# EMPLOYMENT TRIBUNALS

**BETWEEN**

| **Claimant** | **AND** | **Respondent** |
|---|---|---|
| Mr J Armitage | | Longstem Limited t/a London Real |

**Heard at**: London Central (by video) **On**: 10-13 January 2022

**Before:** Employment Judge Stout (sitting alone)

**Representations**
**For the claimant:** In person
**For the respondent:** David Mold (counsel)

# JUDGMENT

The judgment of the Tribunal is that:

(1) The Claimant's claim of unfair dismissal is not well-founded and is dismissed;
(2) The Claimant's breach of contract claim is not well-founded and is dismissed; and,
(3) The Respondent's application for costs is dismissed.

# REASONS

1. Mr Armitage (the Claimant) was employed by Longstem Limited, trading as London Real (the Respondent), from 20 May 2019 until he was dismissed with immediate effect on 17 April 2020. In these proceedings, he brings a claims for unfair dismissal and breach of contract. He claims that his dismissal was automatically unfair because the reason or principal reason for it was that he had made protected disclosures (s 103A Employment Rights Act 1996 (ERA 1996)) and/or had refused to return to his workplace in circumstances of danger that he reasonably believed to be serious and imminent (s 100(1)(e) ERA 1996).

2. I gave judgment at the hearing and these are the written reasons as requested by the parties.

## The type of hearing

3. Unfortunately, although listed to start on 10 January 2022, this case had been omitted from the Tribunal cause list for the day and no panel was available. The parties travelled to the Tribunal expecting an in-person hearing (the Claimant driving for several hours to get there). With the parties' consent, the hearing reconvened as a remote electronic video hearing under Rule 46 at 4.30pm on 10 January 2022 and started properly on 11 January 2022.

4. The public was invited to observe via a notice on Courtserve.net. No members of the public joined.

5. The participants were told that it is an offence to record the proceedings. The participants who gave evidence confirmed that when giving evidence they were not assisted by another party off camera.

## The issues

6. The issues to be determined were identified by Employment Judge E Burns in an Appendix to her Case Management Order sent to the parties on 17 June 2021 to be as follows:-

   <u>Section 100(1)(e) Employment Rights Act 1996</u>

   (1) It is not disputed that the claimant told the respondent that he would not be attending his workplace on or around 30 March 2020.

   (2) Were there circumstances of danger, which the claimant reasonably believed to be serious and imminent?

(3) If so, was the claimant's refusal to return to his work place an appropriate step to protect himself or other persons, taking into account all of the circumstances including the claimant's knowledge and the facilities and advice available to him at the time?

(4) What was the principle reason for the claimant's dismissal and was it the claimant's indication that he would not be attending the respondent's workplace?

Section 103A Employment Rights Act

(5) Did the claimant make the following disclosure?

a. On or around 30 March 2020, a disclosure to Mr Rose, CEO, and Mr Frost, CSO, that the respondent was putting the health and safety of individuals at risk by asking them to return to the workplace.

(6) If so, was the disclosure a qualifying protected disclosure, i.e.
a. does it tend to show that the health or safety of any individual has been, is being or is likely to be endangered (43B(1)(d))?
b. Did the claimant have a reasonable belief in the disclosure?
c. Was it made in the public interest?

(7) What was the principal reason the claimant was dismissed and was it that he had made a protected disclosure?

Breach of contract

(8) It is not in dispute that the claimant's contractual entitlement was to 3 months' notice. Was the respondent entitled to terminate the claimant's contract of employment on 18 April 2020 without notice?

Remedy

(9) If the claimant succeeds, in whole or part, the tribunal will be concerned with issues of remedy and in particular, if the claimant is awarded compensation will decide how much should be awarded. This will include consideration of:
a. Whether the qualifying protected disclosure, if it was made, was made in good faith and whether compensation could be adjusted accordingly.
b. What reduction, if any, should be made to any award applying the principle in Polkey?
c. Should there be any deduction to any award, by reason of the claimant's conduct?
d. Whether either party unreasonably fail to comply with a relevant ACAS Code of Practice, if so, would it be just and equitable in all the circumstances to increase or reduce any award, and if so, by what percentage?

## The Evidence and Hearing

7. I was provided with a trial bundle. The Respondent provided further disclosure in the course of the hearing of messages sent by the Claimant on the Respondent's Slack messaging system, which I also admitted into evidence. In connection with the costs application the Claimant also provided further disclosure of bank statements.

8. I received witness statements, and heard oral evidence from, the Claimant and his witness Alex Walker, and Paul Frost for the Respondent.

9. I read the bundle and the additional evidence and the parties' witness statements and the Respondent's skeleton argument.

10. I explained my reasons for various case management decisions carefully as I went along.

## The facts

11. I have considered all the oral evidence and the documentary evidence. The facts that I have found to be material to my conclusions are as follows. If I do not mention a particular fact in this judgment, it does not mean I have not taken it into account. All my findings of fact are made on the balance of probabilities.

### Background

12. Mr Armitage (the Claimant) was employed by Longstem Limited, trading as London Real (the Respondent), from 20 May 2019 until 17 April 2020. The Respondent is a digital platform specialising in long-form interviews with high-profile guests. The Claimant was employed as Head of Design on a salary of £40,000 per annum.

13. The Claimant's contract provided, so far as relevant:-

> **2 Term of Appointment**
>
> 2.1 The Appointment shall be deemed to have commenced on the Commencement Date and shall continue, subject to the remaining terms of this agreement, until terminated by either party giving the other not less than 3 months prior notice in writing.
>
> **4 Duties**
> 4.2 During the Appointment the Employee shall:
>
> 4.2.1 unless prevented by Incapacity, devote the whole of his time, attention and abilities to the business of the Company;

4.2.2 diligently exercise such powers and perform such duties as may from time to time be assigned to him by the Company together with such person or persons as the Company may appoint to act jointly with him;

4.2.3 comply with all reasonable and lawful directions given to him by the Company;

4.2.4 promptly make such reports in connection with the affairs of the Company on such matters and at such times as are reasonably required;

4.2.6 use his best endeavours to promote, protect, develop and extend the business of the Company …

**6 Hours of work**

6.1 The normal working hours of the Employee shall be 09:30 to 18:30 on Mondays to Fridays and such hours as are necessary for the proper performance of his duties the Employee acknowledges that he shall not receive further remuneration in respect of such additional hours.

**14 Payment in lieu of notice**

14.1 Notwithstanding clause 2, the Company may, in its sole and absolute discretion, terminate the Appointment at any time and with immediate effect by notifying the Employee that the Company is exercising its right under this clause 14 and that it will make within 28 days the first instalment of a payment in lieu of notice (Payment in lieu) to the Employee.

**15 Termination without notice**

15.1 The Company may also terminate the Appointment with immediate effect without notice and with no liability to make any further payment to the Employee (other than in respect of amounts accrued due at the date of Termination) if the Employee:

15.1.1 is guilty of any gross misconduct affecting the business of the Company; or

15.1.2 commits any serious or repeated breach or non-observance of any of the provisions of this agreement or refuses or neglects to comply with any reasonable and lawful directions of the Company;

**19 Disciplinary and grievance procedures**

19.1 The Employee is subject to the Company's disciplinary and grievance procedures, copies of which are available from Brian Rose. These procedures do not form part of the Employee's contract of employment.

19.2 If the Employee wants to raise a grievance, he may apply in writing to Brian Rose in accordance with the Company's grievance procedure.

19.3 If the Employee wishes to appeal against a disciplinary decision he may apply in writing to Brian Rose in accordance with the Company's disciplinary procedure.

14. The founder and CEO of the Respondent is Brian Rose. He is also the host for the guest interviews and he is very much the ‘face’ of the organisation. Paul Frost was at the time of the Claimant’s employment the Respondent’s Chief Strategy Officer and is now Chief of Staff. Alex Walker was the Head of Production. Keith Chamarette was Head of Operations.

15. Mr Frost's evidence was that in practice, during the period relevant to this claim, Mr Rose and Mr Frost made the strategic decisions about the business jointly. The Claimant challenges that and says that Mr Rose made all the decisions, but he was not party to private interactions between Mr Rose and Mr Frost so is not in a position to give evidence about that. Further, from the documents I have seen in these proceedings, and the oral evidence I have heard, it appears to me that Mr Frost was indeed making the decisions that he claims to have made, albeit no doubt with the agreement of Mr Rose.

16. The Claimant has also challenged the authority of Mr Frost and Mr Chamarette to give him directions. He says that under his contract he was only required to report to Mr Rose. This is not correct. Mr Rose is identified in clause 10 of the contract as the individual to whom the Claimant must notify sickness absence, but he is not identified in the contract as the Claimant's line manager. Clause 4 of the contract requires the Claimant to comply with all lawful and reasonable directions given to him by "the Company" and to carry out work assigned by "the Company". In accordance with ordinary legal principles, "the Company" can act through any of its officers, employees or appointed agents which may include contractors if so authorised. The Claimant's focus at times in this case on the status of Mr Frost and Mr Chamarette is misplaced. All the evidence points to them being the duly authorised agents of the Company that was his employer and authorised to give directions to the Claimant. The Claimant acknowledges that on a Company structure plan presented at a Company meeting in January 2020 they appeared in the hierarchy above the Heads of Department; in the Covid-19 home working plan that I refer to below, it is provided for Heads of Department to report to Mr Frost and Mr Chamarette daily, and they signed letters on behalf of the Company.

17. The Claimant has adduced evidence, which the Respondent has not sought seriously to dispute, and which I therefore accept, that, prior to March 2020, the Respondent was planning to expand. At Christmas 2019 the Claimant was given a bonus, subsequently converted to a pay rise. The Claimant and other senior members of the team presented a plan for expansion at the AGM in January 2020. New and larger offices were being considered.

<u>The Respondent's disciplinary and grievance procedures</u>

18. In February 2020 the Respondent dismissed its Social Media Manager. Other employees were concerned about the treatment of this individual by the Respondent and requests were made to see the Respondent's Disciplinary and Grievance Procedure which their contracts said were available from Mr Rose. At this point, it was realised by Mr Chamarette and Mr Frost that the Respondent did not have any such procedures and solicitors were instructed to assist with drafting the documents. A draft had been prepared by mid March 2020 but the Respondent had not adopted or implemented the policy at the time of the Claimant's dismissal. It is accepted the draft policy was not followed and I have not seen it. Mr Frost was also

not at the time of the Claimant's dismissal familiar with the ACAS Code of Practice on Disciplinary and Grievance procedures. This state of affairs is poor practice, and not compliant with the spirit (or, possibly, the letter) of the requirements of ss 1 and 3(1)(a) and 3(1)(aa) of the Employment Rights Act 1996 which requires an employer if it has disciplinary rules to make those 'reasonably accessible' to the worker. I have taken this fully into account in considering the facts of this case. However, I do note that the basics of a grievance policy were set out in the contract itself, in that clause 19.2 states that if an employee wishes to raise a grievance they may apply in writing to Mr Rose; likewise clause 19.3 provides that appeals against disciplinary decisions should be made to Mr Rose. The Claimant did in this case raise a formal grievance on 27 April by writing to Mr Rose and others, so the absence of a written policy did not prevent him raising a formal grievance if he wished to do so.

The pandemic

19. At the beginning of March 2020 concerns about Covid-19 were rising. On 4 March 2020 there was a Heads of Department meeting at the Respondent. Mr Walker suggested a plan for working from home. Mr Frost agreed, but had not had time to draft one yet as the Government guidance had only just come out. The Claimant suggested that the Heads of Department came to this meeting with a fully drafted plan. I reject that suggestion. Mr Walker made no reference to that in his statement and it is implausible that a plan was drafted at such an early stage.

20. However, the Respondent did subsequently draft a Covid-19 Continuity Plan. Heads of Department contributed to this. A written plan was drawn up which contained standard advice about staying at home if you have symptoms, how to avoid catching Covid etc. The plan also included a section headed "Contingency Plan for Working from Home" which states that it starts from 19 March 2020, but that employees are free to start sooner, although it stated that staff were also free to go into the office if they preferred. It set out a structure for the day beginning with a business-wide morning meeting at 9.30am, individual team meetings at 9.45am, then Heads of Department meeting with Mr Chamarette and Mr Frost to confirm team priorities, staff to be contactable during the day by Slack, Zoom/Google Meet or phone and to provide reports at the end of the day, with Heads of Department providing Mr Chamerette and Mr Frost a report at 6.30pm (the form of the report was not specified).

21. Slack was the principal means of communication within the Company and thus was referred to in this document rather than email, although all employees had email and the Claimant accepted that normally he would have expected other company employees to respond to emails during working hours in the same way as Slack messages. For the avoidance of doubt I find that the omission of any reference to email in this document does not indicate that it was not regarded as an acceptable means of communication in the Company. The document states that all design work

can be done from home and all video work can be done from home. It states the business would pay for equipment such as iMacs to be transported home. For guest interviews and filming days in the studio, specific arrangements would be made and the business would pay for taxis for staff to limit exposure on public transport.

22. Mr Russell-Pearcey and Mr Walker also went away and wrote a separate plan for how the Respondent's video interviews could still be produced from home using Zoom. The Respondent did not adopt (or fully adopt) this option as for reasons among other things of production quality it wished to continue using its studio for recording purposes.

23. Mr Frost says that he understands that at this time the Claimant was expressing views to Mr Chamarette that the Respondent ought not to be broadcasting in a pandemic. Mr Frost and Mr Rose did not view that as an option as the business would 'fail' if it stopped broadcasting.

24. On 9 March 2020 the team was made aware that Mr Rose intended to record an interview with David Icke, a prominent conspiracy theorist. The Respondent had recorded interviews with him previously on other topics, but some staff, including the Claimant and Mr Walker, were unhappy about him being interviewed in relation to Covid-19 and expressed their views on this.

25. Mr Rose then began to show signs of respiratory illness and a cough, but was still coming into the office.

26. On 11 March 2020 the Coronavirus was confirmed as a pandemic by the World Health Organisation.

27. On 12 March 2020 Public Health England announced guidelines for self-isolation in the event of feeling unwell.

28. The Claimant says that Mr Rose spoke to the whole team around this time saying, *"other brands will be looking to slow down but I see this as an opportunity"*, *"anyone hiding away or self-isolating are cowards"*. He refers to what he says was a 'similar message' Mr Rose posted on YouTube titled *"Coronavirus – Our Greatest Opportunity to Step Up and LEAD"*. Someone commented on his video *"not to sound too paranoid but that right there is a dry cough Brian!"*. I do not accept that Mr Rose said precisely what the Claimant alleges to the whole team as his is the only evidence on this and I have not found him to be a reliable witness. For example, he said that his contract and the business continuity plan said things that they did not say and he has not given consistent evidence about his claimed alleged protected disclosure. However, I do accept from the material I have seen that in that first month of the pandemic (with which this case was concerned) Mr Rose in social media posts in which he is promoting his own views (as distinct from interviews with others where the Respondent may be acting as journalist and platfom and not explicitly endorsing the views) took a stance that may be described in general terms 'anti lockdown' and 'pro herd immunity'.

29. On 13 March 2020 the Respondent dismissed its Head of Guests and Events, Oliver Russell-Pearcey, without notice. The Claimant says that this was because Mr Russell-Pearcey had voiced concerns about Mr Rose being unwell and contagious and had started working from home. This echoes suggestions that Mr Russell-Pearcey made in his letter of 19 March 2020 in the bundle complaining about his dismissal. However, it is apparent from that letter that Mr Russell-Pearcey had a number of complaints about the Respondent's treatment of him, and that he understood the Respondent's position was that he had not passed his probationary period. I am in no position to decide what the real reasons for Mr Russell-Pearcey's dismissal were as this letter is the only evidence I have relating to it, but I have seen enough to conclude that there were a number of issues going on between Mr Rusell-Pearcey and the Respondent and the Claimant has not established on the balance of probabilities that Mr Russell-Pearcey was dismissed because he had raised Covid-19 concerns.

30. On 14 March 2020 the Respondent's YouTube channel posted *"Coronavirus the real truth – 70-80% of us will contract this disease and this is good"*.

31. Also on 16 March 2020 the Claimant informed Mr Frost via Slack that he had cough and cold symptoms and would therefore follow Government advice and work from home. Mr Frost says he immediately agreed to that and that the Claimant did not explain his reasons for wanting to work from home and there is nothing to gainsay Mr Frost's evidence in that respect, which I therefore accept.

32. The Claimant also messaged Mr Rose directly on Slack stating: *"Morning, I've got symptoms and will be working from home. Appreciate the videos you posted recently on the subject and largely agree. But as it stands, we nor the governments or anyone really understand the situation and I feel like safety is the best policy for the time being. I've already briefed Fiore on the day's tasks and communicated with Paul. Aim to catch up with both of them throughout the course of the day. We'll be focusing on campaign activity – I see this as an opportunity to get the complicated stuff done without office distractions. 'Keep calm and carry on'. Wishing you and your family good health"*. Mr Rose did not respond to that, but did tell Mr Frost to ensure that the Claimant was properly briefed on work priorities. I observe that the Claimant's message to Mr Rose is also consistent with him expecting Mr Rose to have no objection to him working from home.

33. On 18 March 2020 David Icke's first interview appeared on the Respondent's YouTube channel and on the company's website.

34. From 19 March the Respondent's home-working plan already referred to came into effect and many people did work from home.

35. On 23 March 2020 at 8.30pm in the evening the Prime Minister announced the first national lockdown. Mr Rose messaged the whole team on Slack immediately afterwards saying that the Respondent was providing an

essential service *"like Sky, the BBC and the rest"* and that they would be continuing. Mr Rose later took pictures of himself without a face covering on an empty tube train urging people to step up and lead and act for their community. I should add at this point that the requirement for face coverings on public transport did not become mandatory until some months later so this is not a photo of Mr Rose doing something unlawful. The Claimant suggests that it shows Mr Rose was making an unnecessary journey in breach of Government guidance. This is because there is a dispute between the Claimant and the Respondent as to whether it was 'necessary' for any work to carry on in the office at all. The reason for the dispute about what was 'necessary' is because that is one aspect of the Government guidance/rules that the Claimant believes were introduced at this point. He also suggested at this hearing that the guidance/rules at that point were to the effect that only those in 'essential services' should travel to work. I have not been provided with the Government guidance or rules from this point in time and I do not need to see these for the purposes of determining the issues before me. However, I add that, so far as I am aware, it has never been the case that only those in 'essential services' may travel to work and to the extent that the Claimant maintains that it did, he has not proved that in these proceedings. It is my understanding that the guidance/rules at this point was that people should only travel to work if it was necessary to do so and they could not work from home. I do not have to decide for the purposes of these proceedings whether it was 'necessary' for anyone working for the Respondent to attend the office.

36. The Claimant also says that it was messages such as that of 23 March 2020 from Mr Rose that made him feel under pressure to return to the office. I do not accept that the Claimant felt that pressure at the time or if he did that it was reasonable of him to do so. In his Slack messages to Mr Rose and Mr Frost informing them that he would not be coming into the office the Claimant appears to assume that that would be fine as he does not invite any response from them. None of Mr Rose's messages say that 'stepping up' and 'leading' require you to be in the office. The Claimant does not mention having felt any such pressure in his letters or communications at the time. The Covid-19 Contingency Plan was clear that the Design Team were not required in the office and there were no other requests for him to come into the office.

37. On 25 March 2020 the Claimant heard about the dismissal of another employee and sent a Slack message to Mr Frost and Mr Chamarette stating: *"It wouldn't take a genius to recognise the pattern: Those who have not completed their probation periods are losing their jobs. If the same fate is in store for anyone on my team, at any time, please give me a least one month's notice. I expect this as a matter of basic co-operation"*. Mr Chamarette replied, *"The future of anyone in the team is based on continued value and relevance not tenure"*. He agreed the Claimant would be given notice of decisions made about his team (but not specifically one month's notice). The Claimant also sent the message privately to Mr Rose. Mr Rose did not respond, but on 26 March 2020 the Claimant complained to Mr Rose about Mr Frost being 'confrontational'. Mr Rose replied that he thought Mr

Frost was just frustrated and asked whether the Claimant was delivering everything he said he would on time. The Claimant replied that he was and would be happy to take Mr Rose through it.

38. On 26 March 2020 Mr Frost wanted to meet with the Claimant on Zoom, but the Claimant came into the office of his own volition because he said he had issues with his laptop and needed to get it repaired at a shop near the office. He found he no longer had key fob access to the office because the Respondent had removed this as he was not required to be in the office. He met with Mr Frost therefore outside the office and they discussed working arrangements. Mr Frost raised concerns about the Claimant's liaison with him and the team and asked him to check in daily at 10am and 5.30pm.

39. The Claimant claims in his witness statement that on or around 30 March 2020 he told Mr Rose and Mr Frost that they were putting the health and safety of individuals at risk by asking them to return to the workplace. This is not what he said in his claim form. In his claim form solicitors on his instructions wrote that *"On or around 30 March 2020, the Claimant informed the Respondent, namely the CEO, Mr Rose, and CSO, Mr Frost, that he could not come into work because he was showing symptoms of a fever"* and that *"the Respondent would be putting him at risk if they were him to come back to the workplace when he could work from home"* and that *"he would not be coming back into the workplace as it would put both him and his colleagues at risk of exposure to the virus"*. The Claimant did not see that there was any significant difference between his claim form and his witness statement, but it is clear the two do not say the same thing.

40. As to what was in the Claimant's witness statement, I do not accept that the Claimant ever told Mr Rose or Mr Frost in terms that they were putting the health and safety of individuals at risk by asking them to return to the workplace. As Mr Frost acknowledged, I find that the Claimant did express the view to Mr Frost and others during March 2020 that it was not necessary for interviews to continue to be recorded in person in the studio, implicit in which was (I accept) the assertion that doing so posed a risk whether to individuals or wider society as a result of potential increased Covid-19 transmission, but I do not accept that he actually told Mr Rose and Mr Frost that they were putting the health and safety of individuals at risk by asking them to return to the workplace. The debate between them was about whether it was necessary to keep recording in the studio. The Claimant was not alone in expressing the view that they should not keep recording in the studio. Mr Walker at least also expressed such views. The Claimant is now suggesting that the conversation was about individuals being 'coerced' to return to the office, but there is no evidence at all that the Respondent was acting otherwise than in accordance with its Covid-19 Contingency Plan which for the most part permitted individual employees to make choices about whether they worked from home or not. There is no evidence that those individuals who were required to come in for filming were 'coerced' and no evidence that the Claimant made any complaint in response.

41. As to what was in the Claimant's claim form (i.e. his informing the Respondent that he could not come into work because he was showing symptoms of fever) this actually refers to the Claimant's Slack messages of 16 March set out above. As is apparent, his message to Mr Rose included the statement that he had *"symptoms and will be working from home"* and that *"safety is the best policy for the time being"*. That therefore is the content of his communication on 16 March and not what was in the claim form.

42. The Claimant says that he believed that Covid-19 was a serious and imminent danger to himself and his colleagues and that is 'obvious', although he has not adduced any evidence that he or any colleagues were particularly vulnerable or that the Respondent had adopted particularly unsafe working practices.

The redundancies

43. As the Respondent's business operated prior to March 2020, most of the interviews of high profile individuals that formed its core business were carried out in person in its London studio. Mr Frost says that in February 2020 Mr Rose travelled to New York. During that trip he realised that it would be beneficial to the Respondent to change the business model and to carry out most interviews online via Zoom. As a result of the global Covid-19 pandemic the Respondent decided to accelerate its plans in this regard. It was also facing reductions in revenue as a result of the effect of the pandemic on business more generally. The Respondent (specifically, Mr Frost and Mr Rose) decided that if most interviews were carried out online there would be less work for its Production, Design and Guests and Sponsorship teams and therefore fewer people were required to do the work. The Respondent decided that in future it could be done by freelancers on an ad hoc basis. The Claimant was not involved in this decision-making process. He was one of about ten employees that Mr Rose and Mr Frost decided to make redundant.

44. On Friday 3 April 2020 Mr Chamarette contacted the Claimant on Slack at 16.05 asking for his mobile number; the Claimant responded at 16.06 and at 16.07 Mr Chamerette said he would be calling him at 16.40. The Claimant replied at 16.08 *"Sure"*. They then spoke on the phone and Mr Chamarette explained that the Claimant was being made redundant. This was followed up by a letter the same day confirming notice of redundancy. He was given three months' notice as provided for in his contract, with his last day of employment to be 3 July 2020. The letter made clear that the Respondent expected him to work during his notice period and that all contractual obligations would remain in place. The letter said that there *"may be opportunities for you to undertake freelance work for us in the future"*. The Claimant has said on a number of occasions that he was not given any information about what would happen with his notice period, hence his later requests for PILON, but the position is in fact set out clearly in this letter.

45. There were three people in the Claimant's team including himself. The other two were more junior and one was engaged on a freelance basis. All three were dismissed and/or did not have their contracts renewed. Mr Frost explains that with the move to more remote interviews and less studio work there was less for the design team to do and the Respondent decided to save costs by dismissing the whole team.

46. Mr Walker was also given notice of redundancy, along with three other members of his team. He said that two members of the team were retained and those were the two who were 'coerced' into going into the office. He considers that redundancy was not the real reason for dismissal and that he was dismissed because he was working from home. He said in his witness statement that the Respondent hired people to do his job shortly afterwards, but clarified in oral evidence that he meant that one of the members of his team who was retained in fact took over his role, not that anyone new was employed.

47. Mr Frost in part disputed Mr Walker's evidence, and I accept Mr Frost's evidence as he was better placed to give it as he was in the office during the period in question and made the decisions. First, Mr Frost said that one of those made redundant was in fact coming into the office for part of the week, while one of those retained was working part of the week at home. Further, he said that not only had no additional people had been recruited to the team since the redundancies, but no one had 'taken over' Mr Walker's role. Such work as is required of the kind that Mr Walker was doing previously is outsourced to an external company.

48. The Respondent also made redundant two out of three members of the Guest & Sponsorship team as there would be fewer guests coming into the studio.

49. The Claimant says his redundancy was not genuine as designers have been hired since and there is plenty of work to do, with design work ongoing. However, the statutory definition of redundancy in s 139 of the Employment Rights Act 1996 (ERA 1996) focuses on the requirements of the business for employees to do a particular kind of work. How much work there is that needs doing is not relevant. If a company decides it is going to have fewer employees doing the work, that is a redundancy situation. In this case, the Claimant has no personal knowledge of who has been hired since. He is going on the report of a colleague who visited the office and saw someone called Kim sitting at his desk, and also on the fact that the Respondent has continued to produce materials that will have required design input. Mr Frost says that Kim is in fact Head of Operations and does not have a design background or skills, and that the Respondent has not employed any full-time designers since dismissing the Claimant and his team. I accept that evidence as Mr Frost was on the whole the more reliable witness and there is no evidence to contradict it. I am not required in these proceedings to determine whether the definition in s 139 of the ERA 1996 is satisfied, but it is relevant to the issues that I have to decide whether this was a 'genuine' redundancy or a 'sham' cover up for dismissals of people who had chosen

to work from home. On the evidence before me, therefore, I record that I find that this was a genuine redundancy situation. It is immaterial in this respect that the business was previously planning to expand. Plans changed in the light of the pandemic and in fact it reduced its workforce. That is a redundancy situation.

50. Even if there was a redundancy situation, it is still the Claimant's case that those selected for redundancy were all those who chose to work from home. He said there were about 10 people made redundant. He said he knew that all the others were also working from home because of their communications on Slack, but he was unclear on the details and I was not satisfied that he was personally familiar with the circumstances of other employees. Nor was Mr Walker, as I have already found above. On the evidence before me, accordingly, the Claimant has not shown that redundancy selections were made based on who was in the office and who was not, rather than by reference to roles and responsibilities and business requirements as Mr Frost says.

51. On the same day that the Claimant was given notice of redundancy he was disconnected from Slack and the company email address and the company's DropBox account, remote access to computer and access to the company's cloud storage services as well as any SaaS applications. The Respondent denied this in its ET3 and Mr Frost denied it in his witness statement, but accepted in oral evidence that it had happened as part of the Respondent's standard practice when dismissing employees in order to maintain security. However, he maintained that 'erroneously' the Claimant was disconnected from more than he should have been.

52. On Monday, 6 April 2020 the Respondent broadcast a second interview with David Icke in which he linked the introduction of 5G technology with the Covid-19 pandemic. These views were later linked to the torching of the 5G mobile mast at the Nightingale Hospital in Birmingham. The following day YouTube banned videos containing such content. On 8 April 2020 the Television Regulator, Ofcom, issued London Live (a separate company) with a sanction categorised "Harm" because the David Icke interview had breached Rule 2.1 of the Broadcasting Code by containing *"potentially harmful statements about the Coronavirus pandemic"*. London Real was not itself subject to OfCom regulation at that point and so was not censured.

53. Also on Monday, 6 April 2020 Mr Chamarette emailed the Claimant on both his personal and company email addresses to let him know that Mr Frost would be in touch to discuss and agree tasks and ways of working during his notice period. Mr Frost then emailed at 11.01 on 6 April 2020 acknowledging the Dropbox and other associated sharing platforms had been secured, and proposing therefore to use WeTransfer to pass files between them and use email (rather than Slack) as a means of communication. He mentioned certain specific tasks that the Claimant would be asked to undertake. At 14.06 he emailed again asking the Claimant to confirm receipt of the earlier email.

54. At 15.07 the Claimant replied that reconnecting him to Dropbox would be 'infinitely easier', stating that access could be granted just to the Marketing and Website 2020 folders and passwords to other accounts be changed (although he said he did not have any anyway since his laptop had been repaired). (From this I note that the Claimant's laptop was mended and operational by this point.) The Claimant attached a draft of the article that Mr Chamarette had requested. The article concerned a story about the pandemic with the title *"The truth behind the coronavirus pandemic".* The Claimant now says he considered this article irresponsible and distasteful, but he did not say so to anyone at the Respondent at this point, or indicate in any way that he was unwilling or unable to do the work requested. At 15:20 Mr Frost replied that view/download access had been restored to the Marketing directory for him and asked the Claimant to let him know if there was anything else he required. The Claimant did not reply before close of business that day.

55. At 09.59 on 7 April 2020 the Claimant emailed a single line to say that his DropBox account was still disabled. At 17.32 Mr Frost replied that the Claimant should have access to the DropBox areas as discussed and asked him to check and let him know. The Claimant did not reply by close of business. At 20.39 Mr Chamarette asked the Claimant by email to answer Mr Frost's question.

56. At 09.44 on 8 April 2020 the Claimant responded with another single line that his DropBox account was still disabled. Mr Chamarette replied at 10.56 asking Mr Bailes to investigate and asking the Claimant to provide an update on tasks. The Claimant did not reply. At 15.01 Mr Chamarette emailed the Claimant to say that he had created two new folders and shared these with the Claimant's personal email address and asked him to confirm that he could access those. The Claimant again did not reply by close of business. At 19.43 Mr Chamarette chased for a response.

57. At 10.08 on 9 April the Claimant replied that he could not access the files and asked again for his DropBox account to be re-enabled. Mr Bailes replied at 11.10 that he had re-enabled it the other day and it appeared to be working. He asked what error the Claimant was seeing at his end. The Claimant did not reply.

58. Mr Chamarette emailed the Claimant at 11.37 on 9 April providing a separate gmail account for file access and transfer and confirming that the files could also be accessed by this route. He asked him to confirm by return whether he could now access them and to provide an update on work tasks by 6pm. There was no reply from the Claimant, so Mr Frost emailed at 16.30 to ask him to reply. The Claimant did not reply that day.

59. I pause at this point to observe that the Claimant appears during the preceding correspondence to have adopted a policy of responding to emails only at or around 10am each day and not at other times. It appears from what he has said at this hearing that he thought this was the Respondent's working from home policy. It plainly was not, and no reasonable employee

could have taken that approach. The Claimant was still an employee of the Respondent expected to spend his working hours on working for the Respondent. Without access to the Respondent's systems, the only task he should have been working on was getting access to the systems back so that he could do the work he was being asked to do. Days went past during which that did not happen. Although the Respondent had cut off the Claimant's access to files originally, it was using all reasonable efforts to restore that access between 6 and 9 April, but the Claimant's brief and unhelpful responses, with long delays between each meant that the issue of access to files was not resolved that week.

60. Friday 10 to Monday 13 April 2021 was the Easter Bank Holiday weekend.

61. There was no response from the Claimant to Mr Frost's email of 11.37 on 9 April until Tuesday, 14 April 2020 at 09.55 when he replied to Mr Bailes to say that DropBox did not let him log in and asked whether the password had changed, and to Mr Chamarette to say *"this regards linked files – a new account or copies of the files will not help this situation"*. At 10.26 Mr Chamarette emailed to say *"But the files can now be accessed using the new log-in credentials I shared, right? Is there another obstacle I'm not aware of?"* The Claimant did not reply. If he thought his preceding message constituted bringing 'another obstacle' to Mr Chamarette's attention, that was not in my judgment reasonable: the Claimant's message is unclear and it is apparent from Mr CHamarette's response that he is unaware of any reason why the Claimant cannot be working on the files. At 13.12 Mr Chamarette emailed asking the Claimant to reply as a matter of urgency. At 13.21 Mr Bailes did a password reset and provided a new password to the Claimant.

62. Following his own policy of responding only at 10am each day, the Claimant did not reply to the preceding messages until 10.33 the following morning (15 April) to state that the login worked. He then sent a final version of the Coronavirus article that he had been requested to provide a week previously.

63. At 12.13 on 15 April 2020 Mr Chamarette emailed the Claimant asking him to attend to a new brief as a priority. The Claimant confirmed in oral evidence that this was a new brief. At the time, however, he did nothing about this brief and did not reply to Mr Chamarette and did not do the work at any point.

64. At 18.14 on 15 April 2020 the Claimant was invited by text message to a disciplinary meeting via Zoom six-minutes later to discuss his misconduct for failing to respond to team communications. Unsurprisingly given the unreasonably short notice, the Claimant did not attend.

65. At 18.58 the Claimant was issued with a letter giving him a formal written warning, explaining that he was expected to *"respond to team communication in a timely manner according to the timings requested by your colleagues"*. It was stated that the likely consequence of further

misconduct would be a final written warning. The Claimant was notified of a right of appeal to be exercised within two days.

66. On 16 April 2020 at 09.47 the Claimant sent an email to Keith Chamarette stating (115): *"I am not comfortable working for a company that endeavours to spread misinformation during a time of crisis such as this. Please communicate via email so that I have written evidence of communications. I will reply once per day at 10am. The terms of my redundancy have not been made clear, let alone discussed. I want payment in lieu of notice."* At 9.48am he added, with regard to the disciplinary warning, *"I have not signed, seen nor given consent to a disciplinary procedure to which this eludes [sic] to"*.

67. Mr Frost took the view at this point that the Claimant was trying to force the Respondent to pay PILON by making unfounded allegations about spreading misinformation and withholding work. I observe that, whatever the position regarding the Claimant's allegations, on the face of the email the Claimant was certainly demanding pay in lieu of notice despite not having any entitlement to that under his contract.

68. The Respondent sent a letter to the Claimant the same day (122, 123) by email at 20.19 outlining that the Claimant was required to carry out his duties during his notice period and that if he failed to follow the reasonable and lawful directions given by the Respondent it was likely to result in the termination of his contract without notice. The covering email (126) also requested an update before 10am the next day as to progress on the new brief provided the previous morning.

69. On 17 April 2020 at 07:53 the Claimant was again reminded by Mr Chamarette about the need for the Claimant to respond promptly to emails and to make himself available for Zoom calls (127). At 09:59 the Claimant emailed the Respondent as follows:

> I'm going to need a little time to respond more fully to these messages.
>
> Put simply, and in the interest of avoiding unnecessary complication, I'm willing to offer the following:
>
> Should you co-operate with PILON, I'll provide the work you're requesting.

70. I observe that this was in plain terms a refusal to work unless paid a sum of money to which the Claimant was not in fact entitled as a lump sum.

71. At 14.29 Mr Chamarette replied with a further letter which made clear that the Claimant was expected to work during his notice period, asking for an update as to timings on the brief supplied on 15 April at 12.13, which it was expected could be completed by early the following week even if it had not yet been started. The Claimant was asked to advise Mr Chamarette of timings by 4.30pm that day otherwise his employment would be terminated (141). The Claimant did not reply. At 19.51 he submitted an appeal against the disciplinary penalty (124). His letter is lengthy. It is clear that the Claimant fundamentally disagrees with the Respondent's approach to the pandemic

and its reporting, to the point where he has contemplated resigning and drafted a letter of resignation and at the end of the letter he states that he can no longer continue working for the Respondent. (The Respondent does not argue that this was in fact a resignation with immediate effect, despite its terms.) The letter suggests that the reason for redundancies is because the Respondent has not paid its staff, it says nothing about selections for redundancy having been selections of those who were working from home. The Claimant says he did not realise this at the time, it was not until later after discussion with Mr Walker and others that he came to think this. The Respondent did not deal with that appeal.

72. By email and letter sent at 19.54 on 17 April 2020 the Respondent summarily terminated the Claimant's employment (143-144). The reasons for dismissal were given as his *"repeated failed to follow [sic] the reasonable and lawful instruction of the Company by not performing the duties that you have been briefed to undertake in line with the reasonable deadlines indicated by the Company"*. The Claimant was paid up to and including 17 April for salary and accrued but untaken holiday.

73. The Respondent relied in dismissing the Claimant on Clause 15.1 of the Claimant's contract of employment which states:

> 15.1 The Company may also terminate the Appointment with immediate effect without notice and with no liability to make any further payment to the Employee (other than in respect of amounts accrued due at the date of Termination) if the Employee:
>
> …
>
> 15.1.2 commits any serious or repeated breach or non-observance of any of the provisions of this agreement or refuses or neglects to comply with any reasonable and lawful directions of the Company;

74. Mr Frost confirmed in evidence that his reason for dismissing the Claimant was that stated in the letter, and not anything else. In particular he confirmed it was not because the Claimant had alleged the Respondent was spreading misinformation.

75. By email of 20 April 2020 the Claimant requested the return of various items of property.

76. By email of 27 April 2020 the Claimant sought to appeal his dismissal by raising a formal grievance (147). This letter expresses similar views to the previous and again makes clear that he no longer wishes to work for the company. He requested return of his belongings, which the Respondent says it subsequently provided but the Claimant in this hearing disputed that. Mr Frost agreed at this hearing to check.

77. On 19 May 2020 Mr Rose was recorded on video as saying *"Coronavirus, good. It shows you who you can count on"* (166).

## Conclusions

Unfair dismissal

*The law*

78. I was not referred by the parties to any legal authorities, but the law which I have applied may be summarised as follows.

79. The Claimant did not have sufficient length of service to bring an 'ordinary' unfair dismissal claim under Part X of the Employment Rights Act 1996 (ERA 1996). His claim is that he was automatically unfairly dismissed because the reason or principal reason for his dismissal was either (s 100(1)(e)) that *"in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger"* or (s 103A) that he made a protected disclosure.

80. So far as this case is concerned, a reason for dismissal is the factor or factors operating on the mind of the decision-maker which cause them to make the decision to dismiss.

81. In this case, the Claimant must raise a *prima facie* case that the sole or principal reason for his dismissal was that he had made protected disclosures. If he does, then it is for the Respondent to prove that the protected disclosures were not the sole or principal reason for the dismissal. I assume for present purposes the same approach applies to claims relying on s 100(1)(e).

82. Section 43A ERA 1996 defines a protected disclosure as a qualifying disclosure, which is in turn defined in s 43B(1) as *"any disclosure of information which, in the reasonable belief of the worker making the disclosure, is in the public interest and tends to show one or more"* of a number of types of wrongdoing. These include, (d), *"that the health and safety of any individual has been, is being or is likely to be endangered"*.

83. A qualifying disclosure must be made in circumstances prescribed by other sections of the ERA, including, under section 43C, to the worker's employer.

84. What must be established in each case is that the Claimant has a reasonable belief that the information disclosed tends to show one of the matters in s 43B(1), i.e. that the information disclosed 'tended to show' that that the health and safety of any individual has been, is being or is likely to be endangered. What is necessary is that the Tribunal first ascertain what the Claimant subjectively believed, both as to the likely failure and the public interest. The Tribunal must then consider whether the Claimant's belief in both respects was objectively reasonable, i.e. whether a reasonable person in the Claimant's position would have believed that all the elements of s 43B(1) were satisfied, specifically that the disclosure was in the public interest, and that the information disclosed tended to show endangerment

to health and safety. It does not matter whether the Claimant is right or not, or even whether the legal obligation exists or not. The reasonableness of the worker's belief is determined on the basis of information known to the worker at the time the decision to disclose is made.

85. I assume for present purposes that a similar approach is to be taken to the claim under s 100(1)(e), i.e. that the Claimant must show that he subjectively believed that there were circumstances of serious and imminent danger, and I must be satisfied that belief was objectively reasonable.

*Section 100(1)(e) Employment Rights Act 1996*

*Issue 1. It is not disputed that the claimant told the respondent that he would not be attending his workplace on or around 30 March 2020.*

86. Despite the agreement between the parties at the time of drawing up the list of issues, I find as a fact that this communication by the Claimant occurred on 16 March 2020 when he messaged Mr Frost, and, separately, Mr Rose on Slack stating that he had cough and cold symptoms and would be working from home.

*Issue 2. Were there circumstances of danger, which the claimant reasonably believed to be serious and imminent*

87. I find there were not. Covid-19 does not pose a serious danger to the vast majority of people and (although it is obviously not binding on me) I agree with the decision of the other Tribunal panel in *Preen v Coolink Limited* 1403451/2020 to which Mr Mold has referred that something more is required, such as a particular vulnerability in the individual or perhaps a particularly risky practice in clear contravention of all guidance for someone reasonably to believe that they were at 'serious and imminent' danger merely from attending their workplace as a result of the Covid-19 pandemic. Those situations did not apply in this case. In any event, the Claimant's own Slack message to Mr Rose of 16 March 2020 belies any claim now to a subjective belief in serious and imminent danger by the Claimant at the time. He just says that he has cough and cold symptoms and that 'safety is the best policy', which is a platitude that in my judgment falls short of the statutory threshold. In that same message he also says that in general terms he agrees with Mr Rose's pro-herd-immunity, anti-lockdown social media posts, which again belies him having any subjective belief that he or his colleagues were in serious or imminent danger.

*Issue 3. If so, was the claimant's refusal to return to his work place an appropriate step to protect himself or other persons, taking into account all of the circumstances including the claimant's knowledge and the facilities and advice available to him at the time?*

88. The Claimant did not 'refuse' to return to his workplace, because he was not asked to attend his workplace. He said that he was not attending and the Respondent agreed to that. Both the Claimant and the Respondent acted appropriately in this respect, but he did not take any action that was not authorised or expected by the Respondent.

*Section 103A Employment Rights Act*

*Issue 5. Did the claimant make the following disclosure? On or around 30 March 2020, a disclosure to Mr Rose, CEO, and Mr Frost, CSO, that the respondent was putting the health and safety of individuals at risk by asking them to return to the workplace.*

89. There was no such specific disclosure. The Claimant did express the view to Mr Frost and others that it was not necessary for interviews to continue to be recorded in person in the studio, implicit in which was (I accept) the assertion that doing so posed a risk whether to individuals or wider society as a result of potential increased Covid-19 transmission, but I do not accept that he actually told Mr Rose and Mr Frost that they were putting the health and safety of individuals at risk by asking them to return to the workplace or disclosed information that tended to show that. The debate between them was about whether it was necessary to keep recording in the studio. The Claimant is now suggesting that the conversation was about individuals being 'coerced' to return to the office, but there is no evidence at all that the Respondent was acting otherwise than in accordance with its Covid-19 Contingency Plan which for the most part permitted individual employees to make choices about whether they worked from home or not. There is no evidence that those individuals who were required to come in for filming were 'coerced' and no evidence that the Claimant made any complaint in response. I find as a fact that the Claimant did not make a disclosure of information that tended to show that the Respondent was putting the health and safety of individuals at risk by asking them to return to the workplace.

*Issue 6. If so, was the disclosure a qualifying protected disclosure, i.e. (a) does it tend to show that the health or safety of any individual has been, is being or is likely to be endangered (43B(1)(d))? And, (b): Did the claimant have a reasonable belief in the disclosure? And (c) Was it in the public interest?*

90. The Claimant's point was that the Respondent might not be complying with government guidance but it does not mean that he disclosed information that tended to show that there was a threat to the health and safety of any individual. That was not the nature of the conversation, which was focused on whether it was necessary to film in the studio. The issue here is similar to that arising under s 100(1)(e), and I find that the Claimant did not subjectively believe that the health and safety of any individual would be endangered by attending work, or that he could reasonably have believed that in the absence of any particular vulnerability in the workforce or any particularly unsafe practice by the Respondent. The Respondent's Covid-19

policy indicates that it was making more than reasonable arrangements to ensure individual safety by providing taxis to the office. Further, the Claimant's claim to have a subjective belief that the health and safety of any individual was being endangered is belied by the fact this alleged disclosure and belief does not in fact feature in his correspondence at the time. His only written complaints at the time focus on the rather different issue of the Respondents' broadcasting policy and the alleged provision of 'misinformation' to the public. I therefore find that the Claimant did not have the requisite subjective or objective belief. If he had done, I would accept that the claimed disclosure could reasonably have been in the public interest given the importance to the public in the wider sense of complying with the government guidance and rules on Covid-19.

*Reason for dismissal*

*Issue 4. What was the principle reason for the claimant's dismissal and was it the*
*claimant's indication that he would not be attending the respondent's workplace or his alleged protected disclosure?*

91. Notwithstanding my conclusions as to whether or not the claimed protected disclosures have been made or whether s 100(1)(e) of the Employment Rights Act is engaged, I have still considered all the evidence in deciding what the Respondent's sole or principal reason was for dismissing the Claimant. In particular, I have borne in mind the Claimant's evidence that I have accepted about his dispute with the Respondent about whether it was 'necessary' to continue to film in the studio, and what he did say in his email of 16 April 2020 about the Respondent spreading 'misinformation' and I have considered whether any of this was in fact the real reason for the Claimant's dismissal, as well as the matters that are relied on by the Claimant in his pleaded claim.

92. What I have to ask is what was the principal reason for the dismissal. It is not sufficient if any of those matters form part of the reason for dismissal, the question is what was the principal reason and in that regard I have to focus on the reasons in the mind of Mr Frost who took the decision. I also have to focus on the decision of 17 April and not on the decision of 3 April because it is the latter dismissal which is the effective dismissal which brought the Claimant's employment to an end on 17 April and which is the only possible subject of the unfair dismissal claim in these proceedings.

93. I am wholly satisfied in relation to that dismissal of 17 April that the principal reason for the Claimant's dismissal was precisely what the Respondent said it was, i.e. the Claimant's conduct in failing to follow reasonable management instructions. It was not because he had decided to work from home. The Respondent had not complained about that or sought to encourage him into the office at all. The evidence also had not established that that was why individuals were selected for redundancy previously, but

by the time we get to 17 April what is clear, and what has distinguished the Claimant from his colleagues, is that he was not responding to the emails (which I have gone through in detail) in accordance with the expectations of Mr Chamerette and Mr Frost. Their instructions to the Claimant were expressed clearly, he was asked to respond and he was simply not responding. He set himself his own policy in responding at 10am each morning which was in no sense fulfilling the requirements of his contract. Even after he had received a warning about that on 15 April, followed by the further letter requiring him to respond by specific times on 17 April in default of which he would be dismissed, again he did not do so.

94. Nor was the reason for dismissal anything to do with his disagreement with the Respondent about whether it was necessary to keep filming in the studio. Others also disagreed with that policy, but only the Claimant was summarily dismissed. It is very clear from the sequence of events between 6 and 17 April that the reason why he was dismissed was because he did not respond as required and he thus had taken a week to produce the Coronavirus brief that should have been done much more quickly, had not provided that final brief that he had been required to provide, or any information about when he was going to be dealing with it as requested and he had not replied to emails when he was asked to do so. As a result, between 6 April and 17 April he done only one small piece of work and had otherwise failed to cooperate with the Respondent as was required to ensure that he did continue working during his notice period as the Respondent was entitled to require him to do. All of that makes it clear that the reason and principal reason for dismissal was what the Respondent said it was in the letter at the time, which Mr Frost confirmed in evidence to me today.

95. I have also considered the Claimant's case that what he was being asked to do was not reasonable and lawful. I have dealt already with why Mr Chamerette and Mr Frost were entitled to give him instructions, those instructions appear to me to be both reasonable and lawful. The only question the Claimant has raised is about whether or not it was reasonable to require him to write that Coronavirus article that he considered distasteful, but it was not an unlawful article and he did not object to writing that article until after he had submitted the final version. In the absence of any objection by the Claimant, I do not find it was unreasonable for Mr Frost or Mr Chamerette to ask him to do so. As for the last brief that the Claimant did not deal with at all, there has been no suggestion that that was in any way unreasonable and I therefore find that the Claimant did indeed fail to follow reasonable and lawful instructions and that was the principal reason for his dismissal, not any disclosures or complaints he had made or any other action he had taken.

*Breach of contract / wrongful dismissal*

96. That reason for dismissal is a reason which falls clearly within clause 15.2 of the contract and thus entitled the Respondent summarily to dismiss the Claimant without notice.

**Overall conclusion on liability**

97. For all those reasons, in my judgment:

    (1) The Claimant's claim of unfair dismissal is not well-founded and is dismissed;
    (2) The Claimant's breach of contract claim is not well-founded and is dismissed.

# COSTS

98. After I had delivered judgment on liability, the Respondent made an application for its costs on the basis that the Claimant had acted unreasonably or vexatiously in pursuing the claim notwithstanding costs warning letters from the Respondent and offers to settle on the basis that costs would not be sought against him. Again, I gave judgment orally and these are the (corrected) written reasons.

*The law*

99. The law that I have to apply is set out principally in Rule 76 of the Employment Tribunal Rules and Procedure. That provides, so far as relevant, that a Tribunal may make a cost order where it considers that a party or that party's representative has acted vexatiously, abusively, disruptively or otherwise unreasonably in the bringing of the proceedings or the way that the proceedings have been conducted, or the claim stood no reasonable prospect of success.

100. By Rule 78 a cost order may order the party to pay the receiving a specified amount not exceeding £20,000 in respect of costs of the receiving party such an order may be made and on a summary assessment there are other rules if the amount of costs goes above that level.

101. The Tribunal also has jurisdiction under Rule 80 to make a wasted cost order against a representative where that party has incurred costs as a result of any improper, unreasonable or negligent act or omission on the part of a representative.

102. By Rule 84 in deciding whether to make a costs preparation time or wasted cost order and if so, what amount the Tribunal may have regard to the paying party's or where a wasted cost order is made the representatives ability to pay.

103. A number of cases have given guidance on the approach to be taken to cost orders. I have not been referred to any specific cases for the purposes of this hearing, but I have taken the following guidance myself from the relevant authorities.

104. In deciding whether to make order costs and the status of the litigant is a matter to be taken into account and the litigant person is not to be judged by the standards of a legal professional: *Vaughan v London Borough of Lewisham & Others* [2013] IRLR 713 at [25].

105. In deciding whether the conduct of litigation is unreasonable, the Tribunal must bear in mind that in any given situation there may be more than one reasonable course to take: the Tribunal must not substitute its view for that of the litigant: *Solomon v University of Hunter and Hammond* (UKEAT/0258/18-19/DA) at [107].

106. So far as taking into account the Claimant's means is concerned, I am not bound to consider solely the individual's means at the time of the application, I can look to the future and consider whether or not the individual will be able to pay over a period of time: see *Vaughan* ibid at [26].

107. As far as the amount of costs is concerned, there is no requirement that a costs order reflect the amount that is specifically attributable to the unreasonable conduct (*McPherson v BNP Paribas* [2004] EWCA Civ 569, [2004] ICR 1398). However, the tribunal must identify the conduct, what was unreasonable about it and the effects it had: these are all relevant factors in determining whether costs should be awarded and the amount: *Yerrakalva v Barnsley MBC* [2011] EWCA Civ 1255, [2012] ICR 420.

*The evidence*

108. I have heard oral evidence from Mr Armitage relative to the costs application, and he has been cross-examined by Mr Mold, and my findings in relation to that evidence are as follows. Again, I do not set out everything that I have heard, I set out the matters that I consider to be material and I apply the balance of probabilities and test.

109. The Claimant first obtained employment after leaving the Respondent in September 2020 with a company called Programmai. The Claimant earned about £2,300 per month net from Programmai. Whilst unemployed and before obtaining employment with Programmai the Claimant was supported by his mother and owes her about £8,000 from that period. The Claimant moved from Programmai to his current employment at Tribus in May 2020, he is earning about £2,500 per month with Tribus. Of that he pays about £2,185 per month to his wife to cover household expenses, they pay around £1,400 per month in rent and with other expenses the whole is amount spent each month. The Claimant is the sole earner in the household, he does not own property, he has a pension but no other savings and the bank statements that he has provided me represent his only bank account and it is possible to see from that, that it is frequently overdrawn. So far as the Claimant's financial evidence is concerned, I accept his evidence as to his earnings and financial status.

110. The Claimant commenced this claim on 30 July 2020. Before that claim had reached the Respondent, the Respondent wrote a cost warning letter on 29 September 2020 addressed to the Claimant's solicitor who has represented the Claimant throughout these proceedings including during the course of this hearing albeit the Claimant represented himself at the hearing despite the solicitors remaining instructed and providing him with some remote assistance. The solicitors are Clements Solicitors Limited and a Ms Sunnia Begum has been dealing with the matter on the Claimant's behalf.

111. The Respondent's letter of 29 September 2020 set out the Respondents' view as to why the Claimant's claim stood no reasonable prospect of

success and in particular it highlighted the position that the Claimant had taken in relation to working during the notice period as summarised in his email of 17 April set out at paragraph 7 of that letter, i.e. that he would not work during the notice period unless he was provided with PILON. The Respondent reiterated its case that the Claimant was deliberately refusing to follow reasonable management instructions and that his dismissal was clearly for that reason and set out the Tribunal Rules on costs and indicated that it would seek its costs of the proceedings if the Claimant pursued the claim. The Respondent gave an indication that the costs were likely to be in the range of £15,000 to £20,000 plus VAT.

112. The Claimant's solicitor responded to that letter on 26 November 2020 (all of this correspondence being marked without prejudice save as to costs). In that email she expressed the view that the Claimant was likely to succeed in his claim and that the reasons for his dismissal were the reasons that he advanced in these proceedings, namely that he was dismissed for raising health and safety concerns and/or for making protected disclosure. She set out a settlement proposal of £20,000 that was not accepted by the Respondent.

113. The next item of correspondence was from Ms Begum on 7 May 2021 indicating at that point the final hearing was expected on 17 June and inviting settlement to which Mr Farman for the Respondent replied on 18 May 2021 saying that the Respondent had no interest in settlement discussions but would agree not to pursue the Claimant for costs if he withdrew his claim within seven days. That offer was not taken up by the Claimant.

114. On 25 August 2021 Mr Farman corresponded again indicating that he was still willing to ask his client if they would accept a drop hands settlement. In November 2021 there was further correspondence to similar effect. Again the Respondent on 30 November 2021 offered a drop hands settlement which again was not accepted by the Claimant's solicitor on his behalf.

115. In evidence I asked the Claimant whether or not he had seen that correspondence between his solicitor and the Respondents' solicitors. I explained to the Claimant that what happened between him and his solicitors was privileged and it was entirely up to him whether he chose to waive that privilege and tell the Tribunal what happened. I explained I would not draw any adverse inference from a failure to waive privilege but it was a matter for the Claimant to decide whether he wished to waive the privilege. The Claimant chose to waive privilege and tell the Tribunal and the Respondent what happened between him and his solicitors.

116. What he said about is was as follows. He said that he did not see the solicitor correspondence. He said that he was told in phone calls with the solicitors about the contents of that correspondence. Regarding the letter of 29 September 2020 he said that his solicitors told him that there was a risk of him losing and having to pay costs but that they also said that respondent solicitors always say that and his solicitors were encouraging of his case and his prospects. He said that his solicitors were working on a "no win, no fee"

basis in respect of correspondence but were going to charge for representation at the trial. He could not afford to pay that and so was not represented at the trial. They did not at any point tell him that their advice on merits had changed, he understood that those were simply the terms on which they were offering and to provide services i.e. "no win, no fee" so far as correspondence was concerned, but this did not extend to representation. He did not question this but assumed that that was a normal arrangement. Indeed, I do not find that it is abnormal arrangement, I accept what the Claimant says about the terms on which he instructed solicitors.

117. The Claimant then says that he had been advised by his solicitors that he had a 95% chance of winning this case and that was the impression he was working under at all times. He saw his case as being similar to that of Mr Walker and Mr Russell-Pearcy who he was aware were also bringing claims against the Respondent. He understood that they had both settled out of Tribunal although Mr Russell-Pearcy did not tell him that in so many words. (The Claimant was not questioned about how he knew about Mr Walker's case.)

118. The Claimant explained that as far as Mr Russell-Pearcy was concerned he understood that that claim had not gone ahead simply because he was previously aware that Mr Russell-Pearcy had a Tribunal date but then did not go to Tribunal and he assumed that he had not lost the case because he appeared to be happy about his situation and was still encouraging the Claimant to pursue his own claim. The Claimant saw his own case as being similar to that of Mr Walker and Mr Russell-Pearcy because he felt that they had all been dismissed together. He did not see his being dismissed for gross misconduct prior to the end of his notice period put him in a significantly different position to them. He was focusing on the redundancy decision and he felt they were all in the same boat having to work for an organisation that was spreading misinformation, complaining about that and then being dismissed.

119. So far as the £20,000 offer to settle, this is higher than the final version of the schedule of loss (which is, the parties agree, £18,000), but was not higher than the schedule of loss at the time which was £27,000. The Claimant said that at the outset of proceedings he had been told by his solicitors that he could win about £38,000, that this then dropped to around £27,000 and from there to a final position of £18,000. He said he questioned the solicitors as to why the amount had dropped and so far as the last drop from £27,000 to £18,000 is concerned, they explained that they doubled counted his notice period so mis-calculated.

120. By way of explanation for his conduct during his notice period, the Claimant told me today that regarding pay in lieu of notice he felt that he should get that amount as a freelancer did and that he was entitled to some type of discussion with the Respondent as to whether or not they paid in lieu of notice and that he thought it was acceptable to offer to provide the work in return for that sum of money.

121. Regarding what his solicitors told him, he said that he had thought originally that his claim was a whistleblowing case, that his solicitors told him that whistle blowing was usually for sexual or racial discrimination and that it was his solicitors that decided that the case should be about health and safety and the whole angle was the solicitor's idea not his.

122. Finally, I should say that both parties agree that the "drop hands" offer of settlement was repeated on day one of the hearing, but the Claimant again did not accept that.

123. So far as the evidence that the Claimant has given me today is concerned, I accept that what the Claimant has told me about the advice he received from his solicitors represents his genuine understanding as to what he was told, I also accept that his understanding of the similarities of his case and Walker and Mr Russell-Pearcy represent his genuine understanding. Although I found the Claimant at the liability stage not to be a reliable witness, I have not at any point found him to be a dishonest witness. He is misguided, he is not a careful reader of documents, he has no personal grasp of the law and he is a person who is liable to get wrong ideas in his head which he sticks to even when those are objectively unreasonable and contradicted by the documents, but I do not find him to be dishonest.

124. In accepting his evidence about what his solicitors have told him, I am not making a finding that this is indeed what did happen between him and his solicitors, I am merely making a finding that that was his genuine understanding of the position. I also specifically accept his evidence that his solicitors did not provide him with copies of the correspondence on which the Respondent relies and that he was just told about them on the phone. That appears to me to be plausible and there is no reason for me not to accept that specific aspect of the evidence as being an actual fact rather than merely the Claimant's understanding.

*My decision*

125. I then turn to the legal issues that I have to decide and the first one is whether or not the Claimant has acted unreasonably in bringing and continuing these proceedings, notwithstanding the terms of the Respondent's costs warning letters.

126. There is little doubt in my mind that the merits of this claim were very clear and should have been clear to anyone from a reading of the documents. The Claimant after he was given notice on 3 April did not continue to work for the Respondent as an employee should do and as he was required to by his contract of employment. The summary dismissal followed directly from this conduct, following specific warnings by the Respondent. While it could not be said in advance of hearing the evidence that this was a claim that stood no reasonable prospect of success, it was even on the papers clearly a very weak claim.

127. Ordinarily, I would regard a represented litigant as indivisible from his solicitor for costs purposes, such that if I were satisfied that a weak case had been unreasonably pursued with the benefit of advice from a solicitor, I could award costs against that party under Rule 76 even if it were the solicitor rather than the party who was in reality the 'unreasonable' one. However, in this case the Claimant has given evidence about his understanding of the advice he has received from his solicitor which it seems to me means that it is appropriate for me to consider his personal conduct separate to that of his solicitor. Indeed, what he has told me raises questions as to whether this is a case that falls in the territory of a Rule 80 wasted costs order, but I have not heard from the solicitor and do not have the full picture and I am certainly not making any findings to that effect. My findings are confined to the Claimant's understanding of the position.

128. The Claimant was, I find, genuinely convinced of the merits of his case, saw the Respondent as having stepped seriously out of line with Government Covid guidance (and broadcasting regulation), genuinely saw parallels between his case and that of Mr Walker and Mr Russell-Pearcy, and genuinely saw himself as being in the same boat as them. He instructed solicitors who, as he understood it, encouraged him in believing that he had an extremely good case, taking it on as 95% prospects of success on a "no win, no fee" basis.

129. I have considered whether someone in that position has acted unreasonably in pursuing this very weak claim to a hearing and given my findings of fact, I find that the Claimant did not act unreasonably in pursuing the matter to full hearing. Further, the offer of £20,000 to settle proceedings was not itself unreasonable as at that point both he and his solicitors had valued his claim higher than that and in any event that was about what the Respondent anticipated spending in costs, so an offer at that sort of level was not necessarily inappropriate.

130. It is also relevant to the question of unreasonableness that although the Respondent in correspondence had issued the Claimant with the costs warning letter, that was not followed up as one might expect with an application for a deposit order. Nor was any deposit order made by the Tribunal of its own motion. A deposit order is of course the means by which the clearest possible signal can be given to an individual that their case stands little prospect of success and they are at risk of a costs order.

131. Putting all that together, I find that the Claimant has not acted unreasonably in bringing or conducting these proceedings and accordingly this application for costs fails.

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Employment Judge Stout

25 January 2022

JUDGMENT & REASONS SENT TO THE PARTIES ON

26/01/2022..

FOR THE TRIBUNAL OFFICE