;

2 his partner was a key worker and he was therefore the primary carer for their child;

3 the child was categorised as vulnerable ;they were waiting for a postponed consultation with a paediatrician arranged because the child had had asthma and cyanosis and in the interim in view of its previous medical history they had been advised to treat the child as vulnerable.

17 Mr Hancox's evidence under cross-examination was he had had a telephone conversation with the claimant that took place shortly after receipt of the claimant's text in which the claimant told Mr Hancox that his partner was working and he had no childcare and was not able to return to work. His child its vulnerability and his inability to return to work because it might affect the child was not discussed. Mr Hancox had children himself and had been sympathetic to the claimant's position. We did not find the claimant's account of this telephone conversation credible. Despite the serious nature of the issues raised he was

unable to identify its date and provided no telling details of actual words he used. The formal and precise terminology the claimant says he deployed is wholly inconsistent with any other communication he had with Mr Hancox. He did not follow it up in writing as might reasonably be expected given its serious subject matter or even refer to it in subsequent communications with the respondent. We did not find his explanation under cross examination (that he felt having had the conversation there was no need to formally record it) was persuasive. That does not address why he never referred to such a significant conversation at all. We note that when on 14 May 2020 he subsequently wanted clarification/confirmation from Mr Hancox about Universal Credit and furlough he asked Mr Hancox for it and received an immediate and clear response. We found Mr Hancox a clear thoughtful and straightforward witness who was willing to admit having got things wrong (for example not affording the claimant an appeal) . We prefer his evidence about what was said on this occasion by the claimant and find the claimant did not raise the three points above with Mr Hancox as alleged.

18 The next Whats App exchange between the claimant and Mr Hancox began on 16 April 2020. Mr Hancox sent a message to the claimant 'Did you decide what your (sic) doing next week, mate?' The claimant replied by message almost immediately ,again referring to Mr Hancox as 'mate' to ask if he could take 4 days as holiday and have a days authorised leave next week 'so it basically keeps me at 80%.' Mr Hancox then asked the claimant about the following week commencing 27 April. The claimant said 'Provisnally (sic)the same. Obv (sic) unless things improve.' Mr Hancox replied he could only give him 2 weeks holiday and if he could not give a date when he would definitely return to work they were going to have to 're discuss things' as this would affect the running of the business.

19 On 22 April 2020 Mr Hancox messaged the claimant to ask him when would be a good time to call. The claimant replied about 12 and explained that as his partner had work calls in the morning he 'had the lad'. The claimant accepted under cross-examination that he was taking on the bulk of childcare while on furlough and his partner was working from home. During the subsequent telephone conversation a return to work date of 11 May 2020 was arranged.

20 On Saturday 9 May 2020 the claimant messaged Mr Hancox to say that his grandmother had had a stroke and he had to stay with her for a week so that his mother could have a week off so she could look after her permanently. His mother (and sister) were both healthcare professionals working with Covid so before one of them could look after his grandmother they had to self-isolate for 7 days. The claimant was the only person who could look after her. By this time Mr Hancox was becoming frustrated; he had arranged work around an anticipated return to work of 11 May 2020 for the claimant and considered this situation was a different reason for the claimant not to be able to return. It was causing him difficulties running the business.

21 On 14 May 2020 Mr Hancox asked the claimant to 'come into the office' on 21 May 2020 with a view to starting back at work on 25 May 2020.The claimant agreed to the meeting.

22 The meeting took place between Mr Hancox and the claimant on 21 May 2020 at the respondent's premises in a small compact office with people going in and out. The claimant accepted under cross examination he did not wear a face mask nor say he was concerned about contracting Covid and passing it on to his son nor did he ask for the meeting to be conducted remotely because of concerns about contracting Covid. Ms Plotnik (who has long previous experience of human resource matters) took notes which she subsequently typed up. It is

common ground they were not verbatim and they were not sent to the claimant for his approval or amendment.
23 The typed notes of the meeting state that Mr Hancox said he had called the meeting to discuss the claimant's working hours, work related issues and hold a return to work interview following the claimant's furlough and extended leave. He expressed concerns that the claimant had been leaving work before 4pm to get his son from nursery and was not working his full contractual hours .He said there were problems with the claimant's work which he attributed to the claimant rushing jobs in order to collect the child .The claimant said the position would improve once the child started school in September. Mr Hancox asked the claimant if he would return to work on 25 May .The claimant said he would have to discuss with his partner .Mr Hancox said he was needed back at work .Ms Plotnik asked what was preventing the claimant from returning to work - was it the loss of Universal Credit? The claimant said yes but also said his son who had years before been in hospital with suspected pneumonia .Ms Plotnik said he had been to stay with his grandmother for a week and had broken lockdown to look after her and had not quarantined on his return. He did not reply when she asked why the claimant had not done so if his son was at risk. As the claimant accepted under cross examination Mr Hancox assured him that PPE would be available and if the claimant felt at risk at any job ,if he went to Mr Hancox, he could refuse to attend and Mr Hancox would not put the claimant at risk.
24 The notes went on to say that the claimant said he would let Mr Hancox know if he was returning to work on 25 May 2020 after having talked to his partner. Although the claimant said under cross examination that the notes were inaccurate in general terms, he did not identify any specific respects or put forward any alternative version of what was said. We find the typed notes set out the gist of what was said during the meeting.
25 On 22 May 2020 the claimant sent Mr Hancox a WhatsApp message saying he had spoken to his partner but they needed to' hold off' until 1 June 2022 ;they had tried to arrange childcare but had not been able to get anyone .Mr Hancox replied that was not going to work for them and he would send a letter in the post to confirm the position.
26 Mr Hancox sent the claimant a letter dated 22 May 2020 in which he informed the claimant that his employment was terminated with effect from that date. He told the claimant his personal needs could not be accommodated 'now or in the future'. They needed commitment and reliability to manage customers' expectations and not knowing when he was returning to work was not allowing the business to operate efficiently. Mr Hancox had decided to dismiss the claimant on 22 May 2020. His confidence in the claimant was severely shaken. He felt he had tried to be accommodating but it was for the employer to decide when an employee came to work. He could no longer accommodate the claimant's personal needs (for childcare and to look after his grandmother).The claimant could not be relied upon.
27 Mr Hancox did not offer the claimant a right of appeal against his dismissal because he did not think that was warranted if the dismissal was for gross misconduct which he considered was the case as far as the claimant was concerned.
28 After the claimant was dismissed he instructed Donna Clark , an HR consultant ,to draft a letter to the respondent and, because he was hoping thereby to secure his job, told her to include all the allegations subsequently contained in the letter she sent to Mr Hancox on 10 June 2020. That lengthy letter complains, among many matters ,of unfair dismissal in the absence of two years' service but refers to 'whistleblowing' ('fraudulent activity around the job

retention scheme') and to discrimination of the claimant 'as a parent.' Under cross examination he tried to distance himself from the contents of that letter saying he had not agreed with some of what was included. He did not say in evidence that Ms Clark had omitted matters he had wanted to have included .We find the letter sets out what the claimant thought at that stage had caused his dismissal . The claimant has subsequently sought to shape his evidence to this tribunal to support the case he now advances.

Law

29 Under section 44 ERA:
'(1)An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that—
(c)being an employee at a place where—
(i)there was no such representative or safety committee, or
(ii)there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,
he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety,
(1A)A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his or her employer done on the ground that—
(a)in circumstances of danger which the worker reasonably believed to be serious and imminent and which he or she could not reasonably have been expected to avert, he or she left (or proposed to leave) or (while the danger persisted) refused to return to his or her place of work or any dangerous part of his or her place of work.'
30 Under section 100 ERA:
'(1)An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that—
(c)being an employee at a place where—
(i)there was no such representative or safety committee, or
(ii)there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,
he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety,
(d)in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work',
31 Section 100 ERA is not limited to harm or the possibilities of harm at an employee's place of work (**Van Goet v St Georges Healthcare NHS Trust [2001] AER D 478**.
32 Where a claimant lacks the necessary two-year qualifying service contained in ERA 1996 s 108(1) for a claim of unfair dismissal, a tribunal will nevertheless have jurisdiction over the claim if the sole or principal reason for the dismissal came within one of the categories of automatically unfair dismissal (see ERA 1996 s 108(3)). In such a case, the burden of proof is on the *claimant* to show that the two-year qualifying period does not apply and therefore the burden is on the claimant to show that the sole or principal reason for the dismissal was one subject to automatic unfairness (**Maund v Penwith Council**).

33 In **Rodgers v Leeds Laser Cutting Ltd 2022 EAT 69** his Honour Judge Tayler considered automatic unfair dismissal under sections 100 (1) (d) and (e) ERA. At paragraph 37 he said 'There is much to be said for determining the factual reason, or principal reason, for dismissal and then deciding whether that reason was protected by the provision. If there was some reason for dismissal that did not fall within section 100(d) ERA it is generally helpful to have a factual finding of what that reason was'. He did not disagree with the Employment Judge's acceptance in that case that the Coronavirus pandemic could, in principle, give rise to circumstances of danger that an employee could reasonably believe to be serious and imminent, but the case had failed on its facts.

Submissions

34 We thank both counsel for their submissions which we have carefully considered.

Conclusions

35 The first issue for the tribunal to decide was whether the claimant brought to the respondent's attention by reasonable means circumstances that he reasonably believed were harmful or potentially harmful to health or safety.
36 Turning first to the Whatsapp message on 2 April 2020 ,we conclude that in this message the claimant was not bringing to the respondent's attention any circumstances that he reasonably believed were harmful or potentially harmful to health and safety .
37 Having already agreed to attend the Spire job because he had been bored at home (and without raising any concerns to Mr Hancox other than the initial problem with child care) he subsequently confessed to Mr Hancox that he had been 'a little bit worried' about the prevailing coronavirus pandemic. However it is apparent that his (unvoiced) worry in this regard had been allayed when Mr Hancox had volunteered (after he had agreed to do the Spire job) the information that there was no one in the hospital. Having been provided with further reassurance from Mr Hancox about protective clothing and the presence of others on site the claimant attended the site, did the work and reported back to Mr Hancox about the problems with the job but not in relation to any circumstances harmful or potentially harmful to his health and safety or anyone else's. If the claimant had genuinely believed at this time that the circumstances of the prevailing coronavirus pandemic were harmful or potentially harmful to his vulnerable son he would not have agreed to attend and then attended the job in question. We conclude he had no such belief.
38 We have found at paragraph 17 above that during the telephone conversation with Mr Hancox in mid-April 2020 the claimant did not bring to Mr Hancox's attention any circumstances that were harmful or potentially harmful to health or safety .
39 As far as the meeting on 21 May 2020 is concerned the claimant explained that a reason he had not returned to work was his son's previous hospitalisation with pneumonia. It is plain from the conversation that ensued that Ms Plotnik understood him to be saying the prevailing coronavirus posed a risk to his son . We conclude that he was on this occasion bringing to the respondent's attention and by reasonable means the circumstances of the prevailing coronavirus pandemic which he was asserting were harmful or potentially harmful to his vulnerable son .However, we are unable to conclude on the evidence before us that at this stage he believed the circumstances of the prevailing coronavirus

pandemic were harmful or potentially harmful to his vulnerable son, or that any such belief was a reasonable one. He had worked for the respondent in February and March 2020, he had done the Spire job on 2 April 2020 having received advice from Mr Hancox about the presence of others on site and equipment to wear and had been issued with clear Back to Work advice on 10 April 2020 which he did not query .He had voluntarily attended the meeting on 21 May 2020 in person without demur in a confined space with no face mask in the presence of 2 other people. He was specifically told by Mr Hancox of the availability of PPE and his right to refuse a job and that his health would not be put at risk.

40 We have gone on to determine whether the claimant reasonably believed that there were circumstances of danger. The claimant relies on the circumstances of the prevailing coronavirus pandemic and alleges an absence of PPE and/or individual job-specific risk assessment. We conclude that there was no absence of PPE or of individual job -specific risk assessment as asserted by the claimant . On the evidence before us the former was readily available and the latter were carried out.

41As far as the prevailing coronavirus pandemic was concerned we accept that the Coronavirus pandemic could ,on its own , in principle, give rise to circumstances of danger that an employee could reasonably believe to be serious and imminent. However in the circumstances of this case we are unable to conclude on the evidence before us the claimant had such a belief because of the way he conducted himself. As we have already set out in paragraph 39 above he had worked in February and March 2020 ,he had done the Spire job having received advice from Mr Hancox about the presence of others on site and equipment to wear and had been issued with clear Back to Work advice on 10 April 2020 which he did not query .He voluntarily attended the meeting on 21 May 2020 in person without demur in a confined space with no face mask in the presence of 2 other people. He was specifically told by Mr Hancox of the availability of PPE and his right to refuse a job and that his health would not be put at risk.

42 If we are wrong about that, and not only did he hold such a belief and he did so reasonably then we conclude that he could reasonably have been expected to avert the serious and imminent circumstances of danger. He was aware of the availability of PPE; he had been given clear Back to Work advice ;he had good channels of communication with Mr Hancox with whom he got on well ; he knew from 21 May 2020 at the latest that he could refuse jobs and had been reassured his health would not be put at risk.

43 We conclude that the reason the claimant refused to return to work after furlough was because he had child care responsibilities during the prevailing Coronavirus pandemic which he was unable to resolve until 1 June 2020. It is clear from the contemporaneous documentary evidence culminating in his WhatsApp message of 22 May 2020 that was the barrier to his returning to work. If he had any other concerns he would have told Mr Hancox about them .

44 In any event however we conclude that Mr Hancox's reason for C's dismissal was that he had decided the claimant could not be relied on to come to work because of his personal needs (child care and to look after his grandmother) and Mr Hancox was not prepared to accommodate him anymore. The claimant has failed to discharge the burden on him to show that the sole or principal reason for the dismissal was one subject to automatic unfairness. The claimant's claims of unfair dismissal fail and are dismissed.

45 It follows from our conclusions above in relation to the constituent parts of the claimant's complaints of unfair dismissal under sections 100 (1) (c) and (d)

ERA that his complaints of detriment made on the same basis under sections 44 (c) and (d) ERA must also fail and are dismissed.

46 As far as the claimant's claim for wrongful dismissal is concerned ,the claimant 's offer letter of 11 March 2019 referred to a notice period of 1 month. He began work for the respondent and we conclude that by doing so he accepted the terms of employment set out in that offer letter. There is no evidence whatsoever from which we could conclude that the contract of employment dated 4 December 2019 amounted to a subsequent variation of that contract. The claimant is entitled to one months' notice and damages in the sum of £1849.20.

Employment Judge Woffenden

Date 23rd January 2023