Case number: 1403451/2020

EMPLOYMENT TRIBUNALS

Claimant: **Mr Chris Preen**

First Respondent: **Coolink Limited**
Second Respondent: **Mr Richard Mullins**

Heard at: **Bristol** **On:** **8-10 November 2021**

Before: **Employment Judge Oliver**
Ms J LeVaillant
Mr E Beese

Representation
Claimant: Mr S Wyeth, counsel
Respondent: Ms L Taylor, counsel

RESERVED JUDGMENT

1. The claims for wrongful dismissal, unauthorised deduction from wages and failure to pay holiday pay are dismissed upon withdrawal.

2. The claimant was automatically unfairly dismissed by the first respondent for a health and safety reason under section 100(1)(c) of the Employment Rights Act 1996.

3. The remaining claims fail and are dismissed.

REASONS

1. This is a claim for automatic unfair dismissal for health and safety reasons, automatic unfair dismissal for whistleblowing, being subjected to a detriment for raising health and safety issues, being subjected to a detriment for whistleblowing, wrongful dismissal, unauthorised deduction from wages, and accrued but unpaid holiday pay.

2. The hearing was conducted by the parties attending in by video conference (CVP). It was held in public with the Tribunal sitting in open court in accordance with the Employment Tribunal Rules. It was conducted in that manner because the parties had consented to such a hearing and it was in accordance with rule 46, the *Presidential Guidance on remote hearings and open justice* and the overriding objective to do so.

Issues

3. The claimant's representative confirmed that he was no longer pursuing claims for wrongful dismissal, unauthorised deduction from wages or accrued but unpaid holiday pay, and these claims are dismissed upon withdrawal.

4. There was a case management hearing on 16 March 2021 conducted by EJ Rayner. This fixed a list of issues, which were discussed with the parties at the start of the hearing. The remaining issues were agreed as follows:

1. **Health and Safety Dismissal (Employment Rights Act 1996 s100)**

    1.1 Was the principal reason for dismissal one of the reasons set out in sections 100(1) c, d or e ERA 1996? The claimant asserts that the reason or principal reason for his dismissal was:

        1.1.1 That being an employee at a place where there was no such representative or safety committee or he brought to his employer's attention by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health and safety (100(1)(c) ERA)

        1.1.2 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 (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work (100(1)(d) ERA), or

        1.1.3 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 (s100(1)(e) ERA).

    1.2 The claimant identifies the following circumstances of danger:
        1.2.1 The Coronavirus pandemic;
        1.2.2 The risk of contracting the virus, or of passing the virus on to others if he attended his place of work, including travel to and from work, and including attendance at any other sites of work including those of clients and customers.

1.3 Did the claimant reasonably believe those circumstances to be either harmful or potentially harmful to health and safety, and/or serious and imminent because of:

1.3.1 The government instructions of 20 March 2020 regarding essential travel and the closure of some businesses and social distancing;

1.3.2 The Prime Minister's statement of 23 March 2020;

1.3.3 Public information about the virus and the risks of contamination.

1.4 The first respondent asserts that the belief was not reasonable because:

1.4.1 The claimant continued to take a family holiday;

1.4.2 The respondent had discussed the measures put in place by the first respondent to protect the health and safety of employees with the claimant;

1.4.3 The second respondent, by Mr Mullins, made clear to the claimant in advance of lockdown that, it was their view, that the services of cooling were essential services.

1.5 Did the claimant bring the circumstances to his employer's attention by reasonable means? The claimant relies upon the WhatsApp messages sent on 23 and 24 March 2020. (section 100(1)(c)).

1.6 What were the steps or proposed steps taken or proposed to be taken by the claimant? The claimant is asserting that he was not prepared to return to work while the danger remained, unless there was an emergency call out (section 100(1)(e)).

1.7 Were any steps taken by the claimant appropriate by reference to all the circumstances, including in particular the claimant's knowledge and the facilities and advice available to them at the time? (section 100(1)(e)).

2. **Health and Safety Detriment (ERA 1996 section 44)**

2.1 Was the employee subject to any detriment by the employer?

2.2 The claimant relies on the following acts or omissions as detriment:

2.2.1 He was threatened with a deduction from wages regarding a company laptop which had been damaged;

2.2.2 He was sent an invoice for £370 to cover the replacement costs of the laptop.

2.3 If the claimant was subject to any detriment as alleged, what was the ground of that detriment?

2.4 The claimant relies on section 44(1) c,d,e ERA 1996, and relies on the circumstances of danger set out in respect of section 100 above, and the steps taken by him as set out above.

3. **Protected disclosure ('whistleblowing')**

3.1 Did the claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996? The Tribunal will decide:

3.1.1 What did the claimant say or write? When? To whom? The Claimant relies upon the WhatsApp messages sent on 23 and 24 March 2020 as the relevant disclosures.

3.1.2 Were these disclosures of 'information'?

3.1.3 Did he believe the disclosure of information was made in the public interest?

3.1.4 Was that belief reasonable?

3.1.5 Did he believe it tended to show that the health or safety of any individual had been, was being or was likely to be endangered or tended to show breach of a legal obligation?

3.1.6 Was that belief reasonable?

3.2 The respondents accept that the disclosure was made to the claimant's employer?

4. **Dismissal (ERA 1996 section 103A)**

4.1 Was the making of any proven protected disclosure the principal reason for the claimant's dismissal?

4.2 The claimant did not have at least two years' continuous employment and the burden is therefore on him to show jurisdiction and therefore to prove that the reason or, if more than one, the principal reason for the dismissal was the protected disclosure.

5. **Detriment (ERA 1996 section 47B)**

5.1 Did the first and second respondents do the following things:
5.1.1 He was threatened with a deduction from wages regarding a company laptop which had been damaged;
5.1.2 He was sent an invoice for £370 to cover the replacement costs of the laptop.

5.2 By doing so, did they subject the Claimant to detriment?

5.3 If so, was it done on the ground that he had made the protected disclosures set out above?

Evidence

5. We had an agreed bundle of documents. The respondents had also applied to add a supplemental bundle of documents, and the Tribunal accepted some but not all of these documents as additional evidence on grounds of potential relevance to the issues in the case. We also admitted some additional documents on the second day of the hearing which were relevant to the issue of whether PPE had been provided to the claimant.

6. We took witness statements as read. We heard evidence from the claimant. We heard evidence from the second respondent, which included parts of a supplemental witness statement which dealt with documents in the supplemental bundle that had been accepted by the Tribunal. We heard evidence from Naomi Amos (subcontractor of the first respondent), including a supplemental witness statement which dealt with documents in the supplemental bundle that had been accepted by the tribunal. We also heard evidence from William Chappell (apprentice engineer at the first respondent).

7. We had oral submissions from both parties, and were referred to relevant appellate authorities together with details of recent first-instance decisions relating to Covid-19 issues.

Facts

8. We have considered all the evidence and submissions, and find the facts necessary to decide the issues in the case.

9. As a general point, there was evidence presented on both sides which related to peripheral issues and was put forward in order to challenge the other party's credibility. We have not made findings of all of these points, and have limited our findings to the key events and what is required to decide the issues.

10. The claimant was employed by the first respondent from 1 April 2019 as an air conditioning and refrigeration engineer. The first respondent provides chiller, refrigeration and air conditioning services to various premises and industries. This involves a mix of work - routine servicing and maintenance, and emergency or other reactive work. This includes work for a variety of businesses where the continued operation of this equipment is essential, such as hospitals and the food industry. It also includes both routine and reactive work for Misubishi which involves attending customers' homes. The second respondent Mr Mullins is the sole director of the first respondent, and he managed the claimant. The first respondent also has an apprentice, Mr Chappell, and has administrative support in the office from Ms Amos. The claimant was dismissed on 31 March 2020.

11. We have not seen any contract of employment for the claimant. The agreed bundle contained an unsigned set of terms in an offer letter. Mr Mullins says he did send a contract to the claimant, but he never signed and returned it. The offer letter does not contain sufficient terms to satisfy the requirements of section 1 of the Employment Rights Act 1996, and we have no evidence that there was another contract in place which would satisfy those requirements.

12. The events in dispute happened against the background of the government's

response to the developing Covid-19 pandemic. On 11 March 2020 the World Health Organisation declared Covid-19 to be a pandemic. On 16 March 2020, the Prime Minister delivered the first televised Covid-19 briefing. On 20 March 2020 the Prime Minister held an evening press conference mandating social distancing and to "*only travel if absolutely essential*". The Chancellor also first announced the Coronavirus Job Retention Scheme. On 23 March 2020 the Prime Minister gave a live, televised announcement that evening imposing national lockdown, restricting movement and telling people to stay at home except for limited circumstances. This included rules that people were only allowed to leave their home for a set of limited purposes. One of these purposes was, "*travelling to and from work, but only where this is absolutely necessary and cannot be done from home*". The Coronavirus Act 2020 received Royal Assent on 25 March, and the lockdown regulations came into effect on 26 March 2020.

13. The claimant was given the health and safety training that was required to do his job, including in order to meet the requirements of clients.

14. There is a dispute about whether any Covid-19 personal protective equipment (PPE) was provided to the claimant. The claimant says that no PPE was provided to him. The respondent says that it was. We have seen a document headed "Annual Handheld equipment review" which records the claimant being issued with face masks, hand sanitizer and nitrile gloves on 6 March 2020. The claimant alleges that this document has been fabricated. Mr Mullins says that this PPE was provided to the claimant. Mr Chappell also says that PPE was provided. He described how masks, gloves and hand sanitizer was in Mr Mullins' and the claimant's van, and that the masks were the basic blue surgical-style ones. He was not given his own PPE, but could use what was provided in the vans. The respondent provided some invoices during the hearing relating to purchase of equipment, which were what Ms Amos had been able to locate remotely without accessing the office. These were inconclusive, as they did not relate to the relevant dates and referred to dust masks.

15. Having considered all the evidence, we find that face masks, hand sanitizer and gloves were provided to the claimant to keep in his van. We accept the evidence of Mr Chappell on this point. The claimant's representative alleges that he had been pressurised to give this incorrect evidence by Mr Mullins, as he is a junior apprentice who saw what happened when the claimant challenged Mr Mullins. However, we find that Mr Chappell was a credible witness who responded to questions briefly but clearly. There is no evidence of written instructions from Mr Mullins on how to use the PPE, and the claimant did not sign for receipt of it, but do we find that this PPE was provided and available in the claimant's van.

16. We have also seen a "Coronavirus Health & Safety Procedure" dated 7 March 2020. This sets out the precautions that the first respondent's engineers will take to ensure a safe working environment, including social distancing and use of hand sanitizer, masks and gloves. The claimant says he never saw this document and alleges it may have been fabricated, although in oral evidence he said it may have been put through his letterbox. Mr Mullins says he gave it to the claimant. Mr Chappell says he was not given a copy - he saw the document, but was not sure whether he had seen it in the claimant's possession. Ms Amos says she saw this in their dropbox system when she was first in the office on 10

March, but the claimant did not have access to the dropbox. We find that this document was created on 7 March 2020 and was seen by Mr Chappell and Ms Amos. This also supports our finding that PPE was provided to the claimant. It is not clear when or how this document was provided to the claimant.

17. We have also seen a Covid-19 health and travel declaration form prepared by the first respondent. This was provided to a client on 16 March 2020 in an email that was blind copied to the claimant. This email included a list of questions for the client about their risk policies, including policies on employees who had travelled, employees with symptoms, and protective measures in place. The claimant initially said he did not receive this email and it may have gone into his junk mail, but accepted in oral evidence that he may have received it but not read it. We find that this email was sent to and received by the claimant, but he may not have read it or opened the attachment. Mr Mullins also forwarded an email to the claimant and Mr Chappell from SafeContractor, which included links to guidance for employees on coronavirus, and his email said "*FYI, useful info*". We do not know if the claimant read this information or opened the link, but it was sent to him.

18. The claimant says that he had no detailed discussions with Mr Mullins about Covid-19 and what this meant for the continuation of the first respondent's business, although he said in evidence that they had brief discussions about what was going on in Italy. We find this surprising, as the development of the pandemic was a focus for the country at the time. Mr Mullins says he had lengthy conversations with the claimant about the essential nature of the first respondent's services to customers. He says he explained to the claimant that they would continue to work to support their customers unless the government instructed otherwise. He says that most of these discussions were by telephone, or in person if they were working together that day. Mr Chappell says that they would all talk a together and speak on the phone a lot. There were some discussions about what the pandemic meant for the business and he was under the impression they could not just stop work – as he put it, they couldn't just walk away and leave critical kit. Having considered all the evidence, we find that there were some discussions between Mr Mullins and the claimant about the need to continue providing essential services to their customers, which happened when they were together on site or speaking on the phone. There were no formal meetings or written instructions about this issue. However, we do not accept the claimant's assertion that the issue was not discussed at all with him.

19. On 20 March 2020 the claimant went on a weekend break in a holiday lodge in Devon with his partner, child, and his mother-in-law who helped with childcare. This was a self-contained lodge, and they did not mix with other people. He had left for the holiday before the Prime Minister's announcement that evening which said only travel if essential. He remained on holiday until Monday 23 March because the holiday operator remained open. The claimant's evidence is that he was worried about the risk from Covid-19 at this time, but he was following the rules. He referred to elderly grandparents who were vulnerable and would help with looking after his daughter, but he accepted in evidence that they would not do this (or see him or his daughter at all) after the announcement on 23 March. None of the claimant, his partner, their daughter or his mother-in-law were clinically vulnerable or extremely vulnerable to Covid-19.

20. The claimant had work booked on 24 May 2020. We have seen the work schedule, which shows a service and maintenance booking. The claimant says this was a routine job. Mr Mullins provided contradictory evidence on this point. In his witness statement he says he called the claimant at 17.16 on 23 May to explain that this booking was essential works. However, his oral evidence was that he called the claimant to explain that the job may not go ahead as it was routine work, depending on what the Prime Minister said in his announcement later that day. Mr Mullins says this was a mistake in his statement. We take his version of events to be what he said in his oral evidence, which means that Mr Mullins now accepts that the booking was for a routine job rather than essential or emergency work. We do not accept that he explained to the claimant that the job might not go ahead, depending on what the Prime Minister said. His evidence on this point was confused, and this is not what he says in a WhatsApp sent to the claimant afterwards which confirms he has emailed the job details (as set out in the next paragraph).

21. The key events in the claim are the exchange of WhatsApp messages between the claimant and Mr Mullins on 23 March 2020. The relevant parts of the exchange are as follows:

> 18.38 from Mr Mullins – "*Hi Chris, Just emailed job for tomorrow AM (+ details of cancelled job). FYI, there's another MEUK job pending for tomorrow. Thanks* 😊"
>
> 18.42 from claimant – "*Thank you sir x*"
>
> 20.39 from claimant – "*Guessing you just watched Boris, So we are staying at home unless it is absolutely necessary to go to work? i.e. no heating no hot water etc?*"
>
> 20.43 from Mr Mullins – "*He said we can go to work. No social gatherings*."
>
> 21.09 from claimant – "*Rich, I know you don't want to stop working and neither do I but we all have a responsibility to do what's being asked. Therefore I am going to stay at home and would urge you to do the same. I understand that if any call out is urgent and/or essential I will come in to help out of course but unless this is the case the I think it best we all do what's being asked*."
>
> 21.16 from Mr Mulllins – "*Chris, No issues. I'll call round PM tomorrow to collect the van and I'll confirm your terms going forward ASAP. Cheers Rich.*"
>
> 21.20 from claimant – "*That's fine, no problems*."

22. The claimant explained his thinking at the time. In his statement, he says the message from the 23 May briefing was different from before, the situation had deteriorated rapidly, and there was a simple instruction to stay home. He thought everyone had to do their bit and follow the rules. He did not consider that routine servicing was a lawful reason to go to work. He was concerned about risk to himself, and also spreading the virus to colleagues, customers or others. He genuinely believed that it was unsafe to go to work. In oral evidence the claimant

said he had concerns about health and safety in the background, and nobody knew what was really happening. He was concerned about how to proceed with work activities and what it all meant for his job. He says he had never said he would not do essential work, it was a question of whether it was acceptable to go to work. He says he didn't know if this was a legal requirement, but he believed he should not be doing non-essential jobs.

23. The claimant's understanding fits with what Mr Mullins now says was the position – the first respondent would continue providing essential and emergency services, but not do routine jobs. This also fits with the analysis provided by Ms Amos of how work changed after this date, with a graph showing how work for a major client shifted from partly maintenance and partly reactive to all reactive.

24. Mr Mullins' explanation of his response to the claimant is as follows. In his statement he says he was exasperated, and this was an obvious refusal to work which did not fall within government guidelines. He says it was clear that the claimant had no intention of coming to work. In oral evidence Mr Mullins says he should have said more in his message, but he was exasperated and at end of tether, and could not keep revisiting same point. This was in the context of previous conversations when he had told the claimant that they needed to continue essential work for clients, while the claimant was saying that soon they would all have to stay at home. Mr Mullins said it was the claimant's choice not to come to work – it was his decision. He therefore drew a line and made the claimant redundant. Mr Mullins said in response to questions from the Tribunal that he dismissed the claimant because "he would not turn up to work other than on his own terms".

25. On 24 March 2020 Mr Mullins went to the claimant's house to collect work equipment, including the company van and laptop. The parties agree that they had a short conversation during which Mr Mullins said he was "drawing a line under it", and they both understood this to mean the claimant was being dismissed.

26. The laptop had a damaged screen, and the claimant told Mr Mullins about this when he collected the work equipment and said he would pay for repairs. He says it was damaged by his young daughter. Mr Mullins sent the claimant a WhatsApp message about laptop at 18.35 on 24 March, which says he has just noted the damage to the laptop. The message says, "*As it's really extensive…and reasonably beyond economic repair, I'll be deducting its replacement cost from monies owed to you*". The claimant replied with a "thumbs up" emoji.

27. At 19.13 on 24 March the claimant sent a WhatsApp message to Mr Mullins which says he is being sacked for trying to do the right thing, and going to work on non-essential work is "*putting yourself and others at unnecessary risk which is strictly against moral ethics and government instructions*". Mr Mullins replied, "*To clarify, I'll be making you redundant*".

28. On 25 March 2020 Mr Mullins sent a letter to the claimant confirming that his employment has been terminated on grounds of redundancy. His explanation for this is that he could not afford to retain the claimant if he was refusing to come to work, and he and his apprentice were not able to cover all of the claimant's work.

29. The first respondent sent the claimant an invoice for a replacement laptop, for £370. Mr Mullins said he had found the cheapest suitable replacement online, and the damage to the screen was serious. This was also during lockdown when shops were shut and he could not take it somewhere for repair. The claimant sent a letter on 3 April saying he did not accept the invoice amount as the only thing damaged was the screen which could be repaired for approximately £100. He said he was happy to pay £100 plus VAT. The first respondent did not in fact deduct any costs for the laptop from the claimant's final pay or seek to recover this sum from him.

Applicable law

30. **Health and safety dismissals.** The relevant provisions on dismissal in health and safety cases are set out in section 100 of the Employment Rights Act 1996 ("ERA"). The qualifying period usually required for an unfair dismissal claim does not apply (section 108(3) ERA).

> ***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—*
> *……..*
> *(c) being an employee at a place where—*
> *(i) there was no such representative or safety committee*
> *…….*
> *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.*

31. There is relatively limited appellate authority on these provisions, and none relating to the Covid-19 pandemic. We were referred to some recent employment tribunal decisions on this topic, which show that the assessment of whether the above tests are met in relation to the health and safety risks of Covid-19 at work is a fact-specific exercise.

32. A relevant authority is ***Von Goetz v St George's Healthcare NHS Trust (No.1)*** EAT 1395/97, in which the Employment Appeal Tribunal ("EAT") found that sections 100(1)(c) and (e) should not be limited to harm in the workplace, and could cover situations where the employee is concerned for non-employees and/or people outside the workplace. Another relevant authority in relation to section 100(1)(e) is ***Oudahar v Esporta Group Ltd*** UKEAT/0566/10. This confirms that the test does not depend on whether the employer believes in the presence of danger, but on how the employee honestly and reasonably regards the situation.

33. **Health and safety detriment.** Section 44 of the ERA provides that an employee (or worker in some cases) also has the right not to be subjected to a detriment by any act of the employer on the same grounds. In relation to "detriment", we are assessing whether a reasonable worker would or might take the view they have been disadvantaged in the circumstances in which they had to work. This principle is taken from the case of ***Shamoon v Chief Constable of the Royal Ulster Constabulary*** [2003] IRLR 285 (HL) in relation to discrimination law.

34. **Public interest disclosure.** Sections 43A to 43L ERA set out the definition of a protected disclosure. Under section 43B a "qualifying disclosure" means:

> *"any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—*
> *(a) that a criminal offence has been committed, is being committed or is likely to be committed,*
> *(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,*
> *(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,*
> *(d) that the health or safety of any individual has been, is being or is likely to be endangered,*
> *(e) that the environment has been, is being or is likely to be damaged, or*
> *(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed."*

35. A qualifying disclosure becomes a protected disclosure if it is made in a way listed in sections 43C to 43H, which includes a disclosure to the person's employer.

36. A qualifying disclosure requires a disclosure of "information". In ***Cavendish Munro Professional Risks Management Ltd v Geduld*** UKEAT/0195/09, the EAT held that to be protected a disclosure must involve information, and not simply voice a concern or raise an allegation. The EAT referred to the ordinary meaning of information as "conveying facts". This provision was also considered recently by the Court of Appeal in In ***Kilraine v London Borough of Wandsworth*** [2018] EWCA Civ 1436. The Court held that there should not be a rigid dichotomy between "information" and "allegations", and they are not mutually exclusive. Sometimes a statement could be characterised as an

allegation but would also constitute information, and it may be necessary to assess a statement in light of the particular context in which it was made. In order to be a qualifying disclosure, a statement must have sufficient factual content to be capable of tending to show one of the matters listed in the legislation.

37. In relation to public interest we have directed ourselves in accordance with the Court of Appeal decision in ***Chesterton v Nurmohamed*** [2017] EWCA Civ 979**.** The Tribunal must determine whether the worker subjectively believed at the time that the disclosure was in the public interest and, if so, whether that belief was objectively reasonable.

38. **Dismissal for making a protected disclosure.** Under section 103A ERA, employees shall be regarded as automatically unfairly dismissed if the reason or principal reason for the dismissal is that they have made a protected disclosure. The qualifying period usually required for an unfair dismissal claim does not apply (section 108(3) ERA).

39. **Detriment for making a protected disclosure.** Under section 47B(1) ERA, a worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure. The test for detriment is the same as set out above. The test for whether treatment of a worker by an employer was "on the ground" of a protected disclosure is as set out in ***NHS Manchester v Fecitt*** [2012] IRLR 64 (CA). The protected disclosure must "materially influence" the employer's treatment of the worker, meaning it must have been more than a trivial influence.

Conclusions

40. **Health and Safety Dismissal.** We start with section 100(1)(c). *Was the principal reason for dismissal that, being an employee at a place where there was no such representative or safety committee, the claimant brought to his employer's attention by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health and safety?* It is not disputed that there was no health and safety representative or safety committee at the first respondent. We accept that the use of WhatsApp messages on 23 and 24 March 2020 was a reasonable means to bring matters to the first respondent's attention.

41. In relation to the circumstances connected with his work which he believed were harmful or potentially harmful to health and safety, the claimant relies on: the coronavirus pandemic; and the risk of contracting the virus, or of passing the virus on to others if he attended his place of work, including travel to and from work, and including attendance at any other sites of work including those of clients and customers. It is clear that these circumstances existed in March 2020, when the pandemic first became serious in the UK and the first lockdown was announced on 23 March. We have found that the claimant was concerned about the situation when he sent the message to Mr Mullins at 21.09 on 23 March. This message said we all have a responsibility to do what's being asked, and he would be staying home and he urges Mr Mullins to do the same.

42. We find that this message did bring circumstances connected with his work to his employer's attention which he believed were potentially harmful to health and safety. The circumstances connected with his work were his own refusal to work unless it was urgent or essential, and his views on how Mr Mullins should be working, in light of the Prime Minister's announcement and the risk of contracting or passing on the virus. As found in the facts, this was based on background concerns about health and safety, and concerns about what this meant for his job. This provision covers concerns about third parties, as well as concerns about colleagues and the claimant himself.

43. We also find that the claimant did reasonably believe those circumstances to be either harmful or potentially harmful to health and safety. He said that neither he nor Mr Mullins should be doing work unless it was urgent or essential. We do not find this was based on the government instructions of 20 March 2020, as the claimant was still willing to do routine work after that date – as shown by his initial acceptance of the routine work booked for 24 March. However, we have accepted his evidence that he was influenced by the Prime Minister's statement of 23 March 2020 and the seriousness of its implications, as shown by the wording of his messages to Mr Mullins. It is self-evident that the reason for the Prime Minister's announcement and resulting lockdown was the health risks of spreading Covid-19. This caused the claimant to take the view that he should stay at home and only do urgent or essential work. This is also shown by the message sent by the claimant at 19.13 on 24 March, where he says that doing non-essential work is putting Mr Mullins and others at unnecessary risk. This was sent after the claimant had been dismissed, but it shows his thinking at the time.

44. The respondents have argued that the claimant did not reasonably believe those circumstances to be either harmful or potentially harmful to health and safety. We do not agree that the matters put forward undermine the claimant's reasonable belief at the time he sent the WhatsApp messages on 23 March.

44.1 The respondents say that the claimant continued to take a family holiday. The respondents also say that the claimant came into the office on 12 March when his partner was ill with a temperature, although the claimant says he had advice from NHS 111 that this was not Covid-19. However, these things occurred before the Prime Minister's announcement of 23 March, and we accept that this changed his view of the seriousness of the situation.

44.2 The respondents also say that they had discussed with the claimant the measures put in place by the first respondent to protect the health and safety of employees. As found in the facts, there was some information provided to the claimant about safety procedures (even if he did not read it), and some PPE was provided. However, the circumstance the claimant was concerned about was doing routine work when everyone had been instructed to stay at home because of the pandemic. It was reasonable to believe that this was potentially harmful to health and safety due to the risk of contracting or spreading the virus through failing to follow this instruction, even if some health and safety measures were in place.

44.3 The respondents also say that Mr Mullins had made clear to the claimant in advance of lockdown that they were providing essential services. We have found that there were some discussions about this. However, the claimant accepted that this was the position - he said in his messages that he would do urgent and essential work. He was objecting to doing routine work as this did not comply with the Prime Minister's instructions and risked spreading Covid-19, and we accept this was a reasonable belief at the time.

45. We find that this was the principal reason for dismissal. The claimant was dismissed because of what he said in his WhatsApp message at 21.09 on 23 March 2020. Mr Mullins reacted to the claimant raising these concerns by dismissing him. He made no attempt to discuss the issue with the claimant, or explain that he was only being asked to do urgent or essential work. He said that he dismissed the claimant for refusing to turn up for work except on his own terms. We find this confusing, as the claimant was saying he would do urgent and essential work, and the respondents are now saying this is the only work he would have been asked to do anyway. The respondents also argue that this was a redundancy dismissal, but clearly the claimant was not redundant because there had not been a reduction in work which caused his dismissal. Mr Mullins saw the claimant's message as a refusal to work except on the claimant's terms. However, the claimant's "terms" were that he and Mr Mullins should comply with national instructions about remaining at home except for necessary work. The claimant was refusing to do routine work because of genuine concerns about following the lockdown rules and protecting the health of himself and others. This is exactly what section 100(1)(c) is designed to prevent. Employees must be able to raise genuine and reasonably held concerns about health and safety with their employer without the fear of being dismissed as a result.

46. The claimant was automatically unfairly dismissed under section 100(1)(c) ERA.

47. As we have found an automatic unfair dismissal on this ground, we deal more briefly with the remaining unfair dismissal claims.

48. *Was the principal reason for dismissal that, 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 (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work* (100(1)(d) ERA). We do not find that there were circumstances of danger which the claimant reasonably believed to be serious and imminent. This is a higher threshold than section 100(1)(c), requiring "danger" which is "serious and imminent", rather than simply potential harm to health and safety. It is undeniable that Covid-19 is dangerous to many people. However, we do not find that the claimant reasonably believed that either he or others were in serious and imminent circumstances of danger if he went to work.

49. Although not bound by previous Tribunal decisions, we agree with the comments in ***Rodgers v Leeds Laser Cutting Limited*** that the very existence of the Covid-19 virus does not automatically create circumstances of serious and imminent danger in the workplace, as otherwise any employee could refuse to work in any circumstances by virtue of the pandemic. Something more is

required, such as a particular vulnerability or an unsafe workplace. Neither the claimant nor close family members who he had contact with at this time were particularly vulnerable to Covid-19. We have found that the first respondent did provide PPE and some information to the claimant about health and safety precautions, and addressed the issue with clients. The first respondent was not requiring the claimant to work in an unsafe way without appropriate precautions. The booking the claimant had been sent for 24 May was not (as far as anyone was aware) for a vulnerable customer. The claimant himself was also willing to do urgent and emergency work – he did not regard the workplace situation as so seriously and imminently dangerous that he should not be working at all. We have accepted that the claimant reasonably believed that doing routine work in breach of the Prime Minister's instructions was potentially harmful to health and safety. But, we do not find that he reasonably believed this was a circumstance of serious and imminent danger within the meaning of section 100(1)(d).

50. *Was the principal reason for dismissal 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* (s100(1)(e) ERA). For the same reasons, we do not find that there were circumstances of danger which the claimant reasonably believed to be serious and imminent – whether a danger to colleagues, customers or himself.

51. **Health and Safety Detriment.** The claimant relies on being threatened with a deduction from wages regarding a company laptop which had been damaged, and being sent an invoice for £370 to cover the replacement costs of the laptop. We do not find that the claimant was subject to any detriment by the first respondent, or that this happened on the grounds that he had raised health and safety concerns.

51.1 The claimant had told Mr Mullins that his daughter had damaged the laptop. He reacted to Mr Mullins' WhatsApp message that he would be deducting replacement costs from his final pay with a "thumbs up". The claimant appears to have agreed to pay for a replacement, so we do not see that this is something that a reasonable worker would see as a disadvantage.

51.2 The claimant argues that the cost of replacement was excessive and it should only have been a £100 screen repair. He also says that this was an act of revenge for raising health and safety concerns. We do not agree. Even if the threat of deduction and/or the sending of the invoice could be regarded as a detriment, we do not find that this was done on the grounds that he had raised health and safety concerns. It was done because he had damaged the laptop and agreed to pay for it. We also accept Mr Mullins' evidence that he sourced the cheapest appropriate laptop, and it was not practical to take the laptop for a screen repair during lockdown.

52. **Protected disclosure ('whistleblowing')**. *Did the claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996?* We find that he did not. The claimant relies upon the WhatsApp messages sent on 23 and 24 March 2020 as the relevant disclosures.

53. In relation to the claim for automatic unfair dismissal, the disclosures relied on must be the messages on 23 March 2020. The claimant had been dismissed before he sent the WhatsApp message on 24 March. We do not find that the messages sent by the claimant on 23 March 2020 were disclosures of information. We have taken into account the guidance that disclosures of information and allegations may be mixed together, and this should be assessed in the circumstances. However, we do not find that any of the messages sent by the claimant on 23 March contain any facts which would amount to a disclosure of information. The claimant informed Mr Mullins that everyone has a responsibility to do what is being asked, and he will be staying home unless there is an urgent or essential call out. Although we have accepted this message falls within section 100(1)(c) ERA, following the guidance in ***Kilraine***, it does not have sufficient factual content to be capable of tending to show one of the matters listed in the legislation.

54. In relation to the claim for detriment, the claimant was sent the invoice after he sent his message at 19.13 on 24 March (although he is asked to pay for the costs of replacement before this). This message contains more detail, but it is still unclear that it contains any disclosures of information as opposed to just allegations. In any event, for the same reasons as explained in paragraph 51 above, we do not find that the sending of the invoice was a detriment or was done on the grounds that the claimant had made a protected disclosure. The message did not materially influence the respondents' treatment of the claimant in relation to the laptop.

55. The claim for automatic unfair dismissal against the first respondent under section 100(1)(c) succeeds, and the remaining claims against the first and second respondent fail and are dismissed.

56. The remedy hearing provisionally listed for 21 January 2022 will now go ahead and Directions for preparation for this hearing will be sent separately.

_____
Employment Judge

Date 12 November 2021
JUDGMENT SENT TO THE PARTIES ON 25 November 2021
by e-mail only

FOR THE TRIBUNAL OFFICE