



EMPLOYMENT TRIBUNALS

Claimant: Mrs P Fardell
Respondent: War World Limited
Heard at: Cardiff (by CVP) **On:** 10 – 12 May 2021
Before: Employment Judge C Sharp (sitting alone)

Representation:

Claimant: In person
Respondent: Ms C Collins (Counsel)

JUDGMENT having been sent to the parties on 13 May 2021 and reasons having been requested by the claimant in accordance with Rule 62(3) of the Rules of Procedure 2013:

REASONS

1. The Claimant was employed on a part time basis by the Respondent as a Production Operative between 29 January 2019 up to the date of termination on 31 March 2020 when she was dismissed summarily by Mr Ross (a director) over the telephone. The Respondent is a company that makes scenery for model railway enthusiasts and gamers. I am told that it employs approximately 22 staff, some of whom are part-time.
2. The Claimant has brought three claims to be determined as part of these proceedings:
 - a. Failure to supply a written statement of employment particulars;
 - b. A claim of automatic unfair dismissal under s.100(1)(c) Employment Rights Act 1996 (dismissal for the reason or principal reason that the employee, working in a place where there was no health & safety representative or committee, brought to her employer's attention, by reasonable means,

- circumstances connected with her work which she reasonably believed were harmful or potentially harmful to health and safety);
- c. A claim of automatic unfair dismissal under s.103A Employment Rights Act 1996 (dismissal for the reason or principal reason that the employee made a protected disclosure).

The Claimant did not have sufficient service to bring a claim of ordinary unfair dismissal under s. 94/98 of the Employment Rights Act 1996.

3. I had the benefit of the evidence within a main hearing bundle and a supplementary bundle, and hearing oral evidence from the Claimant and her witnesses, being her husband, Mr Adam Fardell and Mr Gwilym Healy (a former colleague and former employee of the Respondent). I did not hear any oral evidence from Mr Malpas though a witness statement was provided in support of the Claimant's case. I also heard orally from witnesses called on behalf of the Respondent - Mr Lloyd (manager), Ms Mohammadi-Jouzani (general manager – account manager and trainee general manager at the time of dismissal) and Mr Adrian Ross (director). Following the oral evidence, I considered the submissions from the parties (both orally and in written form from the Claimant). I will deal with those submissions where relevant to the reasons for the decision.

Failure to supply a statement of employment particulars

4. A written statement of employment particulars is a different entity to an employment contract. It is accepted by both parties that the requirements of s.1 Employment Rights Act 1996 ("the 1996 Act"), which sets out what must be within such a statement, had not been complied with by the Respondent in relation to the Claimant's employment. At page 10 of the Supplementary Bundle ("SB") is a letter allegedly from Mr Martyn Rees (another director) but signed by Ms Keri Gunter dated 7 February 2019. Ms Collins on behalf of the Respondent submitted that this was an attempt to provide a statement of employment particulars. The Claimant's position is that she never received this letter.
5. It is irrelevant whether the Claimant received the letter at page 10 SB as it does not comply with the requirements of s.1. It is missing information about sick pay, pension, or notice provisions. The Claimant submitted that the letter also did not deal with her continuous employment, but this is not required as there was no service with a previous employer to take into account; a similar argument applies to her point about the letter not saying the Claimant's role was permanent (this information was not required as this is the default – it is when the employment is not permanent that more information is required within the statement). The Tribunal finds that the Claimant was not provided with an initial written statement of employment particulars as required by s.1 of the 1996 Act.
6. However, as I explained to the Claimant at the outset of the hearing, s.38 of the Employment Act 2002 says that she must succeed in a claim that is set out in

Schedule 5 of the 2002 Act in order to be successful in this claim. The Claimant has not succeeded in any other claim, for reasons which I explain later in this Judgment. Therefore, I must decline to uphold this claim, even though the Claimant is correct in saying that her legal right to a written statement of employment particulars was breached by the Respondent.

Law regarding automatic unfair dismissal

7. There is no dispute between the parties regarding the relevant law for the claims listed and summarised at paragraph 2 b & c above.
8. In relation to the health and safety automatic unfair dismissal claim under s.100, the questions I must determine are:
 - a. did the Claimant bring to the Respondent's attention circumstances connected to her work?
 - b. did she do so by reasonable means?
 - c. were those circumstances those which she reasonably believed were harmful or potentially harmful to health and safety?
 - d. was the bringing of these health and safety concerns the reason or the principal reason for her dismissal?
9. In relation to the public interest disclosure automatic unfair dismissal claim ("*whistleblowing*"), the questions I must determine are different:
 - a. has there been a disclosure of information? Some time was spent discussing this question with the parties/representatives as the case of ***Cavendish Munroe Professional Risks Management Ltd v Geduld*** [2010] IRLR 38 requires facts to be conveyed to be a disclosure of information, not merely allegations. This principle is further developed in the case of ***Kilraine v London Borough of Wandsworth*** [2016] UKEAT 0260_15_2601 11, which warns Tribunals to remember that information can be contained within an allegation. What I should consider is whether information sufficiently factual and specific was disclosed in the communication made by the Claimant?
 - b. Whether, in the Claimant's reasonable belief, the disclosure was in the public interest? I do not need to engage in any meaningful way with the issue of public interest; Ms Collins, Counsel who appeared on behalf of the Respondent, confirmed that the Respondent was not challenging the public interest question in the circumstances of this case. This was a pragmatic and sensible concession, given that a global pandemic was raging around the world in March 2020 and the subjective belief as articulated by the Claimant from March 2020 onwards about the health risks connected to the pandemic. The spread of the Coronavirus or COVID-19 was (and remains) a matter of great public interest, particularly in March 2020 where all knew

that the world was facing with a novel virus whose impact and treatment was wholly unknown at that point. This question is answered in the Claimant's favour.

- c. Whether, in the reasonable belief of the Claimant, did the information she disclosed tend to show that the health and safety of any individual was, could be or is likely to be endangered by the Respondent? All the disclosures were to the Claimant's employer.
 - d. If it is established that the Claimant made a protected disclosure, was the reason for her dismissal, or the principal reason for her dismissal, the making of the public interest disclosure?
10. The other legal point that I must bear in mind, as drawn to my attention by Ms Collins in her submissions, is the case of ***Kuzel -v- Roche Products Ltd*** [2008] ICR 799 which reminds the Tribunal of the burden of proof (initially on the Claimant) and the questions I have to ask when determining the reasons for dismissal. I must ask first if the reason advanced by the employer is accepted by the Tribunal on the basis of the evidence? If I accept Mr Ross's explanation as to the reason why he dismissed the Claimant, I can go no further and I will not be able to engage with the reasons put forward by the Claimant for her dismissal. It is though open to me to reject what both parties put forward as the reason for dismissal and make my own findings based on the evidence before the Tribunal.

Circumstances raised connected to work/Protected disclosures

11. I considered it efficient and appropriate to examine each occasion where the Claimant asserts she brought circumstances connected to her work to her employer's attention or made a protected disclosure (as she had pleaded each occasion as being both) and analyse whether the occasion met the requirements of s.100 or s.103A.
12. The first occasion was on 22 March 2020 within the texts between the Claimant and Simon Lloyd the Production Manager at the Respondent (pages 99 – 100 of the hearing bundle). The Claimant says that these text messages highlight the advice of the World Health Organisation ("WHO") about social distancing and asks if the Respondent should be going against it and putting the health of the Claimant and other employees at risk. She points out that within those messages she highlighted that people aged between 30 – 40 years with no underlying health conditions were dying and that there was a necessity to protect the NHS and people. The Respondent's submission is that no information was disclosed within these texts, there was nothing within them about the Respondent's work environment, and that the Claimant's texts are simply general comments. Ms Collins submitted that there was no suggestion that social distancing was not possible at work or that the work itself was not safe within the texts.

13. While I have considered carefully the submissions for both parties, it is for me to form my own view of what these text messages say. When viewed in relation to the s.100 claim, "*circumstances connected to her work*" is a regrettably vague form of words used by Parliament. In my judgment, there must be a link or a connection between the circumstances disclosed by the Claimant and her work in a health and safety context for this disclosure to be protected by s.100. It is not required that the circumstances brought to the employer's attention by the employee was previously unknown to the Respondent. There is though a requirement to raise something within the circumstances disclosed and how it causes a health and safety issue at work.
14. In my judgment, the comments within this text about Mr Fardell's employer, its business decisions, and Italy are irrelevant and are not connected to the Claimant's work at the Respondent's site in Wales. In relation to the comments made about Mr Rees, I did not consider these to be circumstances connected to the Claimant's work, as they were about Mr Rees' work and the Claimant was unaware of Mr Rees's own working arrangements at that time by her own admission during cross-examination. The Claimant asked to work from home and said that social distancing was paramount, but nothing was raised was about the circumstances connected to the Claimant's work at the Respondent's site. The comments about the ACAS advice contains nothing about the Claimant's work and the circumstances.
15. However, in the text of 12:37, which is the first text, the Claimant said "*in the light of the WHO's advice on social distancing and the rate at which the virus is now spreading should we be actually going against this advice and putting our health at risk?*" This sentence merits close consideration. It is arguably talking about the Claimant's circumstances at work - it says that the Respondent is going against the WHO advice and refers to a risk to health. The text does not tell the Respondent what the advice is in any detail, but says enough to indicate it is to do with advice on social distancing. The context of the messages in my view and on the balance of probabilities shows that the Claimant's view is that the Respondent should have been shut or in the course of being shut at the time she sent the text. I infer that is what the Claimant was saying within those texts was required in order to avoid the health risk of Covid-19.
16. I accept that it is a very finely balanced point whether this sentence constitutes the bringing of circumstances connected to the Claimant's work relating to harm or potential harm to the Respondent's attention. I found in the favour of the Claimant in part on public policy grounds. Employees should be able to raise health and safety concerns without facing fears of detriment, dismissal or victimisation in order to protect lives and health. I consider that public policy encourages me to take a liberal approach in construing this one sentence of the Claimant's text of 12.37, as opposed to the potentially stricter whistleblowing approach. I find that this sentence demonstrates the Claimant bringing circumstances connected to her work which may have a link to health and safety to her employer's attention.

17. Was this done by reasonable means? I consider that it was. It is a text message to Mr Lloyd who is the manager of the Claimant's direct manager (who was absent from work at the time). He is in the chain of command for the Respondent. There is a dispute between the parties as to whether he was the Production Manager or the Operations Manager, but this is irrelevant as there is no dispute that he was in the management chain.
18. I then considered the reasonable belief of the Claimant when she sent the text. The Claimant is an articulate person generally in my view as shown by her texts generally, her witness statement, oral evidence, and submissions. Her evidence about her belief that her disclosures were in the public interest, were information tending to show that health and safety was being put at risk and that somebody could be harmed or was being harmed if the circumstance was not noted and addressed by the Respondent was detailed and at times referred to respected bodies such as WHO and the government advice in place at the time. I find that her belief was genuinely held. Objectively, the Claimant's belief was reasonable. Being concerned about WHO advice, the need for social distancing and how an employer is going to operate during a global pandemic involving a novel virus would be something an objective person would accept. Consequently, I find that the Claimant's text of 12.37 on 22 March 2020 constituted the bringing of circumstances relating to her work which she reasonably believed were harmful or potentially harmful. I will return to the question as to the reason, or principal reason for dismissal, once I have considered the other disclosures.
19. Turning to the whistleblowing claim, does anything in the text messages between the Claimant and Mr Lloyd on 22 March 2020 meet the requirements of s.103A? In short, no. The Claimant falls at the first hurdle – disclosure of information. There is no information within these texts, they are not sufficiently factual or specific, and in my view are not specific at all. The Claimant did refer to social distancing, but did not provide any information to say that it was not possible to do so in the workplace of the Respondent. I therefore find that this disclosure is not a protected disclosure.
20. The next disclosure was on 23 March 2020. I note that the Respondent's witnesses say that it was 24 March, but by common consensus it was 23 March, the Monday, when the Claimant and her husband held discussions with the Respondent in the car park. All the evidence relating to this is oral and it required careful findings of fact on my part. There are four witnesses who can assist with what happened in the car park - the Claimant, her husband, Mr Lloyd and Mr Ross.
21. The Claimant and her husband say that the Claimant asked about risk assessments, asked to work from home, and asked about safety measures in place. Mr Lloyd and Mr Ross agree and add that the Claimant was told that the risk assessment was in the course of being completed, of the steps that had been

taken and that the business would follow government guidance. To this extent, there was no significant dispute between the parties.

22. The only one point that is contentious is that the Claimant in her witness statement said that she told the Respondent's witnesses it was impossible to work in a socially distanced manner. Only the Claimant says this, in her witness statement and only by way of gist; she does not give the exact words that she used. Her husband does not say that this happened in his account. The messages within the hearing bundle show that the Claimant said to her colleagues (not Mr Lloyd or Mr Ross) that it was impossible to work in a socially distanced manner at the business, but that does not mean this what she told Mr Lloyd and Mr Ross in the car park. The texts earlier to Mr Lloyd did not say social distancing was impossible.
23. Judges are reminded regularly to bear in mind that memory is a problematic area and fluid; it is possible for somebody to believe honestly and adamantly that they have said or done something when objectively this did not occur. Why does this happen? In recalling events, whether that is talking to friends, colleagues, speaking to experts in health and safety (as the Claimant has done), instructing a solicitor, approving the documents to issue a claim, drafting a witness statement – these are all events where an individual goes over and over the events and it is easy for them to incorrectly come to believe a different version of those events, particularly if it is based on a belief they held at the time. To put it another way, the Claimant believed it was not possible to work socially distanced and later believed that she must have told Mr Lloyd and Mr Ross this, when objectively she did not when viewed through the prism of the surrounding evidence. On the balance of probabilities, in light of the evidence and the burden on the Claimant, I accept that the issue of social distancing was raised, but I do not find that the word "*impossible*" was said by the Claimant in the car park in relation to social distancing at work.
24. I have had to carefully consider what happened in the car park on 23 March 2020 as this is the conversation that the Claimant asserts is where she either raised circumstances connected to her work which she reasonably believed could cause harm or was a protected disclosure. Without fully understanding what the Claimant said, I cannot make any findings about whether either s.100 or s103A applies.
25. Did the Claimant bring to the Respondent's attention circumstances connected to her work? There is no dispute that social distancing, risk assessments and safety measures were all discussed, but discussion of these matters did not constitute bringing circumstances to the Respondent's attention in my judgment based on the evidence before me. The same applies to the agreement to allow the Claimant to stay and work in a room on her own.
26. Turning to the whistleblowing claim, I consider that the discussion of these matters did not constitute the disclosure of information by the Claimant as is required. I do not find that anything that the Claimant said in the car park on 23 March 2020 was either a protected disclosure or a disclosure for the purposes of the s.100 claim.

27. The next event occurred on 24 March 2020. The Claimant exchanged Facebook messages with the Accounts Manager (trainee general manager) Ms Mohammadi-Jouzani (pages 107 and 108 of the hearing bundle). The Claimant submitted that she said within these messages that that 2-metre social distancing was not possible in the warehouse and this is all that s.100 and s.103A requires of her to be protected. Ms Collins on behalf of the Respondent accepted that the Claimant did factually specify some points which could be viewed as information such as the comment that 2-metre social distancing was not possible, the use of the phrase “*massive breach of health and safety law*” and the comment that the Claimant was having to tell people to step back.
28. In my view, I considered the following points made by the Claimant to be critical: “*I know the 2-metre health guideline cannot possibly be adhered to*”, that staff were not adhering to the 2-metre rule in the main warehouse, that there is a massive breach of health and safety law, reference to the health and safety duty of care, and “*regularly having to tell those that I do see to step back*”. They are circumstances connected to her work that the Claimant was bringing to the Respondent’s attention through these messages. I have considered the use of Facebook to be reasonable means in the context of the messages being a conversation between the Claimant and a member of the management team. I judged that the Claimant had a reasonable belief that they were circumstances connected to work and a health and safety issue. I find that she had that belief not only based on her oral evidence, which explained her concerns about the need for social distancing to protect people and to protect the NHS, but also I consider it to be objectively reasonable for the reasons I have previously outlined. I find that these points within the Facebook messages meet the requirements of s.100 to be protected.
29. In relation to the whistleblowing claim, I also consider the same Facebook messages are protected. The Claimant gave sufficient facts and specified her concerns to meet the test of “*disclosure of information*”. While arguably there could be a debate about the phrase “*massive breach of HSE law*” because the Claimant does not actually say what the massive breach is, the message has to be read in context. The context is that the Claimant was deeply worried about social distancing at the Respondent’s site as shown by the messages and she considered that to be a massive breach of health and safety law. The Claimant does not have to be correct in such a belief; she simply has to reasonably believe it. I consider she did reasonably believe for the reasons given previously. Objectively, at that time and in the circumstances of the pandemic, I find that somebody who was concerned about the 2-metre social distancing rule (whether or not it was strictly legally enforceable or required at that date) had a belief that was reasonable that there may have been a breach of health and safety law. The disclosure was made to a member of the Respondent’s management team and I find that it is protected under s.103A (public interest having been conceded).

30. The next event is on 30 March 2020 and there are two emails from the Claimant. The first is the furlough request from the Claimant (page 120). There is nothing within this email about circumstances connected to her work or disclosing information - all that the email says is that the Claimant wishes to be furloughed. This email does not constitute a protected disclosure or the bringing of circumstances connected to the Claimant's work to the employer's attention.
31. The later email of the same date is at page 122. The Claimant asks to see the risk assessment of the Respondent regarding employees working during the pandemic. There is nothing within this email that brings circumstances connected to her work to the employer's attention, or discloses information (it is not sufficiently factual or specific). The email is not protected either under s.100 or 103A.
32. The last event happens on 31 March 2020. The Claimant had a phone conversation with Ms Mohammadi-Jouzani, followed by a later call from Mr Ross in which she is summarily dismissed. The Claimant says when she spoke to Ms Mohammadi-Jouzani, she repeatedly asked to see the risk assessment and to be told that protective measures were in place. In the rider to the ET1, the Claimant stated that she told Ms Mohammadi-Jouzani that it was impossible to socially distance in the warehouse, but this is not in the Claimant's witness statement, or in the witness statement of Mr Fardell, or within the Claimant's submissions where she said in this conversation she was merely asking for a copy of the risk assessment and method statement to be provided. I find that the Claimant's evidence, and that of her husband, is that she was asking over and over to see the risk assessment and related documents.
33. Ms Mohammadi-Jouzani does not disagree with this summary of the conversation, nor does Mr Ross in relation to what he understood to have been said. The Claimant by their account was repeatedly asking to see the risk assessment and to know what the protective measurements were. The issue about whether the Claimant and her husband intimidated Ms Mohammadi-Jouzani during the call and laughed at her is not relevant to the issue of what, if anything was disclosed. On the accounts of all involved, during the calls with Ms Mohammadi-Jouzani (or Mr Ross for that matter), nothing was said by the Claimant which involved the bringing of circumstances connected to her work to the employer's attention or disclosing information. Asking for a document or reassurance repeatedly is not a disclosure of information or bringing circumstances connected to the Claimant's work to an employer's attention. This event is not protected under either s.100 or s.103A.

Other findings of fact

34. I also had to make some other findings of fact, some of which were more helpful to me in determining the claims than others. The Claimant did not request written reasons for her dismissal (page 141); all she asked for was for paperwork such as

a P45. If you want to ask for written reasons, you must say “*I want you to tell me in writing why I was dismissed*” or words to that effect.

35. I had to make more findings about the conversation that took place on 31 March 2020 between the Claimant and Ms Mohammadi-Jouzdani to resolve the final question – the reason or principal reason for dismissal. Both agree that that conversation was difficult. There was no substantial challenge to the evidence of Ms Mohammadi-Jouzdani or Mr Ross that Ms Mohammadi-Jouzdani was upset by the end of the call with the Claimant. Mr Fardell, by his own account, became involved in that call, resulting in being two people against one, Mr and Mrs Fardell against Ms Mohammadi-Jouzdani.
36. Six minutes or so after the Claimant and Ms Mohammadi-Jouzdani’s call ended, Mr Ross called the Claimant and summarily dismissed her. The Claimant submits that this was because of her various disclosures. I remind myself of what I have already found. By 31 March 2020, the Claimant had said on 22 March 2020 to Mr Lloyd that WHO advice on social distancing was being breached by the Respondent putting health and safety at risk, which was protected under s.100. In addition, the messages to Ms Mohammadi-Jouzdani from the Claimant on Facebook on 24 March 2020 were protected by both s. 100 and s.103A.
37. However, after these two disclosures on 22 and 24 March 2020, the Claimant was not immediately dismissed, six days passed which included the reaching of an agreement to allow the Claimant to work alone in a room and not follow the protocol the other employees were following (for example, her work was left outside the door) and to take holiday leave at short notice.
38. Mr Ross’ oral evidence, unchallenged by the Claimant but not accepted when she provided her submissions, was that an employee called Diane (who I have not fully named as she is not a witness) raised health and safety concerns during the pandemic, and was given a pay rise and more responsibility, not dismissed. The hearing bundle contained various messages between the Claimant and Diane. The messages demonstrate that Diane was unhappy with how the Respondent was dealing with matters in the COVID pandemic, that she thought very similarly to the Claimant, felt that the business should be shut and was concerned. The evidence I have from Mr Ross is that Diane did raise the concerns expressed in her messages with the Claimant. Mr Ross was expressly asked, “*what is the difference between the Claimant and Diane?*” and Mr Ross said it was how Diane raised her concerns. Diane was an employee for whom he had a great deal of respect; Mr Ross said that when Diane says something, she had a reason for saying it. Diane remains an employee of the Respondent.
39. I was given a statement from Mr Malpas, though he declined to give oral evidence. I gave his statement very little weight as he did not attend and the contents of the statement was not particularly relevant to the issues I had to determine. His evidence was that the Respondent had a culture of firing employees when there is

a downturn. This is not uncommon and irrelevant as the claim is not about a redundancy situation.

40. Mr Healy's evidence showed that the Respondent took action to deal with COVID-19. It may well have been action that the Claimant deemed insufficient, but steps were taken. The fact that the Claimant was able to work in a room on her own, the evidence from the Respondent's witnesses as well as Mr Healy about measures taken in respect of moving work stations, sanitising, and the creation of one-way systems and floor arrows demonstrate this. The Claimant was allowed to take annual leave at short notice so she did not have to be in the workplace while she was so concerned. She was offered statutory sick pay; I understand that the Claimant felt that that was fraudulent but there is no evidence of this. Ms Mohammadi-Jouzani's offer, supported by her oral evidence in cross-examination, showed that she was empathetic, considering the best way of dealing with the Claimant's anxiety while acknowledging her concerns and she was trying to find ways to support the Claimant.

Reason for dismissal

41. I need to look into the mind of the person who decided to dismiss the Claimant. That is Mr Ross. Mr Ross confirmed this but said that he had to consult his co-directors, partly as a sanity check, and partly because they are the majority shareholders. There is nothing inappropriate in checking with colleagues before you take such a dramatic step and I am satisfied that Mr Ross made the decision to dismiss based on all the evidence before me.
42. The case of **Kuzel** reminds the Tribunal to look at the reasons given by Mr Ross first when considering the reason for dismissal. In the further and better particulars and in his own statement, Mr Ross' position was that the reason the Claimant was dismissed was her unreasonable refusal by the Claimant to accept the reasonable health and safety arrangements in place, and her failure to engage with the Respondent constructively about working, though her conversation with Ms Mohammadi-Jouzani on 31 March was the "*straw that broke the camel's back*". Mr Ross' evidence was that he believed the Claimant wanted the business to be closed and was unwilling to accept anything less. He accepts this was in his mind when he dismissed her.
43. There is a principle of law that confirms the way an employee or worker presents concerns or makes a protected disclosure can be separated from the content of any protected disclosure. Ms Collins relied on the case of **Panayiotou v Kernaghan and another** UKEAT/0436/13/RN. However, Mr Panayiotou's behaviour was more extreme than the Claimant's behaviour in this case. I am also very aware of the warning to Employment Tribunals to be alert, that we should not allow unscrupulous employers to find reasons to dismiss someone for raising a health and safety concern or making a protected disclosure by finding a way to argue that the employee was at fault in how they did make the disclosure.

44. However, what I should do is think about what had the Claimant done as known to Mr Ross at the time he decided to dismiss her? She sent messages to Simon Lloyd on 22 March, but was not dismissed after sending those messages. The next day special arrangements were put in place by Mr Ross to allow the Claimant to work alone on site on 23 and 24 March. There was the conversation in the car park with Mr Lloyd and Mr Ross on 23 March, but there was no disclosure made that day, though it showed to Mr Ross that the Claimant had concerns about working on site. On 24 March 2020, the Claimant sent messages to Ms Mohammadi-Jouzani in the evening on Facebook, which are protected (though Mr Ross would have known then of the protected status later found by this Tribunal). The Claimant decided to take 25 March and 30 March off as annual leave at short notice due to her concern at being in the workplace and she was off again on 31 March on pre-booked annual leave. There is no evidence of any resentment or concerns held by the Respondent about the Claimant before 30 March 2020.
45. 30 March 2020 is critical. The Claimant sent two emails to the Respondent, demanding to be furloughed, even though she knew there was work to be done (accepted in her oral evidence), and requiring sight of the risk assessment before she returned to work. On 31 March, by agreement, she called Ms Mohammadi-Jouzani. Ms Mohammadi-Jouzani says that the call was intimidating with two against one, leaving her feeling belittled and humiliated. Her evidence, which matches what Mr Ross says he was told immediately afterwards, was that the Claimant kept repeating over and over what she wanted and she was not listening to what Ms Mohammadi-Jouzani was trying to explain to her about the safety measures in the workplace. At the end of that conversation, Ms Mohammadi-Jouzani was distressed and suggested that she get a director to talk to the Claimant.
46. I accept the evidence I have heard from Ms Mohammadi-Jouzani about the call. In many ways, the parties agree what happened within the call, including that it was difficult and that Mr Fardell became involved. However, what is important is Mr Ross's perception of what happened as he made the decision to dismiss. Objectively, I can see that the impression the Claimant gives from 30 March onwards to the Respondent is not constructive. She wants the business shut or as an alternative to be put on furlough, during what the Claimant accepted was the busiest period ever the Respondent had ever had (and while unknown to Mr Ross at the time, this is what the Claimant messaged to her colleagues, showing her mindset was as Mr Ross believed. She calls the Respondent's directors and managers "*morons*", "*greedy*", and is wholly dismissive of their attempts to keep the business going in challenging circumstances). I consider that the tipping point was reached on 30 March 2020 when the Claimant makes it clear she does not want to work for the Respondent, despite the requirements of the business.
47. The evidence supports a finding that the Respondent concluded that the employment relationship had to end on 31 March 2020. I remind myself that six

days had passed from the last protected disclosure/raising of circumstances connected to the Claimant's work to 30 March; I consider this to be relevant because if it was the disclosure that was the reason or principal reason for dismissal, even allowing for the fact that the Claimant had been on annual leave, I think there would have been indications of action being taken by the Respondent at an earlier date. The first sign that the Respondent is unhappy is on 31 March 2020 when the directors discuss the matter and decide what approach to adopt.

48. On 31 March 2020, the Claimant repeatedly asks for the risk assessment documents, which she accepted in oral evidence that having seen them now, she would not have accepted the documents as reasonable or acceptable. Her evidence was that the risk assessment had not been completed the way she thought that it should be done, so she would not accept them as valid. The conversation with Ms Mohammadi-Jouzdani, as shown by the evidence of both the Claimant and her husband, saw the Claimant repeatedly ask for the risk assessment, and fail to engage constructively with what Ms Mohammadi-Jouzdani was trying to tell her. Mr Ross's view of how the Claimant was conducting herself on 30 and 31 March 2020 matches the evidence of all involved about what happened and what the Claimant believed (that the business should be shut or she should be furloughed, despite the workload). It was a reasonable view for him to adopt.
49. The Claimant's position is that the Respondent could have just sent the risk assessment, but equally the Claimant could have gone to the site as Ms Mohammadi-Jouzdani proposed, look at the risk assessment and see with her own eyes the protective measures in place and discuss the matter. She had been able to discuss such matters as shown by the car park discussions on 23 March and the Facebook messages with Ms Mohammadi-Jouzdani on 24 March.
50. Following the call with Ms Mohammadi-Jouzdani, the parties were at an impasse and could not agree on how to move forward. The Claimant's lack of flexibility and unwillingness to listen was demonstrated by her refusal to listen to Ms Mohammadi-Jouzdani and the Claimant asking repeatedly for the risk assessment (which she accepts she would not have accepted the risk assessment was sufficient). There was sufficient justification based on the emails and the call with Ms Mohammadi-Jouzdani for Mr Ross' view that the Claimant was of a fixed view and that nothing other than closure or furlough was going to be good enough. Indeed, though it is not relevant to the determination of the claim, an example of the Claimant's approach occurred within the hearing where she was adamant that three people could not be at the packing desk, which was 4.8 metres long, safely under the social distancing guidelines. Even though it was explained to her that as long as each person was 2 metres apart, that would be perfectly appropriate as three people could be 2 metres apart over this length if one was at each end, the Claimant would not accept this.

51. 31 March 2020 saw three events. First thing in the morning, following the Claimant's emails of 30 March, Mr Ross, the two other directors and Ms Mohammadi-Jouzdani discussed the situation regarding the Claimant. There was a discussion about whether the Claimant was going to be dismissed (which the Claimant did not challenge). Mr Ross's evidence was that it was decided that it was an option (the Claimant not having two years' service), but he still was trying to see if there was a way forward. What ultimately led to the dismissal was the second event of 31 March, the conversation between the Claimant and Ms Mohammadi-Jouzdani, which Mr Ross saw as the final straw. Mr Ross saw Ms Mohammadi-Jouzdani distressed and heard her account of the conversation. Mr Ross' belief was that Ms Mohammadi-Jouzdani was upset due to the Claimant's belligerence, that the Claimant and her husband had intimidated Ms Mohammadi-Jouzdani and that the Claimant was not engaging properly with what the Respondent was trying to explain to her. I accept that this was Mr Ross' mindset at the time of dismissal (the third event).
52. In light of the evidence, I find that the Respondent's reason for the dismissal of the Claimant was not because of any disclosures made by her, but due to her approach to continuing to attend work, her view that the Respondent should close or she should be furloughed, her repeated requests for risk assessments, unwillingness to attend site as instructed by Ms Mohammadi-Jouzdani, and the Claimant's treatment of Ms Mohammadi-Jouzdani as perceived by Mr Ross on 31 March 2020.
53. I would though point out that if the Claimant had had two years' service and brought an ordinary unfair dismissal claim, the Respondent is likely to have lost in my view on the issues of whether dismissal was within the range of reasonable responses and procedural fairness.
54. I dismiss the two claims for automatic unfair dismissal made under s.100 and s.103A.

REASONS IN THE COSTS APPLICATION

1. An application was made under Rule 76 by the Respondent who says that the Claimant's conduct of the proceedings has been unreasonable in respect of two limited matters. Ms Collins on behalf of the Respondent says the refusal to accept the offer of £4,000 made on 12 March 2021 and repeated as a final offer on 30 April 2021 constitutes unreasonable conduct and the Respondent seeks £1,800 in respect of the two additional hearing fees of Ms Collins. If the final offer had been accepted, the Respondent submits that there would have been no need to pay Ms Collins for Tuesday and Wednesday.
2. Ms Collins provided me with a copy of the two offer letters. I took the opportunity to explain to the Claimant the rules, and I will reiterate them now. Firstly, it is

not unreasonable behaviour to lose. It is not unreasonable behaviour to issue proceedings. It is not unreasonable behaviour to not have a lawyer representing you. However, the situation in relation to offers is more complicated. The case of ***Kopel -v- Safeway Stores PLC*** [2003] IRLR 753 says that a Tribunal may find that a refusal to accept an offer is unreasonable behaviour. While the Tribunal has not heard formal oral evidence on oath in relation to the application, I asked the Claimant about the situation when she received these letters and her reasons for not accepting the offer. I wholly accept her account.

3. I am only dealing whether there has been unreasonable behaviour at this point, because if there has not been any unreasonable behaviour, that is the end of the matter. If I find there has been unreasonable behaviour, I will then go on to hear from the parties about the next two points which is should I exercise my discretion to make a Costs Order, and if so how much given the Claimant's ability to pay?
4. On 12 March 2021, the Respondent's solicitor sent the Claimant a 4-page letter, asking if she will accept the sum of £4,000 in full and final settlement of her claim. The offer is made on a purely commercial and economic basis; in other words, the Respondent would rather pay the Claimant and end the matter than pay lawyers. The letter explains that as the Claimant had not updated her Schedule of Loss or provided further evidence about her financial loss, the solicitor has had to try and calculate the value of the claim based on the limited information available. The letter sets out in detail the calculations to show £4,000 is more than the Claimant is likely to win.
5. The second offer of 30 April 2020 repeats the offer of £4,000 and says it is available to accept until 2.00pm on 7 May 2020. The second letter says that the Claimant had refused to conciliate via ACAS and had not made any Counter Offer. The Claimant says that this is true, and she had been contacted by ACAS on 7 April to discuss settlement. She explained her mindset, which was that she believed that she had made a protected disclosure and while the calculations showed that the money being offered was more than she might actually win at Tribunal, this was a matter of principle. The Claimant said that "*it was not about the money*". She also went on to explain that around this time she had contacted Newport CAB for advice who had said that if a Judge had not ordered her to do a new Schedule of Loss she did not have to (I observe that this was not tremendously helpful advice because the most up to date information is best to assist the Claimant in demonstrating loss and comply with the over-riding objective).
6. In my judgment, the first offer letter set out calculations which the Claimant knew included incorrect numbers because she had not updated the information herself, motivated by the advice she had received from the CAB. That said, the letter explained plainly to the Claimant how compensation was likely to be

viewed by a Tribunal and why £4000 was a good offer. The Claimant did not accept the offer because it was a matter of principle, not because she thought she would win more. It appears she was content to receive less and put the Respondent to the trouble of a Tribunal hearing (using limited public resources in the process).

7. The offer of £4,000 in my view was a good offer, clearly explained within the letter. It was unreasonable to not to accept such an offer, particularly as the Claimant said the money was not the issue and the fact the over-riding objective applies to both parties. I consider it also unreasonable not to have engaged with ACAS in April 2021 to reach a settlement.
8. I then considered whether to exercise my discretion to award costs. I heard further from the Claimant about her position, but not under oath, though I accept her account as true (particularly as she took the trouble to ask for an adjournment to check the position with her husband).
9. In relation to her ability to pay, the Claimant is not on the mortgage or legal title of her home (which is in her husband's sole name). Her current earnings fluctuate from somewhere between zero to potentially up to £352 a week, but she is a zero hour worker. She confirmed that she had no valuable assets, and her savings are approximately £200 of premium bonds and £84.50 in an Easy Saver Account. She does not have any disposable income; the family live on her husband's income.
10. In terms of her reasons why I should not make the Costs Order, the Claimant reminded me that she had been found to have made protected disclosures and disclosures protected under s.100. She submitted that she genuinely thought she had a case and was trying to do the right thing to protect the public, her colleagues and the NHS from COVID-19 and her colleagues in a reasonable manner. She also pointed out she would not be able to pay £1,800 in one lump sum.
11. Ms Collins on behalf of the Respondent submitted that the core issue identified very early on in the proceedings was not whether the disclosures were protected, but the reason for dismissal. The Respondent had always accepted that the Claimant was entitled to raise health and safety concerns and was particularly concerned about the pandemic. Ms Collins noted the claim had been unsuccessful and the Claimant had refused to accept an offer in circumstances that the Tribunal had found to be unreasonable. She observed that the overriding objective encouraged sensible discussions between the parties, and the Respondent's solicitors had set out the reasoning behind the offer to assist the Claimant. Notwithstanding the Claimant's lack of means, Ms Collins submitted that the order of £1800 was very modest and sought in order to demonstrate that the Respondent has been reasonable and to defray the extra expense caused by the Claimant's unreasonable conduct.

12. The decision of the Tribunal was that it would not award costs in favour of the Respondent, despite the Claimant's unreasonable conduct.
13. The Claimant did make protected disclosures both under s.100 and 103A; the Claimant lost because of the reason for dismissal found by the Tribunal. This shows that there was some merit in the Claimant's case as she had made disclosures covered by the 1996 Act. The Tribunal found that the Claimant had a reasonable belief and there was no dispute about public interest. The Tribunal accepted that the Claimant was trying to protect herself, her colleagues and the NHS and did not act in bad faith.
14. The Respondent's reasons for the cost order included a wish for an acknowledgment that they were in the right. The decision to dismiss the claim suffices in the judgment of the Tribunal. It is also the case that if the Claimant had had more service, the Respondent may not have successfully defended an ordinary unfair dismissal claim. The Claimant is a lady of very limited means. While I accept that £1,800 appears to be the appropriate amount for the additional loss that the Respondent had to suffer because the Claimant refused to accept the offer unreasonably, £1,800 for this Claimant with no assets and uncertain income is likely to take years to her to pay. I accept £1,800 is under the bankruptcy threshold, and the parties could negotiate a payment plan, but £1,800 is a significant sum to someone in the Claimant's position. The impact of an £1,800 Costs Order on this Claimant are likely to be severe. I anticipate that the Claimant is likely to regret declining the offer without having to pay costs.

Employment Judge C Sharp
Dated: 15 June 2021

REASONS SENT TO THE PARTIES ON 16 June 2021

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS Mr N Roche