



THE EMPLOYMENT TRIBUNALS

Claimant: Mr M Hetherington

Respondent: Easyfit Blinds Limited t/a A1 Blinds

Heard at: Newcastle upon Tyne Hearing Centre (by CVP)
On: 6, 7 December 2021 & 21, 22 January 2022

Before: Employment Judge Loy

Representation:

Claimant: Mr D Robinson-Young, Counsel

Respondent: Mrs K Skeaping, Solicitor

RESERVED JUDGMENT

- (1) The claimant's complaints of unfair dismissal contrary to sections 100(1)(e) and 103A Employment Rights Act 1996 are not well-founded. The claimant was not unfairly dismissed.
- (2) The claimant, not having succeeded in his claims for unfair dismissal, his claim under Section 38 Employment Act 2002 for failure to give a statement of employment particulars also fails.

REASONS

Introduction

1. The claimant in these proceedings was represented by Mr Robinson-Young of counsel, who called the claimant to give evidence on his own behalf and also called Mr Nathan Graham, an ex-employee of the respondent. A witness statement for Mr Matthew Rocke was accepted into evidence but he was not called to give evidence. Appropriate weight was attached to Mr Rocke's evidence given that he was not subject to cross examination.
2. The respondent was represented by Mrs K Skeaping, solicitor, who called to give evidence Edith Barnes (Finance Manager), Kevin Taylor (Managing Director from 24 June 2020), Yasmin Blakeburn (Office Supervisor), Charlotte Scott (Office

Administrator) and Tony Robinson (Managing Director up until his retirement on 24 June 2020).

3. All witnesses (other than Mr Rocke) from both the claimant and the respondent had each prepared typed and signed witness statements which were taken “as read” by the employment tribunal, subject to supplemental questions, questions in cross examination and questions from the Tribunal. There was an agreed bundle of documents comprising of 107 pages.

Claims and issues

4. By a claim form presented on 28 October 2020, the claimant brought complaints of automatically unfair “whistleblowing” dismissal contrary to Section 103A of the Employment Rights Act 1996 (“ERA”) and automatically unfair “health and safety” dismissal contrary to Section 100 (1) (e) ERA. The respondent denies both claims. Put simply, the respondent says that the claimant was dismissed for gross misconduct upon complaint from a customer that he had offered “a bag of green” (presumed to be a reference to cannabis) to the customer during a visit on 17 June 2020 to the customer’s premises to take measurements for the ordering of window blinds from the respondent. The respondent says that was the sole reason for the claimant’s dismissal.
5. The claimant denies that this was the reason for his dismissal. He says that he made protected disclosures to the respondent shortly before his dismissal and that he’d indicated that he was not willing to attend certain premises because of a fear he would contract Covid-19 in circumstances where he also had a partner who was clinically vulnerable. The primary focus of this case was therefore on the reason for the claimant’s dismissal in the mind of the dismissing and appellate officers. If the claimant can establish that the reason for his dismissal, or if more than one reason the principal reason for his dismissal, was a protected disclosure and/or falls within Section 100 (1) (e) ERA then his dismissal would be automatically unfair. The claimant does not have two years’ service so the Tribunal has no jurisdiction to consider a claim under Sections 94 and 98 ERA. However, any procedural or other irregularities may be indirectly relevant in establishing what was the real reason for the claimant’s dismissal.
6. The issues for the Tribunal to determine are set out at pages 41 to 43 of the bundle which is from Employment Judge Arullendran’s Preliminary Hearing case management summary sent to the parties on 22 July 2021. At paragraph 48 of the case management summary it is recorded that the claimant is no longer pursuing any claim for whistleblowing detriment contrary to section 47B ERA as a consequence of which that claim was dismissed by the Tribunal at that Preliminary Hearing.
7. The claimant also pursued a claim for compensation in respect of an alleged failure by the respondent to provide him with written statement of employment particulars under Section 38 Employment Act 2002.
8. I understood the issues to be determined by the Tribunal to be as follows:

- 8.1 Did the claimant make one of more qualifying disclosures as defined in Section 43B of the ERA? The tribunal will decide:
- 8.1.1 What did the claimant say or write? When? To Whom? The claimant says he made disclosures on these occasions:
- 8.1.1.1 on 11 June 2020, he alleges he informed Jonathan Marshall (the respondent's General Manager who has subsequently been made redundant) about the health and safety dangers posed by entering a high risk block of flats;
- 8.1.1.2 on 15 and 16 June 2020 the claimant alleges he raised concerns again with Jonathan Marshall about the inadequacy of the PPE provided to staff; and
- 8.1.1.3 on 15 June 2020 the claimant alleges he informed Jonathan Marshall about the respondent's entries on its website regarding the safety measures taken for staff in relation to Covid-19 which the claimant said were not truthful.

All of these alleged disclosures were made verbally and were not reduced or evidenced in any written form at the time.

- 8.2 Did he disclose information?
- 8.3 Did he believe the disclosure of information was made in the public interest?
- 8.4 Was that belief reasonable?
- 8.5 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?
- 8.6 If the claimant made a qualifying disclosure, it was a protected disclosure because it was made to the claimant's employer.

Health and safety dismissal

- 8.7 Were there circumstances of danger which the employee reasonably believed to be serious and imminent?
- 8.8 Did he take or propose to take appropriate steps to protect himself or other persons from danger?
- 8.9 If so, were those steps the reason or principal reason for the claimant's dismissal?

Findings of fact

9. The claimant was employed by the respondent from 10 May 2019 until his dismissal on 17 June 2020. The claimant's principal job duties were to visit customers in their homes and businesses to provide quotations for purchasing the respondent's blind products and processing orders which involved handling cash. The claimant was entitled to a commission on sales. The claimant, along with the remainder of the respondent's staff was on furlough between 26 March 2020 until his return on 8 June 2020. The events which are of concern to this hearing took place between 8 June 2020 and 17 June 2020. It was common ground that on 9 June 2020 the claimant was allocated a job at high rise flats at Denton Park House, in the Westerhope area of Newcastle. The claimant says this was known to be a Covid-19 hotspot. The claimant says that he called Tony Robinson, who at that time was the respondent's Managing Director, and expressed his concerns about the risks of contracting Covid-19 when he entered the flats. The claimant said that the lifts were less than two metres wide making social distancing impossible. The stairway was very busy. He also said that he was advised by people who he referred to as "staff" at the building not to enter the flats unless absolutely necessary. The claimant refused to enter the flats. Mr Robinson, according to the claimant, told him to get on with the job because work could not be "knocked back". It was Mr Robinson's evidence that he did "not recall specifically" such a telephone call with the claimant to that effect on 9 June 2020 or at all. Mr Robinson pointed out that the claimant had previously expressed a general dislike about entering high rise flats, not out of fear of contracting Covid-19 but because he didn't like attending the homes of customers in "less desirable areas". Similarly Mr Robinson "[did] not recall any conversation with the claimant in which the claimant expressed concern about contracting Covid-19." It was Mr Robinson's position that if the claimant had raised with him any Covid-safety concerns, he would have guided the claimant through the Covid-safety precautions that the respondent was putting in place upon return to work after the period of furlough. The claimant also gave evidence that he specifically remembered that Mr Robinson had told him that it was fine to enter the flats because an employee who worked for the respondent, Kath Noble, lived there. I pointed out that this exchange on 9 June 2020 not being relied upon as constituting a protected disclosure, which was acknowledged by Mr Robinson-Young

10. The respondent made a number of changes to its working practices both on and off-site in order to provide a Covid-safe environment for its employees upon return to work and to protect its employees and potential customers when one of the respondent's employees was visiting customers premises. I found the respondent's approach to establishing a Covid-safe environment for employees and customers to be comprehensive. There was little in the way of dispute about the steps that the respondent company took except in relation to the amount of PPE that was provided to estimators and fitters visiting client premises. The respondent's witnesses all gave evidence in relation to the Covid-related changes that the respondent made upon the return to work of the majority of its employees from furlough on 8 June 2020. Mr Robinson, who was the Managing Director at the material time, gave evidence (much of which remained uncontested) that the

respondent took the following steps to provide a Covid-safe working environment: the company provided hand-sanitisers; made temperature checks; provided PPE in the form of gloves and masks; erected shields in its office areas; and introduced floor-markings. In relation to customer visits, a script was prepared which was read out by telephone in advance of visits by estimators and fitters to potential customers which would inform customers how the respondent intended to provide as Covid-secure an environment as possible. That script is at page 104 of the bundle. It reads as follows:

“Covid-19 Pre-home Visit Risk Assessment. Before I can confirm your appointment, I do need to read this statement. At the end of this statement if you agree we can complete your booking.

In line with government guidance, all our staff will be equipped with masks, gloves and hand sanitizer. The advisor will call before he arrives and will carry out a verbal risk assessment.

Please note that social distancing must be followed with all appointments and we politely request you maintain 2-metres away were [sic] possible.

To maintain safety it will not be possible for you to touch the samples, the estimator will show you these from a distance. Please ensure all obstructions are moved from the window and all doors kept open.

Any windows that do not have free access will not be measured. We ask if you could keep pets in another room when the advisor is present. I now need to ask the following questions in order to complete the booking....”

11. The claimant was not content with the steps that the respondent had taken. He complained that he had been given “just 6 masks, 6 pairs of gloves a week and a 50ml bottle of hand sanitiser.” The claimant says on 15 and 16 June 2020 he complained about the lack of PPE being provided to Jonathan Marshall (General Manager). The claimant’s position was that he worked six days a week and went into twelve houses per day. On that basis, the claimant thought the PPE provided was insufficient. The claimant says he asked Jonathan Marshall for gloves, masks and cleaning wipes for the company brochures but that Mr Marshall refused to provide them. The respondent’s position was that the claimant did not raise these issues with Mr Marshall and that had he done so the claimant’s concerns would have been welcome and steps put in place to address them. A fundamental difficulty with the respondent’s position is that Mr Marshall was not called to give evidence. The respondent’s position was that it was not unusual for employees who leave a business before a Tribunal hearing takes place not to give evidence at that hearing. Be that as it may, the evidential gap nevertheless remains. I find on the balance of probabilities that the claimant did raise the concerns he said he did about the adequacy of PPE with Mr Marshall on 15 and 16 June 2020. However, I also find that the respondent was not putting any limitations on the amount of PPE that was available to the claimant or other employees.

12. On 8 June 2020 the majority of the respondent's workforce (including the claimant) returned to work from a period of furlough. Around this time there was also to be a change of Managing Director. Mr Robinson, who had been Managing Director for a period of three years was to retire from that role. A new managing director, Kevin Taylor, was due to start on 11 June 2020 with a two-week handover period before Mr Robinson retired and Mr Taylor took over. This meant that it was Mr Robinson who was the Managing Director at the time the workforce returned to work, but by the time that the claimant made an appeal against his dismissal it was Mr Taylor who was by then in the Managing Director role. All of the respondent's witnesses gave evidence in connection with a presentation made by Mr Robinson as Managing Director on 8 June 2020 in which he outlined the steps recorded above that the respondent had taken to ensure a Covid-safe working environment for employees and customers. This was done at an "all staff" meeting on that day. Mr Robinson and Mr Marshall met with all staff for the purposes of this presentation. It was explained at this presentation that the company was seeking to comply with government guidelines on return to work to ensure the safety and protection of staff and customers. It was at this meeting that the specific Covid-safety measures were explained to the workforce. At that meeting a number of employees asked questions about the arrangements including some of the estimators. Mr Robinson accepted that the claimant may well have been one of the estimators who raised a question. The questions were about seeking clarity on what protection was being put in place for off-site workers working in people's homes. I accepted Mr Robinson's evidence that these questions were sensible and welcomed. I also accepted Mr Robinson's evidence that this was a new situation for everyone concerned and that the respondent's management were keen to make sure that all relevant questions were raised so that they could resolve any issues and make any changes that might be appropriate.
- 13 The claimant says that on 11 June 2020 he raised verbally with Mr Marshall that he believed that health and safety would be endangered if he was required to enter the high risk property at Vallum Court. The claimant said that this property had "a lot of people around", "were filthy" and "no one else was wearing PPE". He also said that the lifts were too small to socially distance and that the respondent had not appropriately risk-assessed high rise flats in general. All of this the claimant believed increased the risk of contracting Covid-19. The claimant did not have to enter the property at Vallum Court on 11 June 2020 because the customer did not answer the phone when called by the claimant. I accepted the claimant's evidence that this exchange with Mr Marshall took place on 11 June 2020 to the effect for which the claimant contended.
14. On 15 and 16 June 2020 the claimant says that he raised concerns about health and safety matters. In particular, the lack of PPE with which he was being provided. The claimant considered that six masks and six pairs of gloves per week together with a 50ml bottle of hand sanitiser was insufficient given the fact that he visited twelve houses per day. The claimant's position was that he was concerned about cross-contamination with the effect (as I understood it) that he wished to be provided with a separate pair of gloves and masks for each of the

visits that he undertook. The claimant says that Mr Marshall refused to agree to this and that because no-one else had mentioned it, it was the claimant's problem and no-one else's.

15. On 15 June 2020, the claimant said that he pointed out to Mr Marshall that statements on the respondent's website regarding its Covid-safety measures were not truthful. In particular, the claimant referred to the extracts from the website which stated that the respondent "monitor their staff on a daily basis by taking our temperatures and checking up on our families in case they have any symptoms". The claimant says that he pointed out to Mr Marshall that this was not true because he had never had his temperature taken nor had there ever been any contact with his family to check if they had symptoms of Covid-19. The claimant says that this was incorrect information given to potential customers which ran the risk of spreading Covid-19 and that by so doing the respondent was misleading the public in a way which could endanger the health and safety of employees and customers alike. At page 103 of the bundle there is a screenshot of the extract from the respondent's website to which the claimant is referring. The respondent denied misleading the public and emphasised that there was also a personal responsibility on its employees to remain Covid-aware.
16. I was not persuaded that the claimant had reasonable grounds to believe that the statements on the website endangered health and safety. The statements do not say that all staff were being monitored every day, whether on-site or off-site workers. At this stage the majority of the respondent's employees had only returned to work the previous Monday, 8 June 2020. Having found that the respondent had a very constructive approach to ensuring that the workplace was Covid-safe, I do not find that there was any real basis for criticism for what seems to be a statement on the company's website which places obligations on the respondent's employees as well as on the company for alerting the company to Covid symptoms among its estimators/design consultants and their families.
17. The respondent took steps to re-book the claimant to return to the Denton Park House premises that he had refused to enter on 9 June 2020. The claimant says that he refused to accept the job sheet for the return appointment and gave the job sheet back to Mr Robinson again explaining his concerns to him, Kevin Taylor and Jonathan Marshall. The claimant says three members of support staff (Yasmin Blakeburn, Peter Nee and Charlotte Scott) were present at that time. None of the four witnesses that gave evidence to this Tribunal had any recollection of that happening. Mr Robinson, Mr Taylor, Ms Blakeburn and Ms Scott have no recollection of it. However, this was a busy working environment where multiple conversations were going on at the same time. I find as a fact that the claimant did inform Mr Marshall that he was not prepared to go back to these types of high rise flats. I have come to this finding on the basis that, other than the claimant, the remaining principal direct witness to this exchange was Mr Marshall who did not give evidence to the tribunal. I have noted that other witnesses (principally Mr Robinson) believed that Mr Marshall would have raised with them any Covid concerns that the claimant had raised with Mr Marshall. However, the only direct evidence that I have to go on is that of the claimant and I find it consistent with the claimant's general lack of appetite to attend high rise

flats, particularly in areas which he did not regard as desirable, that the claimant is likely to have raised similar concerns in a covid-related context.

18. I accordingly find that the claimant did raise concerns with Mr Marshall on 11 June 2020 regarding the health and safety risks posed by entering high rise blocks of flats. I find that the claimant also raised concerns on 15 and 16 June 2020 regarding the inadequacy (in the claimant's eyes) of the PPE provided to staff. I noted that the claimant says he raised these matters verbally to Mr Marshall and I found it consistent with the claimant's heightened sensitivity to the risk of Covid that he would be likely to complain that he was not receiving gloves and masks for each and every separate visit that he made to a potential customer's premises. I note the respondent's contention that witnesses who have left the employment of a respondent may not frequently give evidence at later Tribunal hearings in relation to matters which occurred during their employment. Be that as it may, there remains an evidential gap caused by such an omission with the effect that I have heard direct evidence from the claimant but only indirect evidence from the respondent principally along the lines that had such issues been raised about the lack of PPE then Mr Marshall would have spoken to Mr Robinson, the Managing Director at the material time. The nature of such evidence is by definition speculative.
19. The matter that the respondent says led to the claimant's dismissal took place on 17 June 2020. At approximately 9.20am on that day, the claimant attended a potential customer's premises at Matlock Gardens where Mrs Heads and her daughter Lauren Heads were living. The claimant says that the visit was unremarkable and that he stayed for approximately ten minutes before leaving for his next job. The claimant then rang the respondent's office at approximately 10.20am to put a payment to the office system. He was then asked by the person who answered the phone, Peter Nee (a trainee), if he would return to the office immediately. Upon his return he was asked to attend a meeting in the respondent's boardroom with Mr Marshall and Mrs Barnes. A non-verbatim note of that meeting is at page 67 of the bundle.
20. There was some discrepancy about the timings of this meeting. The respondent accepted in its Grounds of Resistance that it had got the timings wrong. I find that the meeting started shortly after 11.00am. Mr Marshall, Mrs Barnes and the claimant were present. At the meeting, the claimant was told that a complaint had been received from the potential customer at Matlock Gardens who had said that the claimant, when asked by the potential customer whether there were any offers available, had responded that the customer could "buy a bag of green". A bag of green was taken to be a reference to a bag of cannabis.
21. The meeting on 17 June 2020 took place in two parts. The first part of the meeting did not take long. It lasted about twelve minutes. During the first part of the meeting, the claimant denied that he said anything to the effect of offering "a bag of green" to Mrs Head or her daughter when he visited Matlock Gardens. Mr Marshall and Mrs Barnes then indicated that they wanted to take a break in order to discuss matters further in the absence of the claimant. It was a contentious issue between the parties whether or not at this stage the claimant (to use the respondent's word) "absconded" from the respondent's offices. The claimant's

position was that he went for his dinner break and to speak to ACAS to obtain some advice. The respondent's position was that it was clear that the meeting had been adjourned for only a short period whilst Mr Marshall and Mrs Barnes further discussed the situation. According to the respondent, it was implicit that the claimant was expected to remain on the company premises while the meeting was reconvened.

22. The claimant returned approximately thirty-minutes later. During the period that the claimant was away he sent a text message to Mr Marshall to the following effect (bundle page 68):

“I'm not a drug dealer you can have my notice. I'm livered [sic] you would believe her over me”.

23. The meeting reconvened at around 1.30pm on 17 June 2020. During the reconvened meeting, the claimant apologised for having left the premises. I find that the claimant would not have apologised had he genuinely thought that he was at liberty to leave the premise once the meeting had been adjourned. I find that it was clear to the claimant that the meeting was adjourned only for a short period of time and that he was expected to remain in the premises to await the reconvening of the meeting. During the reconvened part of the meeting, the claimant was permitted by the respondent to withdraw the notice that he had texted to Mr Marshall (pages 68). The respondent concluded that the claimant had offered “a bag of green” to Mrs Head during his visit to that customer. The claimant says that he was told he had the opportunity to resign or be dismissed for gross misconduct and that he had until 18 June 2020 to make that choice.
24. Mrs Barnes attended (with Mr Marshall) both parts of the meeting on 17 June 2020. I accept the evidence of Mrs Barnes that she and Mr Marshall openly discussed what the appropriate course of action should be and that both Mrs Barnes and Mr Marshall considered that the customer complaint that she had been offered a “bag of green” was genuine. As Mrs Barnes said in her evidence, there was no suggestion that the customer knew or had any grudge against the claimant and the customer had complained shortly after the claimant had visited her. I accepted the evidence of Ms Blakeburn that she was sitting next to the trainee (Mr Nee) when Mr Nee received the initial complaint by telephone from the customer. Ms Blakeburn said that she was told by Mr Nee, immediately after the telephone conversation had ended, what the customer had said. Specifically that there was an allegation that the claimant had offered to sell the customer a “bag of green”. I accept Mrs Barnes' evidence that Mr Marshall communicated to her that he was satisfied that misconduct on the part of the claimant had taken place and I infer that it was this genuine belief that misconduct had taken place which led Mr Marshall to decide to terminate the claimant's employment summarily on 17 June 2020. The letter from Mr Marshall confirming the claimant's dismissal is at page 78 of the bundle. It refers to a decision which “was made” to terminate the claimant's employment on 17 June 2020 on the grounds of a complaint about “your conduct at a customer's home”.
25. I also accepted the evidence at pages 105 to 107 of the bundle. That is an e-mail in which the respondent's solicitor, Mrs Skeaping (who appeared as the advocate

for the respondent at this hearing) confirms the content of a conversation that she had with Lauren Head a substantial time after the incident in question. The e-mail from Mrs (Kerstie) Skeaping confirms that when Mrs Head (Lauren's mother) asked if the claimant had anything else on offer, the claimant had replied he could offer "a bag of green" (see paragraph 2, page 105 of the bundle). Lauren Head's response to that is "Hi Kerstie, I agree to everything you have said. Regards Lauren." I acknowledge Mr Robinson-Young's argument that this is an unusual way in which to compile and present evidence. I am also aware that the respondent has had evidential difficulties in terms of witnesses that it has been able to call in relation to the decision to dismiss. Despite the substantial time that elapsed between the original complaint on 17 June 2020 and the e-mail exchange between Mrs Skeaping and Lauren Head on 24 November 2021, I am satisfied that in her email of 24 November 2021, Lauren Head confirms the accuracy of the complaint that was made on 17 June 2020. I therefore find that on the morning of 17 June 2020: a complaint about a "bag of green" being offered by the claimant was made by Lauren Head to the respondent; that complaint was received by Mr Nee; Mr Nee immediately mentioned the nature of the complaint to Ms Blakeburn; and Mr Nee then informed Mr Marshall that he had received that complaint. I do not accept the claimant's contention that the customer complaint was, as the claimant's representative put it, "trumped-up". I specifically reject the contention that the customer complaint was invented as a pre-text to dismiss the claimant for other (and unlawful) reasons. I find that the reason why Mr Marshall took the decision to dismiss the claimant was because of the customer complaint and for that reason alone.

26. I am fortified in this view by the evidence of Mr Taylor. Mr Taylor dealt with the claimant's appeal against dismissal and whilst that process had considerable procedural shortcomings, I do not infer from that that the respondent was seeking to conceal its real reason for dismissing the claimant. I am satisfied that the respondent did not consider itself legally obliged to go through its corporate procedures, which would potentially have satisfied the law of general unfair dismissal, and that the shortcuts that the respondent took were because of the claimant's short service and not because the respondent was seeking to conceal why it dismissed the claimant. I specifically accept the evidence of Mr Taylor at paragraph 8 of his witness statement in which he says that he questioned Mr Marshall about whether the claimant had raised any concerns with him and that Mr Marshall had confirmed that no concerns or complaints, whether formal or informal, had ever been made to him. In coming to that conclusion, I do not find that Mr Marshall was being untruthful when he told Mr Taylor that no concerns or complaints had been raised with him. I find that Mr Marshall may not have appreciated at the time that in discussions with the claimant on 11, 15 and 16 June 2020 concerns about health and safety or protected disclosures were being raised by the claimant. Mr Taylor's letter confirming that that the claimant's appeal had been unsuccessful is at page 80 of the bundle.

The relevant law

27. The statutory provisions engaged by the claimant's complaint of automatically unfair whistleblowing dismissal are contained in the Employment Rights Act 1996.

Section 43B Disclosures qualifying for protection

- (1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, 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, or is likely to be deliberately concealed.
- (2) For the purposes of subsection (1), it is immaterial whether the relevant failure occurred, occurs or would occur in the United Kingdom or elsewhere, and whether the law applying to it is that of the United Kingdom or of any other country or territory.
- (3) A disclosure of information is not a qualifying disclosure if the person making the disclosure commits an offence by making it.
- (4) A disclosure of information in respect of which a claim to legal professional privilege (or, in Scotland, to confidentiality as between client and professional legal adviser) could be maintained in legal proceedings is not a qualifying disclosure if it is made by a person to whom the information had been disclosed in the course of obtaining legal advice.
- (5) In this Part "the relevant failure", in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1).

Section 43C Disclosure to employer or other responsible person

- (1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure in good faith--
 - (a) **to his employer,** or
 - (b) where the worker reasonably believes that the relevant failure relates solely or mainly to--
 - (i) the conduct of a person other than his employer, or
 - (ii) any other matter for which a person other than his employer has legal responsibility to that other person.

- (2) A worker who, in accordance with a procedure whose use by him is authorised by his employer, makes a qualifying disclosure to a person other than his employer, is to be treated for the purposes of this Part as making the qualifying disclosure to his employer.

Section 103A Protected disclosure

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 the employee made a protected disclosure.

28. The statutory provisions engaged by the complainant's complaint of unlawful health and safety dismissal are also contained in the Employment Rights Act.

Section 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...
- (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.

Submissions

29. I asked both parties to provide written submissions.
30. Mr Robinson-Young's submissions on behalf of the claimant may be summarised as follows:
- 30.1 The claimant's return of the job card on 15 June 2020 and his refusal to go back to Denton Park House amount to appropriate steps taken by the claimant to protect himself or others (in particular his partner who was vulnerable) from Covid-19. Section 100(1) (e) is satisfied and that the claimant was dismissed at least in part because the claimant had taken such appropriate steps.
- 30.2 The claimant had made three qualifying disclosures immediately before his dismissal. Those disclosures are set out in an e-mail from the claimant's solicitor dated 26 July 2021 which is at page 81 of the bundle. The claimant says that these disclosures were made as a matter of fact and that they disclose information which tends to show that the health or safety of an individual has been, is being or is likely to be endangered.

Specifically, that the claimant's own health and safety, that of potential customers and that of his partner and potentially others more widely had been, is being, or is likely to be endangered.

31. The qualifying disclosures amount to protected disclosures because they were made to the claimant's employer.
32. Mr Robinson-Young says that the meeting on 17 June 2020 was "a complete sham". The claimant's position is that no such complaint was made and it has been invented for the purposes of dismissing him by pretext when, in reality, he has been dismissed for taking appropriate steps in circumstances where the claimant reasonably believed he was in serious and imminent danger and/or because of concerns raised about health and safety.
33. The claimant says that the fact that no proper enquiries were made and that the procedural shortcomings in the process demonstrate that the alleged complaint was simply "a tool to remove the claimant" from its employment.
34. The claimant also points out that there is no statement from the complainant, no statement from the decision-maker (Mr Marshall) and no police investigation into a serious criminal offence.
35. Mrs Skeaping's submissions on behalf of the respondent may be summarised as follows.
36. There were aspects of the claimant's job that the claimant did not like doing even before the pandemic and that included visiting properties in undesirable areas.
37. The claimant did not have the requisite service to bring a general unfair dismissal claim and therefore the issues of fairness in respect of the procedure are not directly relevant to the case.
38. The claimant, along with the other employees of the respondent, was given a comprehensive update on 8 June 2020 of the Covid safe measures that the respondent had implemented to ensure that they were operating safely and in accordance with government guidelines. It was clear from that presentation that the respondent's general approach to health and safety in relation to Covid was constructive and evolving. In this respect, the respondent was behaving as a responsible employer. The receipts which were referred to in the claimant's evidence showed that it purchased a substantial amount of PPE in May and June 2020. In addition, there was a script which was read to all potential customers (bundle page 104) which showed how the respondent was seeking to make sure that its off-site employees and customers were Covid-safe.
39. The claimant was dismissed only nine days after he had returned from furlough leave. That dismissal was on 17 June 2020. That followed a complaint received from a customer the claimant had visited earlier that morning. The allegation was that the claimant had offered the customer "a bag of green" which is understood as a reference to cannabis. The evidence of Ms Blakeburn was that Peter Nee,

who had received the call from the customer, immediately informed Ms Blakeburn of what the allegation was.

40. Mrs Skeaping points out that the claimant's position is not that there was any misunderstanding in relation to Mrs Head's complaint. The claimant's position was that the customer had lied. The respondent says that there is no rational basis upon which to infer or conclude that the customer was inventing this allegation. It was suggested that the customer may have been offended by the claimant referring to her accommodation as a flat rather than a house. However, the respondent says that is no explanation for the nature of the complaint that was made. An alternative explanation was that the customer wanted "a freebie". Again the respondent says there was no evidence that the customer was seeking a "freebie" from the respondent.
41. The respondent points out that a solicitor of the Supreme Court of England and Wales has sent an e-mail of a summary of a conversation that she had with Lauren Head (page 106 - 107 bundle) and that this confirms what had been said seventeen months earlier on 17 June 2020. The respondent says, rhetorically, why all this time later would Ms Head continue with her story if it wasn't true. There is no benefit to the complainant in so doing.
42. The respondent says that no protected disclosure were made. The respondent says that those employees which the claimant says have overheard his protected disclosures did not support his case, in particular Ms Blakeburn and Ms Scott. The respondent's says that the claimant's position has changed from saying that Ms Blakeburn and Ms Scott must have heard his assertions to saying that they may not have heard them because of the working environment where several conversations frequently took place at once.
43. The respondent says that, at the meeting on 17 June 2020, the claimant "absconded" during what was intended to be a short break in the meeting. The respondent points to the claimant's resignation by text message during his period away from the workplace. The respondent says that the claimant is not being truthful when he says that he simply went to get his lunch. The respondent points to the fact that the claimant apologised for his behaviour during the second part of the meeting and that such an apology is inconsistent with the claimant's position that he was simply having a lunch break and did not realise he was expected to remain in the office for the reconvened meeting to take place. The respondent allowed the claimant to retract his resignation. Again, the respondent says that affording the claimant such a degree of latitude is inconsistent with its desire to remove the claimant from the workplace for ulterior reasons.
44. The respondent submits that the claimant's evidence should not be relied upon in relation to his three alleged protected disclosures. The respondent points to the claimant's assertion when he says that he returned a job card to Mr Taylor on 15 June 2020. The claimant asserts that that this was witnessed by Charlotte Scott, Yasmin Blakeburn and Tony Robinson. Those witnesses did not confirm the claimant's account. The respondent accepts that Mr Marshall didn't give evidence but it says that the people who the claimant says he made the statements in front of are unable to corroborate it. The respondent points out that Mr Marshall

worked closely with Mr Robinson, later Mr Taylor, and that they would have been made aware of these concerns if they had been raised particularly as Mr Robinson shared an office with Mr Marshall.

45. In the alternative, the respondent says that even if this information was disclosed to the respondent, it did not amount to a protected disclosure. The claimant was not acting in the public interest and was not providing information. The respondent says that the claimant was fearful of Covid but those concerns were about himself and not others as is shown from the fact that he didn't have a problem with other colleagues going into the high rise flats and even suggesting that Mr Marshall himself should attend the premises or send somebody else in his place. The respondent says that the nearest that the claimant gets to raising a matter of public interest is in relation to his alleged disclosure on 15 June being the statements on the respondent's website. The respondent says that it is the claimant's own evidence that he was concerned that the public would be "misled" rather than health and safety would be endangered.
46. With respect to the Section 100 (1) (e) the respondent says that the claimant did not bring anything at all to his employer's attention regarding health and safety. The respondent says that the tribunal will need to be satisfied that the claimant took appropriate steps to protect himself or others from danger. The respondent says that catching Covid was not an imminent danger and it further says that a refusal to attend the premises was not an appropriate step for the claimant to take. The respondent says that the easiest way to avert the perceived danger was to take the precautions recommended by the government including using the PPE he was provided with by the respondent. The respondent essentially says that the respondent was taking all protections advised in government guidance and in so doing the claimant could not reasonably believe that there was a serious and imminent danger in respect of which he needed to take appropriate steps to protect himself or others from danger.

Conclusion

Automatically unfair dismissal contrary to Section 100 (1) (e) ERA 1996

47. In order to qualify for the protection under Section 100 (1) (e) ERA 1996 the claimant must show that:
 - 47.1 there were circumstances of danger which he reasonably believed to be serious and imminent; and that he
 - 47.2 took or proposed to take appropriate steps to protect himself or other persons from danger.
48. Whether steps were appropriate falls to be judged by reference to all the circumstances as set out in Section 100 (2) ERA which include the claimant's knowledge, facilities and advice available to the employee at the relevant time.
49. I find that the requirements of Section 100 (1) (e), judged by the factors at Section 100 (2), are not satisfied in this case. The claimant was concerned about

catching Covid-19 and was also concerned about his partner who was shielding on account of an asthmatic condition. However, the respondent was fully compliant with the Covid guidelines produced by the government and had made PPE available in the form of gloves, masks and hand sanitisers for the claimant's use. I do not accept the claimant held a reasonable belief that these measures were inadequate due to the risk of cross-contamination. I so find for two reasons. First, I do not accept that the claimant had a reasonable belief that the circumstances of danger were serious and imminent. This was not a workplace analogous to a hospital ward where cross-contamination risks are an inherent feature of the workplace. This workplace involved taking measurement for blinds to be fitted in customers' homes with PPE being provided by the respondent. At the material time the respondent took care to ensure as far as possible that social distancing was in place and the respondent proactively risk managed the visits to the customers' premises by using a script specifically designed to minimise the risk of Covid-19 transmission. It is, of course, impossible to eliminate the risk of Covid transmission altogether, but that is not the standard contemplated by Section 100 (1) (e) assessed by reference to Section 100 (2) ERA. Secondly, I accept the respondent's evidence that additional PPE was available on request and that the claimant, along with other members of the respondent's staff, had been encouraged at a Covid briefing on 8 June 2020, to raise any concerns that they had on the Covid-safety measures being taken by the company. I find that the respondent's attitude and approach to Covid-security was constructive and genuine as evidenced by the Covid briefing on 8 June 2020; the steps taken to provide a Covid-secure workplace for employees and customers both on and off-site; and by the provision of appropriate PPE. In these circumstances, I find there were no circumstances of danger that the claimant reasonably believed to be serious and imminent.

50. Nor do I find that the claimant took "appropriate steps" to protect himself or others from danger. The steps that the claimant identifies are refusing to work in high rise flats and, specifically, returning a job card which would have required him to return to a high rise block of flats at Vallum Court. Those steps were not appropriate in circumstances where the claimant could have requested additional PPE from the respondent to reduce the risk of Covid transmission.
51. I've also considered whether, if I am wrong about my findings about serious and imminent danger, the reason (or, if more than one, the principal reason) for the claimant's dismissal was that the claimant took the steps identified above. I conclude that the sole reason for the claimant's dismissal was the respondent's belief that a genuine customer complaint had been made to the effect that the claimant had offered to sell a customer a bag of cannabis. I conclude that the facts and matters operating on the mind of Mr Marshall at the dismissal stage related only to that customer complaint and to nothing else. I conclude that Mr Taylor dismissed the claimant's appeal for the same sole reason.
52. For these reasons, the claimant's claim for automatically unfair dismissal under Section 100 (1) (e) ERA is not well-founded and therefore fails.

The protected disclosures

53. The claimant says that he made three protected disclosures. I refer to the disclosures as “protected” since it is not in dispute that if the claimant has made one or more qualifying disclosures then those disclosures will also be protected because they were made to Mr Marshall and therefore to the claimant’s employer.

PID 1: The alleged disclosure on 11 June 2020

54. I accept that the claimant did raise concerns with Mr Marshall about Covid-safety at Vallum Court and high rise flats in general. The respondent said that the claimant had previously raised his dislike of going into high rise flats. However, I also accept the claimant’s evidence that on 11 June 2020 (only three days after his return to work) he did raise his concerns about Covid-safety in high rise flats in general and at Vallum Court in particular.

55. In so finding, I am mindful that the only direct evidence of this verbal provision of information came from the claimant. Mr Marshall did not give evidence. I accept that the claimant was giving a truthful account of his conversation with Mr Marshall. I therefore accept that the claimant told Mr Marshall that the lifts were small at Vallum Court, that the entry parts of the premises were filthy and that other people at Vallum Court were not wearing PPE.

56. In bringing this information to the respondent’s attention, I accept that the claimant was providing information to his employer that he considered Vallum Court (and high rise blocks more generally) to present a risk to the claimant’s own health and safety and that of others, including his own partner.

57. In coming to this conclusion I have taken into account the evidence of Ms Blakeburn and Ms Scott who the claimant says were both present when he had the conversation with Mr Marshall and neither of whom heard the claimant’s remarks. However, I conclude that in a busy working environment where multiple conversations took place at the same time, it was not surprising that those in the vicinity did not necessarily overhear what was being said in any particular conversation.

58. In these circumstances, I conclude that on 11 June 2020 the claimant disclosed the above information to Mr Marshall and I accept that the claimant had reasonable grounds to believe that the information disclosed tended to show that his own health or safety and that of other colleagues and his partner at the time was likely to be endangered. I accept the respondent’s evidence that the risk was being minimised through the provision of PPE, the script for site visits and the ability of a fitter/estimator to use the lifts one at a time. However, the test is whether or not the claimant had a reasonable belief not whether the respondent was taking proactive steps to mitigate the risk of transmission of Covid-19. The claimant was providing information to the respondent during a pandemic. I find it reasonable for the claimant to have believed that entering high rise flats where social distancing was either difficult or impossible to maintain presented a risk to the health or safety of those who would be present in the flats and by extension to

other people as well. I have also considered whether the claimant provided the information in the public interest. The claimant did not help himself on this issue. He had previously expressed a personal dislike of going into high rise flats in undesirable areas for reasons unrelated to Covid-19. It was the claimant's own position in evidence that perhaps Mr Marshall should attend Vallum Court instead of the claimant and put his own (Mr Marshall's) family at risk. However, I find that to be no more than a petulant remark which does not deprive what was otherwise information affecting the health and safety not just of himself but also of others from being made in the public interest. In other words, I have come to the conclusion that while the claimant was making a point about his own personal interests he was also making a broader point of wider public application.

59. I therefore find the information disclosed verbally to Mr Marshall on 11 June 2020 concerning the Covid risk presented by high rise blocks amounted to a protected disclosure within the meaning of section 43B(1)(d) ERA.

PID 2: The alleged disclosures on 15 & 16 June 2020 regarding the adequacy of the PPE provided to staff

60. I accept the claimant's evidence that he did raise concerns about PPE to Mr Marshall on 15 and 16 June 2020. I conclude that information was disclosed verbally to Mr Marshall that in the claimant's view the provision of PPE was inadequate. I do not however conclude that the claimant had a reasonable belief that health and safety had been, was being or was likely to be endangered. He genuinely believed in the possibility of cross-contamination but that risk has also to be assessed against what I find to be the respondent being prepared to make more PPE available to him and to the many covid-related measures that the respondent put in place on the return to work of most of its staff from furlough on 8 June 2020.
61. I therefore do not find that the claimant's complaint on 15 & 16 June 2020 about the inadequacy of PPE was a protected disclosure within the meaning of section 43B(1)(d) ERA.

PID 3: The alleged disclosure to Mr Marshall that the respondent's entries on its website regarding safety matters taken for Covid-19 were not truthful

62. Again, the only direct evidence that I heard on this alleged verbal provision of information was from the claimant. I accepted the claimant's evidence as a truthful account. I find that the claimant did inform Mr Marshall that in the claimant's view the respondent was not telling the truth to customers on its website regarding the respondent's Covid-safety measures. In particular, I find that the claimant did tell Mr Marshall that he believed the statement on the website that the respondent was monitoring staff on a daily basis by taking temperatures and checking up on families in case of symptoms were untrue. I accept the claimant's evidence that since his return to work on 8 June 2020 his temperature was never taken and nor had his family been contacted.
63. It was the claimant's case that the website was misleading the public. The claimant again relies on Section 43B (1) (d) ERA and it is his case that informing

the respondent about the alleged untruthfulness of statements on the respondent's website was a disclosure made in the public interest and tended to show that the health or safety of an individual had been, was being or was likely to be endangered. I understood the claimant's position to be that the respondent's customers would be more likely to accept an appointment with the respondent based on the safety measures the respondent's said on its website that it was taking, when it was in fact not taking those measures as represented. The respondent's customers would therefore be at a greater risk of exposure to Covid-19 contamination than they believed to be the case based on the representations on the respondent's website.

64. I conclude that when drawing Mr Marshall's attention to what the claimant regarded as factual inaccuracies on the respondent's website the claimant was disclosing information to Mr Marshall. However, I do not find that the claimant in so doing had a reasonable belief that the health or safety of any individual had been, was being or was likely to be endangered. The gravamen of this disclosure is that the public was being misled, not that their health or safety was in some way endangered. At best, this disclosure tended to show that the health or safety of potential customers was not being protected to the extent that the respondent's website alleged to be the case. I do not consider that the claimant had in these circumstances reasonable grounds to believe that health and safety had been, was being or was likely to be endangered.
65. Nor am I satisfied that the claimant had reasonable grounds to believe that the respondent's website was in fact misleading. This disclosure of information was made on 15 June 2020, only eight days after the respondent's staff had returned from furlough. It is the respondent's case, which I accept, that its approach to Covid-safety was evolving in what the respondent fairly says was a unique set of circumstances brought about by the global pandemic. The respondent had devised Covid-safety measures for both its on-site and off-site staff. I accepted the evidence of Ms Blakeburn that temperatures were taken for on-site staff on a regular basis and I accept that staff were told what to do if a family member presented with Covid-19 symptoms. More fundamentally still, I do not interpret the statements on the company's website to which I was referred to mean that all staff were being monitored every day by the respondent taking temperatures and checking up on families in case they had any symptoms. If that is what was intended by the respondent's website, it would amount to making a commitment to speak to all circa thirty-five of its employees' families every day. I do not think that it is either what the respondent intended or what the public would reasonably have understood by the extracts from the website to which I was referred. In coming to this conclusion I also had regard to the respondent's broader Covid-safety measures (of which the claimant was also aware) which I found to be both responsible and comprehensive and which included a bespoke script to be read out to potential customers before off-site customer appointments took place.
66. I therefore find that although the claimant did disclose information verbally to Mr Marshall on 15 June 2020 relating to the accuracy of the company's website, I do not find that the claimant had a reasonable belief that the health or safety of any individual had been, was being or was likely to be endangered by any marginal discrepancy (if indeed there was any discrepancy at all) between statements

regarding Covid-safety measures on the company's website and the safety measures that were being implemented in practice.

The reason for dismissal

67. I have carefully considered the facts and matters that were in the mind of Mr Marshall when he took the decision to dismiss the claimant and in the mind of Mr Taylor when he took the decision not to uphold the claimant's appeal.
68. It was an impediment to so doing that Mr Marshall did not give evidence. Nevertheless, I have come to the conclusion that the sole fact or matter in the mind of Mr Marshall when dismissing the claimant was the serious customer complaint that was made by, or on behalf of, Mrs Head on 17 June 2020. I have done so for the following reasons:
 - 68.1 I accept that on 17 June 2020 Lauren Head made a serious complaint that the claimant offered to sell her or her mother a bag of cannabis during an appointment that had been made to sell the respondent's blinds;
 - 68.2 the claimant was dismissed on the same day as the complaint was made;
 - 68.3 I have inferred, in part from the proximity of the complaint to the dismissal, that the complaint was the reason for the dismissal;
 - 68.4 I have found that the claimant, despite his denials, did leave the workplace when he was aware that the meeting of 17 June 2020 (which had been convened to discuss the customer complaint) had been adjourned for only a short period of time before it was to be reconvened;
 - 68.5 I accepted the evidence that the claimant apologised when he attended the reconvened meeting later on 17 June 2020. If the claimant genuinely thought that he was at liberty to leave the office he would have had nothing in respect of which to offer an apology. It does not matter whether in so doing the claimant could be said to have "absconded". The point of substance is that I find that the claimant was aware that Mr Marshall and Mrs Barnes had expected him to remain in the office while the meeting was reconvened and that he decided to leave the workplace in the company van regardless;
 - 68.6 I accept the evidence of Mrs Barnes, who was with Mr Marshall during both parts of the meeting on 17 June 2020 when the decision to dismiss the claimant was taken, that during that meeting no consideration was given, or discussion had, regarding any disclosure, complaint or concern raised by the claimant. I accept that the sole matter considered and discussed by Mr Marshall and Mrs Barnes was whether the complaint made by or on behalf of Mrs Head was genuine and, if so, what the consequences should be for the claimant;

- 68.7 I accept Mrs Barnes evidence that both she and Mr Marshall agreed that the complaint was genuine, constituted gross misconduct and that the complainant should be dismissed for it; and
- 68.8 I accept that when determining the claimant's appeal on 26 June 2020, Mr Taylor considered that the only issue for his consideration was whether or not the specific customer complaint had been made that the claimant had on 17 June 2020 offered to sell the customer a bag of cannabis and, if so, whether that merited dismissal. I was satisfied that Mr Taylor reached his decision not to uphold the claimant's appeal solely by reference to the customer complaint because he accepted that the complaint was genuine and he considered that dismissal was the appropriate sanction in the circumstances.
69. I therefore find that the sole reason for the claimant's dismissal was the customer complaint. In those circumstances, the claimant's complaint that he was dismissed unfairly contrary to Section 103A ERA is not well-founded and fails.

EMPLOYMENT JUDGE LOY

Date: 21st February 2022

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.