EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Francesco Accattatis	**v**	Fortuna Group (London) Limited

Heard at: Watford (by CVP) **On**: 6 April 2021

Before: Employment Judge Alliott (sitting alone)

Appearances

For the Claimant: Mr Richard Owen (Employment specialist)
For the Respondent: Mr Simon Hoyle (Croner Consultant)

COVID-19 Statement on behalf of Sir Keith Lindblom, Senior President of Tribunals

"This has been a remote hearing not objected to by the parties. The form of remote hearing was CVP. A face to face hearing was not held because it was not practicable and no-one requested the same."

JUDGMENT

The judgment of the tribunal is that:

1. The claimant's claim of automatically unfair dismissal is dismissed.

2. The claimant's claims for notice pay and holiday pay are dismissed upon withdrawal.

REASONS

Introduction

1. The claimant was employed by the respondent as a sales and project marketing co-ordinator on 8 May 2018. He was dismissed with immediate effect on 21 April 2020. By a claim form presented on 6 August 2020, following a period of early conciliation from 11 June to 25 July 2020, the

claimant brings claims of automatically unfair dismissal under section 100 ERA (Health and Safety cases) and claims for notice pay/holiday pay. Out the outset of this hearing, it was confirmed that the claimant did not have a claim for notice pay or holiday pay and consequently those claims stand to be dismissed upon withdrawal.

The Issues

2. The claimant did not have the necessary two years' qualifying service to bring a claim for "ordinary" unfair dismissal.

3. What was the reason, or principal reason for the dismissal?

4. Was the reason, or principal reason for the dismissal that he:

> "100 (1)(e) in circumstances of danger which the employee reasonably believed to serious and imminent he took (or proposed to take) appropriate steps to protect himself or other persons from the danger"

The Law

Reason for dismissal – burden of proof

5. As per IDS Employment Law Handbook "unfair dismissal" at 11.11:

> "Where, however, an employee does not have enough qualifying service to bring an ordinary unfair dismissal claim, the burden of proof is on the employee to show an automatically unfair reason for dismissal for which no qualifying service is required."

Reason for dismissal - causation

6. As per paragraph 11.12:

> "In seeking to establish the reason, or principal reason, for dismissal, it is necessary to ask why the employer acted as it did."

7. Section 100 (1)(e), Employment Rights Act 1996. As per IDS handbook at 11.46:

> "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."

The evidence

8. I was provided with a primary bundle running to 113 pages and a supplementary bundle running to 38 pages. I had witness statements and heard from the following:

    8.1 Mr Julian Bavetta, Managing Director of the respondent.
    8.2 Mr John Sheehan, Sales & Marketing Manager of the respondent. The claimant's, line manager.
    8.3 The claimant.
    8.4 Mr Anuj Patani, a Financial Controller at the respondent until he resigned on 24 March 2020.

The facts

9. The claimant was employed by the respondent on 8 May 2018. For the first six months he was on probation. During the six-month probation period, the claimant worked 35 hours per week, 9am – 5pm, on a salary of £20,000 pa. Upon the successful completion of the claimant's probation period, he was offered a permanent contract working 40 hours per week, 8:30am – 5:30pm with a salary of £25,000 pa. Whilst the claimant accepted the permanent contract, it was clear to me and I find that the extra five hours work was a running source of contention between the claimant and the respondent. In his witness statement, the claimant refers to trying to negotiate 9-5 hours, and that the respondent denied any of his reasonable proposals and just dismissed his request. The claimant accepted in evidence that he raised the issue on a number of occasions over the course of his employment, stating that he kept raising the issue, they disregarded it and he felt under-valued. 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.

10. On his part, the claimant has complained in his witness statement about an Operations Manager deliberately targeting him to put him in a bad light and get him into trouble and cites the July 2019 issue with the Line Manager reporting him as being "indicative of the attitude of management towards me, of repression and obstructionism, despite my impeccable performance at work".

11. The respondent's witnesses readily accepted that as far as his work performance was concerned, the claimant was a very good employee.

12. Nevertheless, from the evidence cited above, I find that there was an undercurrent of antagonism between the claimant and the respondent regarding the various complaints he made which the respondent considered "challenging".

13. The background to the run-up to the claimant's dismissal is the outbreak of the COVID pandemic. This presented a unique, challenging and fast-moving situation for both employers and employees to deal with.

14. The respondent company sells and distributes PPE. The PPE that the respondent sells includes face masks, gels, gloves, thermometers and wipes. Mr Bavetta told me that in March/April 2020 (and thereafter), the respondent was incredibly busy and it is common knowledge that there was a very significant demand for PPE from the NHS and others.

15. I have been shown a screen-shot of a Department of Health declaration contained in the Gazette, published on 14 February 2020 which states:

> "In accordance with Regulation 3, the Department of Health gives notice that the Secretary of State for Health and Social Care has declared that the incidence or transmission of novel Coronavirus constitutes a serious and imminent threat to public health …… "

16. The claimant lived in Wood Green and the respondent's premises were in Enfield. The distance between the two is approximately five miles and the claimant told me that he travelled to work by bus and did not have to make any changes. The claimant told me that whilst he had a driving license, he did not have a car and was single, and so did not have access to a car. He did not own or use a motorcycle.

17. On 23 March 2020, the Prime Minister announced the National Lockdown. The rules provided that people would only be allowed to leave their home for very limited purposes which included:

> "travelling to and from work, but only where this is absolutely necessary and cannot be done from home"

18. It is against that national background that Mr Bavetta sent a number of e-mails to all staff setting out the respondent's advice. Extracts from the e-mails placed before are as follows:

On 28 February 2020, the following was sent out:

> "Please note that the latest information being made available to UK companies is that the risk of Coronavirus (COVID-19) in this country is still moderate and no special measures are recommended; in other words, the risks to individuals in the UK is still considered low……

A link to the Government advice was given ……

> "Under precautions: reference was made to individuals who had travelled to specific continental areas not attending their place of work and ends:-

"For information only, the best possible precaution that we can all take in the current circumstances is to wash hands thoroughly and regularly during the day and to dispose of tissues sensibly".

On 6 March 2020 the following was sent out:

"Further to my communication to staff last week (see below) I would like to inform you that from Monday 9 March, we will be doubling the number of hours that the cleaner currently spends on site; in this way, Patience will be employed throughout units 3 & 4 at the fixed time of 7am – 11am every day from Monday.

Please note that this is a precautionary measure only designed to enhance hygiene on site for the general health and wellbeing of all staff."

On 13 March 2020, the following was sent out:

"As you are all well aware, the current situation regarding Coronavirus (COVID-19) is changing on a daily basis.

I would like to remind everybody that the company's position regarding our employees and possible "self-isolation" is that we should all follow Government Guidelines on this important issue."

On 20 March 2020, the following was sent out:

"It has become apparent during the last week that the rapidly evolving situation with Coronavirus (COVID-19) has created a great deal of uncertainty for staff with issues around 'self-isolation' / childcare / protective clothing / hygiene etc. so please do not hesitate to contact me by phone or e-mail if you have any immediate concerns to be addressed.

It has also been noted that there is discussion around the possibility of a London 'lockdown' with the enforced closure of many businesses, however we remain confident that our own company will be allowed to stay open by virtue of our position in the healthcare supply chain into pharmacies as well as our TCES arrangements with Enfield Council."

On 23 March 2002, the following was sent out:

"As a simple precautionary measure, please can all staff start to sit one person to a table in the canteen area during mid-morning/lunch breaks. As of today, we will also have hand sanitisers, 500ml located in the canteen/office/ warehouse (Unit 3) and showroom/office (Unit 4) so please feel free to access these at any time."

Although not in the bundle, Mr Barvetto read out to me, an e-mail dated 24 March 2020 which stated as follows:

"Following the latest announcement by Government last night, I would ask you to note that our company will continue to stay open for business until instructed to do otherwise. Our company is currently playing a key frontline role in providing PPE …..

> As per my communication last week, we respect any desire by individual employees to refrain from work at this difficult time so any requests for immediate paid or unpaid leave will be approved."

19. It appears that around this time in March, the claimant raised the issue of home-working with Mr Sheehan. I have an e-mail dated 25 March 2020 from Mr Sheehan to the claimant which sates as follows:

> "Can I please ask that you put in writing what was just discussed to Julian highlighting that you feel you are being discriminated against with regards to home working. The examples you gave were Cheryl who has decided to stay at home and Elif.
>
> It is difficult working conditions at present for everybody and I would like to remind you that you have a choice should you decide you would like to self-isolate or stay at home in the current climate.
>
> Working from home is not an option as previously discussed on a number of occasions."

20. This reflected the respondent's position at the time. Those employees who wanted to self-isolate were permitted to do so but on the basis that they either took paid leave as part of their holiday entitlement or unpaid leave.

21. Mr Sheehan's evidence was that the nature of the claimant's work was such that he could not work from home. Although the claimant said that he didn't understand why this was, he accepted that some of the software that he utilised for his job could not be used from his home. Mr Bavetta thought that arranging remote access to the software in the office would cost in the thousands of pounds and was not commercially viable. In addition, Mr Sheehan indicated that, unlike other employees, the nature of the claimant's role was that he was required to be at the respondent's premises dealing with deliveries which were on a daily basis from an increased supply network. The products had to be taken into the warehouse, entered onto the respondent's system for the sales staff, photographed and promotional material organised for customers.

22. I find that the claimant could not have worked from home. Further, I find that the claimant was a key worker and that the respondent's business was in the forefront of distributing PPE. (I have been shown a letter dated 23 April 2020 from the Right Honourable Matt Hancock MP, Secretary of State for Health & Social Care, commending the respondent for staying open).

23. The claimant continued coming to work in the week ending 27 March and attended at work on Monday 30 March 2020. He travelled by bus as usual and told me that he wore a face mask even at that early stage, possibly because of his experience of working in Japan. He told me that the bus was largely deserted.

24. On 30 March 2020, the claimant had symptoms of Corona virus and left work to self-isolate. He phoned 111 and was issued with an isolation note effective from 30 March to 5 April 2020. This confirmed that he had been told to self-isolate by an NHS website because he had symptoms of Corona virus.

25. As the claimant was off sick, so he was paid sick pay in accordance with his contract of employment. The first three days of sickness absence was paid at 50% and thereafter he was paid statutory sick pay alone.

26. On 31 March 2020, the claimant sent an e-mail to Mr Sheehan clarifying his understanding of how sick pay worked and stating that he was not planning to stay at home for more than five working days.

27. On 3 April 2020, the claimant sent Mr Sheehan an e-mail indicating that he would probably come back to work on Monday (6 April).

28. On 5 April the claimant e-mailed Mr Sheehan stating that he was still struggling with symptoms and that he would have to stay at home for another week to fully recover. Given the incidence of Easter, that would give a return date of Tuesday 14 April.

29. Meanwhile, the claimant had obtained two more isolation notes, covering the period 5 – 11 April 2020 and the 12 – 18 April 2020. Although the claimant referred in evidence to other e-mails being sent, it would appear that these referred to pre-lockdown concerns he was raising and not at this time. In any event, I do not have them in front of me.

30. On 15 April 2020, the claimant e-mailed Mr Bavetta sending him a formal letter of agreement to temporarily place him on 'furlough'. He refers to this being a win-win situation as it would help him pay his bills whilst saving money for the company.

31. The details of the furlough scheme have not been placed in front of me. I was told by Mr Hoyle that people qualified as 'furloughed' if "the employee had been instructed by the employer to cease work". It was accepted by the claimant that he was not a vulnerable person required to shield by the Government.

32. On 17 April 2020 Mr Bavetta replied to the claimant as follows:

> "Please note that the Coronavirus job retention scheme (CRJS) was set up by the Government to support companies to continue paying employees who would otherwise be made redundant or be placed on enforced unpaid leave. I appreciate that many other organisations are facing unprecedented challenges in being able to continue trading, with some having to close down completely; however, whilst our company is facing challenges of our own, we are most definitely able to continue trading.
>
> In light of this situation, I am <u>unable</u> to accept your request to be designated a furloughed worker – there remains work for you to perform and we have not experienced any reduction in your workload. As such, we would expect your immediate return to work".

33. On 17 April 2020 the claimant replied to Mr Bavetta as follows:

> "The guidance by the Government is very clear, people that can work from home, should stay at home. As an alternative, this scheme provides coverage for the company of up to 80% of its salaries for workers in self-isolation, while the business can keep trading. To my knowledge, other businesses already obtained the grant.
>
> For the last three weeks I have been struggling with symptoms and to be honest I do not feel comfortable by the idea of using public transport and coming in the office during this lockdown.
>
> The logical options are as follows, either you allow me to work from home, or you place me on 'furlough' until the isolation is over. Both solutions work for me. Up to you which one you find more convenient."

34. On 17 April, Mr Bavetta replied as follows:

> "I would like to reconfirm that 'furlough' is not an option as our company is still trading and your job is still active; I must also emphasise that you are not able to work from home.
>
> If you are still experiencing flu-like symptoms at this late stage, it is essential that you now arrange a visit to your doctor as soon as possible and obtain a GP note providing confirmation that you are unable to attend work.
>
> I await your immediate reply as you are currently away from work on an unauthorised basis".

35. The last comment about unauthorised absence does not appear to be accurate as the third isolation note ended on 18 April 2020.

36. Later, on 17 April 2020, the claimant e-mailed Mr Bavetta. He points out that there must be misunderstanding as he had sent NHS sick notes. The claimant continues to suggest that he should either be 'furloughed' or allowed to work from home. He enclosed a GP sick note. Although the sick note was not in the bundle, it was obtained following a telephone consultation, was dated 17 April and ran until 24 April. The reason for absence was given as "cough".

37. On 18 April 2020, Mr Bavetta replied as follows:

> "Many thanks for this further information.
>
> Please note that we will mark you down as being on sickness leave up to and including Friday 24 April – this is the only option available for processing your time away from the work at present."

38. Later on 18 April 2020, the claimant replied to Mr Bavetta and Mr Sheehan as follows:

> "sick pay won't cover my expenses and that is causing major disruption to me in this situation …..
>
> I urge you to please to kindly look into an alternative solution to guarantee a reasonable income during self-isolation period, otherwise I will not be able to pay my bills. Please verify the furlough elegibility, I can assure you I already received confirmation from several sources that Coronavirus job retention scheme is easily accessible, by any company still actively trading during this time of emergency, without any downside to it".

39. The claimant followed that up with a further e-mail on 21 April 2020 at 15.24 , asserting that he HMRC Job Retention Scheme helpline confirmed that the grant was available for employees that are in self-isolation from March, to place them on furlough.

40. Twenty minutes later on 21 April 2020, Mr Bavetta e-mailed 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."

41. In accordance with the contractual provision for notice, the claimant was paid one months' pay in lieu of notice.

42. On 23 April 2020, the claimant e-mailed Mr Bavetta expressing his shock and disappointment and requesting a reference. He states that he found the decision to dismiss him as "very questionable, to say the least".

43. On 4 June 2020, the claimant e-mailed Mr Bavetta stating he considered dismissal to be unfair, citing an absence of any real basis and a failure to apply disciplinary procedures. He requested compensation.

44. Mr Patini gave evidence that he considered the respondent handled the COVID-19 crisis poorly. He states that he resigned from the office on 24 March 2020 as it was not COVID safe. In particular, there was a lack of social-distancing. In my judgment, there is an element of hindsight in Mr Patini's evidence. The lockdown had only been announced on 23 March 2020, the day before his resignation. As indicated by the e-mail announcements cited above, the respondent was moving towards hand santisation, extra cleaning and doing its best to isolate the workforce. Mr Bavetta accepted that it was not always possible to observe the two metre distance rule at the office although the reduced workforce meant that that was broadly achievable.

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 e-mail 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 onto 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.

Conclusions

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 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.

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Employment Judge Alliott

Date: 29/4/2021

Sent to the parties on:17/5/2021

N Gotecha
For the Tribunal Office