Neutral Citation Number: [2024] EAT 25

Case No: EA-2021-000931-AS

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 29 February 2024

Before :

HIS HONOUR JUDGE AUERBACH

- -

Between :

MR FRANCESCO ACCATTATIS

Appellant

- and –

FORTUNA GROUP (LONDON) LIMITED

Respondent

- -
- -

Edward Kemp and **Richard O'Keeffe** (instructed by Truth Legal Limited) for the **Appellant**
Rad Kohanzad (instructed by Croner Group Limited) for the **Respondent**

Hearing date: 20 December 2023

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JUDGMENT

SUMMARY

UNFAIR DISMISSAL – Health and Safety Grounds

The tribunal considered a complaint of automatically unfair dismissal under section 100(1)(e) **Employment Rights Act 1996** brought by an employee who did not have two years' service. This provides that an employee shall be regarded as unfairly dismissed if the reason, or, if more than one, principal reason for dismissal is that, 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.

The tribunal erred by failing, when reaching its conclusions, to consider and apply the words of section 100(2), which provides that, for the purposes of section 100(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.

Observations on section 100(2).

Where the employee brings a section 100 unfair dismissal complaint, and the dismissal is found to be for a reason or reasons which embrace both conduct which is within scope of section 100 and conduct which is not, it is incumbent upon the tribunal to decide whether the conduct specifically within scope of section 100 was the principal reason for dismissal.

HIS HONOUR JUDGE AUERBACH:

Introduction

1. The claimant in the employment tribunal claimed that he was unfairly dismissed contrary to section 100 **Employment Rights Act 1996**. The claim was heard at Watford, by CVP, before Employment Judge Alliott in April 2021. The claimant was represented by Mr Owen, an employment specialist, the respondent by Mr Hoyle, a Croner consultant. The tribunal dismissed the claim. A written decision was sent to the parties in May 2021. The claimant appealed.

2. Eady P considered the original grounds of appeal not to be arguable. At a rule 3(10) hearing at which the claimant was represented by Mr O'Keeffe of counsel, HHJ James Tayler permitted four amended grounds to proceed. The respondent's Answer included three grounds of cross-appeal, all contingent on the appeal succeeding. Eady P permitted them to proceed. However, as I will describe, the scope of the challenges, and arguments advanced, on each side, shifted and developed between the opening of the hearing before me, and close of written final submissions, following that hearing.

The Facts

3. The following is a summary of the salient findings of fact made by the employment tribunal.

4. The respondent's business includes the sale and distribution of Personal Protective Equipment (PPE). The claimant was employed from 8 May 2018 as a sales and project marketing co-ordinator. He lived five miles from his place of work and travelled to work by bus. Following completion of his probation period the claimant's salary was increased from £20,000 to £25,000 per annum, and his hours from 30 to 35 per week. The increase in hours was "a running source of contention", which the claimant kept raising during his employment, and he also "felt under-valued" [9].

5. The tribunal continued at [9]:

> **"In turn, the respondent's witnesses complained of the claimant being a challenging employee who made a series of ongoing complaints over many months concerning the general working environment. This included the complaints about working hours being excessive and his salary being too low. The respondent has highlighted**

> **complaints about toilet hygiene standards, an office chair not being comfortable and being unsuitable, the claimant wanting to wear headphones in the office, the claimant taking an excessive number of breaks from his desk, the claimant using his personal mobile phone without permission, possibly in the toilet, and on one occasion, not working after 5pm and challenging a line manager who brought it to the respondent's notice."**

6. This conduct on the part of the claimant was regarded by the respondent's Managing Director, Mr Bavetta, and its Sales and Marketing Manager, Mr Sheehan, as "challenging". However, his actual performance of his job was regarded as very good.

7. In view of the nature of its business, the onset of the Covid-19 pandemic in early 2020 resulted in the respondent being "incredibly busy". On 23 March 2020 the first national lockdown was announced. In a series of messages the respondent informed staff that it would be staying open for business, and of various steps and arrangements that it was introducing in relation to hygiene and health and safety in the office. But it also informed staff that any employee requests to be permitted to take paid annual leave or unpaid leave would be approved.

8. On 25 March 2020 the claimant asked to be allowed to work from home. Mr Sheehan indicated that this was not agreed, because it would not be commercially viable to arrange remote access to the software he needed to use, and he also needed to be present at the respondent's premises to deal with the logistics of daily deliveries. The tribunal found that the claimant "could not have worked from home" and was a key worker, as the respondent was in the forefront of distributing PPE.

9. The claimant continued to come in to work until Monday 30 March 2020. However, that day he had symptoms of Covid and left work to self-isolate at home. In accordance with his contract of employment, his first three days of sickness absence were paid at 50%. Thereafter he received SSP.

10. As of 5 April 2020 the claimant anticipated that he would need another week fully to recover, in which case he would return to work after Easter on Tuesday 14 April. He obtained NHS isolation notes covering the period up to 18 April.

11. On 15 April 2020 the claimant emailed Mr Bavetta asking to be placed on furlough, and attaching a draft agreement to that effect. He wrote that this would be a win-win, saving the company money and helping him to pay his bills. The tribunal interposed that it was not given the details of the furlough scheme, but that Mr Hoyle told it that people qualified as furloughed if they had been instructed by the employer to cease work; and that it was accepted by the claimant that he was not a vulnerable person required to shield. On 17 April Mr Bavetta responded that, as the scheme was to support employees who would otherwise be made redundant or placed on enforced unpaid leave, he was unable to furlough the claimant. There remained work for him to perform and there had been no reduction in his workload. "As such, we would expect your immediate return to work."

12. The claimant replied the same day, 17 April, that Government guidance was clear, that those who can work from home should do so. Alternatively, he wrote, the furlough scheme covered employees in self-isolation. He wrote that he did not feel comfortable using public transport and coming in to the office during lockdown. It was up to the respondent whether to allow him to work from home or place him on furlough until the isolation was over. "Both solutions work for me."

13. Mr Bavetta replied the same day, 17 April, that furlough was not an option and that the claimant was not able to work from home. If the claimant was still experiencing flu-like symptoms it was essential that he obtain a GP note as soon as possible. He concluded: "I await your immediate reply as you are currently away from work on an unauthorised basis." The tribunal observed that this last comment did not appear to be accurate, as the last isolation note ran to 18 April 2020.

14. The claimant replied again later on 17 April 2020 referring to the NHS isolation notes, attaching a note from his GP for the period 17 – 24 April, which gave the reason for absence as "cough", and suggesting again that he should be furloughed or permitted to work from home.

15. On 18 April 2020 Mr Bavetta replied that the claimant would be marked as on sick leave until 24 April, which was the only option available for processing his present time away from work. The

claimant replied the same day that "sick pay won't cover my expenses" and urging the respondent to "kindly look into an alternative solution to guarantee a reasonable income during self-isolation period". He said he had received "confirmation from several sources" that the furlough scheme was easily accessible by any company still actively trading, without any downside to it.

16. On 21 April 2022 the claimant sent a further email, stating that the HMRC helpline had confirmed that the furlough grant was available for employees in self-isolation from March. Twenty minutes later Mr Bavetta emailed the claimant as follows.

> **"Re: Termination of employment – Fortuna Healthcare**
> **Further to an internal meeting this week between myself and John Sheehan, I regret to inform you that we have taken the difficult decision to terminate your employment with the company from today, Tuesday 21 April. Please note that the reason for this course of action is due to a general ongoing failure of your part over a period of many months to support and comply fully with our company policies and guidelines."**

17. The claimant was paid one month's pay in lieu of notice.

The Tribunal's Decision

18. The tribunal identified that the claimant did not have the necessary qualifying service to claim ordinary unfair dismissal, and that the issue for consideration was specifically whether, pursuant to section 100(1)(e) of the **1996 Act**, the reason, or principal reason, for the dismissal was that:

> **"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."**

19. In its self-direction as to the law, the tribunal cited this passage from the *IDS Handbook*:

> **"According to the EAT, in Oudahar v Esporta Group Limited 2011 ICR1406, EAT, a two stage approach is appropriate under section 100(1)(e). First, the tribunal should consider whether the criteria set out in that provision have been met as a matter of fact. Were there circumstances of danger that the employee reasonably believed to be serious or imminent? Did he or she take or propose to take appropriate steps to protect him or herself or other persons from the danger, or take steps to communicate these circumstances to the employer by the appropriate means? If these criteria are not satisfied, then Section 100(1)(e) is not engaged. However, if the criteria are made out, the second stage is for the tribunal to consider whether the employers sole or principal reason for dismissal was that the employee took or proposed to take appropriate steps. If so, the dismissal must be regarded as unfair."**

20. In the last part of the section setting out the facts, the tribunal said this:

> **"45. When dealing with the respondent's reasons for dismissing the claimant, Mr Bavetta's witness statement is, in my judgment, revealing. He refers to the initial e-mails from the claimant requesting to be furloughed as "surprising". He refers to an e-mail sent on 17 April as being "written in even more impertinent terms". Mr Bavetta refers to the e-mail sent on 21 April 2020 and avers "it is very clear that the claimant has no intention of returning to work." I do not accept that evidence from Mr Bavetta as the email does not make that clear. The claimant had previously provided a GP certificate covering his sickness absence until 24 April and that had been acknowledged by Mr Bavetta.**
>
> **46. Mr Bavetta goes on to state that that e-mail was to all intents and purposes the last straw.**
>
> **47. In cross-examination it was put to Mr Bavetta that he had dismissed the claimant because the second anniversary of his employment and therefore full protection under the Employment Rights Act against unfair dismissal was imminent. Mr Bavetta accepted that that was a fair point."**

21. I will set out what the tribunal said under the heading "Conclusions" in full (in line 5 at [51], though the tribunal wrote "claimant's", it appears to me that it clearly meant "respondent's"):

> **"48. Although the claimant from a work perspective was a very good employee, I find that there was some antipathy between him and the respondent concerning his attitude and complaints. However, I find that this had not been escalated to any formal process and had not been an issue for some months prior to the COVID crisis. Nevertheless, it represents the background to the respondent's view of the claimant.**
>
> **49. Given the Government announcement on 14 February that the incidence or transmission of novel Corona virus constitutes a serious and imminent threat to public health, so objectively, I find that there were circumstances of danger which an employee could reasonably have believed to be serious and imminent.**
>
> **50. The highpoint as to whether the claimant subjectively believed the danger to be serious and imminent rests upon him exploring working from home around 25 March 2020, and his statement on 17 April 2020 that after three weeks' struggling with symptoms, he did not feel comfortable with the idea of using public transport and coming in to the office during the lockdown. To an extent, the evolving nature of the crisis and the lack of knowledge about Corona virus, makes it somewhat difficult to apply the provisions of section 100. However, I am prepared to accept that, subjectively, the claimant reasonably believed the danger to be serious or imminent.**
>
> **51. The next question to consider is "did he take or propose to take appropriate steps to protect him or other persons from the danger or take steps to communicate these circumstances to the employer by appropriate means?" Firstly, the claimant himself characterised his e-mail on 17 April 2020 as indicating a reluctance to return to work and not a refusal. I have rejected the claimant's characterisation of that e-mail as making it clear that the claimant had no intention of returning to work. The appropriate steps that the claimant was taking in order to protect himself or others from the danger, was to remain at home and not travel on public transport or go into the office. That had always been allowed by the respondent through paid or unpaid leave. This, for obvious economic reasons was not an attractive option to the claimant**

> **and the whole thrust of his exchanges with Mr Bavetta was clearly in order to allow him to remain at home but either working on full pay or furloughed on 80% pay. I find that the respondent reasonably and justifiably concluded that the claimant could not work from home and that he did not qualify for the furlough scheme. As such, I find that the claimant did not take or propose 'appropriate steps' in that he was not only wanting to stay at home (which had been agreed) but also demanding that he either be placed on furlough or be allowed to work from home. I find that his demands for furlough or working from home were not appropriate steps to protect him from the danger. As such, I find that Section 100(1)(e) of the ERA is not engaged and the claim fails.**
>
> **52. Nevertheless, even if the criteria were made out, I find that the sole or principal reason for the dismissal was not that the claimant took or proposed to take those appropriate steps. I find that a significant reason why the respondent terminated the claimant's employment when it did was to prevent him achieving two years' qualifying service and therefore the protection against unfair dismissal. I find the reason that the respondent wanted to prevent the claimant from achieving protection against unfair dismissal was that he was perceived to be a difficult and challenging employee who had written impertinent e-mails demanding to furloughed [*sic*] or to be allowed to work from home. I find those to be the principal reasons for the claimant's dismissal and the reason was not because the claimant was reluctant to come in to work or use public transport.**
>
> **53. Accordingly, the claimant's claim for automatically unfair dismissal for health and safety reasons is dismissed."**

The Statutory Framework

22. Section 100 of the **1996 Act** implements provisions of **EU Directive 89/391**. I do not need to set those provisions out, nor subparagraphs (a) to (c) of section 100(1). I will set out the remainder, including, in italics, words which the EAT in **Balfour Kilpatrick Ltd v Acheson** [2003] IRLR 683 held should be read in to section 100(1)(e) so as to comport with the Directive:

> **"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—**
>
> **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 *or to communicate these circumstances by any appropriate means to the employer*.**

> **(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."**

The Grounds of Appeal

23. At the hearing before me both parties were represented by counsel: the claimant by Mr Kemp, leading Mr O'Keeffe, who co-authored the skeleton argument and post-hearing submissions (more about those in a moment); the respondent by Mr Kohanzad.

24. Prior to the start of the hearing, there were four live amended grounds of appeal, which, using the original numbering, were 2 to 5. In view in particular of a perversity argument raised by ground 5 a request had been made for the judge's notes of evidence. But a reply had been received to the effect that the tribunal no longer had these. At the start of the hearing Mr Kemp withdrew ground 5. By stages, during the course of the hearing, Mr Kohanzad withdrew the cross-appeal entirely.

25. The three amended grounds of appeal, as they stood at the hearing, are as follows.

> "**Ground 2 – The ET gave insufficient reasons as to why a demand for home working or use of the CJRS was not an appropriate step to protect himself.**
>
> **4. In respect of the ET's finding that "his demands for furlough or working from home" (§51) were not "appropriate steps to protect himself", the ET failed to provide sufficient reasons for the Appellant to understand why such demands were not held to be appropriate. Neither the practicability of the measures, nor the Respondent's subjective view of those demands, could be determinative of that issue, as it was to be determined objectively having regard to the Appellant's understanding of the position.**
>
> **Ground 3 – The ET failed to judge whether the relevant steps were appropriate by reference to the Appellant's knowledge and advice available to him, as required by s.100(2) ERA.**
>
> **5. In addition, and in any event, the ET failed to judge whether the relevant steps (the requests identified above), were appropriate "by reference to all the circumstances including, in particular, his knowledge and the facilities and advice available to him at the time" within the meaning of s.100(2) ERA, which provision the ET did not address at all, and in particular by taking into account the Appellant's understanding**

> **that colleagues had been working from home (§19) and his having been advised by HMRC that furlough was available for workers in his situation (§39).**
>
> **Ground 4 – The ET erred in law as to whether particular aspects of the steps taken by the Appellant to protect himself, and / or the manner in which he took those steps, were a separable discrete reason for dismissal.**
>
> **6. Further, and in any event, in holding at §52 of the Judgment, that the reason for the dismissal was "that [the Appellant] was perceived to be a difficult and challenging employee who had written impertinent e-mails demanding to be furloughed or work from home", if the ET is taken to have identified the tone of the requests for furlough or homeworking as a discrete reason (which is not accepted), the ET failed to (a) "evaluate whether the reasons so identified are separate from the protected disclosure [here the s.100 ERA steps]" – per Kong v Gulf International Bank (UK) Ltd [2022] ICR 1513, [57] – (b) explain why the tone of the requests could be treated as a discrete reason, and / or (c) in serious procedural irregularity failed to put the Claimant on notice during the hearing that this was an issue for the Tribunal, it not having been argued by the Respondent.**

26. In the course of oral argument, Mr Kohanzad made a submission about how the tribunal's decision as to the principal reason for dismissal should be read. Mr Kemp objected that this was a shift in his position which should not be permitted. After discussion, I permitted and directed further post-hearing written submissions. Those were thereafter received first from Mr Kohanzad, then from Messrs Kemp and O'Keeffe, and finally a reply from Mr Kohanzad on 26 January 2024. In their submission Messrs Kemp and O'Keeffe also requested that a proposed draft amended version of ground 4 be considered, should I entertain Mr Kohanzad's argument as to the tribunal's conclusion as to the principal reason for dismissal. I will address these aspects in substance in what follows.

Discussion and Conclusions

27. I need to start by noting some points that were *not* in issue before me, whether because such challenges were never raised, were initially raised by one or other party as a ground of appeal or cross-appeal but not permitted to proceed to a full hearing, initially raised by a party but subsequently withdrawn, or because the point in question was agreed or conceded. Thus, ultimately:

(1) It was not contended that the tribunal erred in concluding – as both sides agreed that it did at [49] – [50] – that the claimant reasonably believed that Covid-19 presented a serious and imminent danger to his health in the workplace itself, and also on the journey to work;

(2) It was not contended that the tribunal erred by treating such a reasonable belief as falling within scope of section 100(1)(e). In that connection I was not called upon to decide whether certain observations made by the Court of Appeal in **Rodgers v Leeds Laser Cutting Limited** [2022] EWCA Civ 1659; [2023] ICR 356 (which reached the EAT and then the Court of Appeal only after this tribunal gave its decision) in relation to the scope of section 100(1)(d) applied equally to section 100(1)(e);

(3) There was ultimately no live challenge to the findings, which both parties agreed the tribunal made, first, that the claimant's reluctance to return to the workplace, and corresponding decision to remain at home, *as such*, amounted to an appropriate step within scope of section 100(1)(e), and secondly, that *that* step was *not* the reason or principal reason for dismissal;

(4) It was not ultimately contended that asking to be placed on furlough or permitted to work from home could not in any event properly be regarded as a step to protect the claimant from the danger in question within scope of section 100(1)(e); and

(5) Counsel on both sides confirmed that neither party contended that the tribunal erred by treating the claimant's case as advanced, and advanced solely, under section 100(1)(e) and not also, or instead, under section 100(1)(d).

28. Turning then to the substantive issues that *are* before me, I start with some observations about the live grounds of appeal, as they stood at the conclusion of the appeal hearing, and how the arguments in relation to them then developed, including the proposed re-amendment of ground 4.

29. The implicit premise of ground 3 (and ground 2) is that, on a correct reading, the tribunal found that the reason or principal reason why the claimant was dismissed was because of what the tribunal called his demand that he be permitted to work from home or be furloughed (with associated

pay consequences). Ground 3 then asserts that the tribunal erred in concluding that such conduct was not within scope of section 100(1)(e), by failing to decide that question by reference to section 100(2) and in particular failing to take into account the specific factual features mentioned in that ground. Ground 2 argues that, in the alternative, the tribunal failed sufficiently to set out reasons in that regard.

30. In the course of oral argument, Mr Kohanzad postulated that the foregoing premise was not the correct reading of the tribunal's decision. Rather, the reference in [52] to the claimant having been "perceived to be a difficult and challenging employee" showed that the tribunal had *not* found that the furlough or working from home demand was the sole or principal reason for dismissal. So, even if it did err as alleged by ground 3 (or ground 2), that would not have affected the outcome. It was this argument which Mr Kemp protested represented a late shift in the respondent's position which I should not entertain. In the ensuing discussion I permitted further post-hearing written submissions on the question of whether this argument should be entertained, and, if so, as to its merits. It was as part of those further submissions that Messrs Kemp and O'Keeffe then tabled their proposed re-amended version of ground 4, which they invited me to consider in the event that I did entertain Mr Kohanzad's argument on this point.

31. Ground 4, in the form originally before me, is contingent on the possibility that I might conclude that, on a correct reading, the tribunal had found that the reason or principal reason for dismissal was the *tone* of the demand made by the claimant that he be permitted to work from home or placed on furlough, being something that the tribunal regarded as distinct from the substance of that demand. Were I to hold that that was the correct reading, then the tribunal is said to have erred as contended in that ground. Early in the course of oral argument, Mr Kohanzad indicated that he did *not* advocate such a reading. But in view of the further dispute which emerged later in the day, as to whether that demand (whether as to its substance or tone) had been found to be the principal reason for dismissal at all, I considered it fair to leave ground 4 in play.

32. In their post-hearing submission Messrs Kemp and O'Keeffe then tabled a proposed re-

amended version of ground 4 with a view, as it were, to covering all the bases. This contends that *if* (which the claimant does not accept) the decision is to be read as identifying his being perceived to be a difficult and challenging employee as a discrete reason for dismissal, then the tribunal erred by failing to identify whether that was something separate from the conduct said to fall within section 100 and/or by failing to determine which of the matters referred to at [52] was the principal reason.

33. I turn then to my reading of what the tribunal did or did not decide. I take the established approach of reading the decision fairly and as a whole, not being over-pedantic, but taking account of the context of what the tribunal needed to decide, in order to dispose of the complaint.

34. On the basis that the relevant provision was section 100(1)(e), the tribunal had to decide, first, whether the claimant reasonably held the belief referred to there. The tribunal's answer, at [49] – [50], was that the claimant did reasonably believe that the pandemic gave rise to circumstances of serious and imminent danger (to him), were he to enter, and/or travel to, the workplace. As I have already noted, those conclusions, as such, were not ultimately challenged before me.

35. The tribunal next had to decide whether the claimant took (or proposed to take) appropriate steps to protect himself from that danger. It was common ground that the tribunal found that the claimant deciding to remain at home and not to travel to work, or enter the workplace, *was* such an appropriate step, as such. It said so in terms in the fourth sentence at [51] (beginning: "The appropriate steps that the claimant was taking …"). Again, that holding is not challenged.

36. The tribunal also found that the claimant (in its word) also thereafter demanded that, while remaining at home, he either be placed on furlough or permitted to work from home (with associated consequences for his pay). I interpose that, in the particulars of claim, the claimant simply asserted that he was dismissed "because I had indicated a reluctance to return to work at that time because of my concerns over the Coronavirus situation". But his case at trial appears to have been treated as extending to the proposition that the reason or reasons for dismissal also embraced that demand.

However, the tribunal considered that *that* conduct was *not* an appropriate step to protect him from the reasonably-perceived danger. That is clear in particular from the penultimate sentence of [51].

37. Next, what is the correct reading of the tribunal's decision as to what it found was, factually, the reason or principal reason for dismissal? Again it was common ground before me that the tribunal concluded that it was *not* the one thing that it found that the claimant had done that amounted to an appropriate step to protect himself from the perceived danger, namely remaining at home, *as such*. That conclusion is stated explicitly at the end of paragraph [52], though it would appear to have been reached by the end of [51], at which point the tribunal indicated that the complaint must fail.

38. But in all events what the tribunal did not do, prior to paragraph [52], is make any positive finding as to what *was* the reason or principal reason for dismissal. As I have described, Mr Kemp's position is that, in the substantive part of the reasoning in [52], the tribunal found that the principal reason for dismissal was the demand to be furloughed or allowed to work from home (which I will, henceforth, for convenience, refer to simply as "the demand"). Mr Kohanzad seeks to contend that this is not the right reading, in particular because of the reference there to the claimant being "perceived to be a difficult and challenging employee" which, he says, plainly refers back to the earlier findings the tribunal made about the claimant's conduct from the outset of employment. So, he contends, the tribunal did not find the demand to be the principal reason, but just *a* reason.

39. I think it is fair to say, as Mr Kemp does, that neither the Answer nor Mr Kohanzad's opening skeleton argument for the appeal, expressly flagged up that this was, or might be, the respondent's case. But I consider it fair to entertain the argument at this point. That is for a number of reasons.

40. First, I note that, in the response document accompanying the original response form in the tribunal, the following appears at [20]:

> **"Julian Bavetta and John Sheehan held a meeting, and following seeking legal advice, wrote to the Claimant on 21st April 2020 to terminate his employment due to 'general and ongoing' failures on his part over a prolonged period to comply with company policies and guidelines. The Respondent had been contemplating dismissing the**

> **Claimant previously prior to his 2 year service and his continually disregard [*sic*] to the Respondent's procedures and his attempts to dictate that the Respondent must use the job retention scheme when it was unnecessary led the Respondent to terminate his employment."**

41. The dismissal letter (cited by the tribunal at [40]) also gave the reason for dismissal as "a general and ongoing failure [on] your part over a period of many months to support and comply fully with our company policies and guidelines". The tribunal was of course not bound to accept that as a true statement of the reason. But this material shows that the respondent was, at those earlier stages, advancing a case at least along similar lines to that which Mr Kohanzad seeks to argue that the tribunal should be read as having accepted. This was not an entirely novel line of argument in the EAT.

42. Secondly, given the tribunal's findings at [9] and following, about the history of the claimant's conduct and of the parties' relationship, prior to the onset of the pandemic, Mr Kohanzad's proposed reading of the reasoning in [52] cannot be immediately dismissed as obviously wrong. It merits consideration. Thirdly, Mr Kemp has been able, between his initial submission in the time available at the appeal hearing, and with the further opportunity of a post-hearing written submission, fully to advance his case on the substance of the argument (including citation of a number of authorities); and to put forward a proposed re-amendment to ground 4 in order to respond to it. Mr Kohanzad, in turn, thereafter had the opportunity of a final submission in reply.

43. Overall, I conclude that it is fair to both sides, both to consider, in substance, Mr Kohanzad's argument, but also to consider Messrs Kemp and O'Keeffe's response to it, including, as appropriate, their proposed reamended ground 4.

44. What, then, is the correct reading of what the tribunal decided about the reason or principal reason for dismissal in this case? The arguments focused in particular on the central passage in [52] in which the tribunal set out its positive conclusions, from: "I find that a significant reason …" through to: "I find those to be the principal reasons …". That passage must be read, of course, in the context of what led up to it, and the tribunal's overall decision and earlier findings of fact, as a whole.

45. In that passage within [52] the tribunal referred to three things as in some sense having a bearing on the decision to dismiss: (a) the desire to prevent the claimant achieving qualifying service to claim ordinary unfair dismissal; (b) the claimant being perceived to be a difficult and challenging employee; and (c) the claimant having written impertinent emails demanding to be furloughed or to be allowed to work from home. I think it is clear that (b) is a reference to the earlier findings of fact about what the respondent considered to be the claimant's difficult and challenging conduct prior to the start of the pandemic (and none of which was claimed, or found, to fall within section 100).

46. However, what is not clear is what the tribunal considered to be the relative significance or weight, in terms of their respective influences on the mind of the dismissing manager, of these three matters. The tribunal does not expressly say, and the uncertainty is compounded by the statement in the final sentence that the tribunal finds "those to be the principal reasons". There is a potential initial ambiguity here as to whether "those" refers to all of (a), (b) and (c); or only to (b) and (c), on the basis that those are themselves two distinct contributing reasons. On that point, counsel on both sides in their submissions advocated the latter reading. I think that is right: having identified the significance of the impending two-year milestone, the tribunal then looked to see what, in the employer's mind, was the *underlying* cause of the desire to dismiss before it was reached.

47. But even on that reading, the difficulty remains that the tribunal simply referred to the "principal reasons", in the plural. In their post-hearing submission Messrs Kemp and O'Keeffe cited a number of authorities, sprinkled across the last fifty years, which they submitted cast light on the correct doctrinal approach. They postulated that there can be cases in which the tribunal finds that the principal reason for dismissal is a composite reason, for example, because the employer is found to have dismissed the employee for several pieces of conduct, without distinguishing among them. In such cases, they postulated, if such conduct includes what might be called protected conduct (in the sense that dismissal for that sole or principal reason would be automatically unfair under section 100 or another similarly-framed provision) then the claim should succeed unless the tribunal finds

that some other non-protected part of the conduct forming the composite reason was the principal reason. Alternatively, they submitted, it is incumbent on the tribunal to decide which of the sub-strands was itself the principal reason either way; and it will err if it fails to do so.

48. I do not think it necessary to go through all of the authorities to which Messrs Kemp and O'Keeffe referred. In my view the concept of a composite reason is not a particularly helpful one in cases of this sort. Depending on the choice of language, and/or level of abstraction of the chosen description, the same thing can, potentially, be described as a single reason, or as multiple reasons or sub-reasons. The starting point is that, in accordance with the words of the statute, while there can be more than one material contributing reason for a dismissal, there can be only one principal reason. In cases of dismissal for conduct, where the reasons are found to embrace both what I have called protected conduct, and other, as it were, ordinary conduct, then in order to determine the claim of automatically unfair dismissal, it is incumbent upon the tribunal to consider, and decide, in substance, whether the protected conduct was or was not the principal reason for the dismissal.

49. I will take one illustration from the authorities cited by Messrs Kemp and O'Keeffe. In **Pazur v Lexington Catering Services Limited** UKEAT/0008/19, 20 August 2019 the claimant claimed to have been unfairly dismissed for a reason or principal reason within scope of section 101A of the **1996 Act** (working time cases). The tribunal found that the claimant was dismissed because of his refusal to go back to work for two different clients, but only in respect of one of these was that conduct claimed to be within scope of section 101A. The EAT remitted the matter to the tribunal to determine whether the refusal to return to that particular client was the reason or principal reason for dismissal.

50. As with some other areas of the law, it is possible, I suppose, to envisage a case in which the tribunal simply cannot decide, for example, which of two contributing reasons – one protected and one not – was the principal reason. But, as in other areas, such cases should be rare indeed, and the tribunal's first task is to do its best to decide on the evidence that it has whether the protected conduct was the principal reason or not. I do not underestimate how challenging decisions of this type can

be; but no more challenging, I would venture, than the decisions that tribunals regularly take with great command in other areas where they must peer into the decision-maker's head.

51. In this case I have considered whether it is apparent, reading the tribunal's decision fairly and as a whole, whether it determined whether the conduct prior to what I have called the demand, or alternatively the conduct in making the demand, was the principal reason for dismissal. The earlier reference to Mr Bavetta's evidence that the claimant's final email was "the last straw" [46] and the content of the dismissal letter, set out at [40], might be argued to support the former view. The content of [48] might be argued to support the latter view. But the tribunal does not tell us in terms what it made of these features of the evidence; and the phrase used in [52] itself: "that he was perceived to be a difficult and challenging employee who had written impertinent emails demanding to be furloughed or to be allowed to work from home" is consistent with either interpretation. It was for the tribunal to evaluate these aspects, within the context of all of the relevant evidence; and, if it formed a view on this question, I do not think the reader can safely tell what it was.

52. The uncertainty is compounded by a further ambiguity in [52]. The opening implies that the tribunal has concluded that the "criteria" are not made out, but that it is considering what the position would be, if, contrary to its view, they were. I take "criteria" to be a reference to the passage earlier cited from the *IDS Handbook*, discussing **Oudahar**. So, it is considering whether, if, contrary to its view, certain conduct was appropriate conduct within scope of section 100, *that* conduct was the sole of principal reason for dismissal. It indicates at the outset that the answer is "no". But, if the conduct the tribunal had in mind at the start of [52], which, in [51], it had found was not appropriate conduct, was what I have called the demand, the tribunal does not, in the reasoning that follows, state or explain that it has concluded that the principal reason was *not* the demand. Rather, it contrasts *all* of the conduct which it finds was the principal reasons (plural) for the dismissal, with the conduct which it had already found in [51] was appropriate conduct, but was not the principal reason.

53. I do not think the point raised by the original and re-amended versions of ground 4, about the

potential distinction between the substance of the claimant's conduct and the tone, is apposite to the facts of this case or goes anywhere. It is not the claimant's own case on appeal that the tribunal's decision should be read as relying on the tone as a distinct principal reason – and Mr Kohanzad also consistently indicated that he did not contend for such a reading. I think both parties were right about that. On any view, the respondent's case was that it took issue with the claimant raising complaints, or requests, which it in substance considered to be unreasonable. It was not its case that he raised reasonable requests or complaints, but in an unreasonable or unacceptable manner.

54. However, for reasons I have explained, I am persuaded that the other part of the re-amended ground 4 is made out, being that the tribunal failed to identify, or explain sufficiently clearly, whether it considered that the demand was *the* principal reason for dismissal. Of course this only makes a difference if either ground 3 or ground 2, which attack its conclusion that the demand was not appropriate conduct within section 100(1)(e), is well-founded. But it means that I reject Mr Kohanzad's submission that those grounds are in any event academic; and so to them I now turn.

55. Ground 3 asserts that, in deciding whether the demand was appropriate conduct within scope of section 100(1)(e), the tribunal erred by not considering, or addressing, section 100(2), and, in particular, for that purpose, in the words of the ground, the claimant's understanding that colleagues had been working from home, and his having been advised by HMRC that furlough was available for workers in his situation.

56. It was not suggested by Mr Kemp that the claimant's representative before the tribunal had identified that the claimant was relying on those particular matters as amounting to relevant knowledge of his or advice available to him falling within section 100(2). Rather, his submission was that section 100(2) forms an integral part of the test of whether steps are appropriate for the purposes of section 100(1)(e), which must be considered in every case; and, further, that the words "in particular" indicate that particular weight must be given to the employee's knowledge and the facilities and advice available to him at the time.

57. Mr Kemp accepted, however, that the overall question of whether the steps taken were appropriate is an objective one for the appreciation of the tribunal. But he argued that the present tribunal's reference in the course of [51] to what the respondent "reasonably and justifiably concluded" showed that it had not decided the appropriateness question for itself, because (as discussed in **Oudahar**) what the respondent thought was legally irrelevant. In any event, it had failed to take into account the section 100(2) aspects that related to the claimant's perspective.

58. Mr Kohanzad's position was that he did not dispute that, if the tribunal had failed to take the two matters highlighted by this ground into account, when deciding whether the demand was appropriate conduct within section 100(1)(e), then that would be an error. Nor did he contend that the tribunal had expressly done so in its conclusions. But he relied upon the fact that, earlier in its decision, the tribunal had made findings of fact, that the respondent had told the claimant in the email exchanges that working from home was not an option in the claimant's case (with which the tribunal agreed) – see [19] to [22]; and it had referred in its findings of fact to what the claimant had told the respondent in the email exchanges that the HMRC helpline had confirmed about furlough [39].

59. Mr Kohanzad submitted that the tribunal plainly had, on a fair overall reading, come to its own view that the claimant's demand to be furloughed or permitted to work from home was not appropriate. Further, this was a case where it was not an error not to have expressly referred to these two matters, regarding his knowledge or advice he had received, in the conclusions. That is because I could be confident, and could infer, that, in this short decision, the tribunal had not forgotten these aspects, when coming to its conclusions, and had not failed to take them into account.

60. My conclusions on this ground follow. I will start with some points about the law before turning to the specific challenge to the decision in this case.

61. First, whether the steps on which the employee relied were or were not appropriate steps for the purposes of section 100(1)(e) is, overall, an objective question to be decided by the tribunal

coming to its own view, and doing so, in the words of section 100(2), by reference to all the circumstances of the case. Secondly, the question of whether the employee took appropriate steps will not arise unless the tribunal has first decided that they reasonably believed there to be a serious and imminent danger. It is an additional test, which may or may not also be satisfied; but there is a link, because the tribunal has to decide whether the steps were appropriate to protect the employee or others from the particular danger that the employee reasonably believed existed.

62. Next, while the overall test is objective, the effect of the phrase in section 100(2) beginning "including, in particular…" is that the tribunal must in every case consider and take into account whatever evidence it has specifically regarding the employee's knowledge and the facilities and advice available to them at the time when they took, or proposed to take, the steps in question.

63. Whilst, as I have noted, it was not contended before me that the present tribunal erred in regarding this case as potentially within scope of section 100(1)(e), I would venture that the paradigm scenario with which it is concerned (and which section 100(1)(d) would not cover – see **Rodgers** at [18]) is one in which the employee's response to the perceived danger was not to leave, seek to leave, or stay away from the workplace or a dangerous part of it, but to attempt to mitigate the danger by taking some immediate proactive step to tackle its source. It is easy to see why their knowledge, and/or the facilities or advice available to them at the time, would be regarded as highly pertinent to whether such conduct should be judged appropriate in such a case. But in any event the words apply to any and every case that is properly regarded as falling within section 100(1)(e).

64. Finally, I do not think that the words "in particular" mean that the tribunal must necessarily give those aspects greater weight than other relevant circumstances. What weight to give different relevant circumstances, and the assessment of how they feed into the overall decision about appropriateness, must be a fact-sensitive matter for the tribunal in each case. There may also be cases where the tribunal, upon consideration, concludes that there is no relevant feature relating, say, to the facilities available at the time. But the specific mention of these aspects "in particular" in section

100(2) means that the tribunal must, when reaching its conclusion on the "appropriate steps" question, give consideration to how matters stand in relation to these aspects in the case before it. That is best done by addressing this feature expressly when setting out its conclusions; but, one way or another, it must be clear that the tribunal has indeed considered this aspect as part of its dispositive reasoning.

65. I turn, then, to the present decision. I start by noting again a point about the scope of the arguments or dispute upon appeal, being that Mr Kohanzad did *not* contend that, whether in the course of [51] or otherwise, the tribunal had expressly addressed the section 100(2) aspects relating to the claimant's perspective in the discussion of its conclusions. However, as I have noted, he contended that, in view of passages in the earlier findings of fact, it could safely be inferred that it must have had these considerations in mind when coming to its conclusions.

66. That submission however faces the following difficulties. First, the tribunal did not refer at all to section 100(2), or to its words, or their gist, whether in the concluding section or in its earlier self-direction as to the law. It may well be that it was simply not drawn to the tribunal's attention by either representative, but in the absence of such a mention I cannot be confident that the tribunal had it on its radar at all. Secondly, as I have noted, Mr Kohanzad does not contend that the reference at [51] to what "the respondent reasonably and justifiably concluded" engages with the matters relating to the claimant's perspective at the time, factually relied upon by this ground of appeal as falling within scope of the words in section 100(2). This is not a case where I was invited to hold that the tribunal did in fact expressly cover the ground in its conclusions, even though it may not have appreciated that the statute specifically required it to do so.

67. While the earlier passages in the findings of fact might be said to have provided the tribunal with, as it were, the necessary raw material, to enable it to evaluate the significance of what the claimant knew about some colleagues being permitted to work from home, and the advice that he said he had received from the HMRC helpline concerning furlough, for the appropriateness question, having regard to the foregoing, I cannot infer that the tribunal *did* specifically consider those aspects,

when deciding that question. If, as appears, the tribunal did not have its attention specifically drawn to section 100(2) or receive specific submissions in relation to it, I have some sympathy with it; but for these reasons, and having upheld the amended ground 4 in the respect that I have identified, I am bound also to uphold ground 3. I therefore do not need to consider ground 2.

Outcome

68. The matter must be remitted to the tribunal for the narrow purpose of deciding afresh (a) whether what the tribunal called the claimant's demand that the respondent furlough him or permit him to work from home was an appropriate step for the purposes of section 100(1)(e), considering and applying the words of section 100(2); and/or (b) deciding whether the demand was the reason or principal reason for dismissal.

69. Mr Kemp invited me, should the appeal be allowed, to direct remission to a different tribunal, Mr Kohanzad to the same tribunal. This is a case where the matter is not being remitted for a complete re-hearing and the original findings of fact, as far as they go, will stand. The scope of what is being remitted is very narrow. I see no reason why the original judge cannot be trusted to take on board the section 100(2) point and to faithfully apply the law, guided by my decision; and to complete the task of deciding whether the demand was or was not the principal reason for dismissal. I will not tie the judge's hands, but it also occurs to me that there is at least the prospect that, if the matter returns to the same judge, the hearing and preparations for it may be less extensive than if it is a different judge.

70. I will therefore direct remittal for those two issues only to be heard before the same judge, if available. But I make clear that, whether it returns to the same judge, or, if they are not available, then to a different judge assigned by the REJ, I leave all other matters of case management to the tribunal; and so the parties' further submissions in that regard should be directed to it.