



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4107840/20 (V)

Held in Edinburgh by CVP on 4-7th May 2021

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**Employment Judge Jones
Tribunal Member Ms Grime
Tribunal Member Mr McCaig**

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Mrs K Anderson

**Claimant
Represented by:
Mr Anderson, husband**

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Boots Management Services Ltd

**Respondent
Represented by:
Mr Jupp, of counsel
instructed by
Shoosmiths solicitors**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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It is the unanimous judgment of the Tribunal that

- The claimant was a disabled person for the purposes of the Equality 2010 at all material times
- The claimant was not subjected to discrimination, harassment or victimisation on the ground of her disability
- The claimant was not unfairly dismissed

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Therefore the claimant's claims are dismissed.

REASONS

Introduction

- 5 1. The claimant brought claims of disability discrimination and unfair dismissal. The respondent did not accept that the claimant was a disabled person and resisted the claimant's claims. A preliminary hearing took place on 12 January 2021 at which various case management orders were made. Those orders were not complied with timeously, which caused considerable additional work
10 for the Tribunal's administrative staff. While Mr Anderson, who was representing his wife, did not have experience of Tribunal procedure and therefore could be given some latitude in relation to his compliance with orders, it was not clear why the respondent's agents did not comply with the orders. In particular the bundle of documents did not arrive at the Tribunal office until late
15 in the afternoon on the last working day before the hearing was due to commence. It's arrival was only after considerable prompting by the administration. This meant that despite the best efforts of the administration, bundles could not be sent to members in time for the hearing to commence. When bundles were received, they were not numbered. Again this caused
20 inconvenience to the Tribunal and wasted judicial time.
2. Therefore the first day of the hearing was converted into a preliminary hearing for the purposes of case management. The hearing on the merits took place over the following two days. The Tribunal heard evidence from four witnesses
25 for the respondent, from the claimant and an additional witness on behalf of the claimant. Witness statements were provided, although these had not been signed. Therefore, the witnesses read out their statements and in addition to supplementary questions, this formed each witness's evidence in chief. Witnesses were all subject to cross examination. The claimant also provided a
30 disability impact statement. Both parties made submissions, which they helpfully provided in writing.

3. Having listened to the evidence and considered the documents produced and submissions of the parties, the Tribunal found the following facts to have been established.

5 **Findings in fact**

4. The claimant was employed as a Pharmacy Dispenser at the respondent's Corstorphine Rd Branch in Edinburgh from September 2018 until her dismissal on 2 October 2020.
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5. The branch in which the claimant worked was a small branch and she worked with one or two other colleagues on a shift. The claimant's line manager was Ms Lloyd who reported to Mr Robinson.
- 15 6. The claimant has suffered from severe anxiety and dissociative disorder intermittently from around 2015.
7. In July 2020, Ms Lloyd advised all staff that they would be required to comply with the Scottish Government mandatory requirement to wear face coverings in store.
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8. The claimant told Ms Lloyd that she was exempt from this requirement. She did not advise Ms Lloyd why she believed herself to be exempt from the requirement.
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9. On occasion, the claimant expressed views to Ms Lloyd and her colleagues that the COVID pandemic was exaggerated, that wrong information was given on death certificates and that they shouldn't watch the news as it would brainwash them. Ms Lloyd and her colleagues found these comments concerning.
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10. Ms Lloyd advised Mr Robinson of her conversation with the claimant regarding her exemption from the requirement to wear a mask in an email to him of 13 July 2020. Following a discussion with him, Ms Lloyd contacted the

respondent's in house HR, peoplepoint for advice. Ms Lloyd was advised that the claimant should either be referred to OH, or provide a letter from her GP regarding her exemption.

- 5 11. Ms Lloyd had a discussion with the claimant around middle of July about the advice she received. The claimant contacted her GP but was informed that they did not provide letters of exemption. The claimant did not contact Occupational Health.
- 10 12. The claimant subsequently had a conversation with Mr Robinson, who advised the claimant that he trusted what she was telling him and that she did not require to wear a face covering. Mr Robinson accepted that the claimant did not want to nor have to tell him the reason for her exemption.
- 15 13. The claimant was advised to obtain a sunflower lanyard which was commonly worn by people who were exempt from wearing face coverings because of a hidden disability. The claimant did not obtain a lanyard, although she did obtain one after the termination of her employment.
- 20 14. In late August 2020, the claimant was recommended by Ms Lloyd to attend a technician's course which would help further her career.
- 25 15. Around 5th September, the claimant attended a busy bar in Edinburgh to pick up her husband from a demonstration he had been on. The claimant gave false details for the NHS Track and Trace (or Test and Protect as it is properly called in Scotland) system and refused to allow her temperature to be taken at which point she was asked to leave the bar.
- 30 16. On 7th September, the claimant told Ms Lloyd and another colleague, Ms Barrett, that she had provided false details when she went to a bar that weekend to pick her husband up from an anti-lockdown protest. The claimant said that she had refused to have her temperature taken and had given the bar incorrect details when she was asked for details for NHS Track and Trace. Ms Lloyd and Ms Barnett were shocked at the claimant's actions.

17. On 13th September, Ms Barnett contacted Ms Lloyd indicating that she had displayed COVID symptoms and was awaiting a test. The claimant had worked with Ms Barnett within the last few days. Ms Lloyd took the decision to send the claimant home with full pay when she attended for her shift on 14th September pending the outcome of Ms Barnett's test.
18. Mr Robinson was on leave from around 7-21st September.
19. The claimant sent Mr Robinson an email on 15th September, complaining that she had been sent home by Ms Lloyd and that she had been discriminated against on the ground of a disability. She did not give any details about the nature of that disability and simply said that she was exempt from the requirement to wear a face covering because of a 'hidden disability'.
20. On his return to work, Mr Robinson emailed the claimant on 22 September asking that she call him to discuss her email if Ms Lloyd couldn't answer her queries. The claimant did not contact Mr Robinson.
21. On 24th September, Ms Lloyd contacted Mr Robinson by telephone and told him of the events of 7th September. Mr Robinson asked Ms Lloyd to arrange for her and Ms Barnett to write down what had happened, which they did.
22. On 29th September, the claimant was asked to attend a meeting with a Ms Casey which she was told was a 'fact finding interview'. Ms Casey said 'I am here to speak to you about a conversation in store between yourself and two colleagues on 7th September. Do you know what that conversation was?'. The claimant said she did not.
23. The claimant was then suspended from work and that suspension was confirmed in writing to the claimant in a letter dated 29th September.
24. The claimant was invited to a disciplinary hearing by letter dated 29th September and a hearing took place on 2nd October. The claimant was

accompanied at that hearing by a colleague Ms Tai. The hearing was chaired by Ms Sheppard, who was a Store Manager from another store.

5 25. Detailed notes of the disciplinary hearing were taken. The claimant provided a written statement to the hearing, which provided details of her medical history.

26. After an adjournment, Ms Sheppard advised the claimant that she was being summarily dismissed. Her decision was confirmed in a letter to the claimant that day.

10 27. The claimant appealed against her dismissal and set out her grounds of appeal in a letter dated 9th October.

15 28. The claimant was invited to an appeal hearing by letter dated 21st October and an hearing took place on 5th November. The claimant was again accompanied by Ms Tai. The hearing was chaired by Ms Montgomery who is a General Manager with the respondent. Detailed notes of the meeting were taken. After an adjournment, Ms Montgomery advised the claimant that her appeal was not upheld.

20 29. A letter dated 6th November setting out the basis on which the claimant's appeal was not upheld was sent to the claimant.

Observations on the evidence

25 30. The Tribunal found all the respondent's witnesses to be both credible and reliable. They all gave their evidence in a measured manner. It was clear that Ms Sheppard in particular had given considerable thought to matters prior to dismissing the claimant.

30 31. Ms Tai's evidence was both credible and reliable. However, the Tribunal found the claimant to be evasive at times. She appeared unwilling to answer a number of straightforward questions directly. Although it was clear that giving evidence in chief was difficult for her, and the Tribunal found her difficulties to

be genuine, the Tribunal did not find that that claimant had any difficulty in answering questions in cross examination, other than being unwilling to do so. For instance, the claimant was asked about her views on wearing a mask. Although the Tribunal found that the claimant did not wear a mask as a result of her medical history, it was also clear that she was sceptical about the benefits of wearing a mask in general. However, the claimant denied that she had said that evidence around mask wearing was 'foggy at best' until she was taken to an email where she had made this statement. The claimant also appeared unwilling to accept that there were people who refused to wear masks for reasons other than their medical conditions.

32. The claimant had said that she had given false information to the bar staff in a pub because of her anxiety in the social setting. The Tribunal did not find this evidence to be credible. The claimant could not explain why she went into a busy pub to pick up her husband when she could have texted him from her car. Further, the claimant's position that she was only in the pub 'for a minute' and didn't come into contact with anyone other than her husband and the member of staff who asked for her details, appeared to miss the point of the concern of her colleagues. In any event, the Tribunal did not accept that she had only been in the bar 'for a minute'. Her own position was that she had gone over to her husband's table, been approached by a member of staff to obtain her details and had a discussion about the taking of her temperature, which she refused to allow to be done and then was asked to leave. The claimant was in a busy bar amongst a number of people who had already attended an anti-lockdown or anti-mask demonstration, at which she accepted that it was possible many of them were not wearing masks. The Tribunal also found the claimant's explanation that she refused to allow her temperature to be taken by a member of staff in the pub because she was not a medical professional, lacking in credibility.

Issues to determine

33. A list of issues had been produced in advance of the hearing. These can be summarised as follows:

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Was the claimant at all material times a disabled person for the purposes of the Equality Act 2010?

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If so, was the claimant subject to unlawful treatment because of her disability?

If so, did the Tribunal have jurisdiction to consider those claims, standing the date of the actions complained of and the date on which the claimant lodged her claim.

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Was the claimant dismissed for a potentially fair reason?

Did the respondent follow a fair procedure in dismissing the claimant?

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Was the claimant's dismissal, in all the circumstances, within the band of reasonable responses of a reasonable employer?

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If the claimant was unfairly dismissed or discriminated against, what compensation, if any should be awarded to the claimant and should any deductions be made on the basis of either contributory fault or that the claimant would have been fairly dismissed had a fair procedure been followed?

Relevant law

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Disability discrimination

34. S.6(2) of the Equality Act 2010 ('EqA') provides that person has a disability if he or she has 'a physical or mental impairment' which has a 'substantial and

long-term adverse effect on [his or her] ability to carry out normal day-to-day activities’.

5 35. The burden of proof is on the claimant to show that he or she satisfies this definition.

36. Protection against harassment on the basis of disability is set out in the EqA at S.26(1), which describes harassment as,

- 10
- unwanted conduct
 - that has the proscribed purpose or effect, and
 - which relates to a relevant protected characteristic.

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37. Section 15 EqA, which is headed ‘Discrimination arising from disability’, provides that a person (A) discriminates against a disabled person (B) if:

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- A treats B unfavourably because of something arising in consequence of B’s disability, and
 - A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

25 38. Section 15(2) goes on to state that ‘[S.15(1)] does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.’ In other words, if the employer can establish that it was unaware — and could not reasonably have been expected to know — that the claimant was disabled, it cannot be held liable for discrimination arising from

30 disability.

39. Section 39(4) provides that an employer (A) must not victimise an employee of A’s (B):

- 35
- by dismissing B — S.39(4)(c), or

- by subjecting B to any other detriment — S.39(4)(d).

5 **Unfair dismissal**

40. In order to determine whether a dismissal is fair or unfair, it is first necessary to determine whether the reason for the dismissal is one of the potentially fair reasons set out in the Employment Rights Act 1996 ('ERA'). Section 98(2) ERA sets out the potentially fair reasons for dismissal. These include conduct (section 98(2)(b)) and some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held (section 98(1)(b)).

15 41. Where an employer has established a potentially fair reason for dismissal, that is not an end to the matter. Where a Tribunal is satisfied that an employee was dismissed for a potentially fair reason, a Tribunal must then apply its mind to the provisions of section 98(4) ERA which states:

20 Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

25 (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismiss the employee, and

30 (b) shall be determined in accordance with equity and the substantial merits of the case.

42. This requires the Tribunal to consider whether in all of the circumstances, including the procedure which was followed, the dismissal of an employee was fair. Fairness is to be considered within the band of reasonable responses of

an employer and a Tribunal must be careful not to come to its own view as to the fairness but analyse the employer's conduct within the band of what a reasonable employer would do.

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Submissions

43. Parties helpfully provided submissions in writing and these are included verbatim below.

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Respondent's submission

Introduction

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1. C's case is that she was disabled by reason of anxiety. This had the effect that she could not wear a face mask and was exempt from doing so. C claims that because of this she was discriminated against by her employer. She relies on all forms of discrimination. Direct, indirect, disability related, harassment and victimisation. She was dismissed on 2 October 2020 and claims that this dismissal was unfair and that the real reason for the dismissal was her refusal to wear a mask.

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2. R's case is that C was not disabled and, even if she was, there was no discrimination of any kind. The reason C was dismissed by R was because she gave false details to NHS Track & Trace which was wholly unacceptable for one of its employees. This was a conduct reason and her dismissal was fair.

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3. These Closing Submissions will address the issues as set out in the List of Issues, albeit dealing with the discrimination claims first, then jurisdiction issues applicable to the discrimination claims and then the unfair dismissal claim.

4. Reference to The Equality Act 2010: Guidance on Matters to be Taken into Account in Determining Questions Relating to the Definition of Disability is referred to as 'the Guidance'. ; The Equality Act 2010 Code of Practice is referred to as 'the Code'.

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Disability

- ***Is the Claimant a disabled person within the meaning of S.6 of the Equality Act 2010?***

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5. Section 6 of the Equality Act 2010 ('EqA') provides:

(1) A person (P) has a disability if—

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(a) P has a physical or mental impairment, and

(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

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6. Schedule 1 of the EqA provides the effect of an impairment is long-term if it has lasted for 12 months, is likely to last for 12 months, or is likely to last for the rest of the life of the person affected. If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur. Medical treatment is to be ignored if the impairment would have a substantial adverse effect but for that treatment. The Tribunal is also required to take into account the Guidance as it considers relevant.

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7. An impairment will have a substantial adverse effect if the effect is more than minor or trivial (s. 212 EqA) which is a straightforward factual question, ***Elliott v Dorset County Council*** EAT 0197/20 at [32].

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8. The time at which to assess the disability (i.e. whether there is an impairment which has a substantial adverse effect on normal day-to-day activities) is the date of the alleged discriminatory act, **Cruickshank v VAW Motorcast Ltd** [2002] ICR 729, EAT at [22] to [26].

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9. According to her impact statement C has an anxiety condition and this is supported by the medical material that has been provided. However, this condition does not appear to have had an impact on C's day to day activities. C has not in her written evidence provided any detail of how her day to day activities are affected. Indeed, in a statement in an email to the Tribunal of 12 April 2021 at p52 it is stated that: "*There has never been any question over whether the claimant was able to carry out her daily duties. The question over disabilities only relates to the issue of exemption to wearing face coverings and of how she reacted in the bar on the night of the 5th of September*". Whilst the requirement under the EqA extends beyond work, this nevertheless provides a useful indicator of how C was affected by her condition. The only point which appears to suggest that C's day to day activities are adversely affected in a way which is more than minor or trivial is her claim that she does not go out socially or to the shops spontaneously or without pre-planning. That evidence is difficult to square with the events of 5 September 2020 where she went into a crowded pub with people who had been in a demonstration and the Tribunal is invited to reject it as overstated. C may have some difficulty but not one which is more than minor. The Tribunal will note that the C tended at times to say things convenient to her case which were not supported by documentary evidence of what she said at the time.

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Direct discrimination

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- ***Was the Claimant treated less favourably because of her alleged disability?***

10. Section 13 EqA 2010 provides that a person discriminates against another if, because of a protected characteristic (here disability), he treats that other less favourably than he treats or would treat others.
- 5 11. It appears that C's case is that (see ET1 Box 15) that she was discriminated against because she was disabled by: (a) being sent home on the 13 September 2020 because she did not wear a mask, and (b) by being dismissed because she refused to wear a mask
- 10 12. C was sent home because she had been exposed to another colleague, Ms Barnett, who was thought to have Covid 19 symptoms. The correct comparator here is a person who did not have a disability but was exempt from wearing mask.
- 15 13. Any non-disabled person who was not wearing a mask when she was exposed to Ms Barnett in the same circumstances would have been sent home. As Ms Lloyd said, this was for C's protection, the protection of her colleagues and customers. As she also observed one only has to consider what would have been said if Ms Barnett had tested positive and C had
- 20 contracted Covid.
14. C was dismissed because she gave false information when asked to provide details for NHS Track & Trace not because was not wearing a mask at work. This breached the trust that must be exist between employer and employee.
- 25 Any non-disabled person would have been dealt with the same way.

Discrimination arising from disability

30 ***The Law***

15. Section 15 provides:

“(1) A person (A) discriminates against a disabled person (B) if –

(a) *A treats B unfavourably because of something arising in consequence of B's disability, and*

5 (b) *A cannot show that the treatment is a proportionate means of achieving a legitimate aim.*

10 (2) *Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."*

16. In **Secretary of State for Justice v Dunn** EAT 0234/16 at [48] to [50] the EAT identified the following four elements that must be made out in order for the claimant to succeed in a S.15 claim:

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- there must be unfavourable treatment
- there must be something that arises in consequence of the claimant's disability
- the unfavourable treatment must be because of (i.e. caused by) the something that arises in consequence of the disability, and
- the alleged discriminator cannot show that the unfavourable treatment is a proportionate means of achieving a legitimate aim.

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- ***Did the Respondent's decision to send the Claimant home on 13 September 2020 amount to unfavourable treatment?***

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17. The Code indicates at §5.7 that unfavourable treat should be construed synonymously with 'disadvantage': It is not accepted that sending C home from work on full pay because she had been exposed to a person displaying Covid 19 symptoms was unfavourable treatment. Doing so was to protect not only colleagues and customers but also C. Whilst at § 5.7 the Code provides that even if an employer thinks that they are acting in the best interests of a

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disabled person, they may still treat that person unfavourably, it is difficult to see how that can be said to be the position here as R was not seeking to protect C because she was disabled, it would have done the same for any employee who did not wear a mask.

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- ***If so, did this decision arise from the Claimant's alleged disability?***

18. This depends on a finding that the reason that C did not wear a mask was because of her disability (assuming she establishes she is disabled). This is challenged. There is no medical evidence or information which supports C's view that her anxiety was exacerbated by wearing mask. Indeed, working in a retail store without a mask and being exposed to customers day in day out is more likely to increase anxiety.

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- ***If so, was such treatment a proportionate means of achieving legitimate aim?***

19. Assuming that C did not wear mask because of her disability, it is well established that there is a three-stage test for objective justification:

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- a. Is the measure rationally connected to the objective?
- b. Is the objective sufficiently important to justify limiting a fundamental right?
- c. Are the means employed, no more than is necessary to accomplish the objective.

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20. The objective must correspond to a real need and it is necessary to weigh the need against the seriousness of the detriment to the disadvantaged person. What has to be justified is the limiting of the fundamental right and it is for the Tribunal to undertake its own assessment and not uncritically accept the reasons advanced.

21. The health and safety of the claimant or others is a legitimate aim (see by way of example, **Islam v Abertawe Bro Morgannwg Local Health Board** UKEAT/0200/13/BA).

5 22. Ms Lloyd sent C home on 13 September 2020. She did so because she was genuinely concerned about the risk of Covid 19 transmission as C had worked with a colleague who now displayed symptoms, when she, C, was unmasked. Ms Lloyd's aim, which was to protect her own health, C's health and the health of customers, was a legitimate aim and sending C home on
10 full pay was proportionate. In circumstances where C would not wear mask this step was no more than was necessary to accomplish the objective.

- ***The claimant's dismissal***

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23. Although not included in the list of issues, C's pleaded case is that she was dismissed because of her mask exemption which was also a disability related reason. Had she been, and assuming she was disabled, this would satisfy the requirements of s. 15, but there is simply no evidence of this. C's mask
20 exemption played no part in her dismissal.

24. C has not pleaded that her anxiety caused her to give false details to NHS Track & Trace as a s. 15 claim and that the dismissal was unfavourable treatment because of this. Her ET1 (p15) states:

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*"I have been subject to direct discrimination and/or discrimination arising from disability, on the basis of my employer dismissing me because I was unable to wear a mask in the workplace, and their decision to send me (and no one else) home when a colleague was
30 being tested for Covid-19"*

25. If the Tribunal does consider her dismissal under s. 15, it is invited to reject C's case that she gave false details because of anxiety and stress.

26. That is entirely inconsistent with the manner in which she described the incident to her colleagues who, she accepted, were shocked. Ms Lloyd described it as boasting. Had C discussed this as a genuine enquiry with her colleagues and that she gave false details because of anxiety, there would have been sympathy not shock.

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27. C would never have gone to a busy pub in the height of a pandemic to meet her husband who had come from a protest against lockdown and/or mask wearing had she been genuinely anxious as she described.

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28. Her conduct is also entirely consistent with her character which was: to downplay the risk of Covid, say Covid was exaggerated; the sort of person who refused to have her temperature taken because the person doing it was not a medical professional, who refused to wear anything to indicate her exemption despite the fact that it would stop intrusive enquiries and the sort of person who declined to give her biometric details to her employer.

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29. Her conduct is also entirely consistent with the lack of understanding or remorse displayed in the disciplinary process (see for example termination letter p234 and appeal letter p261).

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Indirect discrimination

25 30. Section 19 of the EqA provides:

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

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(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

(a) *A applies, or would apply, it to persons with whom B does not share the characteristic,*

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(b) *it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,*

(c) *it puts, or would put, B at that disadvantage, and*

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(d) *A cannot show it to be a proportionate means of achieving a legitimate aim.*

- ***Did the Respondent apply the following PCP: “mandatory wearing of face coverings in the workplace”?***

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31. This is not accepted. There was mandatory requirement only for those people who did not self-declare they were exempt. There was therefore not a blanket policy. Not everyone was required to wear a mask.

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- ***If so, did the application of the PCP put other disabled people at a particular disadvantage when compared with persons who do not have this protected characteristic?***

32. The answer to this is no because there was no blanket policy.

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- ***Did the application of the provision put the Claimant at that disadvantage?***

33. The answer is no because C was allowed not to wear a mask

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- ***Does the Respondent show that the treatment was a proportionate means of achieving a legitimate aim?***

34. The same matters are relied on as in the s. 15 claim above.

Reasonable adjustments ('RAs')

5 ***The Law***

35. Section 20 EqA 20100 provides that the duty to make RAs comprises three requirements, set out in s 20(3), (4) and (5). This case is concerned with the first of those requirements. The first provides that where a provision, criterion or practice of an employer's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, the employer must take such steps as it is reasonable to have to take to avoid the disadvantage.

36. In considering whether the duty to make RAs arose, a Tribunal must consider:

- 15 a. whether there was a provision, criterion or practice ('PCP') applied by or on behalf of an employer;
- b. the identity of the non-disabled comparators (where appropriate); and
- 20 c. the nature and extent of the substantial disadvantage in relation to a relevant matter suffered by the employee: **Environment Agency v Rowan** [2008] IRLR 20 at [27].

25 37. What is 'reasonable' is an objective test and it is ultimately the employment tribunal's view of what is reasonable that matters, **Smith v Churchills Stairlifts plc** [2006] ICR 524, CA.

- ***Did the duty to make reasonable adjustments arise?***
- 30 • ***Did the Respondent apply the following PCP: "mandatory wearing of face coverings in the workplace"?***

38. No. There was no blanket policy. C was exempted from wearing a face mask.

- ***Was the Claimant placed at a disadvantage by said PCP?***

39. No as there was no valid PCP. Even if there was, C was not disadvantaged because she did not have to wear a mask.

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- ***If so, did the Respondent know, or could it reasonably have been expected to know, that the Claimant was disabled or that the Claimant would be placed at a substantial disadvantage?***

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40. R did not have any knowledge that C was disabled and could not reasonably have had such knowledge until she mentioned in an email of 15 September 2020 (p204) that she was exempt for reason of an (unnamed) medical condition. Prior to that date R did not know and could not be expected to know that C was disabled.

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- ***If so, did the Respondent take such steps as were reasonable to avoid the disadvantage?***

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41. If there was a valid PCP, and C was disadvantaged, then R took reasonable steps by exempting her from the Policy and allowing her to work whilst not wearing a mask.

- ***What adjustments is it alleged the Respondent should have taken and are these reasonable in the circumstances?***

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42. It is unclear what adjustments C claims should have been made.

Harassment

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The Law

43. Of the three forms of behaviour prohibited under s.26 EqA, C advances her claim under the first; i.e. 'general' harassment: conduct that violates a

person's dignity or creates an intimidating hostile, degrading, humiliating or offensive environment (s.26(1)).

5 44. The general definition of harassment set out in s.26(1) applies to the protected characteristic of disability. In general term, it applies if A engaged in unwanted conduct related to disability (s.21 (1) (a) and the conduct has the purpose or effect of (i) violating the claimant's dignity; or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant (s.26(1)(b)).

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45. Unwanted conduct is essentially the same as 'unwelcome' or 'uninvited', **Reed and anor v Stedman** [1999] IRLR 299, EAT; and the Code § 7.8. The EAT in **Thomas Sanderson Blinds Ltd v English** EAT 0316/10 at [28] pointed out that "unwanted conduct" means conduct that is unwanted by the employee. The necessary implication is that whether the conduct is
15 'unwanted' should largely be assessed subjectively, i.e. from the employee's point of view.

46. In giving general guidance on 'harassment' in **Richmond Pharmacology v Dhaliwal** [2009] IRLR 336 at [11], EAT Underhill P said that it is a 'healthy discipline' for a tribunal to go specifically through each requirement of the statutory wording, pointing out particularly that (1) the phrase 'purpose or effect' clearly enacts alternatives; (2) the proviso in sub-s (2) is there to deal with unreasonable proneness to offence (and may be affected by the
20 respondent's purpose, even though that is not per se a requirement); (3) 'on grounds of' is a key element which may or may not necessitate consideration of the respondent's mental processes (and it may exclude a case where offence is caused but for some other reason); (4) while harassment is important and not to be underestimated, it is 'also important not to encourage
25 a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase'.

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- ***Was the Claimant subjected to unwanted conduct pursuant to s.26 Equality Act 2010?***

- ***What is the conduct relied upon? The Claimant alleges that the following amounted to harassment:***

5 ***a. Did the Respondent querying why the Claimant was not using a face covering amount to harassment?***

b. Did colleagues' decisions not to work near the Claimant amount to harassment?

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- ***Should the above conduct reasonably be considered as having the effect set out in s.26?***

15 47. Asking C why she was not wearing face mask cannot possibly be construed as unwanted conduct. It is a genuine enquiry in the context of the Covid pandemic. C was not, contrary to her case, asked repetitively, she was asked about mask wearing in July 2020 when it became a mandatory and again in September 2020 when there were staffing issues.

20 48. Asking C why she was not wearing a face mask did not have either the purpose or effect of violating C's dignity or creating a hostile, degrading, humiliating or offensive environment. It was asked for perfectly proper and valid reasons.

25 49. C was not isolated or ostracised, if she was this could amount to harassment. There was, no doubt, concern from colleagues who were shocked when C boasted about giving false details to NHS Track & Trace but this is entirely understandable. C herself said this was the only occasion when they were 'off' otherwise everything was fine (Appeal notes p247). On no sensible basis
30 could her colleague's reaction to her blatant flouting of the rules which put them at risk be reasonably considered to have the necessary effect (see s. 26(4) EqA). The Tribunal is invited to reject C's case that she was repeatedly asked about masks. Had she been she would have raised it in her email of 15 September 2020 (p204).

Victimisation

50. Section 27 EqA provides that a person (A) victimises another person (B) if A
5 subjects B to a detriment because a) B does a protected act or b) A believes
that B has done, or may do, a protected act.

51. The question to be answered is whether the protected act materially (in the
10 sense of more than trivially) influenced the actions of the employer.

52. In determining whether treatment is by reason that the person has done a
protected act, the relevant question is to ask why the alleged victimiser acted
as they did. In other words, what consciously or unconsciously was their
reason. **Chief Constable of West Yorkshire v Khan** [2001] ICR 1065 at
15 [29].

***a. Was the Claimant dismissed as a result of carrying out the protected
act of sending an email dated 15 September 2020?***

20 53. There is simply no evidence that the email of the 15 September 2020 (p204)
played any part in the dismissal of C and indeed this was never suggested to
either Kerry Sheppard or Susan Montgomery.

Jurisdiction

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- ***Were the allegations which allegedly took place between May and
August 2020 submitted out of time?***
- ***If so, is it just and equitable to extend time?***

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54. C's employment terminated on 2 October 2020. ACAS was notified on 24
November 2020 and a certificate issued the same day (p16). The Claim was
issued on 11 December 2020. Any claim relating to any act predating the 11

September 2020 is therefore out of time. No reason has been advanced for extending time.

Unfair dismissal

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55. R's case is that C was dismissed for misconduct. Having regard to the serious misconduct, this was within the range of reasonable responses.

10

- ***Did the Respondent have a genuine and honest belief that the Claimant had committed the alleged acts of misconduct?***

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56. Ms Sheppard had a genuine belief that C had committed misconduct. She explained this clearly and cogently in her evidence and also in the disciplinary hearing (see notes p227 – p228) and letter of termination (p233). Her reasons can be summarised as:

20

- The impact on C's colleagues by her actions of giving false information to NHS Track & Trace.

- The lack of concern for her colleagues.

- The impact on the Boots brand of an employee who was a key worker giving false information to NHS Track & Trace.

25

- The lack of remorse on the part of C.

- C had not taken any steps to correct the position at the time.

- The serious breach of trust on the part of C.

30

- ***If so, was this belief based on reasonable grounds?***

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57. Ms Sheppard's belief was based on reasonable grounds. The conduct was admitted by C. There was no issue about what occurred. C deliberately gave false details to NHS Track & Trace.

- ***Was the decision to dismiss the Claimant within the band of reasonable responses available to the Respondent?***

5 58. R is in the healthcare business. It is a trusted brand which has been in
existence many years. The public place a high degree of trust in its business
and its employees. If one of its employees gives false details to NHS Track &
Trace then this completely undermines R. It is unsurprising that she was
dismissed. This was gross breach of trust exacerbated by her attitude to what
10 she had done. Her insouciance in the disciplinary hearing exacerbated this.
R's decision to dismiss C fell into a band of responses open to a reasonable
employer.

- ***If the Respondent had failed to follow a fair procedure, would the
15 Claimant still have been dismissed had a fair procedure been followed?***

- ***If so, to what extent should any compensation awarded to the Claimant
be reduced?***

20 59. This requires the Tribunal to determine whether the investigation and
procedure followed by the Respondent was reasonable by the objective
standards of the reasonable employer. See: **Sainsburys Supermarkets v
Hitt** [2003] IRLR 23.

25 60. There is no evidence that the procedure was not fair and reasonable. The
suggestion that Ms Sheppard was compromised by her knowledge of
Ms Lloyd came to nothing. An investigation was undertaken. C had a hearing
at which she was accompanied and in which she participated and then an
appeal.

30

- ***If the Claimant had been not fairly dismissed, to what extent should any
compensation awarded to the Claimant be reduced to reflect her
contributor conduct?***

61. C contributed substantially to her dismissal by boasting about giving false details to NHS Track & Trace. This is a rare case in which, if she succeeds both her basic award and any compensatory award should be reduced to nil.

5 **Remedy**

Unfair dismissal

Basic Award

10 62. C's gross salary was £1580 per month = £364.61 per week. Subject to the issue of contributory fault, in the event she succeeds C's will be entitled to a basic award of £729.22.

15 63. C's net loss of earnings is agreed at £1345.40 per month. However, C has completely failed to mitigate her loss. Even allowing for the difficulty of obtaining work during the pandemic, applying for only 6 jobs in 7 months demonstrates this. C's loss if not reduced to nil for contributory fault, it should be capped at 3 months.

Discrimination – injury to feelings

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64. C's claim is in the middle of the lower band of **Vento**

Claimant's submission

25 44. Looking back on this case, a number of things are clear. It must be stated that the claimant is in no way, shape or form blameless in what has transpired. She could have tried to better understand how her exemption would have impacted her colleagues in store. And of the incident in the bar on the evening of the 5th, she is absolutely aware that how she acted was not in a manner which was
30 appropriate. But it's important to note the distinction between what has been said and what actually happened; she submitted PARTLY false information. She gave a made up name, only a first name, but then gave her actual mobile number. I believe through the written submission, medical records and health

impact statement which have been given throughout this whole process, this lapse in judgement can be explained.

5 Of the severity of the incident in the bar, the claimant would have been made aware had an outbreak occurred as the two family members she was collecting had given details. She was only ever in contact with the member of staff who approached her, who was wearing a mask and visor. And whilst I can fully appreciate a loss of trust towards the respondent, the potential danger to Boots, its staff and customers was minimal.

10 But there is another side to what happened.

15 It seems clear from what we've heard through the various witness statements that the claimant was a trustworthy member of staff who had no issues between those she worked with. Issues did not start to occur until the mandating of face coverings in store. These issues, we will admit, were not helped by the claimant being a private and very guarded person by nature. She was asked to wear one and replied that she was medically exempt. Going strictly by the SCOT.GOV websites own guidelines, that should have been the end of the matter. It was not. She was then asked on multiple occasions to explain her exemption and to provide proof it. Indeed she attempted on the phone while in store to do this as she felt pressured into this by her manager and was met with the same response she received from the government website. Ms Lloyd telling her that it was proving difficult to find cover for the store as the claimant 20 doesn't wear PPE, and please note the wording Ms Lloyd herself used, further caused the claimant to feel ostracised in store. In her mind, by being exempt she was somehow doing something wrong. She was never, at any point, invited to occupational health. Boots seem happy to quote from their policies throughout the case as a means of protecting themselves but when one of their own policies which could have been followed to protect the claimant and de-escalate an already worsening predicament in one of its stores, they were 25 noticeably quiet on this. Whilst going over the witness statement for the first disciplinary hearing I also found it truly bizarre that the written submission, which was extremely hard for the claimant to write and to hand over, was 30

dismissed out of hand as 'irrelevant'. Mr Robinson the area manager even remarked that he felt the claimant was coming to him too often. Someone as experienced as he MUST have known there was an issue in store between with the staff. Given this was Ms Lloyds first managerial role it again seems really strange that it did not occur to him to step in with both members to try and find a solution that helped everyone. He authorised the exemption, but the animosity was already there and continuing to bubble under the surface by this point.

Ultimately, the St Johns Road branch of Boots (the store in question) is a small store. There are only a couple of very small isles and having someone like the claimant in there who was exempt and couldn't wear the PPE (as stated by Ms Lloyd in her own witness statement) was a major hassle for them. There are other staff in other stores who are exempt and have not had this level of difficulty in finding a solution. I put it to this Tribunal that they have managers who are more storied and used to dealing with 'the individual' than just 'the staff member'. Indeed, even had the claimant worn a lanyard as has been mentioned, this would not amount to anything close of PPE. It is our firm belief that due to the incident in the bar that evening Boots saw an opportunity to give themselves one less hassle. Being asked multiple times to give the reason for exemption and to prove it, which the claimant could not, changed the atmosphere in the shop. Telling the claimant no one wanted to work alongside her because she wouldn't wear PPE would also have undermined both her confidence and subsequently furthered the toxicity in branch. In an ideal world, GP's would write these exemptions. The claimant could have then given this, in the strictest confidence, to her manager or even Mr Robinson. But this was not an avenue that could be explored.

Had this situation ended in a warning and a referral to Occupational Health, as has been put forward as a suggestion during but not before this hearing, this scenario would never have played out like this. The incident in the bar was an uncharacteristic error. The many months and years of being a trustworthy, reliable and responsible employee were never taken into account. But a

momentary lapse of judgement has been magnified beyond all reasonable justification to remove the claimant from a job which she enjoyed.

5 Discussion and decision

Was the claimant a disabled person at all material times?

10 45. The Tribunal carefully considered the medical information provided by the claimant. The Tribunal accepted that the claimant is a very private person and found sharing that information difficult. The Tribunal noted that the claimant had suffered from bouts of anxiety and what was termed dissociative condition, on a number of occasions since around 2015. Although these episodes appeared to be short-lived in that the episodes themselves only last for a few
15 days, the impact of the episodes was long lasting on the claimant. The Tribunal also noted that the claimant had been on anti-depressant medication for a number of years and had undergone treatment to try and control her anxiety or panic attacks. The Tribunal accepted in general terms that the claimant found it difficult to socialise other than with her husband or sister and generally made
20 plans in advance when she went out. She found shopping in supermarkets stressful and would generally get groceries delivered or use a click and collect service. She found work helpful in that it gave her purpose and a structure which helped her cope with her condition.

25 46. Although the claimant did not give evidence on 'deduced effects', that is what her condition would be without medication and coping strategies, the Tribunal could reasonably conclude that if she stopped taking her medication and had not had the benefit of the coping strategies, she would find day to day life very difficult.

30 47. The claimant did not give much evidence on the impact of her condition on her day to day life other than in relation to socialising. However, the Tribunal concluded that the claimant had built up coping mechanisms over the years to

help her with everyday life, and had little hesitation in concluding that she was a disabled person at all material times.

5 48. However, as noted, the claimant is a very private person. She did not disclose that any detail which would allow the respondent to reasonably know that she had a disability until the statement she provided to the disciplinary hearing. While she alluded to the fact that her exemption from wearing a mask was for a medical reason, she did not give Ms Lloyd or Mr Robinson any further information. The Tribunal accepted as genuine Mr Robinson's evidence that 10 he had thought the claimant possibly couldn't wear a mask because of something which had happened in her childhood. Although Mr Robinson could have further questioned the claimant on her condition, the Tribunal accepted that the claimant made clear that she did not wish to discuss it and the possibility of discussing it was likely to upset her.

15 49. While the claimant made reference to a 'hidden disability' in her email to Mr Robinson following the incident when she was sent home, again this gave no detail at all.

20 **Was the claimant subject to unlawful treatment because of her disability**

50. As the Tribunal has found that the respondent was not and could not reasonably be aware that the claimant was a disabled person until the disciplinary hearing on 2nd October 2020, then conduct prior to that date cannot 25 amount to discriminatory treatment because of a disability.

51. In any event, the Tribunal considered whether it could be said that asking the claimant why she wasn't wearing a mask could amount to either harassment or discrimination arising from a disability. The Tribunal concluded that it did not. 30 The Tribunal bore in mind in particular that these events took place during a pandemic, where the position was changing on an almost daily basis and there was a heightened sensitivity because of the risk of transmission of the COVID – 19 virus. The Tribunal found that the respondent was entitled to ask the claimant why she did not wish to wear a mask. The Tribunal found that the

respondent did not ask the claimant any more than was necessary to satisfy itself that the claimant had a genuine reason for not wearing a mask.

52. The Tribunal went on to consider whether it could be said that sending the claimant home from work when one of the colleagues with whom she had been working exhibited COVID-19 symptoms could amount to either harassment or discrimination arising from a disability. Again, the Tribunal determined that it did not. While the claimant did not wear a mask because of her disability, that was not the reason that she was sent home. She was sent home because there was a greater risk that she had been exposed to infection than her colleagues who had been wearing masks. The Tribunal found that being sent home on full pay in these circumstances was not unfavourable treatment. In any event, it did not arise from her disability but the respondent's actions to take all steps to limit the risk of transmission of a potentially lethal virus. Even if it could be said that the treatment was unfavourable and arose because of the claimant's disability, the Tribunal concluded that the respondent's actions were entirely justifiable and a proportionate means of pursuing the legitimate aim of providing as safe as possible an environment for staff and customers in its store.

53. The Tribunal did also consider whether the respondent was under an obligation to make reasonable adjustments. However, given that the Tribunal concluded that the respondent was not aware of her disability until the disciplinary hearing, and the claimant did not suggest that reasonable adjustments ought to have been made to the procedure, or point to any provision criterion or practice which disadvantaged her, the Tribunal did not accept that the respondent failed in any duty to make reasonable adjustments.

30 **Indirect discrimination.**

54. Further the Tribunal did not find that there was any provision, criterion or practice which put the claimant at a disadvantage. It seemed to be suggested by the claimant that the respondent operated a mandatory requirement to wear

a face covering. That was clearly not so as the claimant's request for exemption was accepted by the respondent. In any event, in so far as it could be said that the wearing of face coverings by staff was a practice, it was wholly justified in terms of being a legitimate aim to protect the health and safety of staff and a proportionate means of doing so, particularly where exemptions were granted when they were requested.

Victimisation

55. Although the Tribunal accepted that the email sent by the claimant complaining of discriminatory treatment amounted to a protected act, there was no evidence whatsoever that she was subject to a detriment for having sent that email. In particular it was not suggested that Ms Shepperd took the email into account in taking a decision to dismiss.

Direct discrimination

56. It appeared to be suggested that the claimant was dismissed as it was a 'hassle' in terms of her exemption from wearing a mask. This was not put to Ms Sheppard and in any event there was no evidence that this was the case. Ms Sheppard gave clear evidence, which the Tribunal accepted, in relation to why she reached a decision to dismiss the claimant. The claimant's disability did not form any part of that decision making.

Was the claimant unfairly dismissed?

57. The Tribunal then turned to consider the dismissal of the claimant. In the first instance, the Tribunal considered whether the respondent had established a potentially fair reason for dismissal. It had no hesitation in concluding that the claimant's conduct in giving false information to NHS Track and Trace and then telling her colleagues of this was the reason for the claimant's dismissal.

58. It was therefore necessary to consider whether the procedure followed was within the band of reasonable responses and whether the decision itself was within the band of reasonable responses of a reasonable employer.

5 59. The respondent carried out an investigation into the claimant's conduct. There was a preliminary interview with the claimant at which the statements which were provided by Ms Lloyd and Ms Barnett were read out to her. There was then a disciplinary hearing at which the claimant was accompanied. The claimant provided a written statement at that hearing. The Tribunal was
10 satisfied that the investigation was reasonable. There was no further investigation which could have been carried out.

60. The Tribunal did consider whether the provision by the claimant of her statement which set out her mental health difficulties, should have caused the
15 respondent to pause and conduct further investigation into the claimant's condition or how it manifested itself. However, it concluded that while some employers may have taken such an approach, it was not outwith the band of reasonable responses to have proceeded as the respondent did.

20 61. In particular, Ms Sheppard was concerned with not just the fact that the claimant had provided false information to NHS Track and Trace, but that she had then informed her line manager and a colleague that she had done so. Ms Sheppard made clear both in her letter of dismissal and her evidence before the Tribunal that she had taken into account that the claimant appeared
25 to show no remorse for the way she had acted or that she had any appreciation of the impact what she had told her colleagues had on them. The claimant suggested in evidence before the Tribunal that she had given the information to her colleagues in order to ascertain whether this was a normal way to behave. The Tribunal did not find that evidence either credible or reliable. It
30 was in direct contradiction to the evidence of Ms Lloyd who said that the claimant had almost been boasting when she told her of what she had done. The Tribunal preferred the evidence of Ms Lloyd in this regard. In any event, this was not something the claimant had said at the disciplinary hearing itself. The Tribunal was of the view that she had created this explanation after the
35 event.

62. Therefore the Tribunal concluded that the respondent had a reasonable belief in the conduct of the claimant and had conducted as much investigation as was proportionate in the circumstances.

5

63. The Tribunal was also satisfied that the procedure followed was fair. It was suggested, albeit without considerable force, that Ms Sheppard should not have conducted the disciplinary hearing as she had known Ms Lloyd when Ms Lloyd had worked in her store. The Tribunal did not find any substance in this argument.

10

64. No criticism was made of the appeal hearing by the claimant.

65. Finally, the Tribunal considered whether dismissal was within the band of reasonable responses. The Tribunal accepted Ms Sheppard's evidence that she had considered a final written warning as an alternative to dismissal, however she had concluded that the trust in the employment relationship with the claimant had been broken. She said that she took into account the impact of the claimant's conduct on colleagues but also that the respondent provides services to vulnerable patients and that as a brand, its customers need to trust it. She was of the view that a member of staff who had lied to a government scheme which was in place to protect people during a pandemic could impact on that brand. However, she also took into account that the claimant did not appear to show any remorse for her actions or understand the impact on her colleagues and in those circumstances could not trust that the claimant would not do something similar again.

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66. In all of these circumstances, the Tribunal found that dismissal was within the band of reasonable responses. The respondent is a provider of healthcare equipment and medicines throughout the UK. The claimant worked in its pharmacy. The claimant would necessarily have come into contact with vulnerable customers. The respondent acted reasonably in all the circumstances.

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67. Therefore the claimant's claims are dismissed in their entirety.

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Employment Judge: Amanda Jones

Date of Judgment: 17 May 2021

Entered in register: 07 June 2021

10 and copied to parties