EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104681/2020 & 4104682/2020

Held by Cloud Video Platform (CVP) on 2-4 August 2021

Employment Judge M Sangster

Mr G Gibson	**First Claimant** **Represented by** **Mrs Hay** **Solicitor**
Mr J Campbell	**Second Claimant** **Represented by** **Mrs Hay** **Solicitor**
James Carr and Sons (Sawmillers) Limited	**Respondent** **Represented by** **Ms Amir** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that the claims brought by the claimants do not succeed and are dismissed.

REASONS

Introduction

1. This was a final hearing which took place remotely. This was not objected to by the parties. The form of remote hearing was video. A face-to-face hearing was not held because it was not practicable due to the Covid-19 pandemic and all issues could be determined in a remote hearing.

2. The claimants presented claims of detriment contrary to section 44(1)(d) & (e) of the Employment Rights Act 1996 (**ERA**) and constructive unfair dismissal.

3. The respondent denied that the claimants were unfairly dismissed and that they had been subjected to any detriments.

4. The claimants gave evidence on their own behalf.

5. The respondent led evidence from:

   a. Stephen Havranek, managing director of the respondent; and

   b. Paul Craig, sawmiller, employed by the respondent.

6. The parties lodged an agreed joint bundle of documents extending to 331 pages, in advance of the hearing. The parties also lodged supplementary bundles, extending to 35 pages for the claimants and 29 pages for the respondent.

Issues to be Determined

7. It was agreed at the outset of the hearing that the issues to be determined were as noted below.

Detriment – s44(1)(d) ERA

8. Were the claimants in circumstances of danger which the claimants:

   a. reasonably believed to be serious and imminent; and

   b. could not reasonably have been expected to avert?

9. If so:

   a. did the claimants leave (or propose to leave) their place of work; or

   b. refuse (while the danger persisted) to return to their place of work?

10. If so, did the respondent subject the claimants to the following detriment as a result of doing so?

Detriment – s44(1)(e) ERA

11. Were the claimants in circumstances of danger which the claimants reasonably believed to be serious and imminent?

12. If so did the claimants take (or propose to take) steps to protect themselves or other persons from the danger?

13. If so, were the steps taken (or which were proposed) appropriate?

14. If so, did the respondent subject the claimants to a detriment as a result of doing so? Namely not paying them for the period from 7 April to 1 May 2020 inclusive.

Constructive Unfair Dismissal

15. Did the factual allegations made by the claimants amount to a breach of any express or implied terms of the claimants' contracts of employment?

16. If so, were such alleged breaches (taken alone or cumulatively) sufficiently serious as to constitute a repudiatory breach giving rise to an entitlement for the claimants to treat their contracts as terminated?

17. Did the claimants, by their conduct, waive any such breaches with the result that they did not remain entitled to terminate the contract?

18. Were the claimants' resignations in response to any alleged repudiatory breach?

19. If the claimants were dismissed: what was the principal reason for dismissal; was it a potentially fair reason in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ('ERA'); and, if so, was the dismissal fair or unfair in accordance with s98(4) ERA?

Findings in Fact

20. The Tribunal found the following facts, relevant to the issues to be determined, to be admitted or proven.

21. The respondent is a manufacturing Sawmill. The largest percentage of their workload is making safety critical components for Railway Maintenance Depots throughout the UK. They also supply timber to the

Scottish farming community, as well as timber for landscapers and members of the public.

22. The First Claimant was employed by the respondent from June 2000 to 22 May 2020, latterly as a foreman. His duties consisted of the operation of wood machinery and the day to day running of the business in the absence of SH.

23. The Second Claimant was employed by the respondent as a sawmill operator from August 2017 to 23 May 2020. His duties consisted of the operation of wood machinery.

24. The claimants were paid weekly, at the end of each week. Neither claimant was provided with a statement of terms and conditions of employment at any point during their employment with the respondent.

25. The respondent's sawmill is based at Inchture, Perthshire. It is located next to SH's home. The grounds the house and sawmill extend to around 3-4 acres, in a remote rural location. There are six large roller doors in the sawmill, which remain open whenever the sawmill is operational, meaning that one side of the sawmill is almost entirely open. It is accordingly extremely well ventilated. There are four main workstations in the sawmill, as well as a separate office. Three of the workstations are in the main area and are almost in a line. The distance between the first and second workstation is 12 metres. The distance between the second and third workstation is 22 metres. The fourth workstations is in a separate area, separated by a wall from the others.

26. At the start of 2020, the respondent employed 5 people at the sawmill, including the claimants and SH.

27. SH was concerned about the implications of Covid-19 for his family: his elderly mother and his partner (who has COPD) both, ultimately, required to shield.

28. The claimants were also concerned about the implications of Covid-19 for their families. The First Claimant's partner has mild to moderate asthma and the Second Claimant's wife has moderate to severe asthma. Both the

First Claimant's partner and the Second Claimant's wife continued to work throughout the pandemic and neither required to shield.

29. On Monday 23 March 2020 a member of the respondent's staff called in sick with symptoms of Covid-19. At that point, government guidance was that individuals should self-isolate if a member of their household developed symptoms. It was not suggested in the government guidance at the time that individuals should do so if they had been in contact with another individual who had developed symptoms, for example in their workplace. The respondent's remaining staff accordingly continued to work as normal. Later that day, SH heard the claimants discussing that both of their wives had symptoms of Covid-19. As a result of hearing that, SH asked all members of staff to self-isolate, which they did. Staff were paid SSP in that period.

30. That evening, a national lockdown in order to suppress the Covid-19 virus, was announced. As part of the national lockdown, the Scottish Government advised that specified retail and hospitality businesses should close with immediate effect and that people should otherwise work from home, where possible.

31. The respondent's business did not fall within the category of businesses which were required by the Scottish Government to close. It was not possible for the respondent's employees to work from home.

32. SH called each of the respondent's employees in the course of the next day or so, to indicate that he was investigating whether the sawmill could remain open or not. SH then reviewed the Scottish Government guidance and concluded that it could. He reached this conclusion largely due to the fact that the respondent produced goods for the agricultural and transport sectors. He concluded as a result of this that the function of the business was essential. He also took into account that the respondent's employees could not work from home.

33. SH continued to attend the sawmill each day, but was the only individual present for the first 7 days. PC returned to work after 7 days. The claimants and the other employee remained absent, self-isolating, for 14 days.

34. In the period from 24 March to 4 April 2020, SH carried out a risk assessment in relation to the sawmill, which he then documented. The purpose was to identify any areas or practices in sawmill that may breach the new Covid-19 social distancing measures. Within the risk assessment SH addressed issues such as minimising contact with customers (by appropriate signage, payment by card only, with payment in advance wherever possible, new procedures for collections and customer visits being discouraged), the continued closure of the staff canteen, specific measures when working on particular machines or in particular areas, to ensure social distancing, and general measures such as signage in and around the sawmill, hand sanitising, PPE and face masks. The risk assessment provided for a weekly review, with the workforce, of the measures put in place.

35. The claimants were due to return to work on 7 April 2020, following their period of self-isolation. On 6 April 2020 SH had a telephone discussion with the First Claimant. The First Claimant informed SH that he was speaking on the Second Claimant's behalf also and that they both felt that the respondent should close completely and place them on furlough leave. SH explained to the First Claimant the reasons for his decision that the respondent's business should remain operating. Following that discussion SH sent an email to the First Claimant, stating *'New measures will be introduced on your return tomorrow to ensure the social distancing requirements are met. If you refuse to work then you may request that you use your 2 week holiday entitlement for this year. Alternatively you can take annual leave.*'

36. The First Claimant did not respond to that email. The claimants did not attend work on 7 April 2020.

37. At 12.04pm on 7 April 2020, the respondent received an email from John Swinney MP, which stated *'I have been contacted by an employee of James Carr and Sons, who have expressed concerns regarding your ongoing business practices. My constituent states that staff are being told that they required to come to work, due to your view that the company qualifies as a key business. They allege that you have told all employees who do not come into work that they will either be forced to unpaid leave,*

or that they can use their holidays. They also alleged that a fortnight ago a member of staff showed symptoms consistent with Covid-19, but that the workforce were not allowed to go home. Accordingly, I would be keen to hear from you regarding the situation at James Carr and Sons, to understand in more detail your rationale for the business remaining open.'

38. The respondent provided Mr Swinney with a full explanation of the respondent's rationale for remaining open, namely that as a manufacturing sawmill who make safety critical components for railway maintenance and supply timber to the farming community they are involved in the maintenance of the national infrastructure and expected to remain operating. He confirmed that he had taken advice from Acas in relation to the options for members of staff who refuse to return to work in these circumstances.

39. SH contacted both claimants by email on the evening of 8 April 2020. He stated that he had expected them to return to work the previous day, but they did not, and that they had made no effort to contact him to explain why. He asked that they provide an explanation for their non-attendance. He stated again that they could utilise their 2 week summer holiday entitlement, if they wished, or they could take unpaid leave. He further advised that, if he did not hear from them within 28 days, he would assume that they no longer wished to work at the sawmill and would accept their silence as their resignations.

40. The Second Claimant responded to SH's email later that evening. He stated that he did not consider that the sawmill was an essential business and that it should therefore be closed temporarily and staff furloughed. He referred to the discussion between SH and the First Claimant on 6 April 2020. He stated that he felt SH's emails of 6 & 8 April 2020 were intimidating and bullying and had caused unnecessary stress and quandary for the workforce and their families.

41. The first weekly review of the measures implemented by the respondent under the Covid-19 risk assessment, took place on 10 April 2020. Only SH and PC were present. The claimants had not returned to work and the remaining employee was on holiday. Some additional measures were

discussed, agreed and documented. Weekly reviews took place thereafter, every Friday.

42. The First Claimant sent an email to SH on 13 April 2020 stating *'As the coronavirus pandemic continues, I wish to reiterate myself and Jason Campbell's position with regards to this. It would appear that the nationwide lockdown is continuing, for an unspecified period of time. The current restrictions still in force, that all businesses deemed as non-essential, should therefore be closed to members of the public. Jason and I informed you of our position and concerns in relation to this in the email of 8th April 2020. With the lockdown ongoing, our views remain the same on working practices, social distancing and keeping our families safe.'*

43. SH received an almost identical email from the Second Claimant on 19 April 2020.

44. The respondent received communication from Perth & Kinross Council on 29 April 2020, as concerns had been raised by the claimants. SH replied to Perth & Kinross Council's correspondence of 29 April 2020 to explain the respondent's rationale for remaining open. He also explained the safety measures in place, such as workstations being 5-6m apart, hot water or industrial wipes for handwashing, gloves, facemasks and policing of those entering the building. Perth & Kinross Council responded on 30 April 2020, thanking SH for his comprehensive response and stating that there was nothing they could add or recommend. They stated that he had covered any possible issues.

45. The respondent received a visit from Police Scotland in May 2020 regarding concerns raised by Mr Swinney's office. A full guided tour of the workplace was provided, and the officer was satisfied with the measures put in place by the respondent.

46. The claimants did not return to work. On 3 May 2020 they each emailed SH and requested that they be allowed to use 2 weeks' annual leave entitlement to continue their absence. SH responded the following day to each claimant, stating that he agreed to them using their 2 week holiday entitlement from that day, so he would expect them to return to work on

18 May 2020. He stated that their absence from 7 April 2020 to date would be unpaid. He then stated:

> *'Following your previous emails I've taken legal advice and I wish to reiterate the following points.*
> *Firstly, and importantly, the sawmill is not a business that was required by the government to close. It is permitted to remain open as it supplies the railway industry and farming community, both of which are a critical parts of the National Infrastructure. It is not possible for our employees to work from home.*
> *The only reason the sawmill would require to close would be if we could not provide our employees with a safe working environment. As an employer I take the health and well-being of my employees extremely seriously. I have risk assessed the workplace and our working practices in light of the government recommendations in relation to Coronavirus to ensure that I am providing a safe environment for all of my employees. I have also tried at all times to comply with the Government's Fair Work principles.*
> *The necessary social distancing can be achieved in the workplace as the workstations are more than 5m apart. The canteen has been temporarily closed.*
> *There are hand washing facilities available and a supply of industrial wipes for use by employees.*
> *Employees wear gloves and there is access to PPE e.g. face masks if employees wish to use them.*
> *I hope that you are keeping well and able to enjoy your 2 week holiday. I look forward to seeing you back at the mill on 18th May when you can be assured that, as has been the case throughout, there will be a safe working environment.'*

47. The claimants accordingly received nil pay in the period from Tuesday 7 April to Friday 1 May 2020 inclusive, a period of 3.8 working weeks. They then received two weeks' holiday pay.

48. On 13 May 2020 the Second Claimant contacted SH and advised that he would be required to self-isolate for a 14 day period as a member of his

household was displaying symptoms of Covid-19. SH confirmed that he would be paid SSP during his absence.

49. On 14 May 2020 the First Claimant contacted SH and advised that he would be required to self-isolate for a 14 day period as a member of his household was displaying symptoms of Covid-19. SH confirmed that he would be paid SSP during his absence.

50. The First Claimant emailed SH on 22 May 2020 providing 7 days' notice of his resignation. He stated *'As you are aware, there has been an exchange of emails between myself and the company. In which I have expressed my concerns of the safety in the workplace etc, during this period of the pandemic. I believe that my concerns were genuine, I also feel these concerns were not adequately addressed by the company to my satisfaction. There was a failure to adopt adequate safety measures, to allow me to work safely within the workplace. I believe my position as Foreman within the company is now untenable.'*

51. The Second Claimant emailed SH on 23 May 2020 and stated that he was resigning with effect from 1 June 2020. He did not provide any reason or explanation for doing so in his email.

52. On 2 June 2020 SH, for the respondent, accepted the resignation of both claimants.

53. While the claimants did not see the risk assessment prepared by the respondent prior to the termination of their employment, they had done so by the date of the Tribunal hearing. Both felt that the measures put in place were appropriate.

Claimants' submissions

54. Mrs Hay, for the claimants, submitted, in summary, that:

a. The claimants' evidence should be preferred over that of the respondent.

b. The respondent demonstrated little regard for the safety and welfare of the claimants and their families when taking the decision to remain

open; the respondent failed to actually engage with the claimants to address their legitimate concerns in relation to health and safety.

c. The claimants believed the workplace was dangerous and posed a serious and imminent threat to their health and safety and that of their families. They took appropriate steps in the circumstances and remained away from the workplace. They suffered a detriment as a result of doing so. The detriment suffered was the receipt of nil pay for a 4 week period. They seek a remedy in respect of that period. No remedy is sought in relation to the period the claimants were in receipt of SSP or holiday pay.

d. The claimants were constructively and unfairly dismissed by the respondent. The fundamental breach of contract relied upon is the respondent failing to pay the claimants for a period of 4 weeks. Mrs Hay confirmed, in response to a specific question from the Tribunal, that this was the only act relied upon in respect of the constructive dismissal claim.

55. The following cases were referred to:

a. ***Western Excavating (ECC) Ltd v Sharp*** [1978] ICR 221

b. ***Buckland v Bournemouth University Higher Education Corp*** [2010] IRLR 445

c. ***Nottinghamshire County Council v Meikle*** [2004] IRLR 703

Respondent's submissions

56. Ms Amir's submissions for the respondent submission are summarised as follows:

a. There was no serious or imminent danger to the claimants' health and safety. Neither claimant raised any issue in relation to health and safety prior to their resignation

b. The claimants resigned as a result of not being furloughed, not due to health and safety concerns. There was in fact no requirement on the respondent to close their business or to furlough staff.

c. There was no breach of contract. The claimants were not constructively dismissed.

57. She relied upon the following cases:

a. ***Kaur v Leeds Teaching Hospitals NHS Trust*** [2018] IRLR 833

b. ***Omilaju v Waltham Forest*** [2005] IRLR 35

c. ***Leach v Office of Communications*** [2012] IRLR 839

d. ***Western Excavating (ECC) Ltd v Sharp*** [1978] ICR 221

e. ***Cox Toner (W E) (International) Ltd v Crook*** [1981] IRLR 443

Relevant Law

Health & Safety Detriment

58. Section 44 ERA states

> *'(1) An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that…*
>
> *(d) in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work, or*
>
> *(e) in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger.'*

59. The terms of subsections (d) and (e) of section 44 ERA, as set out above, mirrors that of s100(1) (d) and (e) ERA. Guidance can accordingly be taken from case law in relation to those provisions, when interpreting the provisions of section 44 ERA.

60. In ***Oudahar v Esporta Group Ltd*** [2011] IRLR 730, the EAT held that s100(1)(e) should be applied in two stages:

'Firstly, the Tribunal should consider whether the criteria set out in that provision have been met, as a matter of fact. Were there circumstances of danger which the employee reasonably believed to be serious and imminent? Did he take or propose to take appropriate steps to protect himself or other persons from the danger? Or did he take appropriate steps to communicate these circumstances to his employer by appropriate means? If these criteria are not satisfied, section 100(1)(e) is not engaged.

Secondly, if the criteria are made out, the Tribunal should then ask whether the employer's sole or principal reason for dismissal was that the employee took or proposed to take such steps. If it was, then the dismissal must be regarded as unfair.'

61. The word 'danger' in this context is not limited to dangers generated by the workplace itself ***(Harvest Press Ltd v McCaffrey*** 1999 IRLR 778).

62. The Court of Appeal in ***Akintola v Capita Symonds Ltd*** 2010 EWCA Civ 405 held that an Employment Tribunal was entitled to find that the claimant did not have a reasonable belief that he was in circumstances of serious and imminent danger. In that case, the employer had prepared a method statement of engineering work and a specialist team had undertaken monitoring of the situation.

63. The test of whether an act or omission could amount to a 'detriment' is the same as for a discrimination complaint. The House of Lords in ***Shamoon v Chief Constable of the Royal Ulster Constabulary*** [2003] ICR 337 held that whether an act amounts to a detriment requires the Tribunal to consider:

a. Would a reasonable worker take the view that he was disadvantaged in terms of the circumstances in which he had to work by reason of the act or acts complained of?

b. If so, was the treatment of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment?

64. The House of Lords confirmed however, that an unjustified sense of grievance cannot amount to a 'detriment'.

Constructive Unfair Dismissal

65. Employees with more than two years' continuous employment have the right not to be unfairly dismissed, by virtue of s94 ERA. 'Dismissal' is defined in s95(1) ERA to include what is generally referred to as constructive dismissal. Constructive dismissal occurs where the employee terminates the contract under which he/she is employed (with or without notice) in circumstances in which he/she is entitled to terminate it by reason of the employer's conduct (s95(1)(c) ERA).

66. The test for whether an employee is entitled to terminate his contract of employment is a contractual one. The Tribunal requires to determine whether the employer has acted in a way amounting to a repudiatory breach of the contract, or shown an intention not to be bound by an essential term of the contract (***Western Excavating (ECC) Ltd v Sharp*** [1978] ICR 221). For this purpose, the essential terms of any contract of employment include the implied term that the employer will not, without reasonable and proper cause, act in such a way as is calculated or likely to destroy or seriously damage the mutual trust and confidence between the parties (***Malik v Bank of Credit and Commerce International Ltd*** [1998] AC 20).

67. Conduct calculated or likely to destroy mutual trust and confidence may be a single act. Alternatively, there may be a series of acts or omissions culminating in a 'last straw' (***Lewis v Motorworld Garages Ltd*** [1986] ICR 157).

68. As to what can constitute the last straw, the Court of Appeal in ***Omilaju v Waltham Forest London Borough Council*** [2005] IRLR 35 confirmed that the act or omission relied on need not be unreasonable or blameworthy, but it must in some way contribute to the breach of the implied obligation of trust and confidence. Necessarily, for there to be a last straw, there must have been earlier acts or omissions of sufficient significance that the addition of a last straw takes the employer's overall conduct across the threshold. An entirely innocuous act on the part of the employer cannot however be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of their trust and confidence in the employer.

69. In order for there to be a constructive dismissal, not only must there be a breach by the employer of an essential term such as the trust and confidence obligation; it is also necessary that the employee resigns in response to the employer's conduct (although that need not be the sole reason - see ***Nottinghamshire County Council v Meikle*** [2004] IRLR 703). The right to treat the contract as repudiated must also not have been lost by the employee affirming the contract prior to resigning.

70. The Court of Appeal in ***Kaur v Leeds Teaching Hospital NHS Trust*** [2018] IRLR 833 set out guidance on the questions it will normally be sufficient for Tribunals to ask in order to decide whether an employee has been constructively dismissed, namely:

(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?

(2) Has he or she affirmed the contract since that act?

(3) If not, was that act (or omission) by itself a repudiatory breach of contract?

(4) If not, was it nevertheless a part (applying the approach explained in Omilaju) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the Malik term?

(5) Did the employee resign in response (or partly in response) to that breach?

71. If an employee establishes that they have been constructively dismissed, the Tribunal must determine whether the dismissal was fair or unfair, applying the provisions of s98 ERA. It is for the employer to show the reason or principal reason for the dismissal, and that the reason shown is a potentially fair one within s98 ERA. If that is shown, it is then for the Tribunal to determine, the burden of proof at this point being neutral, whether in all the circumstances, having regard to the size and administrative resources of the employer, and in accordance with equity and the substantial merits of the case, the employer acted reasonably or unreasonably in treating the reason as a sufficient reason to dismiss the

employee (s98(4) ERA). In applying s98(4) ERA the Tribunal must not substitute its own view for the matter for that of the employer, but must apply an objective test of whether dismissal was in the circumstances within the range of reasonable responses open to a reasonable employer.

Discussion & Decision

Detriment – s44(1)(d) & (e) ERA

72. The Tribunal firstly considered whether there were circumstances of danger, which the claimants reasonably believed were serious and imminent.

73. The Tribunal accepted that the claimants had, and continue to have, concerns about the Covid-19 pandemic and the potential impact of it on their family members with asthma. This is entirely understandable.

74. The government guidance at the time centred around social distancing and handwashing. The respondent's workplace is large and well ventilated, with a handful of people working within it at the time. It was accordingly relatively easy to socially distance within it. Whilst the Tribunal accepted that, for certain operations, involving large pieces of timber, social distancing became more problematic, the respondent's risk assessment detailed how this could be addressed.

75. The Tribunal noted that, prior to 7 April 2020, the concerns raised by the claimants were solely related to their view that the business was not essential, so it should be closed and they should be furloughed. Prior 7 April 2020, they had not raised any concerns about health and safety in the workplace and, in particular the measures taken by the respondent to make the workplace Covid secure. They had however been informed by SH, in his email dated 6 April 2020, that 'new measures will be introduced on your return tomorrow to ensure that the social distancing requirements are met.' Neither claimant responded to this email or sought any further information on what those 'new measures' were or how these would ensure that the social distancing requirements would be met within the workplace. The Tribunal concluded that, if the claimants did have concerns at that stage that the workplace posed a serious and imminent danger, they would have asked for further detail in relation to what the new

measures were and how they would ensure that the social distancing requirements would be met. Instead, the only correspondence which followed, from each claimant, was to reconfirm the claimants' position that the workplace should close entirely and claimants should be furloughed. Neither commented on the new measures which SH indicated had been put in place, or requested further details in relation to these.

76. Similarly, when SH indicated to the claimants in his email of 4 May 2020 that he had *'risk assessed the workplace and our working practices in light of the government recommendations in relation to coronavirus to ensure that I am providing a safe environment for all of my employees'*, neither claimant asked for sight of the risk assessment or further detail in relation to it. They simply ignored the email. Whilst the Tribunal notes that the email was sent after the period in which the employees removed themselves from the workplace, the Tribunal find that if the claimants had concerns prior to 7 April 2020 that the workplace posed a serious and imminent danger, those concerns would still have been present on 4 May 2020 and the claimants would have requested to see the risk assessment or at least requested details of how any concerns which they had in relation to health and safety were being addressed. They did not do so. Neither claimant responded to that email.

77. Whilst the First Claimant did allude to health and safety concerns in his resignation, this was the first time he had done so and the particular concerns were not specified. He referred in his resignation to the *'exchange of emails between myself and the company'* in which he stated he had *'expressed [his] concerns of the safety in the workplace etc, during this period of the pandemic'*. In fact, he had not raised any such concerns in his emails with the respondent. The only concerns raised by him in those emails was that he felt the business should be closed and all employees furloughed.

78. Given these circumstances, the Tribunal do not find that the claimants believed there were circumstances of serious and imminent danger, within the workplace. Their concerns were that they were not being furloughed, when they felt they should have been.

79. Even if the claimants had held a belief that there were circumstances of serious and imminent danger within the workplace, the Tribunal would have concluded that such a belief was not objectively reasonable in the circumstances, taking into account the following:

a. What was known to the parties, and particularly the claimants, at the time. We have learnt much more about the virus since March/April 2020, but the Tribunal's focus is on that point in time. The guidance at that time was that Covid-19 was spread by close contact and the advice was to maintain two metres distance from others and to wash hands regularly.

b. The respondent's workplace was large and only 5 employees worked there. It was accordingly easy to work in a socially distanced manner. The main workstations were at least 12 metres apart.

c. The workplace was well ventilated, with numerous very large doors which remained open throughout the day.

d. The claimants were informed by SH on 6 April 2020 that new measures had been put in place to ensure social distancing in the workplace, but simply ignored that email and made no effort to enquire as to what those measures were or how they would ensure social distancing.

80. The Tribunal accordingly found that the claimants did not reasonably believe there were circumstances of serious and imminent danger. Given that finding, the claims under section 44 must fail. Whilst there was no requirement to address other elements of the relevant tests, the Tribunal have done so below, for completeness.

81. Could the claimants reasonably have been expected to avert the dangers? Having regard to all the circumstances, as the claimants knew them, the Tribunal concluded that the claimants could, reasonably, have been expected to avert any dangers, by abiding by the guidance at that time, namely by socially distancing within the large, well-ventilated workplace, by using additional personal protective equipment if they wished to do so and by regularly washing/sanitising their hands. If there were specific tasks which they felt removed their ability to socially distance or posed

other concerns, these were tasks they could reasonably have refused to carry out or raised specifically with their employer. They did not however do so. In light of these findings, the Tribunal concluded that section 44(1)(d) was not engaged.

82. Did they take appropriate steps to protect themselves or other persons from the danger? The claimants stated in evidence that their main concern was in respect of their vulnerable family members. The Tribunal accepted that, as a matter of principle, the claimants could take steps which were intended to protect their families from a serious and imminent danger, rather than themselves. No concerns were raised in writing with the respondent and the Tribunal was not satisfied that any concerns were raised orally. The Tribunal concluded that it was not appropriate for the claimants to absent themselves from work entirely from the workplace, given the ability to socially distance within the respondent's workplace and that they had not raised any specific complaint or concerns in relation to the health and safety measures adopted by the respondent. Section 44(1)(e) was accordingly not engaged.

83. Given these finding, the claims under section 44 do not succeed and are dismissed.

Constructive Unfair Dismissal Claim – s94 ERA

84. In considering the claimants' claim of constructive dismissal, the Tribunal considered the tests set out in ***Kaur v Leeds Teaching Hospital NHS Trust***. The Tribunal's conclusions in relation to each element are as follows:

a. **What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?** The Tribunal noted that the most recent, and only, action relied upon in relation to the constructive dismissal claim was the failure to pay the claimants in the period from 7 April to 1 May 2020 inclusive.

b. **Has he or she affirmed the contract since that act?** The claimants resigned on 22 & 23 May 2020, with effect from 29 May and 1 June 2020 respectively. They were aware, throughout the period from

7 April to 1 May 2020 that they were not being paid, as they did not receive any payment on a weekly basis from the respondent, throughout that period. They then each requested a period of two weeks' annual leave on 3 May 2020. Thereafter they accepted full pay for that period of leave at the end of each week of their annual leave period. Both then informed the respondent that they required to self-isolate for a period of 2 weeks following their annual leave. Both claimants received, and accepted, SSP in respect of that period of self-isolation. By their actions, in requesting annual leave, informing the respondent that they required to self-isolate and accepting payment from the respondent in respect of both periods of leave, the claimants affirmed their contracts of employment.

c. **If not, was that act (or omission) by itself a repudiatory breach of contract?** The Tribunal considered this point, notwithstanding that it was not necessary to do so, given the findings above. The Tribunal found that the failure to pay the claimants in the period from 7 April to 1 May 2020 was not a repudiatory breach of contract. The claimants did not attend work during that period. The claimants had no contractual or legal entitlement to payment for that period, given that they had not undertaken any of the duties they were employed to do for the respondent, or been willing to do so, in the period in question. In failing to pay the claimants for this period, the respondent was not in breach of any express term of the claimants' contracts or any implied duties, such as the implied duty of trust and confidence.

d. **If not, was it nevertheless a part (applying the approach explained in *Omilaju*) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the *Malik* term?** The claimants did not argue that there was a course of conduct which, viewed cumulatively, amounted to a repudiatory breach of the Malik term. They relied only on the respondent's failure to pay them for the period from 7 April to 1 May 2020 inclusive.

e. **Did the employee resign in response (or partly in response) to that breach?** As the Tribunal concluded there was no breach of

contract, repudiatory or otherwise, it was not necessary to determine this point.

85. Given these findings the Tribunal concluded that the claimants were not constructively dismissed by the respondent.

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Employment Judge: **M Sangster**
Date of Judgment: **24 August 2021**
15 **Date sent to parties:** **26 August 2021**