# EMPLOYMENT TRIBUNALS

**Claimant:** **Mrs L Convery**

**Respondent:** **Bristol Street Fourth Investments Ltd**

**Heard at:** **Leeds by CVP**
**On:** **15-17 December 2021 and (deliberations only) 27 January 2022**

**Before:** **Employment Judge Maidment**
**Members:** **Ms N Downey**
**Mr D Pugh**

**Representation**
**Claimant:** **Dr AZ Loutfi, Counsel**
**Respondent:** **Ms L Gould, Counsel**

# RESERVED JUDGMENT

The claimant was unfavourably treated in her dismissal because of something arising in consequence of her disability in contravention of section 15 of the Equality Act 2010.

# REASONS

**Issues**

1. The claimant's sole complaint in these proceedings is of disability discrimination and, in particular, discrimination arising from disability. A complaint of unfair dismissal was previously struck out due to the claimant lacking the necessary 2 years of continuous service.

2. It has been determined at an early preliminary hearing that the claimant was at all material times a disabled person by reason of her suffering from anxiety.

3. The tribunal raised with Dr Loutfi that a skeleton argument produced alluded to claims of indirect discrimination which appeared to be a new claim and

that whilst it was recognised that there was no claim of direct disability discrimination, there was also a suggestion that there might be a complaint alleging a failure to comply of the duty to make reasonable adjustments. Any claim beyond the identified complaint of disability arising from discrimination would appear to require an application to amend. On taking instructions it was confirmed to the tribunal by Dr Loutfi that no such application was being made and the claimant was limited to the Section 15 complaint.

4. In the context of a Section 15 complaint, the earlier Judgment of Employment Judge Brain was limited to disability status and therefore it was for this tribunal to determine the disputed issue of the respondent's knowledge in circumstances where such question had not been before the tribunal at that preliminary hearing and the respondent did not call evidence on the issue.

5. It was then clarified and confirmed on the claimant's behalf that the claim as pleaded and identified during the case management process was in respect of the dismissal and the procedures leading up to it being unfavourable treatment. There was no claim in respect of any act of the respondent beyond the point of dismissal. In particular, the respondent's decision-making at the appeal stage was not a live issue.

6. Ms Gould confirmed that the respondent was not seeking to dispute that the claimant's inability to wear a face mask arose from her disability, but did not accept that the same was the case in respect of the wearing of a face visor.

7. The claimant's complaint is effectively that her dismissal and the procedure leading up to it were unfavourable treatment arising out of her inability to wear a face covering in consequence of her disability. The respondent disputes this and will maintain, alternatively, that it acted proportionately in seeking to achieve a legitimate aim of the provision of a Covid secure workplace for employees, the respondent's management and members of the public.

**Evidence**

8. Having identified the issues with the parties the tribunal took some time to privately read into the witness statements exchanged between the parties and relevant documentation in an agreed bundle of documents numbering some 264 pages. In the circumstances, each witness was therefore able to confirm the contents of their statements and then, subject to brief supplementary questions, be open to be cross examined on them.

9. The tribunal heard firstly from Sophie Gibson, HR Business Partner, Amy Lightowler, HR Business Partner and finally from Craig Patterson, Divisional Aftersales Director. The claimant then gave evidence on her own behalf.

10. Having considered all relevant evidence, the tribunal makes the factual findings set out below.

**Facts**

11. The claimant was employed by the respondent from 1 July 2019 as a service advisor at its Volkswagen car dealership in Knaresborough.

12. After a period of furlough due to the coronavirus pandemic, on 14 May 2020 the respondent sent an email to all employees about beginning to return to work. This stressed the safety of colleagues and customers as the absolute priority. It explained that risk assessments had taken place and that actions had been taken, including to maintain social distancing and for the supply of PPE and face coverings as well as advice on when and how they should be used. Staff were asked to watch an online safety video. A new Covid Adjustment Policy had also been published. Staff were asked to log into the respondent's training programme, watch the video, read the policy and to confirm they had done so. Paragraph 1.5 of the policy allowed for its amendment referring to requirements being likely to change over time in accordance with government guidelines. Paragraph 6.3 stated that masks should be worn where it was not possible to maintain social distancing and where screens were not in place. Employees could choose to wear them at other times at their discretion.

13. The claimant's evidence was that she had watched the video and read the policy but hadn't provided her e-signature in confirmation of its acceptance, because it contained things that she was not comfortable with. On 7 July her line manager, Mr Brogden, was informed that the claimant's safety training was overdue. He emailed the claimant asking her to complete it as soon as possible. She responded saying that she hadn't completed the training because the requirements could change at any time and she did not consent to wearing a facemask for her personal health reasons. The claimant cut and pasted the policy into another email she sent to Mr Brogden on 7 July 2020. In this the claimant said that she was concerned that signing the policy would amount to her agreeing to any future changes as yet unknown and to consent to the use of a facemask. She appreciated that he had said that she could perhaps wear a visor instead, but said that presently she knew nothing about the health implications of wearing a visor so would need to explore that further. She went on: "my main level of concern is the risk of respiratory illness in myself if it were to become mandatory to wear a mask/visor. I am high-risk as I have smoked almost constantly for 21 years. Also, those that are hard of hearing fall into the at risk category as listed by the World Health Organisation and I have experienced hearing and ear problems for around 25 years." The claimant continued that she would source an appointment with her GP for them to confirm her worries and would also put together a lengthier email with scientific links as to why she was unable to wear a face covering. She requested an exemption now and in the future for wearing a facemask.

14. The claimant told the tribunal that she was unclear as to the health implications of wearing a mask for those with hearing problems and relied on the aforementioned WHO statement. She said that they did not recommend wearing a mask. As regards smoking, the claimant said she was anxious as it was not ideal for her to be breathing in her own carbon dioxide. She accepted in cross examination, that the primary purpose of the respondent requiring the wearing of face coverings was to protect other colleagues and customers. Nevertheless, her position was that her own health was her concern and should also have been the respondent's. She said that she was being clear that she did not want to negotiate her own health. Her health as well as that of others ought to have been important to the respondent. When put to her that she referred to her "concerns" rather than "anxiety", she said that they could be read as one and the same thing.

15. At this point in time the claimant had not attempted to wear any form of face covering as there was no requirement or government guidance for them to be worn in or out of the workplace. She was anxious that wearing a visor would cause respiratory issues as much as the wearing of a mask. She said her anxiety was evident from the email correspondence.

16. The claimant messaged Mr Brogden on the evening of 7 July saying that she loved working for the respondent so that if not completing the training put her job at risk then she would sign it off. An ideal scenario would then be the respondent considering her being exempt, continuing that she was not taking the stance "to be a stick in the mud or a difficult cow, but to protect myself for any duties (sic) changes that may be made. But I would rather wear a mask all day and stay at work than not!" In a subsequent message she said that she was just genuinely concerned about her health but recognised that if mask wearing became mandatory then she would have no choice anyway. She stated: "the stress and worry of what could come of this is more damaging…" On 9 July she messaged Mr Brogden thanking him for "looking out for me".

17. Mr Brogden wrote to the claimant on 15 July relating to "a concern" that the respondent had over her refusal to complete the health and safety policy. He said that whilst this was not being treated as a disciplinary matter, she should be aware that he believed it had become necessary to document the situation to ensure that she was clear as to the respondent's expectations of her. He said that the sections of the policy she objected to were to keep herself, colleagues and customers safe. Any re-occurrence of the issue, it was said, could result in the disciplinary process being triggered.

18. Sophie Gibson's unchallenged evidence was that Mr Brogden had also told her that the claimant had been reluctant to have her temperature taken on arrival at work because she thought the infrared beam emitting from the thermometer used could cause her harm. The claimant did ultimately, however, agree to having her temperature checked. The claimant told the

tribunal that she was quite meticulous regarding the use of technologies and medication. She had asked what type of infrared beam was emitted as she wanted to check if there were any health concerns.

19. On 20 July Matthew Barr, HR Director, emailed all staff on the subject of the wearing of facemasks from 24 July. This followed a government announcement that facemasks had to be worn by customers in public shops, which included the respondent's premises. From that date customers therefore had to wear a mask when entering the premises. It was said that staff did not have to wear a mask although they could, should they wish to, but in all cases there had to be strict adherence to the 2m social distancing rule unless mitigation such as screens or facemasks were in place which allowed them to work in line with distancing of 1m plus.

20. The claimant had, after this date, attempted to wear masks herself when out shopping, for instance, but had become anxious and they had induced panic attacks as they triggered recollections of a serious incident [details of which the tribunal redacts] in her youth when her face had been smothered. She had never worn a visor, but the thought of doing so, as with masks, induced a state of anxiety for the same reason. She said that it was evident from her adverse reaction to wearing a mask, that covering her face was not an option for her, although, again, she accepted that she had never tried wearing a visor. She said that in all her future discussions with the respondent, her concerns were about face coverings generally and not just face masks. She said that she was not sure if Mr Brogden understood that a visor was also a face covering.

21. On 23 September Mr Barr emailed all employees to confirm that wearing a mask was now mandatory for all staff in accordance with the latest government directives. He said that from 24 September all customer facing colleagues had to wear masks in the dealership in all customer facing or public areas or when moving around the dealership. This applied whether or not a screen was in place. A further bullet point set out that all colleagues should wear facemasks when moving around the dealership, however, they did not have to do so when at their desk or in a meeting, in both cases where they could maintain the 2m social distancing rule or where there was a screen between them. He attached, as a reminder, guidance on wearing and removing face coverings and masks stating: "if colleagues believe that they have an exemption from wearing a mask they should discuss this with their General Manager, who will liaise with HR to confirm an exemption. Authority to work without a mask will need to be confirmed in writing by the HR team."

22. Updated government guidance was indeed published on 24 September. This included a requirement for face coverings to be worn by retail staff working in areas open to the public. This also made reference to some people being exempt from the requirement. One of the listed circumstances when a person did not need to wear a face covering was "because of a

physical or mental illness or impairment, or disability" and another "where putting on, wearing or removing a face covering will cause you severe distress".

23. Ms Gibson confirmed that the respondent's policy had been modelled on the government guidelines which recognised the availability of exemptions from any requirement to wear a face covering. If there was a request from an employee for an exemption, management were to seek more information to enable the respondent to establish medical grounds for the person being exempt and the reason why they couldn't wear a face covering. Ms Gibson's evidence was that the respondent attempted to have a conversation with the claimant around this issue, but the claimant was not compliant with that type of discussion. The respondent effectively had to establish whether someone had a disability or, under a separate head of exemption whether use of face coverings did cause distress. She agreed that if the claimant said she was experiencing severe distress, a manager would have to establish the cause of distress through meeting with her to discuss her situation. Ms Gibson was taken to a number of occasions where the respondent had referred to a "refusal" on the claimant's part to wear a face covering. She agreed that if, it was determined that the claimant had a disability, it would be unfair to categorise her as having refused.

24. The claimant's evidence was that the government announcement was in fact made on 22 September and that she contacted Mr Brogden "to arrange a convenient time to discuss further and once again explain my disability". In cross examination she recalled telephoning Mr Brogden on that date and saying that her issue with face coverings was her having panic attacks. Having received the email from Mr Barr she said that she then attended the respondent's premises whilst on annual leave on 24 September to speak with Mr Brogden. She said that she was asked by him to wear a face covering which she rejected and said that she explained again that she was unable to do so "from a physical/mental perspective." She said that she was then escorted from the building. The claimant has accepted in evidence that she did not refer when she attended the site on 24 September to her suffering from anxiety or having panic attacks.

25. After these alleged events, the claimant did text Mr Brogden at 12:31pm on 24 September. This read as follows: "The reason I wanted to come and speak to you today is because I guessed that work would be implementing face coverings (obviously I got in touch before the email was sent out), so now I know that that is the case, I wanted to speak to you about where we move forward from here? I physically cannot wear one, I have tried on more than one occasion since 24 July and I just can't do it. It creates severe distress for a number of reasons; the main one being that I have a complete aversion to anything covering my face, which stems back to my teenage years I believe. I wasn't aware that this was even a problem until I have tried to wear a face covering in recent months, but it transpires it is a huge problem for me. I am also wary of the health implications which we have

already discussed. I spoke with my GP who is unable to issue what I suppose one would refer to as an "exemption certificate"; there is no such thing. So where can we go from here? I really want to continue working as efficiently as I can, I don't know if working from home would be viable, or else could I perhaps do what we had touched upon in the past, which is attending to all of the VCHs? Along with preparing job cards, I feel I could still provide invaluable support to the team and the business without being customer facing… And hopefully I can resume my day-to-day role once the government guidelines have changed that way I could be more isolated at work, if that is necessary? That was why I got in touch because I have been really very worried since the guidelines were changed on Tuesday and I want to be able to work to my fullest potential, without having cause myself any unnecessary suffering."

26. It was put to the claimant that if she had told Mr Brogden about anxiety or panic attacks prior to the 24 September text she would have used the same language in the text. Her response was: "possibly; possibly not". There was no reference to panic attacks in her witness statement. The claimant told the tribunal that she thought a reference to her physical/mental health issues would be enough to cover that. She was adamant in evidence that she had mentioned panic attacks and anxiety to Mr Brogden prior to the aborted 24 September meeting. It was put to the claimant that referring to a complete aversion was in essence saying that she did not like her face covered. She said that this was quite different to not liking something. It was put that the reference to this stemming from her "teenage years" did not indicate whether there was a mental or physical health issue and it could have in fact related to a skin condition such as acne. She agreed that it was unclear from her message, but had been very clear from what had been said to Mr Brogden when they met.

27. The claimant and Mr Brogden did meet again on Monday 28 September. Following this he produced an investigation report dated 1 October. In this he firstly referred to the respondent's Covid policy and the concerns the claimant had expressed about it. He made no reference to any conversation then until the claimant contacted him on 22 September to discuss potential changes to the Covid guidelines regarding the introduction of facemasks. The further requirement for staff to wear masks was then issued on 23 September. The claimant then attended the premises on 9:30am on 24 September (although Mr Brogden referred to the meeting taking place the morning following their telephone call). He described her standing in his doorway without a mask, him asking her to put one if she was on site and her refusal. He asked if she had read the email from Mr Barr which she confirmed she had. Mr Brogden said that at this point he stated that she would need to wear a face mask if she wanted to sit and discuss anything. She asked if she could just stand in the doorway and talk to him to which he declined and explained that members of staff were still expected to wear face masks and she was not exempt from this rule. He said that the claimant then asked if she could have the conversation in the car park. Mr Brogden declined, he said because it was raining. At this point he confirmed that he

had requested that she left the site if she was not prepared to wear a mask and to consider her options before her return to work from leave on 28 September.

28. He then noted that the claimant had attended site on 28 September. He noted that she was not in uniform and ready to start work at 8am which he said he commented on to her. He said that the claimant "kind of agreed" that that was the case. He said that he met her at the door, that he had a face mask on and had one ready to issue to the claimant, but that she declined this offer. He then said he suggested that she sanitise her hands and she refused saying that she had washed them earlier. Nevertheless, the claimant and Mr Brogden then sat in his office, he noted, with a distance of 2 – 2.5 metres between them. He noted that he asked if she would wear a face mask and she said that she was still refusing to do this. He noted that he asked why and she replied it was all in the text she had sent. He recounted that he revisited the text and they "both agreed that Laura had no ailments that would stop her from wearing a mask. The text stated that she had tried wearing one and it causes severe distress for a number of reasons, mainly the fact that she doesn't like her face covered." He noted that the claimant asked if her proposal of working from home or in the back office had been considered. Mr Brogden said that he explained that this request had been rejected on the grounds that her role of service advisor consisted of dealing with customers on a daily basis. He noted that he had also stressed that it would be unfair for her colleagues to have to see additional customers when they were already seeing their own. He noted that he had asked again if she would reconsider her decision to not wear a face mask and that the claimant declined this. He noted that he had asked her if wearing a visor would be an option, which was again declined. He noted then that he had felt he had no option but to suspend the claimant and pass the matter to HR with the possibility of this leading to a disciplinary hearing.

29. His report concluded that the evidence suggested that the claimant was failing to follow government guidelines for no good reason in both refusing to wear a mask and failing to sanitise her hands regularly as required. It was noted that this might be considered to amount to gross misconduct relating to serious breach of the respondent's values or policies, failure to follow a reasonable management request and a breach of health and safety policy which might put colleagues and customers at risk. Formal action was recommended to be taken.

30. Mr Brogden, in his report, noted then that around two hours later he received a text consisting of a sicknote for two weeks referring to depressed mood.

31. Ms Gibson, as HR Business Partner, had discussed the matter with Mr Brogden. They believed that the claimant previously had not been cooperative in terms of accepting the terms of the respondent's policy. After the investigation, their view was that the claimant had given a variety of

different reasons why she couldn't wear a face mask. This undermined the claimant's position. She felt that the claimant presenting such a variety of reasons had diluted her reason as to why she believed she was exempt from wearing a face mask. She wasn't sure which of the reasons given were genuine.

32. Ms Gibson confirmed to the tribunal that the respondent had access to a third party occupational health provider. She did not consider a referral and this was not something she discussed with Mr Brogden. She said that, certainly in July, she would not have known what to refer the claimant for. They would normally involve occupational health to ask them to assess a particular ailment.

33. Before the tribunal the claimant said that the note of the discussion with Mr Brogden on 28 September was a misrepresentation in that it did not reflect what she had said in the text. She also said that there was some further discussion regarding the claimant's concerns beyond what Mr Brogden had set out. The claimant accepted that she had received his report prior to a disciplinary hearing which was to take place. The claimant did not challenge its contents. After being notified of her dismissal, she set out her challenges to the respondent's decision-making, but did not say that Mr Brogden had misrepresented what had been said at the meeting. She told the tribunal that she did not realise she had the ability to object. She also said that she considered that her reference to severe distress encompassed her suffering panic attacks and said she did not differentiate between the words. Again, she said that she had told Mr Brogden about suffering panic attacks.

34. The claimant had in fact seen her GP on 25 September, after her 24 September text and before Mr Brogden's investigation meeting with her. That appointment and what was discussed at it was not disclosed by the claimant to the respondent. The medical records note that the claimant felt unable to wear a mask, feeling anxious when she puts one on "like she might vomit/cry. Similar panic feeling to when her children are near water." She was diagnosed with depressive disorder. It was noted that there was a discussion whether to issue a fit note or sick note with the decision being taken to issue a sick note at this point but with the possibility in the future of issuing a fit note with a reference to modifications, explaining that masks caused her to have panic attacks and asking for a more socially distanced role to enable her to continue working. A sick note for "depressed mood" was subsequently issued valid from 25 September to 8 October 2020.

35. When cross examined on this, the claimant said that she was not capable of working and it had been agreed with her doctor that she was not physically capable of going into work. She said she told her doctor that it was likely that she would lose her job unless she could get an exemption certificate from wearing a mask. She was unable to get such a certificate. Therefore, the doctor said she was going to declare the claimant as unfit as long as face masks were mandated. When put to her that her doctor had

said that she could sign her as only fit to work if she didn't have to wear a face mask, but that the claimant wanted the doctor to sign her off completely, she agreed that that was the case on 25 September. She said that she would have been uncomfortable returning to work on 28 September because she had reached a level of unbearable anxiety.

36. Taking stock in terms of factual disputes, the tribunal does not on balance accept the accuracy of Mr Brogden's summary of his conversation with the claimant when they met on 28 September where he recorded that the claimant agreed that she had "no ailments" and said straightforwardly that she didn't like her face covered. The tribunal has obviously not heard evidence from Mr Brogden. The claimant disputes that this was said, albeit in circumstances where she is not a reliable witness as to what she said in this period and did not seek to object to investigation report contents at that time. Nevertheless, the tribunal considers it unlikely that the claimant made these particular statements (against the background of the contents of the recently sent text) and that Mr Brogden was in recording those statements seeking to summarise/paraphrase the contents of the claimant's text message of 24 September. He did so in a way which, as a matter of fact, diminished the strength of the feelings the claimant had in fact expressed in that text.

37. The tribunal also concludes that there was no material disclosure to the respondent beyond what is set out in the claimant's text of 24 September. In particular, the claimant did not tell Mr Brogden that she suffered from panic attacks. This was not said during the telephone conversation on 22 September, when they met on 24 September or at the final meeting on 28 September. Had the claimant made such reference during the 22 September conversation is more likely than not that her text would have referred or alluded to that information already having been provided. Furthermore, her witness statement evidence does not support the earlier disclosure. In terms of this and other conversations, the claimant did not wish to give the respondent more information than she felt she had to. There is no reference in the investigation report to any additional disclosures in circumstances where the claimant did not, on receipt of it or at the appeal stage, challenged the contents. The claimant's recollection of her GP appointment on 25 September is poor and suggestive of a wider lack of recall of exactly what was said by and to her in this period. Nor did the claimant ever refer Mr Brogden to her having a disability.

38. The claimant accepted that on 28 September she had not used the hand sanitiser Mr Brogden provided. Her position was that she had already sanitised her hands before getting out of her car. She agreed nevertheless that Mr Brogden could have a legitimate concern that she could have touched, for example, her face and door handles on the way to his office. The claimant accepted that the instruction to sanitise her hands was a reasonable one in accordance with the policy, but it was a policy she had signed under duress. However, she thought it was reasonable for him to

accept that she couldn't use the alcohol sanitising products provided and queried whether it was reasonable for a meeting to take place outside of her working hours. She described herself as only being a "visitor" on that day rather than being there as an employee. She was there nevertheless, the tribunal considers, for an employee/manager meeting in respect of her employment.

39. She said that having read Mr Barr's email she now understood that as a visitor she still had to comply with the policy. She said that there was no expectation that she would handle anything or touch Mr Brogden during their discussion and that sanitisation was not required if an employee had washed their hands. If he was following policy, he should have requested that she washed her hands which she said she would have. She accepted in cross examination that she did not say in her statement describing the events that she told him about any issue using particular products. Nor was there any such reference in a timeline document she had prepared from December 2020 in preparation for a preliminary hearing before the employment tribunal. She referred only later in her statement under the heading of 'injury to feelings' that she had explained that she had extremely sensitive skin and used her own sanitiser. Mr Brogden's investigation report did not refer to him being given any explanation. The claimant did not challenge such omission at the time of the disciplinary and potential appeal processes. On balance, the tribunal concludes that she did not explain to Mr Brogden her concern regarding using a hand sanitiser.

40. The claimant was invited to attend a disciplinary hearing by letter of 2 October which reflected the recommendations in the investigation report. She was given the right of accompaniment and told a failure to take reasonable steps to attend the meeting might result in it taking place in her absence. The claimant responded on 4 October saying that she did not feel able to attend at present due to increased stress and anxiety levels which had led to her being signed off work. The claimant accepted this was the first time certainly in writing that she had referred to the respondent to her suffering from anxiety. She said they would need to reschedule for her return. The respondent wrote to the claimant then on 7 October saying that the disciplinary hearing had been rescheduled from 6 to 15 October. The claimant did not respond. On 13 October Mr Brogden emailed the claimant asking her to confirm her attendance and saying it was strongly advised that she attended as it might be carried out in her absence if she failed to attend. The claimant responded that day saying she was unable to attend and would attend when her doctor confirmed that she could return to work, but that was definitely not something she was able to do at present. By email of 14 October, Mr Brogden asked the claimant if she was able to conduct the disciplinary hearing via Teams or send in a written submission if she felt unable to attend. The claimant's evidence was that she did not see this email at the time it was sent.

41. It was put to the claimant that again she did not explain to the respondent that her doctor had offered to provide a note saying that she suffered panic attacks from wearing a face covering and that she was fit to work if that was not required of her – an effective exemption. The claimant maintained she was not aware of her having such an option although when referred again to her GP notes she accepted that she must have known. She said that she had already asked Mr Brogden to modify her role and this had been rejected. She presumed that she had told her GP that a modified role had already been ruled out. The claimant accepted this was not referred to in her doctor's notes. When asked why she did not obtain and provide evidence of her reaction to face coverings to her employer she said: "I did not think… I shouldn't have had to go to my GP… At this time my head was all over the place."

42. When put to her that the respondent had taken action in circumstances where no medical concern had been identified as a good reason for not wearing a face covering, the claimant said that she had explained the situation to the best of her abilities and she was not sure what more she could have told or shown the respondent.

43. The disciplinary hearing was held by Mr Kevin Howes, Head of Business. He had prepared number of questions in advance including one asking the claimant the reason for her not wearing a mask and another asking what happened as a teenager which meant that anything covering her face caused distress. He was also planning to ask why she would not wear a visor either. He noted in his script that if she had chosen not to wear a mask that was a conscious choice against government guidelines. When the claimant did not attend the meeting, Mr Howes considered his decision. He noted that she had failed to follow a request and he queried whether if she was at the disciplinary meeting she would refuse to wear the mask and, if she was well enough to come to work, whether she would sanitise her hands as well. If she said no, then he didn't see how her employment could continue. A refusal to abide by the government guidelines and the respondent's policy gave him no option but to terminate employment he noted.

44. He wrote to the claimant by letter of 16 October where he referred to the "mitigation" she had put forward during the investigation. He noted this to be that she was unable to wear a mask because it caused her severe distress due to the aversion to anything covering her face which went back to her teenage years, in addition to having been wary of the health implications of wearing a mask. He concluded that she had not provided sufficient evidence to demonstrate that she was exempt from wearing a mask. Her concerns over the health implications of wearing a mask did not provide her with an exemption. The claimant's actions were not aligned with the duty of care owed to colleagues and customers in preventing the spread of Covid. In addition, the respondent had a responsibility to enforce government guidelines. Therefore, his decision was to terminate

employment with immediate effect from 15 October 2020. The claimant was given the right to appeal within five working days.

45. Ms Lightowler, HR Manager supporting Mr Howes, agreed that the claimant's failure to wear a face mask was characterised as a refusal because it was deemed that there was no legitimate reason for an exemption. When put to her that the claimant's text message had referred to an aversion, she said that they had not been able to find out any more about that and because the claimant couldn't meet the requirements for her to be granted an exemption her position amounted to a refusal. She said that it had been agreed by the claimant at the meeting with Mr Brogden that there were no medical ailments preventing her from wearing a mask and therefore the respondent could regard her stance as a refusal. She been happy to accept Mr Brogden's summary of what the claimant was saying. What she took from the investigation summary was that the claimant did not like to wear a face covering rather than her suffering from any particular ailment. When put to her that severe distress was given as a reason, she said that the purpose of the disciplinary meeting was to understand that, but no more information had been given. Because the respondent couldn't determine what caused the distress, the respondent concluded that she was refusing. Obviously, she now knew that the claimant suffers from anxiety and panic attacks and would have expected that to have been disclosed at the time. She felt that they needed more information than what had been contained in the text of 24 September. They needed an open conversation about what that distress was. The information which the claimant subsequently disclosed (shortly after the dismissal outcome) and as referred to below did change her understanding and she accepted linked in with the text message. She said that she wished she had known this at the time of the disciplinary. Nevertheless, she believed the correct conclusion had been reached on the evidence at the time.

46. As already referred to, the claimant emailed Ms Lightowler raising questions regarding the dismissal decision. She referred to the statement that she had refused to follow government guidelines with no good reason. She then referred to wearing a face covering inducing panic attacks because of a serious sexual assault [details redacted by the tribunal] when she was 15 years of age. Her doctor, she said, agreed with her position and that was why she had been signed off as unfit to work. She went on that she was under no obligation to divulge or share private medical details or prove that she had an exemption under the Data Protection Act 1998. She referred to not sanitising her hands on one occasion when she was not working and was merely visiting during a period of sickness and then that she had explained to Mr Brogden that her hands had been cleaned already. She referred to her sanitising her hands regularly with an organic product so as to avoid irritating her skin. She continued that no doctor was able to provide an exemption certificate as such a thing did not exist and asked what would be considered sufficient. She said that the government had advised that one does not need to prove their disability/medical exemption and provided a link to a government website. She said that she was protected against

unlawful discrimination because of her disability under the Equality Act 2010. She said that she was essentially being told to wear a face covering or lose a job which infringed upon her human rights as well as going against current government guidelines regarding exemptions.

47. Ms Lightowler replied saying that the reasons for the dismissal decision were in the outcome letter and asked whether she would like her email to be treated as her appeal. In a subsequent email of 19 October, the claimant said that she understood that once an employee has contacted the manager to discuss their exemption then HR will decide whether or not individual could be exempt in the workplace. She wanted to hear from someone within HR as HR appeared to be the ultimate decision maker. Ms Lightowler responded that HR supported the management team in assessing whether or not a colleague was exempt from wearing a face mask. She went on that she believed it was made clear that it was determined that she was not exempt from wearing a face mask and as such she was invited to a disciplinary hearing after refusing to wear one.

48. By letter of 26 October the claimant was invited to an appeal hearing to take place via Teams on 30 October. The claimant informed the respondent that she would not attend and an "ACAS representative" would be in touch in due course.

49. The appeal was conducted in the claimant's absence by Mr Craig Patterson, Divisional Aftersales Director. He noted questions he would have liked to have raised with the claimant and explanations he might have sought. As regards the Equality Act, he noted that they would have liked to have talked to her about the fact that the respondent was unaware of her having any sort of issues or condition which had an effect on her daily life.

50. He then wrote to her by letter of 6 November upholding the decision to terminate her employment. He noted that at the time of the disciplinary hearing, the respondent was not aware of the events she had subsequently described as having occurred. The statement she had made to Mr Brogden supported the conclusion that no good reason had been provided. He noted that the claimant could have spoken confidentially to HR citing the reasons for her not wearing a mask and this would have been considered. The decision to dismiss had been made without such disclosure by her. He believed that the decision to terminate her employment was the right one. Whilst he did not refute her reasons for not wearing a mask, there had been considerable opportunity for her to discuss this in confidence, but she chose not to do so. She also chosen not to fully engage in the process and to allow the respondent the opportunity to make a fully informed decision about her circumstances. Her refusal to sanitise her hands was said in itself to be a breach of the Covid policy which the claimant had read and signed.

51. Before the tribunal, the claimant accepted that in hindsight she could have given more information to the respondent but was not sure that she quite realised that at the time. She said that her ability to think logically had been seriously impacted by her mental health at the time. She said that had she been asked to produce medical evidence she would have provided what had been submitted at the earlier preliminary hearing of the tribunal to determine disability status. She said that, had she been asked, she would have seen occupational health.

52. The claimant's position was that she could have been given all of the VCHs to price up and sell to the customers. She said that Mr Brogden had previously suggested that he could ask her to do all of the VHCs. She could have done that work from the back office and said that, as there was a team commission structure, this would not have affected anyone financially. Indeed, she was the best performer in this area. She accepted that her taking on this role would have increased the exposure of her colleagues to customers in the dealership. She felt there was enough work in this area to have kept her busy each day. She agreed that it was preferable to have continuity of service, but believed customer details could have been communicated easily to her by her colleagues, if necessary, by telephone.

53. The tribunal has been told of an individual employee who suffered from severe asthma and was not required to wear a face covering though they would wear one when they were moving around the building. This employee was a sales executive who would on occasions be sat at a desk facing a customer, albeit with a plastic screen between them.

54. Another employee suffered from psoriasis on her scalp and face and would experience physical pain behind her ears and on her scalp following prolonged wearing of a face mask. Ms Lightowler said it had been difficult to determine whether that person was medically exempt because the government guidance seemed to set the bar quite high. However, given her circumstances, an agreement was reached that she would wear a face mask as much as she could, but she was allowed to take breaks from wearing it provided that the breaks were taken away from her colleagues and customers.

55. Ms Lightowler estimated that around 15 – 20 exemptions had been allowed across the business and said that a database was kept of them which was considered to ensure a consistent approach. She only personally dealt with the employee with the skin condition, but believed that others had been granted exemptions because of COPD or severe asthma.

**Applicable law**

56. In the Equality Act 2010 discrimination arising from disability is defined in Section 15 which provides:-

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

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

*(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"*

57. Knowledge is relevant at the time the employee is treated unfavourably. Knowledge acquired only at a later point is not sufficient. The tribunal notes the case of Reynolds v CLFIS (UK) Ltd 2015 ICR 1010, where the Court of Appeal held that allegations of discrimination relating to a decision to dismiss and the decision on appeal were distinct claims that must be raised and considered separately. The tribunal's enquiry in this case ends at the point of dismissal.

58. The EHRC Employment Code (at paragraph 5.15) states that an employer must do all it can reasonably be expected to do to find out whether a person has a disability. An example is given of an individual suffering from depression with a good attendance and performance record who more recently has become emotional and upset at work for no apparent reason, has been repeatedly late and has made mistakes. The sudden deterioration in his circumstances should have alerted the employer the possibility that these were connected to a disability. It is likely to have been reasonable to expect the employer to explore with the worker the reason for these changes and whether the difficulties were because of something arising in consequence of a disability. It is noted by the tribunal that the scenario provided for also includes the worker being disciplined without being given any opportunity to explain that his difficulties arose from a disability.

59. The burden is on the employer to make reasonable enquiries based on the information given to it, but not to require it to make every possible enquiry even where there was little or no basis for doing so. It has been accepted that in the context of a duty to make reasonable adjustments an applicant for a job cannot be expected to go into great detail about his disability or its effects merely to cause the employer to make adjustments that it probably should have made in the first place. On the other hand, a balance must be struck and it would be equally undesirable if an employer were required to ask a number of questions about whether or not a person feels disadvantaged when the need to do so does not arise and which it would not ask of an able-bodied person – see Ridout v TC Group 1998 IRLR 628 EAT.

60. Failure to enquire into a possible disability is not by itself sufficient for an employer to have constructive knowledge of it. It is also necessary to establish what the employer might reasonably have been expected to know had it made such an enquiry. In A Ltd v Z 2020 ICR 199, the EAT noted

that Z would have continued to suppress information about her mental health problems, would have insisted that she was able to work normally and would not have agreed to any medical examination that might have exposed her psychiatric history. Therefore, A Ltd could not reasonably have been expected to know that she was disabled.

61. The tribunal must determine whether the reason for any unfavourable treatment was something arising in consequence of the claimant's disability – this involves an objective question in respect of whether "the something" arises from the disability which is not dependent on the thought processes of the alleged discriminator. Lack of knowledge that a known disability caused the "something" in response to which the employer subjected the employee to unfavourable treatment provides the employer with no defence – see City of York Council v Grosset 2018 ICR 1492 CA.

62. Any unfavourable treatment must be shown by the claimant to be as a result of something arising in consequence of the claimant's disability, not the claimant's disability itself. The EHRC Code at paragraph 5.9 states that the consequences of a disability "include anything which is the result, effect or outcome of a disabled person's disability". It has been held that tribunals might enquire as to causation as a two-stage process, albeit in either order. The first is that the disability had the consequence of "something". The second is that the claimant was treated unfavourably because of that "something". In Pnaiser v NHS England 2016 IRLR 170 EAT it was said that the tribunal should focus on the reason in the mind of the alleged discriminator, possibly requiring examination of the conscious or unconscious for process of that person, but keep in mind that the actual motive in acting as the discriminator did is irrelevant.

63. Disability needs only be an effective cause of unfavourable treatment - see Hall v Chief Constable of West Yorkshire Police 2015 IRLR 893. The claimant need only establish some kind of connection between his or her disability and the unfavourable treatment. In that case sickness absence was as a result of stress and a heart condition. A tribunal had held that the cause of the unfavourable treatment was the police force's genuine but erroneous belief that the claimant was falsely claiming to be sick. The EAT considered nevertheless that disability had a significant influence on or was an effective cause of the unfavourable treatment. On the other hand, any connection that is not an operative causal influence on the mind of the discriminator will not be sufficient to satisfy the test of causation. If an employee's disability-related absence, for instance, merely provided the circumstances in which the employer identified a genuine non-discriminatory reason for dismissal, then the requisite causative link between the unfavourable treatment and the disability would be lacking. The authorities are clear that a claimant can succeed even where there are more than one reasons for the unfavourable treatment. As per Simler J in the Pnaiser case: "The "something" that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or

more than trivial) influence on the unfavourable treatment, and so amount to an effective reason or cause for it". Further, there may be more than one link in a chain of consequences.

64. Applying the legal principles to the facts as found, the tribunal reaches the conclusions set out below.

**Conclusions**

65. It is been determined by a different tribunal already that the claimant was at all material times a disabled person by reason of her suffering from anxiety.

66. The question is then whether the respondent knew or ought reasonably to have known (and at what point) that the claimant was a disabled person.

67. On 7 July the claimant told Mr Brogden that she did not consent to wearing a face mask for her "personal health reasons". Also on that day, she referred him to her main concern being respiratory given her history of smoking and also that she was hard of hearing. She said that she knew nothing regarding the health implications of wearing a visor, as opposed to a facemask, and that was something she would need to explore. At this point the claimant had not tried to wear any form of face covering. The claimant agreed in evidence that there was nothing at this point suggestive of her being so anxious about wearing a face mask to the extent of her suffering from a disability. On 9 July she texted Mr Brogden thanking him for looking out for her.

68. The claimant did have a telephone conversation with Mr Brogden on 22 September after a government announcement had been made regarding a widening of the mandating of the wearing of face coverings. The tribunal has found that she did not refer to herself as suffering from panic attacks during this conversation or to a disability. The claimant then attended the site to see Mr Brogden on 24 September prior to being escorted from the premises. The claimant has accepted in evidence that she did not refer at this point to her suffering from anxiety or having panic attacks.

69. Later on 24 September, the claimant did send a text to Mr Brogden. She said that she physically could not wear a face covering. She said that she had tried and it created "severe distress" for a number of reasons but with the main one being "a complete aversion to anything covering my face, which stems back to my teenage years I believe." She referred to this being a "huge problem" for her. She said that she had spoken to her GP, but that there was no such thing as an exemption certificate which she could issue. She described herself as being "really very worried" since the guidelines were changed and wanting to continue "without having to cause myself any unnecessary suffering". On the tribunal's findings that is definitive of what the respondent was told save for a fit note issued on 25 September which

referred to the claimant as being unfit to attend work due to "depressed mood".

70. The claimant saw her doctor on 25 September and certainly could have told the respondent more following that appointment.

71. No material additional information was provided by the claimant when interviewed by Mr Brogden as part of his investigation. The tribunal's findings are that the claimant did not agree with him expressly that she suffered from no ailments and did not straightforwardly say that she did not like her face covered. This was, the tribunal has found, Mr Brogden's attempt to paraphrase her text of 24 September. Again, having seen this report, the claimant could have objected to his wording and provided greater detail.

72. She informed the respondent on 4 October that she would not be attending the disciplinary hearing due to increased stress and anxiety. The claimant did submit a subsequent fit note on 9 October referring to "depressive disorder". She advised on 13 October that she was unable to attend the disciplinary hearing and would attend when her doctor confirmed that she could return to work, something which she was definitely not able to do at present.

73. Only after the claimant had been dismissed did she provide information about a traumatic assault she had been subjected to in her youth which went significantly further in providing a potential explanation for an inability to wear a face covering which indicated a linkage to some form of trauma. However, the tribunal must consider the respondent's knowledge on the basis that at all material times it did not have that particular piece of information.

74. The tribunal concludes that the respondent did not know, nor ought it reasonably to have known, that the claimant was a disabled person prior to the 24 September 2020 text. The reasons she had given for concerns regarding face coverings prior to that date were not indicative of her suffering from anxiety. The respondent might simply have been alerted regarding potential hearing issues or of a respiratory problem which would certainly not, indeed in respect of those potential impairments, have been sufficient to have put it on further enquiry.

75. When the claimant provided the information she did in her text of 24 September, the respondent ultimately considered that the information provided was undermined by her previous reluctance as regards face coverings having been expressed to be on account of the respiratory and hearing issues. Whilst the tribunal can understand how the respondent came to that conclusion, it was not a reasonable one in circumstances where having other health-related reasons for not wearing a mask ought not

to have reasonably been suggestive that the issue now being raised was not genuine. In particular, it is noted that the claimant had only since the discussions in early July actually been put in a position where she had been required to wear a face covering in her daily life and had effectively discovered only then the effects on her of doing so.

76. The claimant is clearly in her text not talking in terms of a preference, but of her suffering from "distress" and there being a risk of "unnecessary suffering". Again, the reference to a "complete aversion" is indicative of more than the claimant simply not wishing to wear a mask, particularly in a context given by the claimant of something which stems back to her teenage years. The suggestion is of an underlying cause which goes back many years. The claimant then refers to the wearing of masks as a huge problem which is clearly caused her to speak to her doctor. The information is indicative of an underlying cause and now of a medical nature. The information provided by the claimant is not of her doctor being dismissive of there being an underlying medical cause, but of the doctor not being in a position to provide an exemption certificate as there is no such thing – a statement which indeed was accurate.

77. Whilst the claimant's concerns were obscured in the respondent's mind by her different concerns when the issue of facemasks first arose in July and by the claimant's attitude towards Covid safety, including acceptance of policies, undertaking of training and submission to temperature testing, the reaction of the claimant as expressed in her text of 24 September still ought reasonably to have caused the respondent to consider that the claimant's behaviour was not that of the successful service advisor who had appeared to have been effective in her role and who had had no relationship issue with Mr Brogden. This was particularly the case given the state of mind that the claimant was now expressing and that she had been to see her doctor. In early July, the claimant had said that she would wear face coverings if they became mandatory. The tribunal notes that in the claimant's earlier behaviour there are indications of a form of sensitivity and attention to detail which might have had a linkage in the claimant's anxiety impairment, but of which certainly at this stage the respondent could have had no awareness

78. The claimant clearly, on the tribunal's findings, might have been more open and given a better and more detailed explanation of how she felt. The tribunal cannot, however, conclude that had the respondent made further enquiries the claimant would have refused, for instance, to have agreed to the production of a medical report or would have suppressed information. Ultimately, in reaction to the dismissal decision the claimant did provide further detail of the most personal nature.

79. The respondent, the tribunal concludes, ought reasonably to have made further enquiries whether through its occupational health service provider or directly to the claimant's own GP from which it is likely that it would have become aware of the claimant's disabling condition. Given that the claimant

was seeing her GP, to the respondent's knowledge at the time, about her reaction to face coverings and was referring to the inability to produce an exemption certificate, the respondent was on notice that there was a medical reason behind the stance which the claimant was taking which required clarification. The steps necessary to gain such clarification were not onerous for the respondent and there is no evidence that any significant delay would have arisen in terms of the respondent's need to make a determination. The respondent was fully aware of government guidelines regarding exemptions which covered physical or mental impairments, but also indeed situations of distress, had put together a policy reflective of those guidelines and had recognised that a number of its employees were exempt. It kept a database of such individuals. Ms Gibson told the tribunal that it was the respondent's policy to seek more information to establish if an exemption from wearing face coverings applied and that, in the claimant's circumstances, a manager would need to establish the cause of the claimant's distress. Mr Howe anticipated the need to ask at the disciplinary hearing the reason for the claimant's stance, what had happened as a teenager which meant anything covering her face caused her distress and why she could not wear a visor.

80. The respondent in the claimant's case was, however, clouded by considerations that she was taking a position out of choice and effective awkwardness, without which it is likely that the reasonable further enquiries would have been made. As at 24 September 2020, the respondent had constructive knowledge that the claimant was a disabled person by reason of anxiety.

81. The tribunal concludes that the claimant was unable to wear a face covering because of her anxiety impairment. The claimant had tried to wear a face mask when out shopping which had caused her to feel distressed and in a state of panic. It triggered memories of the incident in the claimant's youth, which in turn triggered feelings of anxiety. Whilst the claimant never wore a visor, as distinct from a face mask, the thought of doing so created anxiety for the claimant given how she had reacted to a face mask and her expectation that she would also have a feeling of being closed in or smothered by a visor.

82. The issue of the claimant's inability/refusal to wear a face covering was dealt with firstly by her line manager Mr Brogden, assisted by Ms Gibson of HR, up to the point of the claimant being invited to attend a disciplinary meeting on 6 October 2020. The decision to terminate her employment was made by Mr Howe who was supported at that stage by Ms Lightowler of HR. Mr Howe had before him the investigation report prepared by Mr Brogden as well as texts/emails sent by the claimant.

83. In terms of causation, Ms Gould has urged the tribunal when considering the claimant's dismissal to focus on what was in Mr Howe's mind. It is said that he held a belief that the claimant did not have any inability to wear a

face covering and that there was no good reason for her not wearing a face covering. Therefore, it is said that the claimant's inability to wear a face mask was not an operative cause of the dismissal but rather the respondent's perception of the claimant as effectively refusing to wear a face covering. The claimant's own case is said to be that the respondent thought she was refusing, whereas she was in fact unable to wear the face covering. The respondent was trying to understand if there were genuine grounds for not wearing a face mask and did not believe that there were. The respondent, it is submitted, did not dismiss the claimant because she was actually unable to wear a mask in circumstances where it only wished to employ people who would comply with this requirement.

84. Whilst the tribunal has not heard any evidence from either Mr Brogden or Mr Howe, the tribunal accepts that it has heard from people who were involved in the decision-making and/or privy to their thoughts, which are to a great extent, in any event, documented by them.

85. The respondent's argument on causation appeared to loop back into an examination of the respondent's knowledge and whether any lack of knowledge as to disability or its affects was reasonable in all the circumstances. If it didn't know that the claimant was disabled, its reason for the unfavourable treatment could not have been something arising in consequence of disability. The tribunal has, however, already determined the knowledge issue. It did have constructive knowledge of disability. Also, it is the tribunal's finding that the claimant would not wear face coverings arising out of her disabling anxiety.

86. The claimant's "refusal" to wear face coverings, to use the respondent's language, was not merely a background circumstance to the claimant's dismissal. Mr Howe may well have genuinely thought that the refusal was without any reason, but this is a case where the claimant's disability was an effective cause or had a significant influence on the decision to dismiss. The claimant's refusal to wear a face covering, led to a conclusion that this was a refusal with no good reason which in turn led to the decision to dismiss. There was an effective chain of causation.

87. The respondent, in requiring the claimant to wear a face mask was acting in pursuance of its legitimate aim to protect the health and safety of staff and members of the public. The respondent cannot, however, maintain that it acted proportionately in dismissing the claimant in circumstances where its own policy, reflective of government guidelines, was that people with disabilities rendering them unable to wear face masks would be granted an exemption. The government guidance is in itself an exercise in balance recognising that whilst the wearing of masks ought be adopted in certain settings to reduce risk of spreading infection, the rule should not be absolute so as to exclude people who could not wear face coverings from those settings. In such cases, allowing individuals access to shops/workplaces trumped the health and safety imperative. As with other Covid safety

measures, masks were never designed to be or thought of as wholly preventative, but only a measure which would reduce risk. The respondent recognised this and in its own policy ensured that there was due scope for consideration of individual circumstances. It did exempt a number of employees in appropriate circumstances such as to allow them to continue to work with all other appropriate safety measures in place to reduce close face-to-face contact with others including in both working arrangements and physical features such as the installation of plastic screens.

88. This is a difficult case in terms of 'doing justice' in the broad sense. Whilst the tribunal has found that the respondent ought reasonably to have known that the claimant was a disabled person, the claimant was not open and helpful. Given the traumatic nature of the background behind the claimant's feelings of anxiety and its linkage to her anxiety in wearing a face covering, that can be understood to an extent. Nevertheless, the claimant could reasonably have given the respondent more information and she at times acted in a way which enabled a picture to be built up of an individual who was a denier of the risks to health posed by the coronavirus pandemic. On the other hand, the claimant did provide key information prior to her appeal which very clearly did put the respondent on notice. Ms Lightowler did see this as something of a game changer, but the respondent then appeared to limit itself to a consideration of the reasonableness of Mr Howe's decision on the basis of the information he had. An opportunity to rescue the situation regarding the claimant's employment and indeed the respondent's potential liability arising out of a termination of that employment was not taken.

89. The tribunal, however, has to determine only the claim that is brought and apply the facts to the relevant cause of action. That is what (and all) it has done. The claimant was unfavourably treated in her dismissal because of something arising from her disability in contravention of section 15 of the Equality Act 2010. Her claim succeeds.

90. The tribunal would note finally that the claimant has never been clear and specific as to the processes leading up to dismissal which she asserts should be found to be separate instances of unfavourable treatment. The tribunal's findings are confined to the act of dismissal.

Employment Judge Maidment

Date 7 February 2022