EMPLOYMENT TRIBUNALS

Claimant: Mr Samuel Callan

Respondent: Done Brothers (Cash Betting) Ltd t/a Betfred

Heard at: Watford (via CVP) **On:** 23rd & 24th March 2023

Before: Employment Judge David Hughes

Representation
Claimant: In person
Respondent: Mr McFarlane, consultant

JUDGMENT

1. The Claimant's claim for unfair dismissal is not well-founded and is dismissed;

2. The Claimant's claim is respect of notice is pay is dismissed upon withdrawal.

REASONS

1. The Claimant was employed by the Respondent from 01.02.2020 to 15.08.2020, as an Assistant Manager. By a Claim Form presented on 29.09.2020, he claims for unfair dismissal and other payments, which appear to be a claim for notice pay. At the hearing today, he clarified that his claim is confined to one of unfair dismissal.

2. The case has had a rather convoluted procedural history. The unfair dismissal claim was struck out on 07.06.2021 by order of Employment Judge Lewis, because the Claimant did not have 2 years' service.

3. On 06.06.2022, Employment Judge S.L.L. Boyles directed that the Tribunal file be placed before Employment Judge Lewis, so that he could decide whether to reconsider the Judgment striking out the unfair dismissal case. A reconsideration decision, reinstating the unfair dismissal claim, was in the bundle before me @p114. The

Respondent made a response to the claim, and on 07.11.2022 the Tribunal sent out to the parties Notice of this hearing.

4. There was some discussion of housekeeping matters at the start of the hearing. The Claimant wished to have 5 additional pages added to the bundle. The Respondent agreed to this, and they were sent in to me as a separate PDF. The Respondent had a statement from Ryan Webster, which had not found its way to me, but which was also sent in.

5. An issue also arose as to the correct identification of the Respondent. The Respondent provided a statement of terms of employment, which although unsigned by the Claimant was signed on behalf of Done Brothers (Cash Betting) Limited t/a Betfred. The Claimant agreed that this meant that that was probably the correct Respondent, and asked me to substitute it as Respondent. Sensibly, Mr McFarlane made no objection to this, and I do so.

Issues and Law

6. S108 of the Employment Rights Act 1996 (ERA) provides as follows:

> ***108.— Qualifying period of employment.***
> *(1) Section 94[1] does not apply to the dismissal of an employee unless he has been continuously employed for a period of not less than [two years]1 ending with the effective date of termination.*
> *(2) If an employee is dismissed by reason of any such requirement or recommendation as is referred to in section 64(2), subsection (1) has effect in relation to that dismissal as if for the words " [two years]1 " there were substituted the words "one month".*
> *(3) Subsection (1) does not apply if—*
> *(aa) subsection (1) of section 98B (read with subsection (2) of that section) applies,*
> *(b) subsection (1) of section 99 (read with any regulations made under that section) applies,*
> *(c) subsection (1) of section 100 (read with subsections (2) and (3) of that section applies,*
> *(d) subsection (1) of section 101 (read with subsection (2) of that section) or subsection (3) of that section applies,*
> *(da) subsection (2) of section 101ZA applies (read with subsection (3) of that section) or subsection (4) of that section applies,*
> *(dd) section 101A applies,*
> *(e) section 102 applies,*
> *(f) section 103 applies,*
> *(ff) section 103A applies,*
> *(g) subsection (1) of section 104 (read with subsections (2) and (3) of that section) applies,*
> *(gg) subsection (1) of section 104A (read with subsection (2) of that section) applies,*
> *(gh) subsection (1) of section 104B (read with subsection (2) of that section) applies,*

[1] The right not to be unfairly dismissed.

(gi) section 104C applies,
(gj) subsection (1) of section 104D (read with subsection (2) of that section) applies,
(gk) section 104E applies,
(gl) subsection (1) of section 104F (read with subsection (2) of that section) applies,
(gm) section 104G applies,
(h) section 105 applies,
(hh) paragraph (3) or (6) of regulation 28 of the Transnational Information and Consultation of Employees Regulations 1999 (read with paragraphs (4) and (7) of that regulation) applies,
(i) paragraph (1) of regulation 7 of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 applies,
(j) paragraph (1) of regulation 6 of the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002 applies,
(k) paragraph (3) or (6) of regulation 42 of the European Public Limited-Liability Company Regulations 2004 applies,
(l) paragraph (3) or (6) of regulation 30 of the Information and Consultation of Employees Regulations 2004 (read with paragraphs (4) and (7) of that regulation) applies,
(m) paragraph 5(3) or (5) of the Schedule to the Occupational and Personal Pension Schemes (Consultation by Employers and Miscellaneous Amendment) Regulations 2006 (read with paragraph 5(6) of that Schedule) applies,
(o) paragraph (3) or (6) of regulation 31 of the European Cooperative Society (Involvement of Employees) Regulations 2006 (read with paragraphs (4) and (7) of that regulation) applies ,
(q) paragraph (1)(a) or (b) of regulation 29 of the European Public Limited-Liability Company (Employee Involvement) (Great Britain) Regulations 2009 (S.I. 2009/2401) applies, or
(r) paragraph (1) of regulation 17 of the Agency Workers Regulations 2010 applies.
(4) Subsection (1) does not apply if the reason (or, if more than one, the principal reason) for the dismissal is, or relates to, the employee's political opinions or affiliation.
(5) Subsection (1) does not apply if the reason (or, if more than one, the principal reason) for the dismissal is, or is connected with, the employee's membership of a reserve force (as defined in section 374 of the Armed Forces Act 2006).

7. The question of 2 years' qualifying service was discussed before me. Mr McFarlane, who appeared on behalf of the Respondent, submitted that the only basis on which his claim could succeed appeared to be under s100(1)(d) or (e) of the ERA. S100 reads as follows:

100.— Health and safety cases.
(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that—
(a) having been designated by the employer to carry out activities in connection with preventing or reducing risks to health and safety at

work, the employee carried out (or proposed to carry out) any such activities,
(b) being a representative of workers on matters of health and safety at work or member of a safety committee—
(i) in accordance with arrangements established under or by virtue of any enactment, or
(ii) by reason of being acknowledged as such by the employer,
the employee performed (or proposed to perform) any functions as such a representative or a member of such a committee,
(ba) the employee took part (or proposed to take part) in consultation with the employer pursuant to the Health and Safety (Consultation with Employees) Regulations 1996 or in an election of representatives of employee safety within the meaning of those Regulations (whether as a candidate or otherwise),
(c) being an employee at a place where—
(i) there was no such representative or safety committee, or
(ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,
he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety,
(d) in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work, or
(e) in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger.
(2) For the purposes of subsection (1)(e) whether steps which an employee took (or proposed to take) were appropriate is to be judged by reference to all the circumstances including, in particular, his knowledge and the facilities and advice available to him at the time.
(3) Where the reason (or, if more than one, the principal reason) for the dismissal of an employee is that specified in subsection (1)(e), he shall not be regarded as unfairly dismissed if the employer shows that it was (or would have been) so negligent for the employee to take the steps which he took (or proposed to take) that a reasonable employer might have dismissed him for taking (or proposing to take) them.

8. Having considered the exceptions in s108, I agree that it appears that only 100(1)(d) or (e) might be relevant to the Claimant's case. The Claimant, who appeared in person, did not contend that any other exception applied.

9. The provisions of s100(1)(d) were considered, in the context of the Covid-19 pandemic, by the Court of Appeal in Rodgers -v- Leeds Laser Cutting Ltd [2022] EWCA Civ 1659 [2023] ICR 356. In that case, Underhill LJ, with whom Nicola Davies and Stuart-Smith LJJ agreed, identified 5 questions that a Tribunal considering a s100(1)(d) claim will have to decide:

(1) Did the employee believe that there were circumstances of serious and imminent danger at the workplace? If so:
(2) Was that belief reasonable? If so:
(3) Could they reasonably have averted that danger? If not:
(4) Did they leave, or propose to leave or refuse to return to, the workplace, or the relevant part, because of the (perceived) serious and imminent danger? If so:
(5) Was that the reason (or principal reason) for the dismissal?

10. Underhill LJ went on to say of the fifth question;

Questions (1) and (2) could in theory be broken down into two questions, addressing separately whether there was a reasonable belief in the existence of the danger and in its seriousness and imminence; but in most cases that is likely to be an unnecessary refinement

11. The parties agreed that these five questions were the issues that I would need to address to decide the question of liability.

12. Discussion at the hearing focussed, understandably, on s100(1)(d). Insofar as s100(1)(e) was concerned, it seems to me that a refusal to attend the workplace might be an appropriate step for the purposes of that subsection, but it was not contended that a consideration of subsection (e) would make a material difference to this case.

What happened

13. The detail provided in the Claimant's ET1 is rather thin, as is that provided in his witness statement.

14. This dispute arose in the context of the Covid-19 pandemic. The Claimant says that he told the Respondent that he needed to take furlough to shield for his father. He said that he got a letter from his GP, which said that he "*…needed to shield or something along those lines…"* (as he puts it in his ET1). In his statement, he said[2];

Betfed were told I need to take furlough to shield for my dad as he was classed as now extremely vulnerable registered Disabled Diabetic Sleep Apnea amongst other underlining health conditions and at the time awaiting an operation.

Betfred were not happy with this and asked to provide proof.

Proof was provided in the form of a letter from a GP.

The lead-up

15. On 22.06.2020, Mr Webster, the Respondent's area manager, wrote to the Claimant. The Claimant had been on furlough since March 2020.

[2] I will use the original spelling and punctuation when quoting directly.

The letter said that the Respondent had telephoned him on 10.06.2020, to confirm that he would be back in work on 13.06.2020, but that the Respondent had had no communication from the Claimant.

16. The Claimant told me in his evidence that he had attempted to contact Julie Addison, another employee of the Respondent. He called Ms Addison, but there was no answer and he did not leave a voice message. Asked about other attempts he could have made to contact the Respondent, the Claimant said that, in his mind, at that time he only had one number.

17. I accept that the Claimant did attempt to contact Ms Addison.

18. Asked about Mr Webster's letter of 22.06.2020, the Claimant said that couldn't say definitely whether he'd received it. But he had, in fact, emailed the Respondent's Cathy Kilner the following day. The terms of his email of the following day - with which I deal below - are, I think, consistent with him having seen the letter, and I find that he did see it.

19. Asked whether this letter encouraged him to make contact with the Respondent, he said that, in his mind, he only had one number – by implication, that of Ms Addison – that he could call. But the letter of 22.06.2020 had included 3 telephone numbers.

20. I accept that, at this hearing, the parties were discussing events that took place some time ago. But where I have the benefit of contemporary emails or suchlike between the parties, those are likely to be reliable.

21. The Claimant sought to question the dates of the email of 23.06.2020, in which he had contacted Ms Kilner. It seems to me to be extremely unlikely that the date is incorrect, and I accept that the date is correct. The Claimant gave no reason why he thought the day might be incorrect, and I do not accept that he genuinely doubted that it was correct.

22. Regardless of his attempt to dispute the date, the Claimant accepted that he did send the email of 23.06.2020. In that email, he said that he had spoken to Ms Addison "*last week Friday, I believe*". He went on to say:

> *All was fine then, on sunday*[3] *however my dad got attacked and was involved in attempted robbery by two men one with a knife and one with a shovel, he survived but has fractured wrist and broken shoulder or vice versa, did try call Julie back on the number she called me on, but no answer, as you can imagine was bit of crazy week, plus the fact my dad over 60, so been helping him out , think term is shielding, as you can imagine, had alot to think about it, did 100% try and call Julie, and if honest surprised no one had called me this week*.

[3] I use the Claimant's own spelling and punctuation.

23. I observe that the assertion in the email that the Claimant had spoken with Ms Addison was not correct. He had attempted to do so.

24. On 26.06.2020, another letter was emailed to the Claimant. The letter read:

I write further to my letter of 22nd June 2020 encouraging you to contact us by Wednesday 24th June 2020.You sent an email to Cathy Kilner, Area Administrator on 23rd June to explain your circumstances. We have since attempted to contact you via phoner on 24/06/2020 and twice on 25/06/2020, however you have failed to contact us or return our calls.

I would like to reiterate that our main concern is your wellbeing. If the reason for your absence is ill health or due to other circumstances, I must inform you that as per the absence policy, it is important that you follow the correct absence reporting procedures and allow us to offer our support to you.

Furthermore, as you have failed to contact us correctly your absence is presently being treated as unauthorised and therefore, unpaid with effect from and including 13th June 2020.

Please can you contact Cathy Kilner, or myself on 01925 736910 / 07891 075268 by 4pm on 28th June 2020. If we do not hear from you by this date, we will have no alternative other than to conclude that you no longer wish to work for Betfred and that you have terminated your employment by your own choice as a result of your lack of contact and we will arrange for your P45 and any monies owing to you to be forwarded under separate cover.

I would again like to give you the details of the Employee Assistance Programme in case this can be of help to you. The EAP is a totally free, confidential and independent service which is available 7 days a week. If you wish to contact them their free phone number 0800 030 5182.

Please do not hesitate to contact me directly if you believe information is incorrect.

25. At 11:17hrs on 26.06.2020 – it is unclear whether this was before or after the message referred to in the previous paragraph – the Claimant emailed Ms Kilner, addressing also Mr Webster, anticipating – correctly – that he would read the message. He gave a time of his attempt to call Ms Addison (14:26hrs), and said that there had been no attempts by the Respondent to call him. He added that he had had possible Covid-19 symptoms since 24.06.2020, and also mentioned the incident involving his father, saying:

Don't particularly want to call if don't have to, have explained situation, as stated in the email since incident occurred with my dad, very traumatic event, which he was lucky to escape with his life, I done my bit by

calling Julie back on the number she called to update her, before I was meant to start work, am using a different phones with reduced numbers so,who else could I call, but did not get a call or message back from her till yesterday, which would be well over a week.

26. The following day, there was an exchange of emails between the Claimant and Ms Kilner. I do not need to set out the entirety of that exchange, but I will set out significant parts of it.

27. At 00:19hrs, the Claimant e-mailed Ms Kilner. He said:

Good evening Cathy.

So at the time of first speaking to Julie, he did not really need help and shielding as full operation of his wrist and shoulder , one is now fractured and one is now broken, as a result of the attackers. He is a long time diabetic takes insulin and various over medicine as well, and various over health issues a disabled badge as cant walk to far and the use of disability skooter when out and about far, as I was aware that is classed a long term condition and would be classed and vulnerable as well. Apologies as did not fully explain my dads situation understand you did to make sure is is in need and shielding and is classed and vulnerable. Think I did get some days at dates wrong in previous email obviously being on furlough, some days can sometimes potentially merge. The attack happened I believe Thursday the 11th spoke to Julie the day before on the 10th and called her on the 12th to try and update her.

Regarding myself would rather not cause alarm, calling 111, unless symptoms were to worsen, apologies as I thought 2 weeks was the normal quarantine procedure, although do not think I have it.

Would like thank you for the number you gave me. Would like to be carrying on shielding which started on the 12th , and return to work I think would be the 4th July.

Thanks

28. In that email, the Claimant clearly contemplates the possibility of returning to work on 04.07.2020. Cross-examined about this, the Claimant accepted that that is what the email said, but said that it was possible that he hadn't, in fact, intended to do so. To the suggestion that an employer would be entitled to take the email at face value, the Claimant replied, that he would not say so, that not everyone is honest. Asked if that meant that he was dishonest in the email, he said that he did not remember his mindset at the time.

29. I do not accept this evidence from the Claimant. I think it probable that he did at least contemplate that he would return to work on 04.07.2020. I think that his attempt to pull back from the obvious meaning of his email was not honest. The Respondent would have

been entitled to treat this professed intention as genuine, and the Claimant's attempt to say otherwise was also, I think, not credible.

30. In another email of that day, - for which I don't have the time, but which appears to me to be in answer to the one to which I have just referred - Ms Kilner said:

The government guidelines state that even if you are living with someone who is vulnerable and shielding unless you yourself are vulnerable or shielding then you should return to work unless you can provide documentation from GP or NHS that there is a confirmed medical risk to your dad by you returning to work.

So unless you can provide this documentation from the GP or NHS to say that there would be a medical risk to your dad by you returning to work you can't remain shielding.

…

As I have already said in my previous email you can proof of self-isolation by visiting the NHS website or by clicking on this link https://111.nhs.uk/isolation-note/pdf/isolation-note.pdf

So for you to remain of work we will either need the proof of self-isolation or documentation from a GP or NHS stating there would be a medical risk to your dad by you returning to work.

Can you please email we back with this proof by 4pm 19/06/2020

31. The request for evidence of the Claimant's need to self-isolate by 19.06.2020, in an email of 27.06.2020, is curious, but does not appear to have any significance. It is likely to be a typo.

32. The Claimant responded at 13:05hrs, mentioning an ongoing mental health condition, on which he did not elaborate. A short time later, at 13:27hrs, Ms Kilner replied, mentioning the possibility of going on sick leave if the Claimant wasn't able to work because of his mental health. As to shielding to protect his father, she wrote:

You may remain of work due to your dads condition if you have got the documentation from the GP or NHS to say that there would be a medical risk to your dad by you returning to work. But we will require proof of this document.

As you have said that you are showing symptoms in your email dated 26/06/2020 with symptoms starting on 24/06/2020 then you should self-isolate for 7 days but again we will need proof from either your GP or NHS that you have been advised to self-isolate.

33. There was another letter apparently emailed to the Claimant in the bundle, @p57. It reads:

According to our records you have been absent from work since Saturday 13th June 2020 when you were expected to return from your period of furlough.

Following the e-mail correspondence received on 27th June 2020 where you stated that you wouldn't be returning to work yet as your father has been told to shield following an attack. We are sensitive to your situation, however as an employer, we do require medical evidence that you have been advised to shield, otherwise your absence from the business will be deemed as unauthorised.

I am writing to confirm that we must receive this evidence by the latest on ***Wednesday 8 July 2020,*** *otherwise we will have no choice to assume that you no longer wish to work for Betfred and you have terminated your employment by your own violation.*

If you have any queries regarding the contents of this letter, then it is important that you contact me to discuss them.

I look forward to hearing from you.

34. It was suggested to the Claimant that this email, which is undated, was probably from around 30.06.2020. The Claimant was reluctant to accept this, but it seems to me that it is probably correct, as the email refers to the communications on 27th.

Letter of 08.07.2020

35. Probably the key document in the case is a letter dated 08.07.2020. It is this letter that the Claimant says told the Respondent that he needed to isolate, to protect his father. It reads as follows:

To whom it may concern,
Re: Samuel Callan DOB: 24 Jan 1988
Westone Lodge, Westone Avenue, Northampton NN3 3JH

I am writing to confirm that Samuel Callan needs to look after his father who is shielding and therefore is required to shield himself.

This is currently from 12th June to 1st August 2020.

36. The letter is signed Dr Tiffany Crawford of Greenview Surgery, Hazeldene Road, Northampton.

37. There is no dispute that this letter was sent to the Respondent. There was, however, considerable dispute as to what it meant.

38. The Respondent contended that this letter reflected a position up until 01.08.2020. The Respondent points out that the Claimant doesn't say in his statement that he believed that there were circumstances of serious and imminent danger at the workplace, and the letter, the Respondent contends, does not support that. But, I am invited to find,

even if there were, the letter cannot help with the position after 01.08.2020.

39. That strikes me as an unrealistic interpretation of the position. Firstly, some allowance must be made, insofar as the Claimant's statement is concerned, for the fact that he has not been professionally represented. It would be unfair for me to treat his statement as having been drafted by a professional. Secondly, the Covid-19 pandemic was a serious health concern, and an on-going one. It is unrealistic to treat the position reflected in the letter as changing drastically on 02.08.2020. The Covid-19 pandemic was not comparable to, say, a fire at the workplace, which may present a serious and imminent danger one day but – with appropriate assistance from the fire brigade and discounting the risk of any structural damage – none at all the following day. A contagious virus is very different.

40. The Respondent makes the point that the letter does not have the appearance of a shielding letter. There is something in that. But, taking the letter at face value and leaving aside other criticisms to which I will come, what would a reasonable person conclude from reading this letter? I think a reasonable person would see this letter as a recommendation from a GP that the Claimant shield, to protect his father.

41. Although the letter does not say so expressly, I think it is implicit that the recommendation is because of the Covid-19 situation.

42. In receipt of such a recommendation, I think it is hard to describe a person who acts on that recommendation as unreasonable.

43. The Respondent queried whether the Claimant's father needed to shield, given that he had been attacked in a park. I do not think that the fact that he left home to go to a park is indicative of no need to shield. A park is an open space.

44. However, the Respondent makes further criticisms of the letter.

45. The Claimant was asked if Dr Crawford was his father's GP. He said that she was not. His father is not a patient at that practice. Challenged that one could not tell that from the face of the letter, the Claimant replied that it was up for debate in his opinion. That was, I find, a nonsensical and argumentative answer. Although the letter does not say so expressly, a reasonable reader would probably infer from it that the Claimant's father was a patient of Dr Crawford.

46. Secondly, the letter gives the Claimant's address as Westone Lodge, Westone Avenue, Northampton. But the additional pages that I was sent – which the Claimant had asked be before me – included letters addressed to the Claimant's father, at an address in Sherbourne Way, Rickmondsworth. The Claimant confirmed that that was his father's address. It is implicit in the assertion that he needed to shield to protect his father that he was living with his father, and the Claimant

told me that, when the letter from the GP was prepared, he was living with his father.

47. On the Claim Form and the ACAS Early Conciliation certificate, the Claimant's address is given as 86 Grove Crescent, Rickmondsworth.

48. The Claimant was asked about these addresses. He said that the Westone Avenue address in Northampton is one where he had previously lived, and where his mother lives. Later, he said that he had put the address on the Claim Form as a mailing address, that he was looking after a building as a "guardian" but not living there.

49. It is, of course, possible that the Claimant might have been living with his father at the time of the GP letter, but moved out by the time the Early Conciliation process was started. The address on the GP letter might be explicable by him having requested it of a GP surgery he used when he lived in Northampton. But that is not what the Claimant says. His evidence would have him choosing to give his address, to ACAS and on the Claim Form, as an address where he was not living. His reasons for doing so were not clear – he said it was "*part of a scheme*" he was using – and were implausible. On a balance of probabilities, I find that the Claimant was not living with his father. I think he probably was living at the address he gave to ACAS and put on his Claim Form.

50. It follows from that that I do not accept that the Claimant thought that he needed to shield in order to protect his father. The more probable explanation would appear to be that he wished to avoid having to make the commute from Rickmondsworth to Northampton, if he thought he could do so.

Subsequent events

51. Mr Webster emailed the Claimant on 09.07.2020. The email stated that the Claimant was not eligible for the furlough scheme, as he was not within the government's definition of extremely clinically vulnerable. He was told that he would be processed on unpaid sick leave until he reported for work, or until 01.08.2020 if he did not report for work before that date.

52. On 27.07.2020, the Claimant made a formal complaint against Mr Webster and Ms Kilner. In the bundle before me were documents relating to the complaint process, which progressed to a meeting on 06.08.2020.

53. On 11.08.2020, following the grievance meeting, Damian Glossop, another of the Respondent's area managers who chaired the grievance meeting, wrote to the Claimant. Insofar as concerns this claim, the letter said;

In regard to this point, during our meeting, you stated you have sent a letter from your GP and you have never been told that you needed to

provide a shielding letter. You also stated that you wanted to forget about furlough pay and you just want Betfred to pay despite now qualifying for it as it is 'exceptional circumstances'.

On 30th June 2020, you were sent correspondence from Ryan Webster, Area Manager, explaining that, although we are sensitive to your situation, we do require medical evidence that you have been advised to shield, otherwise your absence from the business will be deemed as unauthorised. Upon receipt of a letter from your GP that explained that your father was shielding, Ryan Webster again confirmed to you in correspondence dated 9th July 2020 that you were not eligible for any payment under the government furlough scheme as you were not included in the government definition of being extremely clinically vulnerable. This letter also explained that as per government guidance, living with or caring for someone who is vulnerable does not automatically qualify your for furlough payment, especially as our shops were open and we were able to offer you work. Ryan also stated in this letter that in order to qualify for SSP, you would need to provide a GP note to declare that you were unfit for work, or, provide a self-isolation note sent to you directly from the NHS that would allow you to be paid SSP for the self-isolation period.

Therefore, although you have stated that you were not told you needed to provide a shielding letter, this is incorrect. You have now also acknowledged that you are not pursuing furlough pay but would like paying due to the 'exceptional circumstances'. Unfortunately, as I am sure you can understand, this has been the case for a number of employees as the company were experiencing an unprecedented situation with regards to the corona virus pandemic and throughout, we have adopted a consistent approach throughout the Company. As you did not qualify for furlough payment due to not being included in the government definition of being extremely clinically vulnerable, we would not be in a position to pay furlough pay as you were expected to return to work following shops re opening for trading from 15th June 2020. The Company has in fact taken your circumstances in to account by allowing you to remain on unpaid leave until 1st August 2020 and by informing you that could would be able to request to take any accrued holidays during this time.

54. On 12.08.2020, the Claimant emailed the Respondent. He wanted to make a formal complaint about Mr Glossip.

55. On 13.08.2020, the Respondent's HR Support emailed the Claimant. The email read, in part:

We know of no valid reason why you have not attended work since our shops reopened on 13th June 2020 , and as you have still given no indication that you intend to return , the company will not be progressing any further complaints until you return as by continuing not to attend work for no valid reason you are failing to meet your contractual obligations .

I can confirm that you are required by the Area Manager to report for work at 9am on Saturday 15th August 2020 at shop 2587 , Wellingborough Rd . If you do not report for work on that date at that time , we will conclude that you do not intend to return to work and that you have resigned your position on your own volition .

The company will consequently terminate your employment and process you as a leaver effective from 15th August 2020 .

56. The Claimant responded, disputing the accuracy of the hearing notes, by which I understand him to mean, the notes of the grievance meeting.

57. He emailed again the following day, writing:

Please take this as my appeal, just stating facts here really.

Unlike the notes taken in previous meeting with Damian Gossip, who said would get me to sign the notes for accuracy and yet made his decision, without doing this, HR sent me them out, afterwards and would say could be less than 10% accurate.

Spoke to Acas, they are sending me out a earlier conciliation form.

So just to be clear, I am formally asking to be paid my wages owed from the 13the June - 1st August, to be paid, which have supplied a doctors note from Gp telling you that I need to shield, have spoke to NHS 111 yesterday, they said Gp sugrey works for the NHS and can't understand how you are not accepting it as proof of shielding, for someone who extremely clinically vulnerable, so can't understand how that does not qualify for furlough.

Have attached doctors note. To be sure.

As previously stated will not be returning to work, till paid properly, really should be asking for payment for every day I'm missing, and if you do decide to let me go, will have no choice but to presue unfair dissmal, wages owed and claim for all the time the claim goes on for.

58. The Respondent's position is that, in this email, the Claimant says that he is not returning to work because of a dispute about pay, rather than because of any need to shield.

59. Asked about this email, the Claimant was evasive. Challenged that his true reason for not returning to work was because of the pay dispute, he said that that was what was in the email but he couldn't remember his mindset.

60. It is, of course, possible that there was more than one reason why the Claimant did not return to work. But I have not accepted that the Claimant genuinely thought he needed to shield in order to protect his

father, and a belief that he did not genuinely hold cannot have been his reason for not returning to work.

Analysis

Question 1 - Did the Claimant believe that there were circumstances of serious and imminent danger at the workplace?

61. The Covid-19 pandemic caused huge disruption to previously-normal working patterns. It seems to me that an environment such as a betting shop is one in which implementing safe working practices might well present some challenges.

62. However, that would go to the reasonableness of any belief that the Claimant might hold. In this case, I do not accept that the Claimant did believe that there were circumstances of serious and imminent danger at the workplace. The concern he professed was related to his father shielding. But that was dependent upon him needing to shield, because he was living with his father. I have found that not to be the case.

63. I also note that he did not ask the Respondent about any measures it had taken to ensure safety in the workplace.

Question 2 – if so, was that belief reasonable

64. I have not accepted that the Claimant held the belief.

65. Had he been living with his father at the time, it might well have been reasonable to believe that there were such circumstances.

Question 3 – could they reasonably have averted the danger

66. The Respondent criticises the Claimant, for not raising with the Respondent the question of what steps it had implemented to ensure safe working.

67. There is something in that criticism. However, the Respondent can also be fairly criticised, for it appears to have considered the matter purely by reference to whether the Claimant qualified for the furlough scheme. S100(1)(d) and (e) make no reference to the furlough scheme, understandably enough given that they date from 1996. The Respondent, it seems to me, could and probably should have responded to the GP letter by explaining the steps that it was taking to ensure a safe working environment in its shops. It didn't do so.

68. On the evidence before me, I do not have sufficient material to be able to conclude that the Claimant could have averted any danger that going to work would have presented.

Question 4 – did the Claimant refuse to return to the workplace because of the perceived serious and imminent danger

69. It follows from the findings I have made above, that the answer to this question is, no.

Question 5 – was that the reason (or principal reason) for the dismissal

70. There is no dispute that the Claimant was dismissed because he did not return to work. I have not accepted that his refusal to return to work was because of a genuine belief that he needed to do so to keep his father safe.

Employment Judge Hughes

24.03.2023
Date

JUDGMENT & REASONS SENT TO THE PARTIES ON
16 April 2023
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T Cadman
.....
FOR THE TRIBUNAL OFFICE