EMPLOYMENT TRIBUNALS (SCOTLAND)

Case no 4110737/2021

Held at Edinburgh on 22 and 23 March 2022

Employment Judge W A Meiklejohn

Ms Karen Shanks	**Claimant** **Represented by:** **Mr M Horn -** **Representative**
Lothian Health Board	**Respondent** **Represented by:** **Mr R Davies - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is as follows –

(a) the claimant's claims relating to overtime and holiday pay having been settled by mutual agreement, these claims are dismissed under Rule 52 of the Employment Tribunal Rules of Procedure 2013;

(b) the claimant's claim of unfair dismissal does not succeed and is dismissed; and

(c) the claimant's claim of breach of contract (relating to notice pay) does not succeed and is dismissed.

REASONS

1. This case came before me for a final hearing to deal with both liability and remedy. The claimant was represented by Mr Horn and the respondent by Mr Davies.

Nature of claims

2. In terms of her ET1 claim form the claimant brought complaints of unfair dismissal and breach of contract (relating to notice pay), and also in respect of entitlement to payment of overtime (between March and June 2020 due to *"emergency worker"* situation and between February and May 2021 while suspended) and holiday pay. Her complaints in respect of overtime and holiday pay were settled by mutual agreement either before or during the hearing and these claims fell to be dismissed under Rule 52. The claimant's preferred remedy for unfair dismissal was reinstatement.

3. These claims were resisted by the respondent. Their position was that the claimant had been dismissed for the potentially fair reason of misconduct. They did not accept that the claimant's dismissal without notice was in breach of contract.

4. For the sake of completeness, I should add that the respondent understood that the claimant might also be seeking to bring these further complaints –

(a) a claim under the Health and Safety at Work etc Act 1974 ("HSWA");

(b) a claim under the Management of Health and Safety at Work Regulations 1999 ("MHSW Regs");

(c) a claim of negligence (under reference to ***Montgomery v Lanarkshire Health Board [2015] UKSC 11***); and

(d) a petition for judicial review (under reference to ***Reverend Dr William J U Philip and others, Petitioners [2021] CSOH 32***).

5. The respondent's position was that the Tribunal did not have jurisdiction to deal with these complaints. In the event it became clear that the claimant was not seeking to bring these further complaints but rather that the legislation and cases referred to formed part of the argument advanced by the claimant that the management instruction with which she was found to have failed to comply in this case was not reasonable.

Evidence

6. For the respondent I heard evidence from Dr Jane Hopton, Programme Director in the respondent's Facilities Directorate. I also heard evidence from the claimant. I had a joint bundle of documents extending originally to 221 pages and supplemented by further documentation added during the hearing. I refer below to documents in the joint bundle by page number.

Findings in fact

7. The respondent is the legal entity which provides NHS services across Edinburgh, Midlothian, East Lothian and West Lothian. Its operations include facilities management which in turn includes catering at Edinburgh Royal Infirmary ("ERI"). The claimant was employed as a Catering Assistant at ERI. Her employment began on 16 July 2018 and ended with her summary dismissal on 27 May 2021.

Risk Assessment

8. The respondent's operations were impacted by the coronavirus pandemic and the spread of Covid-19 infections. It produced a Risk Assessment dated 29 April 2020 (the "Risk Assessment") (167-169). This highlighted a number of hazards including –

"*Wearing a facemask encourages the touching of the face and increased likelihood of COVID infection or food contamination"*

and

"The improper use of facemasks gives a false sense of security leading to reduced distancing and hand hygiene and increased likelihood of COVID infection."

9. Under "*Who might be harmed and how?"* the Risk Assessment stated –

"Catering staff, due to improper use of face masks leading to potential increased risk of COVID infection"

10. Under *"Existing Precautions/Instructions in place"* the Risk Assessment included –

- *Where social distancing cannot be achieved a fluid resistant surgical facemask can be used*
- *Discussion with and reassurance to staff on social distancing and what this means for them in their particular workplace; listening to concerns and answering questions*
- *Using appropriate departmental PPE commensurate with the risk*

11. Under "*What further action is necessary?"* the Risk Assessment set out the following action points –

- *Review all tasks to assess whether 2m social distancing can be sustained*
- *Consider alternative options for maintaining distancing for problem tasks that are identified*

- *If not alternative options are available, implement the use of fluid resistant surgical masks for staff performing these tasks*

- *Monitor and review the use of facemasks as required*

Statutory background

12. The statutory background against which the Risk Assessment was carried out is found in the HWSA which contains the following provisions –

2 General duties of employers to their employees

(1) It shall be the duty of every employer to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees….

3 General duties of employers and self-employed to persons other than their employees

(1) It shall be the duty of every employer to conduct his undertaking in such a way as to ensure, so far as is reasonably practicable, that persons not in his employment who may be affected thereby are not thereby exposed to risks to their health or safety….

4 General duties of persons concerned with premises to persons other than their employees

….(2) It shall be the duty of each person who has, to any extent, control of premises to which this section applies or of the means of access thereto or egress therefrom or of any plant or substance in such premises to take such measures as it is reasonable for a person in his position to take to ensure, so far as is reasonably practicable, that the premises, all means of access thereto or egress therefrom available for use by persons using the premises, and any plant or substance in the premises or, as the case may be, provided for use there, is or are safe and without risks to health….

13. The MHSW Regs, made under the HSWA and the European Communities Act 1972, include the following provisions –

3 Risk Assessment

(1) Every employer shall make a suitable and sufficient assessment of –

(a) the risks to the health and safety of his employees to which they are exposed whilst they are at work; and

(b) the risks to the health and safety of persons not in his employment arising out of or in connection with the conduct by him of his undertaking,

for the purpose of identifying the measures he needs to take to comply with the requirements and prohibitions imposed upon him by or under the relevant statutory provisions.

(2)….

(3) An assessment such as is referred to in paragraph (1)….shall be reviewed by the employer….who made it if –

(a) there is reason to suspect that it is no longer valid; or

(b) there has been a significant change in the matters to which it relates;

and where as a result of any such review changes to an assessment are required, the employer….concerned shall make them….

4 Principles of prevention to be applied

Where an employer implements any preventive and protective measures he shall do so on the basis of the principles specified in Schedule 1 to these Regulations….

Schedule 1

General Principles of Prevention

(This Schedule specifies the general principles of prevention set out in Article 6(2) of Council Directive 89/391/EEC)

(a) avoiding risks;

(b) evaluating the risks which cannot be avoided;

(c) combating the risks at source;

(d) adapting the work to the individual, especially as regards the design of workplaces, the choice of work equipment and the choice of working and production methods, with a view, in particular, to alleviating monotonous work and work at a pre-determined work-rate and to reducing their effect on health;

(e) adapting to technical progress;

(f) replacing the dangerous by the non-dangerous or the less dangerous;

(g) developing a coherent overall prevention policy which covers technology, organisation of work, working conditions, social relationships and the influence of factors relating to the working environment;

(h) giving collective protection measures priority over individual protective measures; and

(i) giving appropriate instructions to employees.

October/November 2020

14. The respondent held regular update meetings with staff. They also issued email updates called Speed Reads. According to a diary of events prepared by the claimant (152-162), Ms E Warren, Assistant Catering Manager, announced at a meeting on 31 October 2020 that *"masks are now part of uniform policy".*

15. Following a meeting on 2 November 2020 the claimant sent an email to Ms Warren on 3 November 2020 (187) in which she inserted links to a number of sources of information about the use of face masks. These sources included three American doctors (Dr J Meehan, Dr R Baylock and Dr T C Fry). There was also a reference to material which appeared to have been made available by Mr Horn.

16. The gist of what the claimant was saying can be found in the penultimate paragraph of her email –

"*there is a lot of accessible information regarding health, mask use and viruses and in light of the small but significant evidence given to you and others i have come to the informed decision that wearing a surgical face mask will not stop the spread of a "virus" furthermore wearing one for more than 5 minutes at a time will decrease my oxygen levels. i do not wish to suffer from hypoxia or severe hypoxia which can lead to cardiac arrest.*
you stated yesterday that staff must have a drs letter to be exempt from mask wearing or face disciplinary action. given the evidence on the whole mask topic and results of available studies to discipline or worse anyone over this matter would be a massive breach of the Nolan principles, human rights, employment rights, constitutional rights and the common law."

17. One of the statements used by the respondent in subsequent disciplinary proceedings against the claimant came from Ms S Dalgleish, Assistant Catering Manager and related to events on 4 November 2020. In her statement (115) Ms Dalgleish provided the following details –

"*Karen Shanks had been refusing to wear a mask in dept whilst on shift & other staff were complaining & stating they would not wear a mask if KS was not.*

After speaking to Karen Howieson (who had taken advice from Karen Fraser with the support of Robert Aitken)

I was asked to phone KS and inform of the need to always wear a mask in dept, or she could not come to work. All she said was OK.

She was repeatedly told by myself and the Supervisors on shift about wearing mask correctly. Again other staff working with her complained continually."

December 2020

18. Another of the statements used by the respondent came from Ms Warren (116). It related to events on 29 December 2020. The details were as follows –

"*Adil Gonden, Supervisor, came to the office to ask if I would speak to Karen Shanks about wearing her mask properly. He had asked her a few times and she ignored him, continually pulling it down leaving her nose out of it. I asked Karen to come to the office for a chat, which she did. I asked her to please make sure she wore her mask properly and re iterated to her how to wear it in the proper manner, fully covering her nose and mouth. She said ok and left."*

February 2021

19. Matters came to a head on 26 February 2021. The statement (118) obtained by the respondent from Ms A Miller, Assistant Food Production Controller, gave the following details –

"*Karen Shanks was not wearing her mask correctly,*

So I politely asked KS to put her mask over her nose and mouth and wear it properly when at work

She "pinged" her mask over her nose and mouth. Later on that day I had to ask her to wear her mask correctly when she was at dish wash area. This is

not the first time i have had to speak to KS as staff were continually complaining to me about how KS was wearing her mask in dept."

20. The statement (119) obtained by the respondent from Mr D Lee, Assistant Food Controller, said as follows –

"*Leading up to this incident Karen Shanks had been asked on more than one occasion to make sure she is wearing her face mask properly (especially where social distancing isn't possible within the dept). When challenged about this, she stated the following:*

- *She doesn't believe covid exists*
- *That I was one of "them"*
- *It doesn't matter how she wears the mask, as long as she has one on her person*

On the day of the incident I was speaking to Collette Cameron in front of the "loading end" of the dishwasher and noticed that Karen wasn't wearing her mask properly (covering her mouth but not her nose). I politely asked Karen to wear her mask properly. Her response to this was to pull her mask below her face entirely and stood smiling at me.
I then reported the incident to Sheena Dalgleish"

21. A longer statement was provided by Mr G Patterson, Site Services Manager (120-121). After referring to the incidents described by the other witnesses and having taken the claimant to the Supervisor's office, he continued –

"*At this point Karen just started to say, over and over again – "show me your evidence". It became clear that it was impossible to enter into any type of conversation with her….*

I was aware that Karen had been sent a letter by Janis Butler in response to her being challenged as to having to wear a face mask while on duty. I returned to my office and searched back through my email to find a copy of that letter. I printed a copy and placed this in an envelope. Forty minutes later I returned to the kitchen and again found Karen working with her face mask down under her nose…. I asked if I could have a word with her…[after returning to the office]…. *I handed her the letter and said I think that this is the evidence you are looking for…."*

22. The letter to which Mr Patterson was referring was one sent by Ms Butler, Director of Human Resources and Organisational Development, to the claimant on 11 January 2021 (164-166). This was stated to be a response to a letter from the claimant dated 4 January 2021 to the respondent's Chief Executive. The following excerpts highlight the points made by the claimant (in italics) and Ms Butler's replies –

1. *Place an immediate ban on compulsory use of face masks in the Catering department*

   Response:

   Scottish Government guidance states that:

   "You must **by law**….**wear a face covering** in shops, on public transport and public transport premises such as railway and bus stations and airports, and in certain other indoor public places such as shops, restaurants/cafes **including canteens**…."

   It goes on to say that:

   "This includes, for example, when attending an appointment at any healthcare setting such as GPs' surgeries, dentists, optometrists and **hospitals**. In workplaces (other than an early learning or school setting) you are **legally obliged to wear a face covering in communal areas**

indoors, unless exempt. You are also advised to wear a face covering in other indoor places and **where physical distancing is difficult and where there is a risk of being within 2 metres of people who are not members of your household**."

As a consequence of the above legal obligations placed on us and our duty of care under the Health and Safety at Work Act 1974, the use of fluid resistant surgical face masks in the workplace is considered to be essential personal protective equipment….

2. *Confirm that you will immediately cease and desist from compelling all colleagues from wearing face masks*

   Response:
   ….the use of fluid resistant surgical facemasks is legally required….the use of these facemasks must continue as one of the required control measures within catering departments. The rationale for this decision is the findings from the departmental risk assessment which highlighted that there are areas and times when physical distancing cannot be achieved and/or maintained.

3. *Furnish us with a copy of all risk assessments carried out by the catering department in connection with face masks*

   Response:
   Please find attached a copy of the most up to date departmental risk assessment (reviewed on the 20th November 2020). It is important to note that all risk assessments must be reviewed as circumstances change. As such we have requested that local line management review and update this one if necessary and communicate any changes to their staff….

4. *Provide confirmation that catering managers have been fully trained in connection with health risks associated with face masks, including regards to recognising health contra-indications from the use of same*

Response:

All managers have received comprehensive training with regard to the use of personal protective equipment including its donning, doffing and disposal….

Claimant is suspended

23. Mr Patterson wrote to the claimant on 2 March 2021 (180-181) confirming her suspension from work until further notice and advising that he was arranging an investigation. The reasons for the claimant's suspension were given in these terms –

- *There is a need to remove you from the premises to de-escalate the situation*
- *You may pose a threat to yourself or others*
- *To protect NHSL from organisational risk*

24. On 17 March 2021 Ms Butler sent an email to the claimant (173) in which she referred to a Caution Notice which the claimant had sent to various employees of the respondent, stated why she believed this was inapplicable and, after making reference to the investigation, continued –

"*I would, however, be prepared to set aside this action and allow you to return to work on the clear understanding that you will comply appropriately and at all times with the necessary Health and Safety rules around mask wearing in the workplace. If you are prepared to do so, please let me know and your suspension will be lifted. If not, the next communications you will receive will relate to the investigation process in relation to your alleged health and safety breaches."*

Investigation

25. Ms A Ritchie, Assistant Nurse Director, was tasked with undertaking an investigation into the following allegations brought against the claimant –

1. That you have continued to refuse to wear and/or properly wear a face mask in the workplace, as is deemed as essential Personal Protective Equipment required by Health and Safety legislation, without good reason.

2. As a result of refusing to wear a face mask and/or properly wear a face mask in the workplace, you may pose a threat to yourself, other staff members and patients.

3. Furthermore, as a result of refusing to wear a face mask and/or properly wear a face mask in the workplace, you may expose NHS Lothian to organisational risk.

26. The claimant was invited to an investigation meeting on 13 April 2021. She did not attend. Ms Ritchie wrote to the claimant on 15 April 2021 (182-183) inviting her to an investigation meeting on 23 April 2021, to be held via Microsoft Teams. Once again, the claimant did not attend. She set out her position in an email to Ms Butler of 16 April 2021 (201) –

"*Your failure to comply with Health and Safety Policy is the employers failure to provide supporting evidence as to the lawfulness of your policy and until you all act in accordance to the law I am under no obligation to comply with your irrationality."*

27. On 28 April 2021 Ms Ritchie wrote to the claimant (184-185) advising that the allegations against her would now be considered at a disciplinary hearing to be held on 21 May 2021. The disciplinary panel was to comprise Dr Hopton, Ms N Clancy, Head of Employee Relations (as HR adviser to the panel) and Ms L Guthrie, Associate Director, Infection Prevention and Control (professional adviser).

28. Ms Ritchie prepared an investigation report dated 10 May 2021 (106-112). This referred to the interviews with Ms Dalgleish, Ms Warren, Ms Miller, Mr Lee and Mr Patterson and documentary evidence from the claimant. The

conclusion was confirmation that the case had been referred for consideration at a formal hearing under NHS Scotland Conduct Policy.

Documents served by claimant

29. The claimant sent notices addressed to the respondent to and employees of the respondent. On 12 March 2021 she sent a *"Notice of liability – Opportunity to remedy".* On 22 March 2021 she sent a *"Warning – default notice"* (141-151). On 5 April 2021 she sent a *"Letter before action – default notice"* (123-140). In these she alleged *"Unlawful breach of the People's Peace"* and, in essence, challenged the lawfulness of the instruction relating to the wearing of face masks.

Conduct hearing on 21 May 2021

30. Dr Hopton wrote to the claimant on 10 May 2021 (53-55) inviting her to attend a conduct hearing on 21 May 2021. In her letter Dr Hopton set out the allegations against the claimant in the same terms as recorded in paragraph 25 above. She enclosed a copy of the management statement of case and appendices. She confirmed that while there would be a panel of three, the decision was ultimately her responsibility. She invited the claimant to provide a written case setting out any further information she wished to present. She set out the possible outcomes, including dismissal.

31. The attendees at the conduct hearing and their roles were as follows –

- Dr Hopton – Chair
- Ms Clancy and Ms Guthrie – Panel members/advisers
- The claimant
- Ms Ritchie and Ms T Stewart , Employee Relations Manager – presented management case

- Mr Patterson and Ms Warren – management witnesses
- Mr Horn – claimant's witness
- Ms M Baxter – Notetaker

32. The meeting was conducted over MS Teams. It was recorded. A note of the meeting was prepared (88-105). I found no reason to doubt the accuracy of this. The claimant provided a document dated 19 May 2021 (205-211) responding to the management case.

33. Dr Hopton wrote to the claimant on 27 May 2021 (81-87) to provide the outcome of the conduct hearing. She again set out the allegations against the claimant in the same terms as recorded in paragraph 25 above. Her letter included the following –

"You accepted without reservation that you had failed to wear the mask appropriately. You acknowledged that when challenged you agreed to wear the mask appropriately, as you felt harassed into agreeing to do so, but then subsequently failed to comply."

"Your rationale for failing to wear your mask appropriately was that you had not been provided with the scientific evidence to justify the NHS Lothian policy requiring you to do so and therefore you did not require to comply with the policy."

"During the hearing, questions from the Investigation Team about your compliance with other aspects of required Health and Safety standards in catering such as wearing a hat or hair net established that you understood the need for compliance with Health and Safety standards and policy within your role as catering assistant."

"On the basis of your statements about your view of the evidence in relation to COVID, its transmission and impact along with the absence of any other reason for not wearing a face mask appropriately, I concluded that your rationale was related to your interpretation of the information you had read and considered as evidence, which is contrary to NHS, Government and World Health Organisation's findings on the evidence of infection prevention and control, and Health and Safety.

In respect of the allegations I find there is insufficient evidence to support the specific allegation that you did not wear a mask. However, there is sufficient evidence to support that you did not wear the mask appropriately as you yourself confirmed.

On the issue as to whether you had good reason not to comply with NHS policy and the emergency laws in place as a result of the pandemic, I believe there is sufficient evidence to suggest that you did not have a good reason for this given your failure to provide any evidence other than the information you have relied on, which is contrary to that accepted by the key agencies leading on the pandemic response.

Other than your assertion that you had not been provided with the necessary independent scientific information to determine the reasonableness of the request for you to wear a face mask properly, you offered no further mitigation to support your position even after the panel had offered you several opportunities to do so and had explained the importance and implications of you not giving any further explanation of your position on the outcome of the hearing."

"In coming to my decision I have taken the following factors into account:

- *The extended period over which you continued to disregard the requirement for proper mask wearing;*

- *The clear messages and training you were provided with to ensure compliance;*

- *The recognition that you felt it was reasonable for you to comply with other Health and Safety requirements such as hat and hairnet wearing without the requirement for further explanation;*

- *The impact on your colleagues in causing anxiety for them in terms of their personal safety;*

- *The role of NHS staff in supporting the education of others to understand the importance of complying with COVID requirements to prevent the spread of the virus and the associated impact on the service of treating severely ill patients."*

34. Dr Hopton's decision was to dismiss the claimant -

"*Having taken into account the evidence outlined above I would advise that I am dismissing you from your post of Catering Assistant as I deemed your actions constitute gross misconduct. Therefore, in line with the NHS Scotland Conduct Policy, I concluded that dismissal was the appropriate sanction with effect from the date of this letter, ie 27 May 2021. Under these circumstances you have no entitlement to notice or pay in lieu of notice…."*

35. Dr Hopton decided that her decision to dismiss the claimant should also apply to her contract with the respondent as a bank worker. Dr Hopton advised the claimant of her right of appeal.

Claimant appeals

36. The claimant exercised her right of appeal. Dr Hopton prepared the management statement of case for the appeal (71-78). The claimant also prepared a statement of case for the appeal (56-61) which she emailed to

Ms R Kelly, Deputy Director of Human Resources, and Ms L Grieve on 15 June 2021. In this the claimant made the following points (in summary) –

(a) The respondent had failed to provide supporting evidence to quantify the benefits and risks of wearing a face mask.

(b) Their COVID-19 policy was irrational, and therefore unlawful (under reference to ***Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374***).

(c) The respondent, in giving prophylactic medical advice, had failed to comply with their obligation to provide quantified risks, effectiveness and consequences, including reasonable alternative options (under reference to ***Montgomery***).

(d) The respondent was in breach of its obligations under the HSWA and the MHSW Regs, referring to the respondent's failure to respond to the *"new scientific knowledge"* provided in the claimant's email following the daily update meeting of 2 November 2020.

(e) The respondent's obligation to conduct a suitable and sufficient risk assessment was absolute, and it had to take account of all information available to it (under reference to ***R (Dolan) v Secretary of State for Health and Social Care [2020] EWCA Civ 1605***).

(f) Before anyone follows an order, they must satisfy themselves as to the lawfulness of their actions (under reference to ***Commissioner of Police of the Metropolis v Raissi [2008] EWCA Civ 1237***).

(g) Dr Hopton had shown bias by intervening during the cross-examination of Mr Patterson and Ms Warren, and had reached a decision based on her own unsupported opinions.

(h) The claimant was innocent until proved guilty, and the respondent had failed to show that its mask wearing policy was lawful.

37. An appeal hearing was scheduled for 24 June 20212 but did not go ahead because the claimant was not going to be available for sufficient time due to another appointment. It was rescheduled to 31 August 2021. However on 9 August 2021 Mr Horn emailed Ms Kelly (64) indicating that *"as you have confirmed to ACAS that you are not interested in further attempts to settle* [the claimant's] *dispute, there is no need for the appeal to continue, as you have consistently refused to provide scientific support to evidence the lawfulness of your H&S Policy and quantify the risks in your risk assessment…."*. Accordingly, the appeal did not proceed.

Submissions for respondent

38. Mr Davies submitted that this was a conduct dismissal where the conduct was not in dispute. It formed the basis for the respondent's genuine belief. The conduct was the claimant, as a catering assistant, choosing not to wear a face mask correctly at work. She knew the rule. She was asked by management to comply. Her conduct extended over a period of some four months. It was a knowing contravention of a clear instruction, which was itself reasonable. The claimant provided no medical reason for her refusal to wear a face mask correctly. Her refusal was ideological.

39. Mr Davies argued that the issue was only whether it had been reasonable to categorise the claimant's conduct as gross misconduct. Dr Hopton had addressed this in her outcome letter (at 85). She had set out the factors which she took into account.

40. Mr Davies said that the respondent had not relied on its own findings but on national policy. This was clear from Dr Hopton's reference to the NHS Scotland Guide to Expected Standards of Conduct. The respondent was a healthcare provider. It was involved in dealing with the pandemic. It had been reasonable for the respondent to treat the claimant's conduct as gross

misconduct. The claimant's conduct had been knowing, repeated and unjustified. The fact that the claimant disagreed in principle and wished to challenge the science did not change the respondent's categorisation of her conduct.

41. Mr Davies submitted that at the core of the dispute in this case was the question – who makes the rules? Does a reasonable employer have to justify its workplace rules? Mr Davies argued that the respondent did not have to persuade its staff of the scientific validity of an infection control measure. There might be an exception if rules are self-evidently onerous or unreasonable, but that was a high bar. In the present case, the instruction was not unreasonable.

42. Mr Davies said that a reasonable employer did not need to justify its rules. If it did, the *"rules"* would become suggestions and it would be up to each individual to comply or not, or to say if the *"rule"* was legitimate or not. A workplace could not function in such circumstances, particularly having regard to vicarious liability.

43. In matters of health and safety, it was for the employer to do what was reasonably practicable. It could not be left up to each employee. Health and safety was part of the wider obligations of an employer. Due to those wider obligations, the employer needed to be able to make workplace rules. The respondent did not require to debate with the claimant the infection control measures of which face mask wearing formed part.

44. Even if the Tribunal disagreed, Mr Davies submitted that the decision to dismiss was still reasonable. Dr Hopton had the benefit of professional advice from Ms Guthrie, an expert in infection prevention and control. The Scottish Government and other bodies had indicated the benefits of mask wearing. Dr Hopton had in her evidence contrasted the amount of research done at national level with the claimant's own research. The claimant had referred to a small number of articles, but this was part of a much bigger picture. Dr Hopton had also referred to the cumulative public health benefit of

mask wearing – it was a public health intervention which worked best with maximum compliance. If the respondent did require to address the claimant's challenge (to the validity of its rule on mask wearing), this approach was entirely reasonable.

45. As to whether dismissal was a reasonable sanction, Mr Davies argued the terms of the outcome letter demonstrated that Dr Hopton had considered alternatives. However, she had no confidence that the claimant's pattern of behaviour would change. It was a reasonable conclusion. The respondent could not allow employees to cherry pick which infection prevention rules they followed.

46. Turning to remedy, if the unfair dismissal claim were to succeed, Mr Davies submitted that it had not been reasonable for the claimant withdraw from the appeal process. She had done so because the respondent would not settle. That was unreasonable and in consequence any award should be reduced by the maximum of 25%.

47. Mr Davies argued that there had clearly been contributory conduct on the claimant's part. She had been wholly to blame for her own dismissal. Because of that, any award should be subject to a 100% reduction.

48. Turning to the claimant's preferred remedy of reinstatement, Mr Davies referred to Dr Hopton's evidence of a breakdown in trust with the claimant. Dr Hopton felt that the claimant's approach to workplace rules created a risk. It remained the claimant's position that she should only comply if she was satisfied as to the legitimacy of the rule. That made reinstatement unreasonable.

49. Mr Davies then addressed the claimant's claim for notice pay. He submitted that the claimant's conduct had destroyed trust and confidence and amounted to gross misconduct. The respondent had accepted that as a repudiation of the contract of employment. Mr Davies referred to ***Sandwell and West Birmingham Hospitals NHS Trust v Westwood EAT/0032/09*** –

he directed me to paragraphs 111-113 but I will quote from paragraphs 110-111 –

"110. …There is no dispute as to the commission of the act alleged to constitute misconduct. What is at issue is the character of the act. The character of the misconduct should not be determined solely by, or confined to, the employer's own analysis, subject only to reasonableness. In our judgment the question as to what is gross misconduct must be a mixed question of law and fact and that will be so when the question falls to be considered in the context of the reasonableness of the sanction in unfair dismissal or in the context of breach of contract. What then is the direction as to the law that the employer should give itself and the employment tribunal apply when considering the employer's decision making?

111. Gross misconduct justifying dismissal must amount to a repudiation of the contract of the contract of employment by the employee: see ***Wilson v Racher [1974] ICR 748, CA*** *per Edmund Davies LJ at page 432 (citing Harman LJ in* ***Pepper v Webb [1969] 1 WLR 514 AT 517***):

"Now what will justify an instant dismissal? – something done by the employee which impliedly or expressly is a repudiation of the fundamental terms of the contract"

and at page 433 where he cited Russell LJ in ***Pepper*** *that the conduct "must be taken as conduct repudiatory of the contract justifying dismissal." In the disobedience case of* ***Laws v London Chronicle (indicator Newspapers) Ltd [1959] 1 WLR 698*** *at page 710 Evershed MR said:*

"the disobedience must at least have the quality that it is "wilful": it does (in other words) connote a deliberate flouting of the essential contract conditions."

So the conduct must be a deliberate and wilful contradiction of the contract terms."

50. Mr Davies submitted that this meant there needed to be deliberate wrongdoing. In this case, he argued, the claimant's conduct had been deliberate and was very serious. The claimant believed that the respondent needed to show that its instruction (to wear a face mask properly) was reasonable based on the science – that was itself not reasonable. It was clear that the respondent had been undermined by the claimant's conduct. That conduct had repudiated the contract.

Submissions for claimant

51. Mr Horn said that this case involved one simple issue – was the claimant's action reasonable? There was, he contended, no such thing as settled science. Referring to regulation 3(3) MHSW Regs, he said that there was a need to update [the Risk Assessment] based on the best available knowledge. What, he submitted, was unreasonable in asking the respondent to provide evidence (to support their claim that mask wearing was necessary)?

52. Mr Horn contrasted the respondent's mask wearing policy with their hairnet policy. It was obvious that hair can fall out, with a high risk that it would fall on food. This was easily supported by logic and reason. Where a policy was sensible, it was easily enforced because people would see the rationality.

53. Mr Horn submitted that the fact the claimant had a contract of employment did not mean that she should comply with every command of her employer. Mr Horn accepted that the claimant was required to comply with the respondent's conduct policy but argued that it was her consent to that which created the duties and obligations. Mr Horn relied on ***Montgomery*** where the Supreme Court had set out the requirement to quantify the risks and options for any medical procedure. There had to be informed consent.

54. Mr Horn said that the law made underlying assumptions about coronavirus including its transmissibility. To have the force of law, these presumptions

must be proven. If they cannot be proved, the legislation has no lawful basis and no-one needs to comply. Mr Horn relied on ***Philip and others, Petitioners*** which involved a challenge to the lawfulness of the Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No 11) Regulations 2021. He asserted that (a) there must always be a legitimate aim, (b) all alternative options should be considered and (c) the measure must be a reasonable and proportionate response to the legitimate aim.

55. This meant, argued Mr Horn, that assumptions must be proved. That determined whether the behaviour was reasonable. It was not rational behaviour to make a claim which was not supported by logic and reason.

56. Referring to the allegations brought against the claimant (see paragraph 25 above), Mr Horn submitted that *"may"* (as in *"may pose a threat"* and "*may expose"*) was subjective. The question was whether the claimant acted with or without good reason. The respondent must follow due diligence before creating a health and safety policy. However, Dr Hopton had acknowledged that the respondent did not have people capable of doing this. It was not part of their skillset to assess the science. Under reference to ***Dolan***, Mr Horn submitted that just because the Government or SAGE (Scientific Advisory Group for Emergencies) said something, that did not relieve the respondent of its obligation to address its own health and safety policy.

57. In the context of whether the claimant had a reasonable excuse, Mr Horn said that she had engaged early (in relation to coronavirus) because she felt something was not right. She had provided her line managers with guidance published on www.gov.uk on 21 March 2020 (222-223) which stated "*As of 19 March 2020, COVID-19 is no longer considered to be a high consequence disease[s] in the UK".* This indicated that the science at that time convinced health authorities that there was no imminent risk to human health.

58. The respondent's Risk Assessment of 29 April 2020 highlighted the hazards associated with face mask wearing (see paragraph 8 above). This

acknowledged that wearing a mask could actually increase the infection rate. It followed that the respondent's subsequent instruction to wear a mask was unreasonable.

59. On 3 November 2020 the claimant had forwarded further evidence about face mask wearing. The respondent had failed to evaluate this. In so doing, the respondent had breached the claimant's contract.

60. In relation to allegations 2 and 3 (see paragraph 25 above) what, Mr Horn asked, was the risk and/or consequence of the claimant's action? In what way was it measurable? This bore on the reasonableness of the respondent's instruction. The respondent was saying that there was a risk – he who has said must prove. The obligation (to prove that the virus and related risk exists) lay with the respondent.

61. The claimant had given the respondent ample opportunity to show that there was a real risk. She had asked for the evidence. It was not unreasonable to ask the respondent as a healthcare provider for that evidence, ie to show that there was a real risk and that the virus was transmissible. It was unreasonable of the respondent not to have provided this. It followed that the claimant's dismissal was unlawful and unreasonable.

62. Referring to the withdrawal of the claimant's appeal, Mr Horn submitted that it had been the respondent who had not wished to engage. The claimant had asked in her appeal papers for evidence of the rationality of the respondent's mask wearing policy. The respondent had unreasonably withheld this.

63. Mr Horn referred to the links provided by the respondent in response to the claimant's Freedom of Information request (per the claimant's ET1 at 18-19). This was opinion, not science. It was speculation. Everything was <u>possible</u>; the issue was what was <u>probable</u>. It was not science simply because it appeared in a publication.

64. In answer to a question from me, Mr Horn agreed that the issue was whether the respondent's instruction (to the claimant in relation to wearing a face mask) was reasonable.

Applicable law

65. The right not to be unfairly dismissed is found in section 94 of the Employment Rights Act 1996 ("ERA") –

(1) An employee has the right not to be unfairly dismissed by his employer….

66. Section 98 ERA deals with the fairness of a dismissal and provides, so far as relevant, as follows–

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it –

(a) ….

(b) relates to the conduct of the employee….

(3) ….

(4) 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) –

(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 dismissing the employee, and

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

67. Jurisdiction to deal with a claim of breach of contract (including in respect of notice pay) was conferred on Employment Tribunals in Scotland by the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994 which has effect as if made under section 3 of the Employment Tribunals Act 1996 (**Power to confer further jurisdiction on employment tribunals**).

Discussion

Unfair dismissal

68. It was not in dispute that the respondent had dismissed the claimant for alleged gross misconduct. The potentially fair reason for dismissal relied on was therefore conduct. I began by reminding myself of what higher courts have said about conduct dismissals.

69. In ***British Home Stores Ltd v Burchell [1980] ICR 303*** the Employment Appeal Tribunal (per Arnold LJ) said this –

"What the tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that

misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all, there must be established by the employer the fact of that belief, that the employer did believe it. Secondly, that the employer had in his mind grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case. It is the employer who manages to discharge the onus of demonstrating those three matters, we think, who must not be examined further. It is not relevant, as we think, that the tribunal would itself have shared that view in those circumstances. It is not relevant, as we think, for the tribunal to examine the quality of the material which the employer had before them, for instance to see whether it was the sort of material, objectively considered, which would lead to a certain conclusion on the balance of probabilities, or whether it was the sort of material which would lead to the same conclusion only upon the basis of being "sure", as it is now said more normally in a criminal context, or, to use the more old-fashioned term, such as to put the matter "beyond reasonable doubt". The test, and the test all the way through, is reasonableness; and certainly, as it seems to us, a conclusion on the balance of probabilities will in any surmisable circumstances, be a reasonable conclusion."

70. In ***Iceland Frozen Foods Ltd v Jones [1983] ICR 17*** the EAT (per Browne-Wilkinson P) said this –

"*Since the present state of the law can only be found by going through a number of different authorities, it may be convenient if we should seek to summarise the present law. We consider that the authorities establish that in law the correct approach for the industrial tribunal to adopt in answering the question posed by section 57(3) of the 1978 Act is as follows:*

(1) the starting point should always be the words of section 57(3) themselves;

(2) in applying the section an industrial tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the industrial tribunal) consider the dismissal to be fair;

(3) in judging the reasonableness of the employer's conduct, an industrial tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;

(4) in many (though not all) cases there is a "band of reasonable responses" to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;

(5) the function of the industrial tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outwith the band it is unfair."

71. Section 57(3) of the Employment Protection (Consolidation) Act 1978 was the predecessor of section 98(4) ERA. The EAT were echoing the words of Lord Denning in ***British Leyland UK Ltd v Swift 1981 IRLR 91*** where he referred to there being a *"band of reasonableness".*

72. The Court of Appeal in ***Sainsburys Supermarkets Ltd v Hitt [2003] ICR 111*** (per Mummery LJ at paragraph 30) said this –

"The range of reasonable responses test (or, to put it another way, the need to apply the objective standards of the reasonable employer) apply as much to the question whether the investigation into the suspected misconduct was reasonable in all the circumstances as it does to the reasonableness of the decision to dismiss for the conduct reason."

73. These cases serve to emphasise the need for a Tribunal to focus on the reasonableness of the employer's conduct. That is where section 98(4) ERA directs the Tribunal – *"….whether…the employer acted reasonably or unreasonably…."*. Per ***Burchell*** – *"….the test….is reasonableness…."*. Per ***Jones*** – "*….must consider the reasonableness of the employer's conduct…."*.

74. Mr Horn began his submission by focussing on whether the claimant's action was reasonable. He ended it by agreeing that the issue was whether the respondent's instruction (to the claimant in relation to wearing a face mask) was reasonable. These are perhaps two sides of the same coin. However, the cases I have cited stress the need to look at the reasonableness of the employer's conduct. Accordingly, the issue at the heart of this case is whether the respondent's instruction to the claimant - to wear a face mask properly – was reasonable.

75. At the risk of stating the obvious, the issue I had to decide was not a scientific one. It was not whether wearing a face mask helped to prevent the risk of the spread of the Covid-19 virus, or whether such a virus actually exists. My focus was on the reasonableness of the respondent's conduct.

76. The claimant's position was that the instruction was unreasonable. This was said to be because the claimant had asked for the evidence that there was a real risk and the respondent had failed to provide this. Absent such evidence, the claimant could not give informed consent (to comply with the respondent's instruction). The assumptions about coronavirus upon which the instruction was based had to be proved for the instruction to be lawful.

77. I could understand the sincerity with which the claimant's arguments were advanced. However, the difficulty she faced was that what she expected the respondent to do, so as to make their mask wearing instruction lawful, went well beyond what the law required of them. I agreed with Mr Davies that the respondent did not require to debate with the claimant the infection control measures of which face mask wearing formed part.

78. That is not to say that an employer can issue an unlawful instruction and expect it to be obeyed under pain of disciplinary sanction. The test is reasonableness. An instruction to act unlawfully would not be reasonable. An example would be a haulage company instructing its drivers to exceed the maximum permitted driving hours. It is hard to think of any circumstances in which dismissal for non-compliance with such an instruction would be fair.

79. In considering the reasonableness of the respondent's instruction to the claimant to wear a face mask properly, I believed the points made by Ms Butler in her letter to the claimant of 11 January 2021 were relevant (see paragraph 22 above). To suggest that the respondent had any option but to follow current Scottish Government guidance would be to fly in the face of reason and common sense.

80. The claimant was critical of the respondent in relation to their Risk Assessment because it had not been revisited in response to the information she had provided in November 2020. This was said to be a breach of the MHSW Regs. I could see the possible relevance of this if it tainted the respondent's instruction, non-compliance with which led to the claimant's dismissal, with illegality.

81. Regulation 3(3) MHSW Regs requires a risk assessment to be reviewed if (a) there is reason to suspect that it is no longer valid or (b) there has been a significant change in the matters to which it relates. I was not persuaded that the provision by the claimant to the respondent of information which indicated that the wearing of a surgical face mask did not stop the spread of a virus and had its own attendant health risks was sufficient to render continued reliance on the existing Risk Assessment, without review, unlawful. I did not consider that it excused the claimant from wearing a face mask (without medical exemption).

82. I found that when the respondent decided to dismiss the claimant, they had done what the law, as expressed in ***Burchell***, required –

(a) They had formed a belief in the claimant's misconduct, ie that she had failed to comply with instructions to wear her face mask properly.

(b) They had grounds for that belief based on the statements provided during Ms Ritchie's investigation.

(c) They had carried out as much investigation as was reasonable.

83. I also found that dismissal was within the band of reasonable responses open to the respondent. The examples of gross misconduct listed in their Conduct Policy (at 39-40) included –

- *Wilful failure to adhere to safety rules where this would create a measurable risk of danger to others….*

- *Wilful failure to adhere to clinical governance/infection control policies….*

84. These were clearly matters Dr Hopton had in mind when she decided to dismiss the claimant because she referred to them in her letter of 27 May 2021 (at 85). I did not believe it could be said that no reasonable employer would have come to that conclusion.

85. While the decision to dismiss was within the band of reasonable responses, could the same be said of the sanction of summary dismissal? I believed that the same approach was appropriate – could it be said that no reasonable employer would have dismissed? Here I agreed with the argument advanced by Mr Davies as set out at paragraphs 49-50 above. The claimant's refusal to wear a face mask properly amounted to a repudiation of the contract of employment entitling the respondent to dismiss her summarily. That dismissal was not unfair.

Breach of contract

86. Unlike unfair dismissal where the Tribunal must not substitute its own view for that of the employer, in dealing with the claimant's complaint of breach of contract I had to decide whether the claimant's conduct amounted to a repudiation of her contract of employment, such as to entitle the respondent to terminate that contract without notice.

87. I was not provided with a copy of the claimant's contract of employment. However, I did not understand the claimant to assert that the respondent's Conduct Policy did not apply to her. Even if there was no express term to that effect, I considered that it was reasonable to imply a term that the claimant would comply with lawful instructions from the respondent as her employer. I proceeded on the basis that the Conduct Policy did apply, so that conduct on the part of the claimant which resulted in disciplinary action being taken against her indicated a failure on her part to comply with the standards of behaviour expected of her.

88. Given that I did not accept the claimant's argument that the instruction (to wear her face mask properly) with which she had failed to comply was unlawful, the question became one of whether the breach of contract which that failure entailed was sufficiently serious to justify the respondent terminating the contract without notice. The cases to which Mr Davies referred (see paragraphs 49-50 above) were of assistance here.

89. Those cases indicated that there needed to be a *"deliberate and wilful contradiction"* of the terms of the contract of employment by the claimant for the respondent to be entitled to terminate that contract without notice. I decided that this was what had occurred. The claimant had persisted with not wearing her face mask properly despite being asked to do so on a number of occasions, as confirmed by the statements gathered during Ms Ritchie's investigation.

90. I found that this was conduct which was sufficiently serious so as to entitle the respondent to dismiss the claimant without notice. That meant that her breach of contract claim did not succeed.

Employment Judge: Sandy Meiklejohn
Date of Judgment: 26 April 2022
Entered in register: 29 April 2022
and copied to parties