EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100590/2021

Final Hearing Held by Cloud Video Platform (CVP) on 9 and 10 August, 26, 27 and 28 October and members' meeting on 30 November 2021

Employment Judge: R Bradley
Tribunal Member: N Elliot
Tribunal Member: W Muir

Colin Hosie — **Claimant**
In person

Tayside Health Board — **Respondent**
Ms V Robertson
Solicitor

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Tribunal is: -

1. To declare that the claim of detriment in respect of the failure to pay salary for 23 October 2020 under section 44(1)(d) of the Employment Rights Act 1996 is well founded;
2. To award compensation to be paid by the respondent to the claimant in the sum of SEVENTY ONE POUNDS AND THIRTY FOUR PENCE (£71.34) in respect of that failure;
3. To declare that the claim of detriment in respect of the failure to pay salary for 24 October 2020 under section 44 of the Employment Rights Act 1996 is not well founded and is dismissed;
4. That the claimant was not unfairly dismissed.

REASONS

Introduction

1. In an ET1 presented on 8 February 2021 the claimant indicated that he made claims of "*discrimination, management negligence and financial detriment*" having indicated (on page 6 of the form) that he was making "*another type of claim which the employment tribunal can deal with*". None of the types of claim specified at 8.1 of the form were ticked. The claims were resisted. The background to them concerned certain steps that were taken by the respondent at one of its hospitals (where the claimant and his wife worked) after the Covid-19 virus was discovered in three of its wards.

2. On 7 June 2021 a Case Management Preliminary Hearing (CMPH) took place by telephone conference call. Various orders were made at it relating to the two days of a final hearing fixed for 9 and 10 August. The Note from the CMPH records that after discussion the claims were:-

    1. Detriment (namely withholding of pay on 23 and 24 October 2020 when the claimant said he was self-isolating) under section 44(1)(c), (d) and/or (e) of the Employment Rights Act 1996 ('ERA') for raising health and safety matters and/or not attending work on health and safety grounds;
    2. Automatically unfair dismissal under section 100 ERA, again for raising health and safety matters and/or not attending work on health and safety grounds;
    3. Unlawful deduction of wages under section 13 ERA (again, based on non-payment of wages for 23 and 24 October 2020);
    4. Unpaid holiday pay on termination of employment under Regulations 13 and 14 of the Working Time Regulations 1998, in respect of 7 October 2020 when the claimant says he was ill but which was treated as a holiday.

3. A joint indexed bundle and a joint supplementary bundle (of 236 and 23 pages respectively) were lodged in time for the start of the hearing on 9 August. To the latter was added (as **page 24**) a payslip dated 1 November 2020 issued by the respondent to the claimant. Most but not all material

within the bundles was spoken to by one or more witness. We say more on certain aspects of the point at paragraphs 6 and 7 below.

4. Part way through the hearing the parties advised that the claim for holiday pay had been resolved by agreement. We were not asked to make an order concerning it.

5. The claimant gave evidence as did his wife, Helen O'Sullivan. Their evidence occupied the two days fixed by the CMPH, 9 and 10 August. Evidence for the respondent was heard from Carolyn Thompson, Amanda Gillogly and Garry Stewart. That evidence and submissions occupied the three days in October. At our request, Ms Robertson provided her submission in writing after the conclusion of the final day of the hearing. The claimant then submitted a written submission.

6. At the time of his short oral submission, the claimant asked us to consider in particular three documents within the joint bundle. Two of them, "*Coronavirus (Covid-19) testing guidance for employers and third-party*" **(pages 73 to 87**) and "*email from Claimant to James Stewart and Others attaching Letter*" (**pages 132 to 136**) had not been spoken to by any witness. As a result, on 5 November the tribunal directed the clerk to write to parties in the following terms; "*The tribunal has considered its notes of the 5 days of evidence. It appears from that exercise that no witness spoke to either document 8 (**pages 73-87**) or document 25 (**pages 132-136**). The tribunal is conscious that in his submission the claimant asked that both documents be taken into account. In those circumstances the tribunal directs that the respondent should indicate whether it has any objection to the tribunal considering those pages in its deliberations and does so within 7 days of the date of this communication, with a copy to the claimant. If the claimant has any comment on the respondent's reply, he should do so within the 7 days following the reply*." On 11 November, the respondent objected to them being considered and set out its reasons. On 12 November the claimant replied, expressing surprise at the respondent's reasons. In his email the claimant said:-

    1. "*Ms Scott (HR Business Advisor) was listed as a witness in the TPH heard by Judge Campbell and I take it this was for policy matters.*

She continued to be named as a witness until after documents had been exchanged and then was removed, although I objected to her removal as she was best placed to answer policy matters, by the Respondent's representative anyway.

2. *Ms Scott's removal and instatement as Client Instructor means that she has had privy to all evidence heard and so therefore could not be reasonably expected to offer any new evidence without prejudice. I had no chance to raise policy matters with Ms Scott due to this.*
3. *Correspondence listed as document 18, was discussed with Ms O'Sullivan by both myself, Ms Robertson and Judge Bradley asked a question of her as well I believe, so therefore as document 8 was referred to by a member of the respondents' management team, it should be considered as such.*
4. *As Mr Findlay, highest ranked member of the Management Team, was approached to give evidence but would offer no help to the tribunal, it was not in my nor the Tribunals interest for me to pursue his attendance. However, the Respondents representative had ample time to call additional witnesses if required*."

7. While we appreciate that the claimant as a party litigant may not be familiar with either (i) the need to have documents spoken to by witnesses in order that they be considered as "*evidence*" or (ii) the need to ensure the attendance of witnesses to give relevant oral evidence, that state of affairs does not oblige us to overlook or circumvent them. It was open to the claimant to give evidence himself and/or ask questions of any witness about any material within either bundle. He did so in relation to many other documents. He did not say that he had overlooked the documents in question. We decided that given the respondent's objection and the usual rule we should leave them out of account. For completeness, document 18 (**pages 111 to 121**) (referred to by the claimant above) was spoken to by more than one witness and was considered.

8. There was an amount of discussion as to the meaning of the word "*asymptomatic*". Indeed, the joint bundle contained (**pages 219 to 227**) three texts to do with it albeit referred to only obliquely in cross-examination of Ms Thompson. At our request parties were agreed (by the afternoon of

28 October) that "*asymptomatic*" means, "*an individual who has a laboratory-confirmed positive test and who has no symptoms during the complete course of infection*."

The issues

9. In light of the claimant's submission, the thrust of the evidence and as a result of the resolution of the holiday pay claim, the issues for determination were narrower than the claims identified at the CMPH and became:-

    1. In circumstances of danger which the claimant reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert and in which he refused to return to his place of work, was he subjected to the detriment of having salary withheld for 23 October?
    2. In circumstances of danger which the claimant reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert and in which he refused to return to his place of work, was he subjected to the detriment of having salary withheld for 24 October?
    3. On the question of salary for either date and insofar as the claim under issues 1 or 2 did not succeed, did the respondent nonetheless withhold salary in contravention of section 13 of the Employment Rights Act 1996?
    4. Was the claimant unfairly dismissed because the reason (or principal reason) for the non-renewal of his fixed term contract was in circumstances of danger which he reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he refused to return to his place of work?

Findings in Fact

10. From the evidence and the Tribunal forms, we found the following facts admitted or proved.

11. The claimant is Colin Hosie.

12. The respondent is Tayside Health Board. It operates from at least four sites in Dundee. They are; Ninewells hospital; Dundee dental hospital; the Royal Victoria hospital; and Kings Cross hospital.

13. The episode which gives rise to the claims in the ET1 occurred at Ninewells between about 22 October and 15 December 2020. On the latter date, the claimant's contract of employment with the respondent ended.

14. In about June 2019 the claimant began work for the respondent on an agency basis. On Monday 18 May 2020 he was employed by the respondent on a fixed term contract of 6 months (**pages 99 and 101**). His employment was as a waste yard operative at Ninewells hospital. By that date the claimant knew that the contract was due to end on 17 November 2020. He was then and was not while employed by the respondent a member of a trade union.

15. At that time and since at least August 2016 the respondent had a fixed term contract policy (**pages 29-62**). It sets out that (paragraph 2) "*NHS Tayside is committed to using permanent contracts of employment as the norm, with fixed term contracts only being used where necessary and appropriate*." It provides that staff on fixed term contracts will have their position reviewed mid-term and thereafter at regular intervals as appropriate. It further provides that "*The manager must discuss the outcome of the review directly with the employee and confirm this outcome in writing*." (**page 35** paragraph 4.2 of the Policy). Further, it provides three options which may arise during the anticipated discussions. First, an extension to the contract, which process is detailed (at paragraph 4.3) and which prescribes the use of a model letter (Appendix 3); second, renewal resulting in a permanent contract of employment; and third, the running of the contract for its original duration. In the first option (renewal or extension of the contract) "*Notice of the renewal of the contract must be at least four weeks before the expiry of the contract*." (paragraph 4.3, on **page 36** of the bundle). The policy also provides (paragraph 4.5.2) for a right of appeal in the event of non-renewal (paragraph 4.5.3) and for the grant of access to redeployment vacancies in line with the respondent's Skills Register Protocol.

16. At the time of the claimant's contract, employees on fixed term contracts very often had them extended. Often, they were offered permanent contracts.

17. The claimant's role was principally in the removal of non-clinical waste. On occasion, he was required to remove clinical waste from a number of wards at Ninewells. That particular task involved him being in wards for a few minutes at a time. He did work on shifts. He was paid weekly.

18. The claimant reported to a supervisor. There were about 8 supervisors across various of the respondent's teams. The claimant's supervisor in turn reported to Garry Stewart, Portering team leader. Mr Stewart reported to Carolyn Thompson, Portering services manager. She reported to Louise Fraser, Soft Facilities manager.

19. Prior to about July 2020 the claimant's supervisor was Linnards Kapernikis. At about that time, Mr Kapernikis was promoted. From that time, the claimant's joint supervisors were Jim Taylor and Keiran Simpson.

20. The midpoint or midterm of the claimant's contract was 18 August 2020. The respondent did not carry out a review at that time as prescribed by paragraph 4.2 of the policy or at all.

21. Helen O'Sullivan is the claimant's wife. Ms O'Sullivan is employed by the respondent at Ninewells hospital. She works as a domestic. Her employment began in April 2020. She has experience of working as a health care worker and a nursing assistant in the Republic of Ireland. In her role, Ms O'Sullivan reported to Annmarie Hind, Domestic supervisor. In turn she reported to Mark Finlay Locality Domestic Services manager.

22. On 23 March 2020 the Prime Minister made a statement concerning coronavirus (COVID-19). In it he said that from that day people in the UK were only allowed to leave their homes for some very limited purposes. One of them was for travelling to and from work, but only where that was absolutely necessary and could not be done from home.

23. By about July 2020, the respondent had created "*a hospital within a hospital*". It involved the functions of triaging and testing for the virus. It

involved a number of intensive care unit wards which were specifically designated for patients with the virus.

24. In the period before and including October 2020 the respondent took steps to disseminate to its workforce advice on working in its hospitals with a view to preventing the spread of the virus. It did so by doing things such as publishing material (called "*Vital Signs*"). The material was shared with some of the workforce by email and by physical distribution at communal workplaces and break rooms. On occasion, it was not kept current. The claimant did not have an email account within the respondent's system. He did not have access to a computer within that system. He therefore did not receive information to do with the spread of the virus by email.

25. The respondent also used signage such as "*stand-up*" masts, posters and floor stickers. It shared information in team meetings. In that time the claimant asked, on three occasions, for risk assessments to be carried out. There is no documentation relating to any of those requests. To his knowledge, they were not done.

26. On or about 1 October 2020, NHS Scotland issued a six page leaflet headed Test and Protect (**pages 63 to 68**). It explains "*Test and Protect*" as being "*the next step in tackling coronavirus. It works by identifying who has the virus and who they have had close, recent contact with to break chains of infection and stop the spread*." It contains the following advice; "*If you develop symptoms, you should self-isolate immediately and stay home for 10 days. Others In your household should stay home for 14 days in case they also develop symptoms*"; "*NHS Scotland will ask you for help In contacting anyone you have had close, recent contact with. They will let those people know they may be at risk, request they do not leave home for 14 days and offer a test if appropriate*"; it explains that a close contact is "*Somebody who has been near someone with coronavirus and could have been infected. Close contacts may have been near the infected person at some point in the 48 hours before their symptoms appeared, or at any time since symptoms appeared*"; "*Someone from the NHS Scotland contact tracing team will get in touch*" if someone has "*had close contact with someone who has coronavirus*"; and "*If you do not have symptoms yourself and you are the only person who has been identified as a close contact of*

someone with coronavirus, then the other people in your household will not be asked to self-isolate unless they have symptoms."

27. Tuesday 20 October was the date being four weeks before the expiry of the claimant's contract. By that date, the respondent had not issued a notice of the renewal of the contract.

Thursday 22 October 2020

28. On Thursday 22 October 2020 both the claimant and his wife were due to be working at Ninewells. The claimant's shift required him to work between about 2.00pm and about 9.30pm that day. Ms O'Sullivan was due to start work at 4.00pm. She was due to be working on wards 1 to 6. Prior to leaving for work, they watched on television the daily update from the First Minister of Scotland. At that time the claimant and his wife understood the information from the Scottish Government to include the advice that if a person was called for a COVID-19 test they should; go home; stay at home; do not take public transport or a taxi; and anyone else at home with them should also stay at home and await the result of the test. The claimant was by then 56 years of age.

29. The claimant left for work at about 12.45pm that day. A little later and while Ms O'Sullivan was still at home she missed a telephone call. On returning the call to her supervisor's office she was invited to come in earlier than her shift start time to Ninewells for a COVID-19 test. She understood that the reason was that there had been an outbreak of the virus in ward 2. She duly attended and was tested. At or about the time of the call or the test she was told there was nothing to worry about. She believed that she had been in contact with a person who had tested positive, that person being a patient in ward 2. She was told to work her shift that day as normal, which she did.

30. At about 8.20pm Ms O'Sullivan met the claimant at the waste yard where he was working when she finished her shift. She told him that she had had a COVID-19 test before she started work that day and that she had worked her shift. She told him that she did not yet know the result. The claimant asked her what she meant. She told him that; there had been an outbreak of the virus on ward 2; as a result she had to come in to the hospital 20 minutes prior to her shift starting and that she was then tested. The claimant

told her that; they were not getting the bus home; they would have to walk and get wet (it was raining); and that they needed to do so because of the advice from the Scottish Government. The claimant discussed the situation with three of his work colleagues that evening. They said that he should go home and to let his supervisor, Jim Taylor, know. The claimant sent a text to Mr Taylor that evening. In it he told Mr Taylor that; Ms O'Sullivan had been called in for a test; and they both would require to self-isolate until they knew the result. Mr Taylor replied shortly thereafter. He said that he would let Mr Stewart know. Copies of the texts were not produced. Ms O'Sullivan was upset at what occurred. She was concerned that if she tested positive then in all likelihood the claimant would have the virus also, as would her work colleagues. Ms O'Sullivan understood that there were three patients on ward 2 at the time. She believed that everyone who worked on that ward was therefore at risk. She worked within 1m of all three patients. The claimant was of the view that his wife's test was mandatory, in that his wife was required (as opposed to being asked) to take it prior to her shift. He believed that she was required to take the test because she was deemed to be at risk by virtue of having worked on ward 2. There was a danger that Ms O'Sullivan had the virus at the time. There was also a danger that the claimant had it. There was thus a danger that it could be transmitted to others by him, including to his work colleagues.

31. An edition of the Dundee Express newspaper on 22 October carried a story which appeared to be based on information issued by the Press Association at about 1.27pm that day (**pages 127 and 128**). The story said that 3 non-coronavirus wards at Ninewells had been closed to visitors and new admissions. It noted that the respondent; was investigating a small number of cases in three wards, including ward 2; had offered tests to patients in the wards; and that it tested asymptomatic workers in line with Government advice. It is not clear if the claimant or his wife saw the story at the time.

32. The claimant had access to The Scottish Government's Test and Protect leaflet from about July 2020 (**pages 63 to 68**). The then current copy had in part informed his decision that he should not attend work on 23 October.

Friday 23 October

33. On the morning of 23 October both the claimant and his wife were concerned as they awaited the result of her test. The claimant telephoned Mr Taylor between about 9.00 and 10.00am. Mr Taylor told the claimant that he would speak to Mr Stewart and get back to him. Just after 10.00am Mr Taylor called back. In that call he said that; he had spoken to Mr Stewart; and the claimant should stay away until he knew the result of his wife's test. This was what the claimant expected based on his knowledge of Mr Stewart's advice to others in similar circumstances. Ms O'Sullivan then telephoned to her workplace. She left a message for someone to call her back. Meanwhile, Mr Stewart spoke with Mr Finlay, Locality Domestic Services manager. Mr Finlay told Mr Stewart that domestics (including Ms O'Sullivan) were being tested so that they could come to work, and that no symptoms were being shown by them. Mr Stewart then spoke with Annmarie Hind, the claimant's supervisor. She was in the process of telephoning Ms O'Sullivan.

34. Ms Hind told Ms O'Sullivan that she was asymptomatic and could work. The claimant was party to the telephone conversation. He was horrified. He interjected and spoke with Ms Hinds. He told her that being asymptomatic was the worst condition to be in especially in a clinical setting. This was because in his view it meant that Ms O'Sullivan had the infection but did not know she had it because she was not displaying symptoms. Mr Stewart became involved in the call at that point. He told the claimant that he would need to find out more information and get back to him.

35. Mr Stewart then spoke with a member of the respondent's Infection Control team (Clare). He explained that as far as he knew Ms O'Sullivan was asymptomatic and had been tested. He asked whether the claimant should be attending work. Clare advised Mr Stewart that he should, and that there was no need for the claimant to be self-isolating while awaiting his wife's result. Mr Stewart then telephoned Ronnie Halliburton a trade union representative for Unite. Mr Stewart explained to Mr Halliburton the advice he had received from Infection Control. Mr Halliburton concurred with their view. Mr Stewart contacted Infection Control because they were the main source of advice within the respondent on matters to do with the virus.

36. At about 12.30 or 12.45pm Mr Stewart called the claimant. He spoke both with the claimant and Ms O'Sullivan on "*loudspeaker*". Mr Stewart explained what he had found out from Infection Control and from the trade union representative. The claimant did not know why the trade union had been involved. Mr Stewart explained that both Infection Control and Mr Halliburton agreed that; the testing was precautionary; no-one was required to self-isolate; and people could work as normal. The claimant told him that he did not think that a "*precautionary*" test existed. He had heard of tests which were symptomatic, asymptomatic and routine. Mr Stewart made hand notes at the time of that conversation **(page 105**). They include a note of the claimant's email address. In the call, the claimant asked Mr Stewart to confirm the position by email. It was for that reason that the address was noted. Mr Stewart did not email the claimant as he had agreed to do. The claimant's opinion was that Mr Stewart's position and advice to him was based on inaccurate information which was contrary to Scottish Government's advice.

37. At about 2.00pm Mr Finlay telephoned Ms O'Sullivan. The claimant heard this call also on "*loudspeaker*". Mr Finlay said that; Ms O'Sullivan had been told that; the test was precautionary; there was nothing to worry about; it was done because of an outbreak; and he had to "*fight tooth and nail*" to have "*his domestics*" included in the testing. Given her confirmation that she was unwilling to attend work that day, he told her that; her absence would be treated as unauthorised unpaid leave; and there would be an investigation and a disciplinary process which could lead to her dismissal.

38. At about 2.26pm on 23 October the claimant emailed the First Minister (**page 107**). He blind copied it to Mr Stewart. After recounting his version of the events he said, "*Can you please clarify what is a precautionary test and what is the right thing, as it is your governments advice we believe we are following*." He copied the email to tay.feedback@nhs.scot.

39. Neither the claimant nor Mr O'Sullivan attended work on 23 October.

40. At about 3.04pm that day Mr Stewart forwarded the claimant's email to Ms Thomson (**page 123**). He summarised his version of what had occurred since the testing of Ms O'Sullivan. Within it he advised her that; he initially

told the claimant that he should isolate until the results were returned; the domestics (meaning Ms Hind) contacted Ms O'Sullivan to make her aware of the fact that the test was precautionary; and told the claimant that his leave would be treated as unauthorised but had not mentioned an investigatory, contrasting Mr Finlay's advice to Ms O'Sullivan. He appeared to be asking for advice on the processing of the claimant's "*situation*". Within 10 minutes, (at 3.14pm) Ms Thompson replied (**page 123**) to say, *"We need to know what Colin's wife was told when she was tested and ensure that it was clear to her that this was precautionary and that she should continue to work, otherwise, if it wasn't clear then I can understand why they thought they had to stay at home until the results came in*." It would appear that Mr Stewart replied to her on Monday 26 October (see paragraph 45 below).

41. Very shortly thereafter (at 3.20pm) the claimant emailed Mr Stewart. The incomplete bundle copy (**page 102**) says *"tried to phone on mobile, direct line and through switchboard but to no avail. Just to let you k...*". The remaining part of the message probably said that; Ms O'Sullivan's test was negative; and the claimant was returning to work the next day, Saturday 24 October. At 3.44pm that day, Mr Stewart replied (**page 102**). In it he recognised that it was good and a relief to both the claimant and his wife that the test was negative. He said he would catch up with the claimant on Monday (26) when he was back on shift. By the time of this email Mr Stewart had organised for "*Resilience*" to be in place to cover the claimant's shift on Saturday 24. Keiran Simpson was asked to cover that shift, which he did. Mr Stewart did not cancel that cover in the afternoon of 23 October when he learned that the claimant said he would work his shift on Saturday 24.

42. On 23 October Mr Finlay wrote by letter to Ms O'Sullivan (**page 111**). He referred to the telephone conversation which he noted had been at about 2.00pm. It confirmed the content of the discussion including reference to disciplinary action. It noted that she was not attending for work that night.

Saturday 24 October

43. At about 1.30pm or 2.00pm on Saturday 24 October the claimant arrived at work for his shift. On arrival he learned that Keiran Simpson was rostered to do it. In the course of their discussion the claimant told Mr Simpson that

in light of him telling Mr Stewart about his wife's negative result, Mr Stewart had had plenty of time to tell Mr Simpson that he could stand down. It became clear to the claimant that Mr Simpson was staying to work the shift. The claimant said to Mr Simpson that he was not staying because he was not insured to work the shift in those circumstances. That being so, he decided that he was leaving. He therefore returned home.

Monday 26 October

44. On Monday 26 October Mr Stewart spoke with Mr Simpson. Mr Simpson explained his version of his exchanges with the claimant on Saturday. The explanation included his recollection that the claimant had said that he was not working as he was not insured. Mr Stewart's expectation was that even where the two members of staff had turned up to cover the same shift, both should have worked, one covering the shift work, the other doing a "*clean up*", attending to things such as confidential waste bags and broken equipment. He believed that the claimant should have known that.

45. At about 1.15pm on Monday 26 October Mr Stewart replied to Ms Thomson's email of Friday 23 (**page 122**). In it he said he was seeing the claimant that day. He sought advice on how the claimant's shifts on 23 and 24 should be processed or treated. He said, "*I feel this should be processed as unauthorised for the Saturday, but what do you think about the Friday*?" At about 1.38pm Ms Thomson replied (**page 122**) saying, "*Definitely unauthorised for the Saturday. I think it needs to be the same for the Friday, as he took the decision to not come in and didn't seek the correct advice on the process he should have followed. Instead he contacted Jim to advise he wouldn't be in, but it would seem his wife was aware of the protocol around this, therefore, I am authorising* [that] *he is put through as unauthorised leave for both days*."

46. On 26 October Mr Stewart made a handwritten note of his recollection of matters to do with the claimant over the two days 23 and 24 (**pages 103 and 104**).

47. At 4.25pm on 26 October a member of the respondent's complaints and feedback team replied (**page 109**) to say that the claimant's email of 23 October "*would not sit under the remit of the complaints and feedback*

team, however, I have sent this onto the HR Department for them to review, and have asked them to respond to you directly."

27 and 28 October

48. On Tuesday 27 October the claimant started work at about 2.00pm. Mr Stewart met him in the waste yard. They went to the site office. Mr Stewart asked the claimant to relay to him what had happened on Saturday 24. After the claimant recounted his version Mr Stewart advised him that it did not accord with Mr Simpson's version. Mr Stewart told the claimant that his absence on Friday 23 would not be treated as unauthorised but Saturday would be unauthorised and he would not be disciplined. Mr Stewart did not say to the claimant that he had had advice from Ms Thompson on what should happen about those two days. The claimant told Mr Stewart that he preferred to be taken through the formal disciplinary process (as the respondent intended to do with his wife) because it allowed him a right of appeal against any sanction. Mr Stewart did not acknowledge that request. In the course of that discussion and to do with his fixed term contract, the claimant said to Mr Stewart, "*At this moment in time and the mind I am in, I don't possibly think I would be in a position to accept a new contract if offered*" or words to that effect. Mr Stewart said that he would put any proposed extension on hold and they would discuss it later. The claimant was not formally disciplined. Mr Stewart did not make a note of his meeting with the claimant on 27.

49. Later in the afternoon of 27 October, the claimant met Amanda Gillogly by chance. Ms Gillogly's shift had finished and she was on her way home. She knew that the claimant was upset. She said "*I hope you're ok, try to be more positive, things work out for a reason. You're a really good worker so think about it*" or words to that effect. He replied, "*I can't work in this department, I no longer trust NHS Tayside. I'm not coming back, I'm scared coming into the hospital*" or words to that effect. He suggested that he was going back to work for Amazon. He also suggested in that conversation that he was confused and conflicted. Ms Gillogly's opinion at the time was that the claimant was upset, anxious and frustrated. Her opinion of him was that he was professional and a hard worker. She did not want him to leave the respondent's employment. She tried to persuade him that he should stay.

50. At 10.30pm on 27 October the claimant emailed Mr Stewart (**page 126**). Notwithstanding the time he said, "*Good Morning Garry, Having thought about what you said and asked about returning home from on Saturday, I am happy to acknowledge that I did not fight too hard to stay at work when given the circumstances I met. As there was cover already In place it may have been more prudent of me to ask for an emergency leave day from Kieran [Simpson] at the time, but my head was all over the place as you are fully aware. I am happy to accept whatever occurs from the event and wish no more harm on anyone or morale in the section (Covid has caused enough of that as it is). So whatever you decide is ok with me, and whatever Kieran did say and I don't need to know, Is ok with me too*." The email made no mention of how his absence on Friday 23 had been treated. Neither did it refer to his conversation with Ms Gillogly, or of any suggestion that he was leaving or intended to.

51. On or about 28 October, Ms Gillogly spoke with Mr Stewart. She relayed her impression of her meeting with the claimant the previous day.

Early November

52. The respondent issued to the claimant a wage slip for period ended Sunday 1 November 2020 (**page 24** of the supplementary bundle). It showed a deduction of £142.68 narrated as being "*unauthorised unpaid absence*". That amount was deducted to account for the two days being 23 and 24 October. He received the payslip on 5 November. He was angry because the deduction contradicted what he understood from his conversation with Mr Stewart. One day's pay was agreed as being £71.34.

53. On 5 November a team secretary for HR business Management – medicine emailed the claimant about his email of 23 October (**page 127**). It suggested three ways in which the issues he raised could be looked at. Two of them related to progressing matters for his wife. The third suggested that the respondent could send the claimant's email to "*Test and Trace*" for them to send him the correct information. The claimant replied that day (**page 128**). He agreed to all three albeit recognising the need for his wife's assent. The next day the team secretary agreed that she would send the email to Test

and Trace (**page 128**). By February 2021 the claimant was still awaiting the information.

54. On 6 November the claimant emailed Mr Stewart (**page 130**) to advise that he had been certified as unfit for work until 19 November. His general practitioner certified this on 6 November (**page 129**). The stated reason was "*stress at work*." Mr Stewart wrote by post to the claimant with a questionnaire that day (**page 131**).

55. On Wednesday 11 November, the claimant came in to work to check his shift work pattern. It is ordinarily published about four weeks in advance.

56. On 12 November the claimant emailed Mr Stewart (**page 137**). In it he said, "*I have today received the work profile questionnaire, your ref GS/CC/Work Pressure Questionnaire, dated 06th November 2020. Although I have no problem In filling it in to help NHS Tayside going forward, I fail to see that there is enough time left of my 6 month fixed term contract to arrange a meeting in line with NHS Tayside Promoting Attendance at Work Policy. As there has been no communication regarding any renewal of contract, or any other offer, I assume that I will just become unemployed as of 18th November 2020 and have all intentions of claiming Universal Credit from that date. That is a fair assumption to make and looking at the rosters for the weeks ahead I think that's a fair assumption. Therefore please let me know if you wish this to be completed and returned.*" The claimant made the assumption about becoming unemployed for the reasons set out in his email.

57. On Friday 13 November 2020 the claimant signed a completed version of the questionnaire. Amongst other things the claimant said in it in answer to specific questions that; it was formerly the case that he could speak to his manager about things that upset or annoyed him at work but "*not so much now*"; he felt there was anger or friction between colleagues, "*not so much before the rise in cases of COVID*"; and in answer to the question "*Are there any other pressures at work or at home which have contributed to how you are feeling*?" the claimant answered, "*Yes, my wife has an impending disciplinary meeting and I have 2 unauthorised absences and now a period of sickness which are intrinsically linked*." As a result of what was said at

the meeting with Mr Stewart on 27 October, the claimant's view was that he could no longer trust him.

58. Also on Friday 13 November, Mr Stewart wrote to the claimant (**page 138**). It is not clear why Mr Stewart communicated by post in contrast with the claimant's emails to him and when by then he had information from the claimant which suggested that posted mail took six days to reach him. Mr Stewart said, "*Thank you for your email dated 12 November 2020. In relation to your Fixed Term-contract, there was a discussion with yourself about the extension of your fixed term contract within the Wasteyard of which you were informed that your contract was going to be extended, of which you stated that "I have not confirmed that I will be extending my contract, that we cannot just assume that the offer will be accepted". There was then an incident which occurred and you stated to both myself, and then at a later date, to Amanda Gillogly, Portering Team Lead, that you will not be returning once your fixed term elapsed on 17th November 2020. I was looking to discuss this matter with you, but you consequently then went off sick and this conversation could not be had. With regards to the rostering, we have to devise rota's for the staff to have enough notice We placed provisional cover to ensure that duties were not put to a detriment. Due to you indicating that you were not extending your contract, we have accepted your verbal resignation and your contract will be terminated as of 17th November 2020. I would like to thank you for all your support through your time at NHS Tayside and wish you the best in your future*." The claimant received the letter on 17 November.

59. The claimant took advice from the Armed Forces Advice Project. He was advised; to look at the legislation on fixed term contracts; that if it could be deemed that he had resigned he would lose access to State benefits for 26 weeks; and if he had not been given any notice period the respondent was obliged to extend his contract. On Monday 16 November he emailed Mr Stewart (**page 148** and repeated at **pages 150 and 151**). In it he said, "*As I have not received any notice period regarding a contract, nor have I issued any, I take it that under employment law for fixed—term contract's that my contract has been extended to a as yet undetermined date. As I don't see any reason medically to seek an extension to my medical certificate beyond the19/11/2020, I will therefore be available for work from*

20/11/2020. If you could let me know before then when you require me to report for duty I would be grateful." By the time of this email the claimant had not received the letter of 13 November. Within 40 minutes (at 12.03pm), Mr Stewart had forwarded it to Ms Thompson for clarity on the situation (**page 148**). Ms Thompson advised him to seek advice from HR. Very shortly thereafter, (at 12.18pm) Mr Stewart forwarded the claimant's email to three colleagues, including Imogen Scott, HR Business Adviser at Ninewells **(page 150**). In his email Mr Stewart said, "*Can you advise on the following, with regards to one of the colleagues within the portering department. Mr Hosie was on a fixed term contract of which expires on 17th November 2020, I had a discussion with Colin initially to state that his contract was to [be] extended, but his response was "we cannot just presume that I would be accepting this". Through that discussion, he did not advise whether he was going to accept. There was an incident that occurred within the hospital, which affected his wife. On 2 occasions, one to myself and one to Amanda Gillogly, he stated that he would not be returning once his fixed term elapsed on the 17th November 2020.With that information, I devised the attached letter and posted out, informing him that his contract will not be extended and that this will be terminated. Mr Hosie has then subsequently sent the email below. Can I be provided with an urgent response on this matter*." Later on 16 November Mr Stewart received a call from an HR Business Adviser colleague, Jennifer McCabe. He was not able to recall what was discussed with her.

November 17 to 27

60. Ms Thompson took the decision to contact the claimant directly herself. On Tuesday 17 November at 2.49pm Ms Thompson emailed the claimant, copied to Mr Stewart (**page 153**). In it she said, "*Thank you for returning my call today. As discussed, your temporary contract will be extended by 4 weeks with the last date of your contract now being 15 December 2020. I also advised you that I was therefore giving you 4 weeks' notice that your contract will terminate on this date. By way of this email, I will ask that Garry arrange for you to be contacted re your roster for your return to work after your period of absence. I will speak with you next week when you are on duty. I hope you are feeling better and looking forward to your return*." Prior to sending the email, Ms Thompson spoke with Mr Stewart. They discussed

the claimant's answers to the questionnaire. It is not clear if that discussion involved express reference to either Mr Stewart's letter of 13 November or the claimant's email of 16. There was no consideration of offering the claimant a permanent contract. The claimant was not put on the Skills Register. On Saturday 21 November the claimant returned to work. He took annual leave on 25 and 26. On 27 November the claimant met with Mr Stewart and Ms Thompson. The claimant and Mr Stewart both signed a completed pro forma return to work discussion document that day (**pages 155 and 156**). Amongst other things it recorded that; the claimant sometimes felt unsafe but was happy to carry out his duties; and he was fine to be onsite and carry out his duties but felt unsafe onsite and was happy to be finishing. **Page 157** is an "*RTW Managers checklist*". Mr Stewart completed it. It records that the claimant did not want a copy of what is now pages **155 and 156**.

December 4 to 15

61. On or about 4 December the claimant wrote an undated letter to Ms Thompson (**pages 162 and 163**). It was headed, "*Official complaint as to misrepresentation and duty of care re: Garry Stewart and to a lesser extent but implicated in writing Amanda Gillogly*." It makes three numbered complaints. First, it challenged the assertion that he had resigned, either verbally or in writing. Second, it asserted that it was important chronologically to record that; the first person to mention the extension of his fixed term contract was himself on 27 October; his letter repeated what was said by him that day, as noted above; and his contract would be put on hold pending a later discussion. Third, and while referencing two conversations with Ms Gillogly asserted that in neither was it assumed that a contract renewal would be offered, and complained that "*trigger points*" for mental health issues were missed. Also on or about 4 December the claimant wrote an undated letter with no particular addressee (**pages 160 and 161**). It was headed, "*Official complaint against Portering Services Management Team*". It began, *"Initially I wish to make a complaint of discrimination based on the following facts which lead me to believe I am being discriminated against unfairly*." In summary, the claimant's complaint was that he was "*penalised*" by having absences on 23 and 24 October treated as unauthorised (and unpaid) while others who travelled abroad and

were required to quarantine on their return had that time treated as special leave. The letter does not clarify which protected characteristic (for a discrimination claim) is relied on. By 11 December the claimant emailed Ms Thompson to express his concern that his two complaints were being treated as one and as a result intended to involve ACAS and the Health & Safety Executive (**page 166**). On 14 December Louise Fraser (Soft Facilities Manager) emailed the claimant to say that his concerns would be fully investigated (**page 172**). By letter dated 15 December the head of Soft Facilities, Billy Alexander, acknowledged one of the claimant's letters as raising a grievance at stage 1 and advised him that he had appointed Brian Moore to arrange a hearing (**page 174**). The claimant's effective date of termination was 15 December 2020.

62. In the period between 4 November and 10 December the claimant applied for seven posts. Of them, four were with the respondent. The claimant was not successful in any of them.

January and February 2021

63. On 25 January 2021 the claimant attended a meeting with Mr Moore. Present at it also were Ms O'Sullivan and Imogen Scott. A typed note of the meeting was produced (**pages 190 to 193**). It bears to record the claimant saying that; on 23 October neither he nor his wife had symptoms of COVID-19; the public broadcast at the time said "*if you are called for a test you should not leave the house for any reason*"; he was told by Mr Stewart that he would be paid for Friday 23 but not Saturday 24 October; with his wife *"in the state she was in*" he took the decision to take 24 off; in hindsight he should have asked for a day's leave for that day; he believed that the respondent used his COVID-related absences to "*cover*" the termination of his employment; he did not take a copy of the questionnaire when offered it at the meeting in November; and in answer to the question, what would be a satisfactory resolution? said that he hoped for transparency and policy for all to see, payment of the money due to him and his job back "*but if untenable*." At the end of the meeting, Mr Moore advised that he would need to see others as part of the process. In an email dated 5 February to Mr Moore (**page 195**) the claimant said, "*Thank you for the minutes of our meeting of 25/01/2021 which I have received today, having had a quick*

glance, there are either many discrepancies or have been copied shorthand as important details have been either left out or condensed. Once I have read through again I will return my comments to you but for example, the 2nd question from IS states "please could you explain the process you followed that resulted in you taking a day off on 23 October 2020 to self-isolate and clarify if your wife was symptomatic at the time." In the minutes my answer does not contain what I said and may actually be as if I did not know what process I followed." It is not clear if the claimant replied later about the notes.

64. On 2 February and following a meeting on 26 January the respondent wrote to Ms O'Sullivan. In turn that meeting followed a meeting on 30 November convened under the respondent's Conduct policy. The letter of 2 February recorded the agreement that no further action would be taken as a result of Ms O'Sullivan's absence from work on 23 October 2020.

65. On 8 February 2021 the claimant presented the ET1 in this claim. On 22 February Mr Moore emailed the claimant (**page 197**) saying, "*the notes are only a summary of the discussion on 25/1/21 and not a verbatim record. However if there are any details that you feel need to be clarified then please feel to send me a note of these and I can ensure these are noted accordingly*."

March 2021

66. On 11 March Mr Stewart signed updated the notes from a meeting he had had with Mr Moore on 8 March (**pages 214 to 216**). The meeting was in connection with the claimant's grievances. The updated notes record that in relation to 23 October; he spoke to "*the domestics*" who advised that they (the claimant and his wife) should be coming to work because it was asymptomatic testing; the claimant was "*just stating*" what he had seen in TV adverts because his wife was getting tested, and talked about government guidance, whereas the advice he provided was from the respondent's infection control team; in answer to a question about payment for 23 (but not 24) October, his recollection was there was nothing about him getting paid; he could not recall the date of his meeting with the claimant after his return to work. On the issue of his contract; in answer to a question

about any specific discussion with the claimant about it, said that the only process where he had one was in the waste yard where the claimant said "*who says I'm going to accept an extension*?"; that conversation was not documented; he sent the letter on 13 November in relation to the claimant's email dated 12 November; the claimant never said he was resigning but the way he came across indicated he would "*never*" work with the respondent or in a hospital again; and he had heard the claimant had applied for some posts but was unsure.

67. On 18 March Ms Thompson signed updated the notes from a meeting she had had with Mr Moore on 1 March (**pages 205 to 208**). The meeting was in connection with the claimant's grievances. The updated notes record that she; was involved in the decision-making regarding the claimant's absence on 23 October; took the decision that it should be recorded as unauthorised; noted that Mr Stewart had initially told the claimant that he should isolate but that Mr Finlay said he should not. In relation to the question of his resignation she said; she understood that the claimant had been offered a three month extension to his contract but that he had said to Mr Stewart that he didn't know if he would accept it; she understood that the claimant had told Ms Gillogly that he was going to return to work at Amazon and didn't trust NHS Tayside; the respondent's fixed term policy was not followed; he had not been put on the respondent's skills register because he wanted to resign; his role was still available if he wanted it; he had not resigned in writing which should have been sought from him; at no point did the claimant say he wanted to stay, he felt unsafe and was glad to be finishing and wanted to leave, a point which she repeated; confirmed that he was issued with notice of four weeks which should have been dealt with sooner; porter jobs were advertised and closed in October 2020; held her hands up in that she should have met with him and sought a letter of resignation and may have understood the circumstances better.

68. Sometime after the events of October, the claimant saw the document (**pages 91 to 93**) indexed as being *"Covid-19 testing for key worker and their household contact*." Its first paragraph says, "*If you have been referred for testing then you and your entire household should be self-isolating. Do not come to work if you or anyone in your household has symptoms*

suggestive of possible covid-19 no matter how mild your symptoms. You may return to work if/when you receive a negative result but not before."

69. The respondent did not review the claimant's contract in accordance with its fixed term policy. In particular it did not carry out a mid-term review. Nor did it either discuss or decide on any of the three options open to it on such a review. The respondent did not offer a three month extension to his contract. It did not provide the claimant with access to redeployment vacancies in line with its Skills Register Protocol. The extension of four weeks was not conform to paragraph 4.3 of the policy.

70. In the period between 15 December 2020 and 5 February 2021 the claimant made a number of applications for employment. None of them was successful. By 17 February he had received £392.38 from an agency for work done via it. By August 2021 he was in receipt of Employment Support Allowance at the rate of £74.70 per week.

Comment on the evidence

71. The claimant gave the impression of being genuinely and closely interested in and concerned about both adhering to guidance issued by the Scottish Government and the potential impact for him, his wife and family and his work colleagues of contracting Covid-19. This is evidenced (for example) by his email to the First Minister on 23 October, within two hours of his last conversation that day with Mr Stewart. For the most part, his evidence was credible and reliable. His recollection of detail without recourse to contemporaneous material was good. That said, he appeared a little equivocal on the question of his willingness to remain in the respondent's employment beyond the expiry of his fixed term.

72. Helen O'Sullivan appeared to have been as concerned as her husband was about the impact of Covid-19. Her answers to questions were clear and direct.

73. Carolyn Thompson's job role was three tiers above that of the claimant. It would be unrealistic to expect that she had would have had day to day knowledge of his work or the issues affecting it and she did not. To the extent relevant, her evidence was credible and reliable.

74. Amanda Gillogly is a peer of Garry Stewart. She was not directly involved in managing the claimant. Her evidence was relevant in relation to one aspect of the case (her exchanges with him about leaving).

75. Garry Stewart was an unimpressive witness. He could not recall a significant amount of relatively basic information. For example he could not recall; how he initially found out about the claimant's intended absence on 23 October; whether Mr Taylor (the claimant's supervisor) initially spoke with the claimant early in the morning of 23 October; when he wrote the record at pages **103 to 106**; why he had noted the claimant's email address (on **page 105**); when or from whom he learned of the claimant's attendance at work on 24 October; and the date of the meeting with the claimant after his return to work. Perhaps more significantly he could not recall the detail of the conversation with the claimant on 27 October. There was a dispute as to which of them began the conversation about extending the claimant's contract. Given Mr Stewart's inability to recall, we preferred the claimant's evidence on the point. Nor could he recall conversations with Ms Gillogly about the claimant. He could not recall if he had had any conversations with Ms Thompson about renewing the claimant's fixed term contract. That all said, he accepted that he could have handled the episode with the claimant better than he did. He accepted that he did not follow the respondent's Fixed Term Policy in that he did not write to him at any stage about either its renewal or expiry. He did not explain why, when the claimant wrote by email to him, he did not reply by email. Instead, he wrote by letter at a time when it was well known that post was taking longer than usual. He accepted that at no stage did the claimant say (even verbally) that he was resigning. He also accepted that the wording of his letter "*accepting*" the claimant's resignation was "*maybe incorrect*." In our view it was most obviously incorrect and hasty.

Submissions

76. It was agreed that as the respondent was legally represented, its submission would come first. While both sides made oral submissions, the claimant was left with little time at the end of the final day in which to make his. It was obvious that Ms Robertson's oral submission was based on a written one which she spoke to. So as to ensure fairness, we asked (and

parties agreed) that the respondent lodge and intimate the written version of its submission to which the claimant could then reply in writing. That exercise duly took place. This is a summary of both. No disservice is meant to either party in doing so.

77. The respondent's submission followed a self-evident structure using headings. It suggests 18 findings in fact. On our findings we do not agree that; the claimant's contract was extended in accordance with the respondent's Policy (finding 1); Ms O'Sullivan was advised by telephone on two separate occasions that she did not require to self-isolate (finding 2); Mr Stewart informed the claimant in the morning of 23 October about testing being precautionary (finding 5, contrast the timing with finding 6); the claimant and Mr Stewart discussed matters on 26 October (finding 12); the respondent's decision that absences be treated as unauthorised was reasonable (finding 13); or that Ms Gillogly's evidence was as set out in the first two sentences of paragraph 25. The proposed findings 15 to 18 quite properly reflect how opaque was the question of whether the claimant had been offered an extension to his contract. On the claim of unfair dismissal Ms Robertson said; by reference to the decision of the EAT in ***Balfour Kilpatrick Ltd v Acheson & ors*** (2003) IRLR 683, under section 100(1)(c) of the Employment Rights Act 1996 a claimant must establish three requirements being:- (1) it was not reasonably practicable for the employee to raise the health and safety matters through the safety representative or safety committee, (2) the employee must have brought to the employer's attention by reasonable means the circumstances that he reasonably believes are harmful or potentially harmful to health or safety, and (3) the reason, or principal reason, for the dismissal must be the fact that the employee was exercising his rights; and in ***Oudahar v Esporta Group Ltd*** UKEAT/0566/10/DA the EAT applied a two-stage test when considering section 100(1)(e) of ERA 1996 being; (1) whether there were circumstances of danger which the employee reasonably believed to be serious and imminent, and (2) whether he took appropriate steps to protect himself or other persons from danger. If those questions are answered appropriately the next question was (3) whether the sole or principal reason for the dismissal was that the employee proposed to take such steps; and if so, the dismissal was to be regarded as unfair. On the claim of detriment, she

referred to the decision of the EAT in ***Harvest Press Ltd v McCaffrey*** EAT/488/99 noting that a "*sensible employer*" faced with concerns would investigate these to "*form a view*" on whether the employee's concerns about his safety are genuine, and to act accordingly. Her submission was that after Mr Stewart's call the claimant could no longer have a reasonable belief in harm.

78. In reply the claimant said (on the claim of unfair dismissal); the respondent's fixed term policy was in no way satisfied as stated as per its paragraphs 4.2, 4.3, 4.5.1 and 4.5.2 was withheld. 4.5.3 was not adhered to at all; and "*the only reason for non-renewal of contract, avoidance of disciplinary policy, and termination was for fear of Health & Safety issues being raised within the NHS that they did not wish to address as they cared more for having people in work than safeguarding staff. I believe either NHS Tayside or a representative thereof, took these decisions in the hope that the matter would be dropped and ignored. Therefore I put to you that all criteria under Section 100(e) have been met and respectfully ask that you find in favour of the Claimant in this case*." He said (on the claim of detriment); he had a continued belief that to protect himself and his wife, their family, friends, colleagues, patients and the general public they both took the only precaution available at the time, which was to self-isolate. They believed there were no precautions taken by the NHS to alleviate the risk posed to them or to others.

The relevant law

79. Section 44(1) of the Employment Rights Act 1996 read short for present purposes provides that 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 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 refused to return to his place of work or any dangerous part of his place of work.

80. Section 100(1)(d) of the 1996 Act read short for present purposes provides that an employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the

principal reason) for the dismissal is that 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 refused to return to his place of work or any dangerous part of his place of work.

81. Section 95(1)(b) of the Act provides that for the purposes of a claim of unfair dismissal an employee is dismissed where he is employed under a limited term contract which terminates by virtue of the limiting event without being renewed under the same contract.

Discussion and decision

82. The claimant accepted in evidence that he should not be paid for 24 October 2020. His claim of detriment for non-payment of salary on that date is therefore dismissed.

83. In our view the claim of detriment for the non-payment of salary on 23 October succeeds under section 44(1)(d) of the 1996. We first asked the question; were there circumstances of danger? In our view there were. There is little doubt that Covid-19 is a dangerous virus. It is well known to be fatal and to be highly contagious. The respondent's invitation to Ms O'Sullivan to be tested was because of its presence in a ward in which she worked. The claimant was in her household. There was a danger that Ms O'Sullivan had the virus, hence her test. There was a danger that if she had the virus so would the claimant have it. Indeed, for the early part of 23 October the respondent's advice to the claimant was that he should self-isolate pending his wife's test result. We next asked; did the claimant believe that those circumstances were serious and imminent? In our view he did. It was clear from his reaction at the time that he regarded it as serious. He paid close attention to public broadcasting on the issue. He contacted the First Minister very quickly on 23 October. He was willing to forgo a day's pay for what he believed to be a dangerous work environment. He also regarded it as imminent. Had he returned to work on 23 October, he believed he could have been placing his work colleagues in danger. The danger was imminent had he returned that day. It was self-evident that the question would be resolved quickly, on receipt of the result of his wife's test. We then asked; was that belief reasonable? In our view it was. Up until the

point in time of the telephone call at about 12.45pm on 23 October, Mr Stewart agreed that the claimant should self-isolate. This was the respondent's position at the time and Ms Robertson's submission to us. Ms Robertson continued on the point by submitting, "*following the advice from Mr Stewart around 12:30 on 23 October the Claimant could no longer have a reasonable belief of harm*." We agree with the inference that up until that point in time his belief of harm was reasonable. But we do not agree that from that point in time his belief was "*no longer*" reasonable. It was reasonable for the claimant to treat his understanding of the First Minister's advice as correct. That advice was clear. It was this; if a person was called for a COVID-19 test they should; go home; stay at home; do not take public transport or a taxi; and anyone else at home with them should also stay at home and await the result of the test. The respondent did not lead any evidence to suggest that this was not the advice of the Scottish Government at that time. It was reasonable for the claimant to adhere to that position which was not displaced by the advice from Mr Stewart. There was uncertainty in the respondent's position at the time. The most obvious example is that Mr Stewart's advice changed in the space of the morning. The respondent's position seemed to be; "*we have taken advice from our own Infection Control Dept; we have checked it with a trade union* ***therefore*** *our advice to the claimant meant that his position became unreasonable*." The uncertainty was also evidenced by the respondent's unfortunate use of the word "*asymptomatic*" to describe Ms O'Sullivan on 23. It is now agreed to mean "*an individual who has a laboratory-confirmed positive test and who has no symptoms during the complete course of infection*." The respondent accepts that it used this description about Ms O'Sullivan on 23 October. That is (it appears now) incorrect because at the crucial time that day and while she had no symptoms, she did not have a laboratory-confirmed positive test. But in some respects that misses the point, the point being what was the claimant's understanding of the meaning of the word at the time? He understood it to mean; she had the virus but showed no symptoms. This was why he was horrified when the word was used on 23. The state of uncertainty and confusion was made worse by the use of the word "*precautionary*" to describe Ms O'Sullivan's test. We preferred the evidence of the claimant and Ms O'Sullivan that it was first used on 23 on the telephone and not on 22 when the test was sought or when it was

carried out. The claimant's state of knowledge about such a test was persuasive. Within two hours, he had emailed the First Minister asking, "*Can you please clarify what is a precautionary test?*" The obvious conclusions that can be drawn from the asking of that question are (i) the claimant did not know what it meant and (ii) the respondent had not explained what it meant or why such a situation necessitated his wife being tested as a precaution. In our view, the respondent treated the claimant's non-attendance on 23 as unauthorised and unpaid on the ground that he refused to return to work while that danger persisted. That treatment was a breach of section 44 of the 1996 Act. We have made a declaration and an award of compensation in terms of section 49 of the 1996 Act. It is therefore unnecessary for us to decide the third issue (identified above) or make a formal award under Part II of the 1996 Act.

84. The claim of unfair dismissal does not succeed. While the respondent might quite properly be criticised for failing to adhere to its own Fixed Term Contract Policy it is obvious that any such failure does not of itself mean that section 100 of the 1996 Act is satisfied. Indeed, the respondent might also be criticised for its apparent failure to adhere to its invariable practice of retaining staff on fixed term contracts either by renewing them (for three or six months) or by offering them a permanent contract. But importantly, the Policy failures occurred prior to 23 October. The evidence about Mr Stewart's discussion with the claimant on the possibility of renewing his contract was unsatisfactory. While the contract was extended by one month from the date of its original end date, there was no evidence that would allow us to find that the reason (or principal reason) for the non-renewal of the contract beyond that was that the claimant had refused to return to work on 23 October. The claimant focussed on subsection (e) of section 100(1). In our view the case was more relevantly considered under section 100(1)(d). We agree with the respondent's submission that the burden of proof lay with the claimant (see the decision of the EAT in ***Ross v Eddie Stobart Ltd*** UKEAT/0068/13/RN and the cases referred to in it). Even taking the evidence as a whole as distinct from particular evidence adduced by the claimant, the burden was not discharged. There was no evidence which supported a finding that the reason or principal reason for the non-renewal of the claimant's fixed term contract was that he had refused to

return to work on 23 October. The claimant suggested in evidence and in his cross-examination that the note on **page 155** from his meeting with Mr Stewart and Ms Thompson was incomplete in that where it records that he "*stated he feels unsafe onsite and is happy to be finishing*", the sentence to be accurate should read on by referring to the finishing of his shift. On this issue we preferred the contemporaneous record on **page 155** particularly where the claimant signed the notes that day and did so confirming that he had "*read the above and accept the comments made as accurate*." If the alleged omission had been significant, the claimant would have noticed this at the time and would either have declined to sign the notes or would have suggested a change to correct it. He did neither.

Remedy

85. The claimant is entitled to a declaration in respect of the failure to pay salary for 23 October 2020. We make that declaration

86. The parties were agreed that the sum of £142.68 deducted as per the wage slip dated 1 November 2020 (supplementary bundle **page 24**) represented two days' pay. It follows that one half of that amount (£71.34) represents one day's pay. The judgment of the tribunal is to award that amount as compensation in respect of the failure to pay salary for 23 October.

Employment Judge: **R Bradley**
Date of Judgment: **10 December 2021**
Date sent to parties: **13 December 2021**