EMPLOYMENT TRIBUNALS

Claimant		Respondent
Mr M Ham	**v**	**Esl Bbsw Ltd**

Heard at: **Cardiff (by video)** **On: 12 and 13 April 2021**

Before: **Employment Judge C H O'Rourke**

Appearances
For the Claimant: **in person**
For the Respondent: **Mr K Chehal – legal consultant**

JUDGMENT

1. The Respondent automatically unfairly dismissed the Claimant, on health and safety grounds, contrary to s.100(1)(c) and/or (e) Employment Rights Act 1996.

2. The Respondent is ordered to pay the Claimant the sum of £16,640, subject to such deductions as may be appropriate under the Recoupment of Benefits Regulations (as set out in the Reasons below).

(The Respondent having, at the Hearing, requested written reasons, in accordance with Rule 62(3) of the Employment Tribunal's Rules of Procedure 2013, the following reasons are provided:)

REASONS

Background and Issues

1. By a claim form dated 25 May 2020, the Claimant brought a claim of automatic unfair dismissal, on health and safety grounds. He had been employed by the Respondent, a company that provides cleaning services, for five months, as an area supervisor. He was dismissed on 30 March 2020. It is unclear as to when his effective date of termination was, but that is not an issue that is to be determined by this Tribunal and there is no dispute that the Claimant received all notice, or pay in lieu thereof that was due to him.

2. The issues in this claim (as agreed at a case management hearing of 7 October 2020 [27]) are set below.

3. Automatic Unfair Dismissal - s.100(1)(c) and/or (e) Employment Rights Act 1996 (ERA)

   3.1. Can the Claimant show that the reason (or, if more than one, the principal reason) for his dismissal was that:

   3.1.2. Being an employee at a place where there was no safety representative or 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 and safety; or

   3.1.3 In circumstances of danger which he reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger?

   3.2. If so, the Claimant will be regarded as unfairly dismissed.

The Law

4. I reminded myself of s.100 ERA, as set out above.

The Facts

5. I heard evidence from the Claimant and on behalf of the Respondent, from Ms Edyta Kocinska, the Claimant's line manager, who dismissed him; Mr Jean-Henri Beukes, the CEO, who approved Ms Kocinska's decision and Ms Jennifer Gower, a former systems and compliance director of the Respondent, who conducted the appeal.

6. Chronology. I set out the following brief chronology, by way of 'setting the scene', upon which I comment as I consider appropriate:

   6.1. 1 November 2019 – the Claimant commenced employment with the Respondent. The first six months of his employment were expressed to be probationary, during which time the normal disciplinary procedures of the Respondent would not apply [contract – 41].

   6.2. 9 March 2020 (all dates hereafter 2020) – Ms Kocinska becomes regional manager and the Claimant's line manager [WS 1].

   6.3. 16 March – I take judicial notice that on this date the Prime Minister addressed the Nation, stating that due to the COVID pandemic, all non-essential contact and travel should cease.

6.4. 23 March – again, taking judicial notice, the Prime Minister announced a lockdown, stating that all those not required to do otherwise, should 'stay at home'.

6.5. 26 March – following Royal Assent of the bill, the Coronavirus Act 2020 comes into force, making lockdown legally enforceable.

6.6. 27 March – Ms Kocinska emails a client to state that she is self-isolating at home, due to suspected COVID symptoms and will be for a further week. She copies the Claimant into that email on the same day, asking him to visit the client [170].

6.7. 30 March – the Claimant is dismissed by Ms Kocinska, following a couple of telephone calls and other communications between her and the Claimant (more of which below).

6.8. 1 April – Ms Kocinska asked the Claimant to carry out a task at the client school ('the school'), which had been previously discussed on 30 March. The Claimant declined, as he considered that he had already been dismissed.

6.9. 2 April – Ms Kocinska wrote to the Claimant to confirm her decision of the 30th, stating that the Claimant's employment had been terminated with immediate effect on that date and that he would be paid a week's pay in lieu of notice (which he was) [177]. There was some confusion on this point, with Ms Kocinska thinking that she had dismissed the Claimant, on notice, on the 30th (hence her request that he carry out the task on 1 April), which situation her letter seems to contradict. The Claimant in fact agreed in his email of appeal [178] that he had been dismissed on notice. Ms Kocinska accepted that having realised that the Claimant wasn't going to carry out more tasks, regardless of what had happened on 30 March, it was more sensible to summarily dismiss him and she therefore effectively retrospectively confirmed that belated decision on her part. In any event, this issue does not affect the matters I need to decide. The letter stated that the Claimant had been dismissed for '*failure to follow a reasonable management instruction'* (in relation to collecting equipment of the Respondent from the school) and his '*poor and inappropriate attitude during a follow up phone call'*.

6.10. 3 April – the Claimant appealed against his dismissal [178].

6.11. 17 April – Ms Gower held an appeal hearing by telephone [notes 181]. The hearing was recorded.

6.12. 23 April – Ms Gower sent her decision to the Claimant, which was to reject it [187]. In the days following, there is some further correspondence between them, as to the accuracy of the transcript of the recording [188-193].

7. Events of 30 March. Clearly, the events of this day are crucial to this claim and although there is some email correspondence, the bulk of the evidence is oral and therefore, as the accounts differ, I will need to come to a view as to which account I prefer. I summarise the evidence put as follows:

   7.1. The Claimant. The Claimant's account is put in several forms:

      7.1.1. In his appeal email of 3 April (so, four days after the incident), he said that on the afternoon of that day he had been contacted by Ms Kocinska and instructed to collect cleaning equipment from the school, as the Respondent's contract there had ended. She emailed him at 13.06 [174], asking him to do it '*today as the site will be closed later today'*. He replied at 13.08, stating '*where am I going to store this equipment as the van is already pretty much full?*' It was undisputed evidence that the Respondent did not have a dedicated storage facility in the area, with the Claimant's van effectively serving as mobile storage. The Claimant said that in a subsequent telephone conversation, at around the same time, he also said that he asked Mr Kocinska whether, in view of the then COVID travel restrictions, the collection was essential and also, having been told by her that he should deliver the items to her house, whether that was wise, in view of her self-isolation. He said that Ms Kocinska then became '*extremely rude and overbearing'* stating that '*I am your manager and you should not question me* and *if I tell you to do something you should do it'* etc. He said that he attempted to reiterate to her that he had a genuine concern about his health and that as the school was closed, the equipment could be left there until such time as the pandemic was over. He said the conversation then ended. Some time later (but in the next half hour or so) she phoned him and dismissed him on seven days' notice. He subsequently received an email from her, at 13.50, instructing him to return all company equipment by the end of the week and to collect the cleaning equipment from the school by the next day '*and bring it to my address BS10 6LX as I did advise you earlier'* [173]. He replied at 16.23 stating that he would go there now to collect it, '*regardless of the risk to my health which quite clearly is not a concern to you. Is it safe bringing equipment to your house bearing in mind on 27th you advised a client you needed to self-isolate for another month* (which he subsequently corrects to a week)*? I know you deny this fact so can forward you the email to refresh your memory if needed.'* Ms Kocinska did not respond to that email. On arrival at the school, he found it to be shut and called Ms Kocinska (at about 17.20), to inform her and she said '*that's your fault, you've left it too late. I've got dinner on the table, I'm not speaking to you.'* In his appeal, he denied that he had refused to follow a reasonable management instruction, or demonstrated an inappropriate attitude. He pointed out that prior to this incident he had visited a self-isolating cleaner's house to collect keys, during which visit he had no PPE and was concerned both for his health and that of his family, including his young children. He also stressed that he had '*not suggested for one moment that I would not*

work during the COVID-19 pandemic …'. He also said, in respect of the allegation of poor attitude that his work record belied that.

7.1.2. In his appeal hearing [181], two and a half weeks later, he broadly reiterates that account and the following additional information is provided. He points out what he considers the irony of the hearing being conducted remotely, when he was '*sacked for not going to someone's house that was displaying symptoms of COVID19 and their daughter had them, as well you know'*. He said that while '*it was already late in the day … I haven't got an issue getting it, but my van's already full'*. In respect of the discussion about whether or not the collection is 'essential', he agreed that he responded, when Ms Kocinska said '*If I say it's essential, it's essential'*, by saying, '*it's not'*. He pointed out that he was the only one going site to site and that he was '*just trying to minimise my risk*'. He referred to Ms Kocinska as '*going off the rails'* in the way she responded to him and that he told her she was rude. He said that when she suggested he take the equipment to her house and he pointed out that she was self-isolating, that she denied that that was the case. He said that in respect of his alleged refusal to go to the school '*it was never a refusal, it was always a question of 'is this the best thing to do considering the circumstances'. I mean, if the Corona thing wasn't an issue, yeah, I would have whipped over there'*. In cross-examination, before this Tribunal, he was asked what his intentions were in respect of the equipment, had the school been open when he got there, at around 17.00 and he said that his intention was to get the cleaner on site to take the equipment in his van, but in any event there was nobody at the school went he got there. He said that the reference in the notes [185] to somebody having *'a battered Skoda'*, which Ms Gower recorded as the Claimant '*being difficult to understand'* (the recording being unclear) is him referring to that vehicle. Finally, Ms Gower confirmed in the notes that the Claimant had *'never had a complaint that I'm aware of, because I suppose Wayne was your manager, he's not said that you were rude. This is just Edyta, this is the first time this has come up.'*

7.1.3. The Claimant's ET1 broadly reiterates that account. The following additional information was provided in his statement. He said that Ms Kocinska's precise instruction was that he should first come to her house, unload his van, then attend the school, collect the equipment, return to her address, offload that equipment and reload his van. In respect of his later decision to go to the school, he said that despite not feeling safe, having to risk exposure to COVID '*by delivering equipment to Edyta's address, however I had a partner, step children and bills to pay. I felt I had no choice but to attend the address.'*

7.1.4. In cross-examination, he agreed that despite lockdown, there were no travel restrictions on him, as he was a 'front-line worker'. It was suggested to him that as he was already going to various customer sites, some of which were manned, he was, by doing so, taking more risk than dropping off equipment at Ms Kocinska's house. He

responded by disagreeing, considering that going to a person's house, where two people were self-isolating was riskier, particularly when there were alternatives, such as leaving the equipment at the school. He said that he was simply seeking to mitigate his risk. He denied that Ms Kocinska had referred to her leaving her garage open and there being no contact between them. Again, he was challenged as to why, if he was so concerned about the risk, he had gone to a cleaner's house, to pick up keys, when they were self-isolating and he said that the keys had been left at the end of the drive, having been sprayed and left in a plastic bag. He denied, as this account was not in his statement that he was making this up. He was also challenged as to why he had not informed Ms Kocinska of the possibility of using another cleaner's van for storage and he said that he couldn't, as she wouldn't listen to him and had put the phone down on him. He didn't further follow up on this point, as he was very soon afterwards told he was dismissed. He denied that his true motivation was that it was late in the day and he didn't wish to do the driving, stating that he routinely drove long distances, putting in long days (sometimes up to eighteen hours) and that that was not the issue.

7.2. The Respondent's Evidence. While Ms Kocinska is the Respondent's main witness, she did have a telephone conversation with Mr Beukes, on the day, in order to get his authority to dismiss the Claimant. In total, therefore, the Respondent's evidence is as follows:

7.2.1. Apart from the 'bare bones' of the dismissal letter, the Respondent's first written account is contained in the ET3 [24], so, about three months after the incident. Ms Gower was asked whether she had obtained any written account from Ms Kocinska when conducting the appeal and was unsure as to whether she had or not, but, in any event, no such record was provided to this Tribunal. The ET3 states the following. The Claimant was requested to collect the equipment from the school and questioned whether it was essential to do so. It was '*denied that the Claimant made reference to the COVID 19 pandemic during the call'*. It was also stated that Ms Kocinska had told the Claimant that she would leave her garage door unlocked, so he could drop off the equipment without being in contact with her, or being in her house. It went on to say that '*the Claimant began raising his voice at Ms Kocinska in an aggressive manner and ended the call abruptly.'* and also that '*it is denied that the Claimant raised any concerns for his health during the call.'* It is then asserted that shortly afterwards, Ms Kocinska called the Claimant to '*see whether he had calmed down and would carry out Ms Kocinska's instructions'* but as he raised his voice again, she dismissed him. The Respondent agreed that the Claimant did subsequently go to the school, but obviously was unable to collect the equipment. The ET3 denies that there was any discussion about masks or PPE (but this is not asserted by the Claimant), or that he had suggested leaving the equipment in place until alternative storage could be arranged.

7.2.2. In her statement, Ms Kocinska says the following. She recounts the initial exchange of emails and then, when the Claimant queried where the equipment should be stored, said she phoned him, told him the collection was essential and that he could drop it off at her garage, which she would leave unlocked, '*so he could drop the equipment without being in contact with me or walking into my house.'* She said that in the very short conversation, he became very aggressive, raising his voice, before terminating the call. She said that she '*categorically denied that the Claimant made any reference to the COVID 19 pandemic during the call.'* She also denied being overbearing or rude. She then rang Mr Beukes, recounted events and asked for his permission to dismiss the Claimant, which was given. She reiterated the account in the ET3 of calling the Claimant to see if he'd calmed down, but as he hadn't, then dismissing him. She said that it was only in his email of 16.23, later that day that he raised concerns about his health. She recounted his later journey to the school, albeit that her time differed by forty minutes, or so. She also recounted that the Claimant had previously picked up keys from a self-isolating employee and was visiting several client sites, but had not raised concerns about those tasks, which she considered to be a '*riskier situation'* than coming to her house.

7.2.3. In his statement, Mr Beukes recounts Ms Kocinska's call to him, which he says was at around 14.00, stating that she was upset and in which he confirmed his agreement to the Claimant's dismissal.

7.2.4. In cross-examination, Ms Kocinska said the following:

7.2.4.1. She agreed that the Claimant had not refused in emails to go to the school, but had done so in the telephone conversation.

7.2.4.2. When challenged as to whether or not there'd been discussion, in the call, as to her self-isolating (as this had not been stated in the ET3, or in her statement), she accepted that there had been such discussion. When challenged, therefore, as to how she could '*categorically deny that the Claimant made any reference to the COVID 19 pandemic during the call.'*, she said that she '*was not sure if he had raised it first'*.

7.2.4.3. She was also challenged as to why she had referred in her statement to her leaving her garage door unlocked, to avoid contact with her, if the Claimant had not raised this issue as a health and safety concern and said that '*he did raise a concern'*. Again, when further challenged that the whole premise of the defence to the claim was that he hadn't raised such issue, she said that '*he did, in reference to the school'*.

7.2.4.4. She did not remember if she had referred to any COVID-related discussion when she spoke to Mr Beukes and that the main

issue was the Claimant's attitude. She didn't remember if the self-isolating issue arose.

7.2.4.5. After a break, when the issue was raised again as to whether COVID was discussed in the telephone conversation, she said '*he didn't raise it on the phone call … I don't remember him raising COVID'*.

7.2.4.6. She considered that the entire issue revolved around the Claimant refusing to go to the school.

7.2.4.7. She did not reply to his 16.23 email, as she'd not seen it until after they talked again on the phone later that afternoon.

7.2.5. Mr Beukes, in supplementary questioning, raised, for the first time, assertions as to the Claimant's previous performance and that his '*co-operation had previously been questioned'*. When challenged as to why he was doing so, when this had not been put in the ET3, or in his statement, he was unable to answer. He agreed that he had no corroborative evidence of this alleged under-performance and nor had it been raised in any form with the Claimant, at any point, apart from today. He confirmed Ms Kocinska's account of her conversation with him and in particular that she had not mentioned COVID as being an issue.

8. Conclusion on the Evidence. I prefer the Claimant's account of the discussion with Ms Kocinska and I do so for the following reasons:

8.1. I found his oral evidence as to what was discussed to be persuasive and he was not substantially shaken on it in cross-examination. In contrast, Ms Kocinska's evidence was contradictory and she, on several occasions, referred to gaps in her memory. She had made a bold assertion in her statement about *categorically deny(ing) that the Claimant made any reference to the COVID 19 pandemic during the call.'* when, clearly, on her own evidence in cross-examination, he had. It was also curious that at no point, until cross-examination had there been any reference to Ms Kocinska self-isolating, indicating to me a desire to obscure that fact from earlier evidence.

8.2. The Claimant's evidence was supported by and consistent with near-contemporaneous written accounts of his, whereas the Respondent had no written record, whatsoever, until production of their ET3, approximately three months later. That ET3 also contained the categorical assertion as to there being no discussion about COVID, when, clearly that was untrue.

8.3. Mr Beukes' belated and uncorroborated assertion as to the Claimant's alleged previous underperformance, particularly when contrasted with Ms Gower's record, in the appeal hearing, of there being no such concerns, damaged the Respondent's credibility generally, indicating to me that they felt a need to bolster what they may have begun to think was a weak case.

9. Conclusion on whether dismissal because of raising health and safety concerns. I conclude that the dismissal was, at least, for the principal reason of the Claimant raising concerns about his health and safety and I do so for the following reasons:

   9.1. As stated above, I accept his account of events and that therefore his concern was not about going to the school, but loading and unloading his van at Ms Kocinska's house, when she and her daughter were self-isolating, with suspected COVID symptoms.

   9.2. It was his challenging of the proposed arrangement by Ms Kocinska that lead to the short call being terminated (probably by her) and her promptly seeking clearance from Mr Beukes to dismiss the Claimant. There may have been some element of irritation on Ms Kocinska's part as to the Claimant's alleged tone, but that concern would not have arisen independent of the health and safety concerns raised by him. I don't believe that she then further considered, when she subsequently called the Claimant as to whether, if his attitude had changed, that she might not dismiss him, but instead prefer his account that he was simply peremptorily dismissed.

   9.3. It is unfortunate that these events coincided with the then very recent announcement of the lockdown and the accompanying nationwide uncertainty and lack of knowledge as to the consequences of the pandemic and this will have caused huge uncertainty for many employers. It is also unfortunate that Ms Kocinska was so recently in post and was herself self-isolating. These factors no doubt contributed to her reaction to the Claimant's legitimate concerns, but while understandable, are not excusable.

   9.4. In the context of the uncertainties and fears of late March last year and the death toll since then, it is inconceivable that an employee being instructed to go to a house where two people were self-isolating with suspected COVID symptoms, was not raising concerns that he '*reasonably believed were harmful or potentially harmful to his health and safety'* or that he was seeking to take '*appropriate steps to protect himself from danger in circumstances in which he reasonably believed to be serious and imminent'.*

10. Judgment. For these reasons, therefore, I find that the Respondent automatically unfairly dismissed the Claimant, contrary to s.100(1)(c) and/or (e) ERA.

REMEDY

11. I heard evidence from the Claimant and submissions from both parties.

12. The Claimant was claiming one year's loss of net earnings, from what was likely to be his effective date of termination (7th April 2020, or so), to the date of this

Hearing, limited to 52 weeks. The Respondent agreed the Claimant's calculation of his weekly net pay, as set out in his schedule of loss, at £320. A year's loss is therefore £16,640.

13. He stated that he is still not in employment, but is presumably optimistic that now with the recent relaxation of lockdown restrictions that he can soon find employment.

14. He said that he has continuously sought employment since his dismissal, but due to the following factors been unsuccessful:

    14.1. The fact that lockdown has drastically suppressed economic activity; and

    14.2. As a consequence, there has been a shortage of jobs, with a related huge increase in those applying for those remaining. As evidence of this, he referred to his documentary evidence, which showed that for most of the roles he applied for there had been up to a hundred applicants.

15. He had sought jobs as a general and delivery driver, a cleaner, lower management roles and store work, with, he thought, well in excess of fifty applications, but been unsuccessful. He agreed that he did have an HGV licence (from his time as a fire-fighter), but said that he lacked recent driving experience at that level and was therefore disadvantaged, in comparison to more experienced applicants. He had provided some limited documentary evidence of his job-searching [199-204], which was by way of a record from his personal account with Indeed.com, showing applications for various roles, from November of last year to the present. When challenged as to why he had not provided more, he said that he had been unsure as to how far back he should go and said he'd sought advice from the Respondent's representative, as to what his or her expectations might be (not at the time Mr Chehal), but not had a response. In retrospect, he agreed that it was perhaps foolish of him to expect such advice from the other party. He said, however that he had a lot more documentary evidence of such job searches and registration details with agencies, which he could provide, if given more time.

16. He said he had considered re-training (Mr Chehal giving the example of forklift truck driving), but he said that the problem was getting on a course, as lots of the agencies had closed. He accepted that in respect of some roles, on-line training might have been available.

17. His geographical area for job-searching was limited to about a 25-mile radius, as he had been obliged to sell his car. He'd also been forced to rent out the house he owned, to pay the mortgage and to move in with his mother.

18. He was questioned as to whether he'd applied for benefits and said that he wasn't eligible for Universal Credit, due to owning a property, but had recently been informed by an advisor that in fact he may have been eligible nonetheless for Job-Seekers' Allowance (JSA), which he was now investigating. He had, otherwise, he said, been '*living off handouts'* for a year.

19. In submissions, Mr Chehal said that the documentary evidence the Claimant had provided was limited to three or four pages of jobs, showing perhaps ten to twenty roles. Lockdown had not closed down all opportunities, with some areas, such as logistics or supermarkets, expanding. The Claimant has failed to mitigate his loss and therefore deductions should be made to reflect that.

20. Conclusions. I concluded as follows:

    20.1. Having generally found the Claimant to be an honest and forthright witness (he was, for example, in both phases of the Hearing, willing to accept errors on his part, or to concede points when unsustainable), I don't doubt that he has made the efforts to find work that he has described, but that through lack of knowledge of Tribunal proceedings and a naïve belief that the Respondent would assist him in such matters, he has failed to provide the full documentary evidence he almost certainly holds.

    20.2. From the evidence he has provided, covering the last four months or so, he has clearly has been applying, unsuccessfully, for a range of roles.

    20.3. He has not, at least so far, been in receipt of benefits , living off, as he says, 'handouts' and therefore has had every incentive to find work. (In respect of the benefits position, he considers, belatedly that he may have, in fact, been eligible for JSA, which may or may not be backdated. He said that he found the Universal Credit system difficult to navigate and that even when speaking to official advisors of the Benefits Agency, was getting unclear advice. He awaits confirmation as to any such entitlement. Clearly, if that were backdated, to a date between 7 April 2020 and the date of this Hearing, then he will need to declare that to the Respondent, in order that they can apply to the Benefits Agency for a calculation of such sums as should be deducted from the award below and paid to the Agency, subject to the Employment Protection (Recoupment of Benefits) Regulations 2010.)

    20.4. The onus of showing a failure to mitigate lies on the employer as the party who is alleging that the employee has failed to mitigate his or her losses — **Fyfe v Scientific Furnishings Ltd [1989] ICR 648, EAT**. It follows that tribunals are under no duty to consider the question of mitigation unless the employer raises it explicitly and adduces some evidence of a failure to mitigate. While assertions were made by the Respondent in this respect, no evidence was provided as to, for example, roles that the Claimant could have applied for, but didn't.

    20.5. While a much over-used word in the last year, the period since April 2020 has been unprecedented. It is a statement of the obvious that the economy has taken a huge hit, with very many sectors ceasing all activity, or greatly reducing such activity. This factor will have inevitably increased the pressure of applications on those sectors still recruiting. I am therefore satisfied that in the context of that environment that the Claimant has done his best to find employment, but to date, has been unsuccessful, despite such efforts. I consider, therefore that he has made sufficient efforts to

mitigate his loss and is therefore entitled to recover the loss of earnings he claims.

20.6. Judgment. Accordingly, therefore, the Respondent is ordered to pay the Claimant the sum of £16,640, being one year's net loss of earnings, subject, as stated, to any recoupment of benefits that may be appropriate.

Employment Judge O'Rourke
Cardiff
Dated 14 April 2021

Reasons sent to the parties on 22 April 2021

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FOR THE TRIBUNAL OFFICE Mr N Roche