EMPLOYMENT TRIBUNALS

Claimants: **Ms S. Bartlett**

Respondent: **Heheals Pharmaceutical Ltd t/a Christ Church Care Agency**

Heard at: **East London Hearing Centre (by Cloud Video Platform)**

On: **30 May and 1 June and (in chambers) 18 July 2022**

Before: **Employment Judge Hallen,**
Members: **Ms. A. Berry**
Ms. S. Harwood

Representation

Claimant: Mr. S. Tibbits- Counsel
Respondent: Mr. S. Joshi- Solicitor

This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was V by Cloud Video Platform. A face-to-face hearing was not held because the relevant matters could be determined in a remote hearing.

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that: -

1. **The Claimant was dismissed by the Respondent by reason of capability pursuant to section 98 (2) (a) Employment Rights Act 1996 and her claim for unfair dismissal contrary to section 98 ERA is made out and succeeds.**

2. **The Claimant was wrongfully dismissed and was entitled to 5 weeks notice or pay in lieu of notice pursuant to section 86 (1) ERA.**

3. **The Claimant is a disabled person pursuant to section 6 Equality Act 2010 (EqA) and her claim under section 15 (discrimination arising out of disability) EqA is made out and succeeds.**

4. The Claimant's claim for reasonable adjustments pursuant to section 20/21 EqA is made out and succeeds.

3. The case will be set down for a remedy hearing and separate directions will be made in that respect including listing the case for hearing on this issue.

REASONS

Background and Issues

1. The Respondent operates as a care agency which provides domiciliary care services with up to 100 carers in its employment as well as an additional 20 employees in its associated companies. The Claimant was employed by the Respondent between 1 April 2015 and 2 December 2020 as a Community Care Assistant. The Claim Form was presented on 14 April 2021, after an ACAS early conciliation period between 17 February 2021 and 15 March 2021. The Claimant complained of unfair dismissal, disability discrimination and wrongful dismissal (notice pay). The disability relied on was severe asthma. The claims relate to the Respondent's requirement that employees wear a blue surgical face mask while working their shift. The Claimant contended that she told the Respondent that she could not do so because of her severe asthma. She said that she proposed alternatives but was summarily dismissed the same day on 2 December 2020.

2. This case came before Judge Massarella on 19 November 2021 who defined the legal claims and issues. The Claimant is making the following complaints: unfair dismissal; wrongful dismissal (notice pay); discrimination because of something arising in consequence of disability (s.15 Equality Act 2010) and failure to make reasonable adjustments.

3. With regard to unfair dismissal, the Tribunal had to answer the following questions: Was the Claimant dismissed? If the Claimant was dismissed, what was the reason or principal reason for dismissal? Was it a potentially fair reason? Did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant? The Claimant said that the dismissal was unfair because the Respondent: failed to obtain any medical evidence or occupational health opinion in order to obtain the full medical picture before dismissing the Claimant; failed to consider any alternative PPE the Claimant to wear other than a surgical mask; failed to follow a fair process in terminating the Claimant's employment; failed to conduct any meaningful investigation; failed to invite the Claimant to a meeting to discuss her termination; failed to afford the Claimant a right of appeal; breached the ACAS code; failed to consider any alternative duties for the Claimant to undertake or whether any changes could be made to the Claimant's working practice to accommodate her disability.

4. With regard to wrongful dismissal / notice pay, the Tribunal had to answer the following questions: What was the Claimant's notice period? Was the Claimant paid for that notice period? If not, did the Claimant do something so serious that the Respondent was entitled to dismiss without notice?

5. In relation to disability, the Tribunal had to ask the following questions: Did the Claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about? The Tribunal will have to decide: Did she have a physical

impairment of asthma? Did it have a substantial adverse effect on her ability to carry out day-to-day activities? If not, did the Claimant have medical treatment, including medication, or take other measures to treat or correct the impairment? Would the impairment have had a substantial adverse effect on her ability to carry out day-to-day activities without the treatment or other measures? Were the effects of the impairment long-term? The Tribunal will decide: did they last at least 12 months, or were they likely to last at least 12 months? if not, were they likely to recur?

6. With regard to the claim for discrimination arising from disability (Equality Act 2010 section 15), the Tribunal had to ask itself the following questions: Did the Respondent treat the Claimant unfavourably by: dismissing her; alternatively stopping giving her shifts? Did the following things arise in consequence of the Claimant's disability: the Claimant's inability to wear a surgical face mask for longer than ten minutes? Was the unfavourable treatment, in part at least, because of that inability? Was the treatment a proportionate means of achieving a legitimate aim? The Respondent says that its aims were: the safety of service-users and staff; The requirement to comply with government guidelines/ legislation. The Tribunal had to decide in particular: was the treatment an appropriate and reasonably necessary way to achieve those aims; could something less discriminatory have been done instead; how should the needs of the Claimant and the Respondent be balanced? Did the Respondent know, or could it reasonably have been expected to know that the Claimant had the disability? From what date?

7. Finally in relation to reasonable adjustments (Equality Act 2010 sections 20 and 21), the Tribunal had to ask itself the following questions: Did the Respondent know, or could it reasonably have been expected to know, that the Claimant had the disability? From what date? A "PCP" is a provision, criterion or practice. Did the Respondent have the following PCP: requiring the Claimant to wear a blue surgical mask while on duty. Did the PCP put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that it exacerbated her asthma? Did the Respondent know, or could it reasonably have been expected to know, that the Claimant was likely to be placed at the disadvantage? What steps could have been taken to avoid the disadvantage? The Claimant suggests: allowing her to exercise her exempt status and not be required to wear a mask; allowing her to wear a plastic forehead face shield, which she says is more effective than the surgical face mask that the Respondent required the Claimant to wear; varying the Claimant's duties; providing assistance with the Claimant's duties? Was it reasonable for the Respondent to have to take those steps, and when? Did the Respondent fail to take those steps?

8. The Tribunal had an agreed bundle of documents in front of it made up of 313 pages including relevant government guidance operating at that time dealing with the covid pandemic and obligations placed upon employers. During the hearing, parties produced additional documents and the Tribunal permitted this late disclosure in the interests of justice. The Claimant produced a witness statement made up of 22 paragraphs along with a disability impact statement made up of 6 paragraphs. The Respondent called two witnesses, Mr. Baba Akomolafe, the Managing Director who prepared a written witness statement made up of 7 paragraphs and Ms Michelle Kirk, the Respondent's Human Resources Manager who prepared a witness statement made up of 12 paragraphs. The Claimant and the Respondent's' witnesses gave oral evidence and were subject to cross examination and questions from the Tribunal. At the end of the two-day hearing, there was no time to hear oral submissions, so we ordered the parties to provide written submissions

to us (and then subsequently comment upon them in writing) which we considered in coming to this reserved judgment.

Facts

9. It was accepted by the parties that the Claimant was employed by the Respondent for over 5 years and that (save for the exceptional pandemic situation) the Claimant had throughout her working time with the Respondent been provided with regular care work, regularly and repeatedly tending to the needs of particular service users every week. Under normal circumstances there was an implicit expectation that the Respondent would provide the Claimant with regular work and the Claimant would undertake that work. No evidence was presented to us by the Respondent that showed any breaks in continuity of employment other than for legitimate reasons such as furlough leave during the pandemic or paid holidays. We therefore found that albeit the Claimant's contract was on the face of it a 'zero hours contract', the 'zero-hours' clauses in the contract did not reflect the true agreement between the parties. She was a full-time employee who undertook regular hours with the Respondent in the expectation that she would do such hours.

10. The Claimant clearly specified on her application for employment with the Respondent dated 18 March 2015 that she suffered from asthma, and it was accepted that the Respondent knew throughout her employment that she suffered from asthma. The Tribunal accepted the Claimant's evidence contained in her disability impact statement that she suffered from severe asthma since birth. The effects of her asthma on her ability to do day to day activities at the relevant time were: difficulty in breathing along with an inability to walk for long distances due to her being out of breath. Household chores, such as cooking, and cleaning were undertaken slowly or had to be done sitting down to allow the Claimant to get her breath back and then carry on. On a very bad day, the Claimant was unable to get out of bed or do anything around the house and struggled to breathe. The effects of the Claimant's asthma were expected to be lifelong. To treat her severe asthma, the Claimant had to take the following medication: (i). Spiriva respimat 2 puffs a day; (ii). Relvar 184/22nd 1 puff a day and (iii). Salamol easi breathe use when required. If she did not take her medication, she would not be able to breathe and would have a serious asthma attack which could lead to death.

11. The Respondent produced no evidence to counter the evidence of disability from the Claimant other than observational evidence from Mr Akomolafe that she appeared to deal with her asthma well and was not out of breath when he saw her on the stairs. It should be noted that the Respondent did not produce any medical evidence to counter the evidence of the Claimant, so we preferred the evidence of the Claimant with regard to her disability.

12. Prior to the start of the pandemic in March 2020 we found that the Respondent was aware that the Claimant's asthma did have an effect on her working activities to some degree at very least: Ms Kirk openly stated in evidence to the Tribunal that the Claimant moved from double to single rounds to accommodate her asthma. The Claimant could not work with persons who smoked due to her asthma. The Respondent in its Grounds of Resistance stated that *'The company has always accommodated her medical condition and she has had no problem getting regular work in the past'*.

13. The Claimant was identified by the government as being *'extremely clinically vulnerable'* due to her asthma in various letters contained in the trial bundle which led to her being furloughed by the Respondent on receipt of such letters for example between April

2020 and mid-September 2020. Government advice was that persons with '*severe asthma'* are defined as meeting the requirement of *'extremely clinically vulnerable*.'

14. The Claimant returned to work in or around mid-September 2020 after furlough leave and expressed a happiness to be back at work to Ms. Kirk at that time.

15. The Claimant worked for the Respondent between mid-September 2020 to early November 2020 when she was again furloughed for a month after receiving a letter from the government stating that she was a clinically extremely vulnerable person. During this time, it was readily apparent that it had come to the Respondent's attention that that the Claimant was unable to wear a surgical face mask due to her severe asthma and that the Claimant was not wearing such during any of her care duties which were both reported directly by the Claimant to 'Sam' and in the electronic record / note the Claimant submitted to the Respondent. In fact, the Respondent's case as confirmed by Ms Kirk in her evidence was that whilst the Claimant may not have been aware, two other service users had raised an *'issue'* or complaint about the Claimant not wearing a surgical face mask (AB and JA).

16. The Public Health England Recommendations that the Respondent sought to rely upon were in force throughout this period, indeed from early April 2020. In addition, the Respondent at no stage suggested at the hearing that Ms Kirk nor anyone else even spoke to the Claimant about this, let alone reprimanded her for her actions or instructed her that she must wear the surgical mask rather than a face visor which she was happy to do. Rather even following the reports that the Respondent received from the electronic record/note the Claimant submitted to the Respondent that she was unable to wear a face mask, Ms Kirk held a supervisory session and made no reference to any discussion of requirements of PPE the Claimant was required to adhere to. The Respondent did not consider it appropriate even at this stage (i.e. September to November 2020) to discuss the Claimant's asthma with her or seek medical advice or raise any such enquiry – in fact at no stage had the Respondent sought or suggested that this should be done or carried out any investigation or discussion with the Claimant even though the Respondent was aware that she was categorised as clinically extremely vulnerable by the government due to her severe asthma. Indeed, we saw a note of a supervision meeting with the Claimant dated 6 October 2020 in which it was noted, 'she feels safe with her visor and other PPE'. We find that it would have been appropriate and reasonable for the Respondent at this time to have discussed the matter with her if it had concerns about her actions or her reasons for not wearing a face mask.

17. The Claimant received a *'top up'* of Universal Credit to her furlough pay from April 2020. Indeed, in the Claimant's summary table it was clear that the Universal Credit top up from April 2020 to November 2020 was an average of around £285 per month. The Claimant continued to receive this top-up during the period she returned to work (September to November 2020) in addition to wages received from the Respondent and outside of this she was being paid 80% of her £1200 / £1300 of her normal take home pay. Following the termination of her employment, the Claimant was not paid any Universal Credit for December 2020 and only from January 2021 was she in receipt of Universal Credit of around £800 per month which overall was significantly less than the overall sum she received by way of furlough / wages and Universal Credit top up whilst employed by the Respondent.

18. On 2 December 2020, Ms Kirk called the Claimant to discuss her return to work after her furlough leave during November 2020 and her expected return date in December. At

the time, the Claimant's shielding letter was expiring on 2 December 2020, and she was getting paid 80% of her wages through the CVJRC (Corona Virus Job Retention Scheme). The Claimant had not obtained a further shielding letter on the expiry of the current one expiring on 2 December 2020 nor had she received a doctors sickness certificate to cover any sickness absence thereafter.

19. During her telephone conversation with the Claimant, she had told Ms Kirk that she was able to come back to the service users' homes with her asthmatic condition but could only do so if she could wear a face visor rather than a surgical mask. The Respondent was already aware that the Claimant could not wear a surgical mask due to her asthma. Ms Kirk explained to the Claimant that as the call times were for a minimum of 30 minutes, the legislation stated that face masks were to be always worn during the home visit to service users in domiciliary care. It was not properly explained to us why the Claimant was able to visit service users as she previously did whilst wearing a face visor but could not do so after her return to work after her last shielding letter was expiring. Nevertheless, we find that Ms Kirk did tell the Claimant that as she was not able to wear a surgical mask, she could not return to work after her shielding letter had expired and that as a consequence, her employment was being terminated with immediate effect. In order to assist the Claimant in respect of claiming state benefits in the future, Ms Kirk agreed to help the Claimant by saying that her employment had been terminated as this would mean that she could claim state benefits without any period of suspension. The Tribunal were not persuaded as to the legality of such an approach but accepted that Ms Kirk was trying to assist the Claimant by ensuring that she would be able to claim state benefits so that she would not be immediately penniless. There was no discussion with the Claimant about her notice entitlement and nor indeed was the Claimant provided with any notice of her termination or payment in lieu of such notice. We find that during this telephone discussion, there was little if any discussion about any alternative options other than dismissal and neither was the Claimant given the right of appeal against dismissal.

20. The Respondent sought to persuade us in evidence that Ms Kirk could not terminate an employee's services without the authority of Mr Akomolafe, the company's Managing Director. We did not accept that Ms Kirk could not terminate the employment of an employee without Mr Akomolafe's agreement. We did not accept this. Rather, we found that Ms Kirk's actions were those of an inexperienced HR professional under pressure who had not been given appropriate training or guidance by the Respondent with regard to the pandemic and/or disabled employees. She acted on the spur of the moment not being fully cognisant of the consequences of her actions.

21. The return-to-work form prepared by Ms Kirk as a record of the telephone discussion with the Claimant of 2 December 2020 was dated 19 November 2021 (nearly a year after the termination) was actually prepared on 11 May 2021 some six months after the termination and in contemplation of legal action after the Claimant had indicated that she was proceeding with this claim. We found that this document was a self-serving document that was prepared to support the Respondent's contention that this was a termination by mutual consent. As a consequence, we did not accept the accuracy of the note and in particular its assertion that the termination was by way of mutual agreement. We did not consider that this was the case at all. We reproduce the email of dismissal (a contemporaneous document) in its entirety which confirmed clearly to us that the Claimant was dismissed by the Respondent. It can be seen that the word mutual agreement was not used in it. We found that the reason for the dismissal was capability in that the Claimant could not wear a surgical face mask for more than ten minutes due to her severe asthma.

The wording of the dismissal email dated 2 December 2020 is as follows:- *'Dear Steph, Following our telephone conversation, I am writing to confirm what was discussed. You are employed as a community Care Assistant. To abide with the law at this time all care workers must wear full PPE. This includes gloves, aprons and masks. Due to your health condition, you advised me that you cannot wear a mask for more than 10 minutes. So summing this up you cannot go into a service users home without a mask on. Unfortunately, we have no other choice than to terminate your employment with immediate effect. My apologies for this decision, It's not us as a company, It's the guidance we are provided to follow by law. Stay safe. Kind Regards Michelle Kirk HR'.*

22. During her evidence to the Tribunal, Ms Kirk accepted that *'we could have'* looked at whether certain service users would have agreed to the Claimant wearing just a face shield or visor but did not as people were becoming more worried. Ms Kirk disputed whether the Claimant could have undertaken alternative duties (such as administration work) and whether adjustments to her working practices could have been made but fully accepted that there was no discussion with the Claimant about any of this during their conversation on 2 December 2020 or that Ms Kirk carried out any investigation into alternatives with anyone else at the time (either with Mr Akomolafe, taking legal advice, or contacting Public Health England or otherwise).

23. Ms Kirk's evidence to us was that because the Claimant had not received another formal shielding notification for after 2 December 2020 and because the Respondent had work there was no option to furlough the Claimant. However, the government guidance that we were referred to clearly showed us that because the Claimant was classified as *'clinically extremely vulnerable'* she was able to be furloughed past 2 December 2020. We produce the extract from the government guidance published in May 2020 and operative at the time of the Claimant's dismissal as follows: - '*If your employee's health has been affected by coronavirus or any other conditions. Your employee is eligible for the grant and can be furloughed, if they are unable to work, including from home or working reduced hours because they: are clinically extremely vulnerable, or at the highest risk of severe illness from coronavirus and following public health guidance …… these employees remain eligible for the Coronavirus Job Retention Scheme even whilst shielding guidance is not in place'* Ms Kirk however did not make any enquiries or check on the position with any Government agencies prior to terminating the Claimant's employment.

24. Ms Kirk accepted in oral evidence that by refusing to offer the Claimant any work for the foreseeable future and immediately terminating the Claimant's employment on 2 December 2020 was not a proportionate / reasonable course of action in hindsight and that *'everything gets done properly now'*.

Law

Nature of Employment and Zero-Hour Contracts

25. Albeit trite law, it was pertinent to remind ourselves that in order for a relationship of employment to exist in the first place, the contract must provide for the three irreducible elements of control, mutuality of obligation and personal performance, without which no contract of employment can be said to exist **(Carmichael and anor v National Power plc 1999 ICR 1226, HL).**

26. If a contract does not oblige an employer to offer work, and the other party to the contract was not obliged to accept any work that is offered, then that contract that would be regarded as lacking the mutuality of obligation necessary to form a contract of employment.

27. Zero-hour Contracts ('ZHCs') commonly include wording that expressly denies the existence of any obligations to offer and do work. It is invariably on this ground that ZHCs lack the requisite mutuality of obligation to amount to 'contracts of employment'. Indeed, not infrequently, ZHCs will not amount to a contract of employment.

28. However, 'the contract' (as referenced above) is not purely defined by reference to the written contractual terms between the parties but rather the reality of the working relationship between the parties. This has been made clear several times in the authorities, notably by the Supreme Court in **Autoclenz Ltd v Belcher and ors 2011 ICR 1157, SC**. The SC authoritatively stated that a Tribunal has and should look beyond the contractual documentation that describes an employment relationship and consider the reality of the situation when determining employment status. In Autoclenz one of the clauses stated that there was no obligation on A Ltd to offer work or on the claimants to accept it. However, the evidence before the Tribunal showed that the reality of the working situation was that the claimants were obliged to carry out the work offered, and the employer was under an obligation to offer work. The contract, as performed, was therefore a contract of employment.

29. Indeed, the Tribunal's focus in defining the nature of a relationship between the parties to a contract will be on the true intentions of the parties on the questions of whether the employer is expected to offer work and whether the zero-hours worker is expected to do it if offered. In **Pulse Healthcare Ltd v Carewatch Care Services Ltd and ors EAT 0123/12** the claimants had each signed documents entitled 'zero-hours contract agreement'. These documents contained a number of provisions consistent with a more casual working relationship: work was to be done at such times and hours as agreed, there was no obligation to offer work, and the employer retained the right to reduce working hours whenever necessary.

30. The EAT upheld the Employment Tribunal's finding that the 'zero-hours' clauses in the contracts did not reflect the true agreement between the parties. What made the claimants' case particularly compelling was the nature of the work they carried out. They were engaged as carers to provide critical care to a single patient on a shift system around the clock. The EAT considered it 'fanciful' that such care would have been provided through reliance on ad hoc arrangements and that it would have been 'unrealistic' to reach any conclusion other than that the claimants worked under contracts of employment.

31. It is furthermore, surely disingenuous in an employer being able to avoid the risk of an unfair dismissal claim or the obligation to make a redundancy payment by the simple expedient of reducing the employee's hours to zero and never dismissing.

Termination of Employment

32. The EAT concluded that the employee's employment was not terminated by agreement where both options put to him by the employer involved his dismissal. The crucial issue was who brought the contract to an end, and where, as in this case, an employee is given two options, both of which involve dismissal, the only sensible conclusion is that the dismissal is intended by the person offering those options. (Francis v Pertemps

Recruitment Partnership Ltd EATS 0003/13). Termination by mutual agreement or by way of a dismissal by the employer is a question of both fact and law. The question *'who really terminated the contract of employment?*' is one of fact (**Martin v Glynwed Distribution Ltd 1983 ICR 511, CA**). However, whether those facts amount to a dismissal or a consensual termination — is a question of law (**Birch and anor v University of Liverpool 1985 ICR 470, CA**).

33. The effect of a *'termination by agreement'* is to deny the employee statutory employment protection rights, thus courts and tribunals should be wary and exercise caution in making such a finding unless there is very clear evidence that an entirely voluntary arrangement has been entered into. Several authorities provide support for this: -Finding that an employee had voluntarily resigned after agreeing severance terms at the same meeting at which the employer told him that he was being dismissed was held to be perverse (**Sandhu v Jan de Rijk Transport Ltd 2007 ICR 1137, CA**); Tribunals should look at such situations carefully to ensure that the employer's words do not, in reality (as a matter of law), amount to a dismissal. The intention of the employer and the attitude of the employee need to be considered: if there is no threat of dismissal and the employee acts voluntarily, termination is by agreement. (**Hart v British Veterinary Association EAT 145/78);** The EAT concluded that the employee's employment was not terminated by agreement where both options put to him by the employer involved his dismissal. The crucial issue was who brought the contract to an end, and where, as in this case, an employee is given two options, both of which involve dismissal, the only sensible conclusion is that the dismissal is intended by the person offering those options. **(Francis v Pertemps Recruitment Partnership Ltd EATS 0003/13).**

Unfair Dismissal

34. Section 98(1) Employment Rights Act 1996 provides that it is for the employer to show the reason or principal reason for dismissal of the employee and 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. If the Respondent fails to do so the dismissal will be unfair.

35. If the Tribunal decides that the reason for dismissal of the employee is a reason falling within Section 98(1) or (2) ERA it will consider whether the dismissal was fair or unfair within the meaning of Section 98(4) ERA. The burden of proof in considering Section 98(4) is neutral.

36. Section 98(4) ERA provides: -

> "the determination of the question whether the dismissal is fair or unfair (having regards to the reason shown by the employer) –
>
> 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 shall be determined in accordance with equity and the substantial merits of the case."

37. In the case of **Iceland Frozen Foods Ltd v Jones [1982] IRLR 439 EAT**, guidance was given that the function of the Employment Tribunal was to decide whether in the particular circumstances 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 outside the band, it is unfair.

38. In the case of **Sainsburys Supermarket Ltd v Hitt [2003] IRLR 23CA**, guidance was given that the band of reasonable responses applies to both the procedures adopted by the employer and the sanction, or penalty of the dismissal.

39. The Tribunal should not substitute its own factual findings about events giving rise to the dismissal for those of the dismissing officer (**London Ambulance NHS Trust v Small [2009] IRLR 563**).

40. In the case of **British Home Stores v Burchell [1978] IRLR 379 EAT**, guidance was given that, in a case where an employee is dismissed because the employer suspects or believed that he has committed an act of misconduct, in determining whether the dismissal was unfair, an Employment Tribunal has to decide whether the employer who discharged the employee on the grounds of misconduct in question and obtained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at the time. This involved three elements. First, there must be established by the employer the fact of that belief, that the employer did believe it. Second, it must be shown that the employer had in its mind reasonable grounds upon which to sustain that belief. Third, the employer at the stage on which he formed that belief on those ground, must have carried out as much investigation into the matter as was reasonable in all of the circumstances of the case.

Wrongful Dismissal

41. Pursuant to s.86(1)(b) ERA 1996 an employee is entitled to receive notice of dismissal which is contractual notice of statutory notice whichever is the greater up to 12 weeks maximum statutory notice unless the employee's employment was terminated due to the employee's repudiation of the contract (i.e. gross misconduct).

Disability.

42. Whether an individual is considered disabled for the purposes of S.6 EqA 2010 clearly can differ from a more generalised public perception of who is and who is not disabled. Disability is not always obvious and those with disabilities often adjust their lives and often will not advertise their difficulties to others. The EAT's observations in (**Goodwin v Patent Office 1999 ICR 302**) are worth noting in this context at the outset: *'What the Act is concerned with is an impairment on the person's ability to carry out activities. The fact that a person can carry out such activities does not mean that his ability to carry them out has not been impaired. Thus, for example, a person may be able to cook, but only with the greatest difficulty. In order to constitute an adverse effect, it is not the doing of the acts which is the focus of attention but rather the ability to do (or not do) the acts. Experience shows that disabled persons often adjust their lives and circumstances to enable them to cope for themselves. Thus, a person whose capacity to communicate through normal speech was obviously impaired might well choose, more or less voluntarily, to live on their own. If one asked such a person whether they managed to carry on their daily lives without undue problems, the answer might well be "yes", yet their ability to lead a "normal" life had obviously been impaired. Such a person would be unable to communicate through speech and the ability to communicate through speech is obviously a capacity which is needed for carrying out normal day-to-day activities, whether at work or at home. If asked whether they*

could use the telephone, or ask for directions or which bus to take, the answer would be "no". Those might be regarded as day-to-day activities contemplated by the legislation, and that person's ability to carry them out would clearly be regarded as adversely affected.'

43. The Tribunal has the assistance in determining whether someone is disabled in the form of Guidance on **Definition of Disability (2011) ('GDD'**), the **Code of Practice on Employment 2011, App1 – Meaning of** Disability ('COP 2011') and Sch 1 to the EqA 2010.

44. 'Substantial' is defined as 'more than minor or trivial' (s.212(1) EqA 2010).

45. The time taken and way in which a person with that impairment carries out a normal day to day activity are relevant factors to be considered in determining whether the effects are substantial (**GDD – Para B2 / 3**).

46. The cumulative effects of an impairment should also be considered. A person whose impairment causes breathing difficulties may, as a result, experience minor effects on the ability to carry out a number of activities such as getting washed and dressed, going for a walk or travelling on public transport. But taken together, the cumulative result would amount to a substantial adverse effect on his or her ability to carry out these normal day to day activities. (**GDD – Para B5**).

47. Care needs to be exercised when considering an individual's coping mechanisms or avoidance strategies to minimise or prevent the effects of an impairment. It would not be reasonable to expect an individual to give up or modify normal activities that might exacerbate symptoms (**GDD – Para B7 / 8**).

48. Para 5(1), Sch 1, EqA 10 provides that an impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day to day activities if measures are being taken to treat or correct it and but for that it would be likely to have that effect. Likely meaning of course 'could well happen' (**Boyle v SCA Packaging Ltd [2009] ICR 1056**). This is often referred to as 'deduced effects'. This provision is applied even if the measures result in the effects being completely under control or not at all apparent **(GDD – Para B13**).

49. Relatively little evidence is required to raise the issue of 'deduced effects'. If there is material before the tribunal to suggest that measures were being taken that may have altered the effects of the impairment, then the tribunal must consider whether the impairment would have had a substantial adverse effect in the absence of those measures. Indeed in **Fathers v Pets at Home Ltd and anor EAT 0424/13** the EAT held that a tribunal had erred in not making findings as to the deduced effects of F's depression were she not taking medication or receiving counselling. The EAT agreed with the obiter observation in **J v DLA Piper UK LLP 2010 ICR 1052, EAT**, that 'there is nothing particularly surprising in the proposition that a person diagnosed as suffering from depression who is taking a high dose of anti-depressants would suffer a serious effect on her ability to carry out normal day-to-day activities if treatment were stopped', though that proposition 'could of course be challenged'.

50. The EqA 2010 states that if the impairment has had a substantial adverse effect on a person's ability to carry out normal day to day activities but that effect ceases, the substantial adverse effect is treated as continuing if it is likely to recur (**GDD – Para C5**)

51. It is not necessary for the effect to be the same throughout the period being considered in relation to determining whether the 'long term' element of the definition [of disability] is met. It may change, for example activities which are initially very difficult may become possible to a much greater extent. The effect might even disappear temporarily. (**GDD – Para C7**)

52. Normal day to day activities are not defined by the EqA 2010, but are things people do on a regular or daily basis such as shopping, having a conversation, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and taking part in social activities as well as normal-work related activities such as keeping to a timetable or a shift pattern etc (**GDD - D3**)

53. Similar points of guidance are set out in COP 2011 and the tribunal is referred in particular to **Paras 8 – 10, 13 and 16** of App 1 in this regard.

Knowledge of Disability

54. Whether an employer has actual or constructive knowledge of disability is determined (like the issue of disability itself) as at the material time in question – i.e. the date of the alleged discriminatory treatment (in this case 2nd December 2020).

55. It is not simply a question as to actual knowledge, but rather also whether the employer 'could not reasonably have been expected to know that the Claimant was disabled' whether for a claim of reasonable adjustments and / or arising from disability (s.15(2) EqA 2010 / Para 20, Sch8 EqA 2010). This is an objective question for the tribunal in light of the evidence before R at the material time.

56. An employer has a defence to a claim under S.15 EqA if it did not know that the claimant had a disability — S.15(2). This stipulates that subsection (1) does not apply if the employer shows that it 'did not know, and could not reasonably have been expected to know' of the employee's disability.

57. The Tribunal found assistance in guidance provided by the EHRC Employment Code (i.e. COP 2011) and particular reference to the following points is made: Employers should consider whether a worker has a disability even where one has not been formally disclosed, as, for example, not all workers who meet the definition of disability may think of themselves as a "disabled person"' — **para 5.14.** An employer must do 'all it can reasonably be expected to do to find out whether a person has a disability' - **Para 5.15 / 6.19** (together with the examples referenced under those Paras). Where information about a disabled people may come through different channels employers need to ensure that there is a means…for bringing that information together to make it easier for the employer to fulfil their duties under the Act – **Para 5.18**

Justification Defence.

58. Pursuant to s.15(1)(a) EqA 2010, an employer can defend a claim of discrimination arising from disability if the employer shows that the discriminatory treatment is a proportionate means of achieving a legitimate aim. The burden of proving this accordingly rests with the employer.

59. The test is an objective one for the tribunal, not a 'band of reasonable responses' test and tribunals must engage in 'critical scrutiny' by weighing an employer's justification against the discriminatory impact, considering whether the means correspond to a real need of the undertaking, are appropriate with a view to achieving the aim in question and are necessary to that end (**Stott v Ralli Ltd 2022 IRLR 148**)

60. Whilst the measure adopted by the employer does not have to be the only possible way of achieving the legitimate aim, the treatment will not be proportionate if less discriminatory measures could have been taken to achieve the same objective (**COP 2011 - Para 4.31)**

61. 31. Indeed, a failure to consider whether a lesser measure could have achieved the employer's legitimate aim may mean that the tribunal fails to take a relevant factor into account in the proportionality exercise required under s.15(1)(b) EqA 2010 (**Ali v Torrosian and ors (t/a Bedford Hill Family Practice) EAT 0029/18.**

Discrimination Arising from Disability

62. An employer discriminates against a disabled employee if it treats that person unfavourably because of something arising in consequence of his disability and the employer cannot show that the treatment is a proportionate means of achieving a legitimate aim (Section 15 EA).

63. Simler P in **Pnaiser v NHS England (2016) IRLR 170 EAT** gave the following guidance as to the correct approach to a claim under section 15: – "*A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects of respects relied on by B*."

64. The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for the impugned treatment in a direct discrimination context, so too, there may be more than one reason in section 15. 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 of it.

65. The Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is "something arising in consequence of B's disability'. That expression "arising in consequence of' could describe a range of causal links. The causal link between the something that causes unfavourable treatment, and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

66. For employer to show the treatment in question is justified as a proportionate means of achieving a legitimate aim, the legitimate aim being relied upon must in fact be pursued by the treatment. The principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and reasonable needs of the undertaking. The Tribunal must weigh the reasonable seeds of the undertaking against the discriminatory

effect of the employer's measure or treatment and make its own assessment as to whether the former outweigh the latter: **Hardys and Hansens plc v Lax (2005) IRLR 726 CA.**

Reasonable Adjustments

67. Under section 39 (5) of the EA, a duty to make reasonable adjustments applies to an employer. A failure to comply with that duty constitutes discrimination (section 21 EA).

68. Section 20 of the EA provides that the duty to make reasonable adjustments comprises three requirements set out in that section. This case is concerned with the first of those requirements which provides that where a provision, criterion a practice of an employers puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, the employer must take such steps as is reasonable to have to take to avoid that disadvantage. Section 21 (1) provides that a failure to comply with this requirement is a failure to comply with the duty to make reasonable adjustments.

69. In considering whether the duty to make reasonable adjustments arose, a Tribunal must consider: – 1. Whether there was a provision, criterion or practice (PCP) applied by way or on behalf of an employer; 2. The identity of the non-disabled comparators (where appropriate); and 3. The nature and extent of the substantial disadvantage in relation to a relevant matter suffered by the employee.

70. The EAT has held that a "practice connotes something which occurs more than on a one-off occasion and which has an element of repetition". **Nottingham City Transport Ltd v Harvey (2013) EAT**. There will not have been a breach of the duty to make reasonable adjustments unless the PCP in question placed a disabled person concerned not simply at some disadvantage generally, but at a disadvantage which is substantial and which is not to be viewed generally but to be viewed in comparison with persons who are not disabled: **Royal Bank of Scotland v Ashton (2011) ICR 632 EAT**.

Conclusion and Findings

Unfair Dismissal

71. In the first instance, albeit the Claimant was described as a 'zero hours' employee, we considered the guidance in **Autoclenz Ltd v Belcher and ors 2011 ICR 1157, SC**. We looked beyond the contractual documentation that described the employment relationship in this case and considered the reality of the situation when determining employment status of the Claimant. We found that the evidence before us showed that the reality of the working situation was that the Claimant was obliged to carry out the work offered by the Respondent, and the employer was under an obligation to offer work. The contract, as performed, was therefore a contract of employment with the Claimant having over five years continuous employment without any breaks in continuity. Indeed, the Respondent did not adduce any evidence in this case that there was not the requisite mutuality of obligation to form a contract of employment such as breaks in continuity of employment, where, for example, the Claimant undertook employment elsewhere.

72. We next had to determine whether there was a dismissal. In answering this question, we had to ask ourselves, *'what ultimately caused'* the Claimant's termination of employment. We found this to be clear from the evidence presented to us. Ms Kirk in telling the Claimant

during the call on 2 December 2020 that because of her inability to wear a mask for longer than 10 minutes the Respondent was dismissing her and could not/would not offer the Claimant any further work. That in our view amounted to a dismissal in law. It was this decision as relayed to the Claimant that ultimately led to the Claimant's employment being terminated but pertinently it was this statement which confirmed the Respondent's withdrawal from any implied mutuality of obligation to provide any work or any other ongoing obligation to the Claimant and thus brought an end to the employment relationship.

73. We did not find any merit in the Respondent's submission to us that the dismissal was somehow coerced or agreed upon between Ms Kirk and the Claimant during this call on 2 December 2020. Firstly, and principally, we found that given the actual contemporaneous documentation quoted by us above being the email of dismissal, the Claimant's own evidence and that of Ms Kirk, we preferred the Claimant's evidence of what in fact happened. We found that there was no coercion on the Claimant's part nor agreement to dismiss. Ms Kirk might out of thoughts of sympathy for the Claimant decided to dismiss the Claimant, (rather than retain her but offer no work), to assist her with her claim for state benefits and confirm this decision in writing, but it was her decision to dismiss. Ms Kirk's own evidence and recollection was vague, and this was understandable as no note taken at the time was produced to us, Ms Kirk having confirmed that her own handwritten notes of the meeting were destroyed. The only note that was produced to us (a return to work form) was prepared five months later after the claim had been presented and at same time as the Respondent was seeking legal advice. We placed little weight on this note as we make clear in the facts section of this judgment. Furthermore, the wording in itself that was used referred to termination by '*mutual agreement*,' which we treated with extreme caution. We noted that this phrase was not used by Ms Kirk anywhere in her witness statement and in the dismissal email. The phrase is a somewhat legal phrase, Ms Kirk had little to no formal training in HR, let alone in law and read in context we find that that Ms Kirk was clearly trying to help her employe in preparing this note.

74. The second consideration for us was to determine the reason for the Claimant's dismissal on 2 December 2020. Initially the Respondent did not provide a reason for dismissal but only in closing submissions raised as the reason under s 98(1)(b) ERA 'some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held'('SOSR'). We noted that the Respondent bears the burden of proving a potentially fair reason for dismissal (s.98(2) ERA 1996).

75. The Respondent set out the basis of it's SOSR case namely that the '*Claimant's inability to wear a mask for more than 10 minutes was a substantial reason of a kind such as to justify dismissal'*. We note, however, that it was accepted that that restriction was clearly stated by the Claimant to Ms Kirk to be because of her asthma. If the reason for dismissal was this, we find that the reason clearly and evidently was one which was '*related to'* capability and accordingly we find that this was the principal reason for dismissal. We find that there was no need or possibility of seeking recourse to the label of SOSR.

76. It was accepted by the Respondent that it followed no process let alone a recognised fair process in dismissing the Claimant and nor did it follow its own disciplinary procedure. For example, there was no warning of potential dismissal, no opportunity for the Claimant to adduce evidence or make considered representations or have support from a work colleague in any meeting, no investigation undertaken by the Respondent prior to deciding to dismiss, limited (if any real) consideration of alternatives to dismissal and no offer of a

right to appeal. In short, the dismissal was clearly therefore procedurally unfair and, on this basis, alone did not fall within the band of reasonableness.

77. Furthermore, such a dismissal was substantively unfair, especially in light of the fact that the Respondent had not fully informed itself of the true medical position pursuant to **East Lindsey DC v Daubney [1977] ICR 566**, thus again placing this immediate dismissal outside the band of reasonableness. As to other matters of contribution and 'Polkey' these will be dealt with at the remedy hearing.

Wrongful Dismissal

78. We note that the Claimant was contractually entitled to 28 days notice on termination. It was agreed by the parties that the Claimant, however, had worked for more than 5 years as at date of termination. Pursuant to s.86(1)(b) ERA 1996 we find that she was therefore statutorily entitled to 5 weeks' notice.

79. We find that the Claimant was not dismissed for a repudiation of the contract (i.e. gross misconduct). It was accepted that the Claimant was not given any notice of termination or payment in lieu of notice. Accordingly, we find that the Claimant was dismissed in breach of contract and is entitled to 5 weeks' notice pay.

Was the Claimant disabled at the material time (date of dismissal 2 December 2020)?

80. We noted that principally the Respondent's defence to the fact that the Claimant was disabled was based on the fact that the Claimant's asthma was *'well controlled with prescribed medication*.' We find that this was clearly a misconceived defence in law as set out above by us in the legal section. We find that the Respondent neither in its denial of disability, nor its witness evidence adduced any substantive evidence itself to undermine or challenge the contents of the Claimant's impact statement prior to the Tribunal hearing. The legal issues or questions pertaining to whether the Claimant was disabled was clearly identified for the Respondent back in November 2021, clearly setting out the issue of *'substantial adverse effect on day-to-day activities'*. The Claimant's impact statement was received by the Respondent prior to exchange of witness statements. Yet we noted that no reference, examples or evidence was sought to be adduced to us to challenge the Claimant's account as set out in her disability impact statement.

81. The Respondent sought to advance some evidence (through supplementary questions) to undermine the Claimant's account, but at best we found it to be vague, generalised and uncertain. This evidence predominantly consisted of anecdotal evidence from Mr Akomolafe passing the Claimant on the stairs at head office, in which he observed she was coping well with her asthma. In any event, even if he passed her on the stairs at the office looking unaffected by her asthma on one or more occasions, it does not, undermine the Claimant's evidence at all if proper account is taken of the legal principles set out above and steps persons with disabilities (particularly those that are long standing) invariably take. To reiterate disabled persons, adapt their lives to accommodate their disabilities to minimise or eradicate the adverse effects where possible, that is not to say there are no effects. Furthermore, the effects of a disability such as asthma can fluctuate yet they still remain disabled. Mr Akomolafe might have seen the Claimant on a 'good day', she may have just moments before taken medication to ease her symptoms, she may have been taking the stairs at a slower pace, stopped to converse and have a break, there were numerous potential permutations. What was clear and irrefutable to us was the Claimant's

own medical records which clearly recorded examples of '*shortness of breath on inclines and stairs and feels this is worsening', Having shortness of breath 'once a day', 'Asthma causes daytime symptoms most days', 'Asthma limits activities 1 to 2 times per week'* is triggered by cold air, respiratory infection and exercise. We find that medical records clearly indicated the Claimant's asthma had more than a minor / trivial impact on normal day to day activities over a prolonged period, albeit they may have been worse or better at different points in time.

82. Accordingly, we find that on the evidence which was largely unchallenged that the Claimant suffered from a long-term impairment of asthma; that the Claimant's asthma had been having effects on the Claimant for several years prior to December 2020; that the extent of effects as set out in the Claimant's impact statement were not fully challenged by the respondent and were corroborated broadly by the Claimant's GP records. For the Respondent to suggest that those effects, cumulatively considered, at no point prior to December 2020 met the relatively low threshold of being more than minor or trivial on the Claimant's ability to undertake normal day to day activities was therefore misconceived. In short, we find, therefore, that the Claimant's asthma on the balance of probabilities had more than merely a minor or trivial adverse effect on her ability to undertake normal day to day activities and accordingly she was disabled during the course of her employment with the Respondent.

83. We also must consider the '*deduced effects'* had the Claimant not been taking medication, namely 2 preventative inhalers and 1 reliever inhaler at the material time and a whole host of other medication (steroids, antibiotics etc) in the past. We find that given breathing is a fundamental bodily function required for any day-to-day activity, the fact she was on several inhalers and her GP records record the need and use of those inhalers and the fact such medical treatment was clearly not curative of her condition, and was for prevention / alleviation of her symptoms. We find that it is frankly obvious that a severe asthmatic without 3 prescribed inhalers, would be in a far worse condition without such medication and her ability to do many daily activities involving any physical exertion would be impaired by more than what may be regarded as a 'minor or trivial' sense.

84. Given the Respondent had knowledge throughout her employment that the Claimant suffered from asthma, had made accommodations in working practices for her asthma in the past (as referenced above) and by the material time was aware that the Claimant was considered to be a severe asthmatic and adjudged to be '*clinically extremely vulnerable'* and was unable because of her asthma to wear a surgical face mask, we find that objectively viewed an employer in the position of the Respondent had more than sufficient evidence to be on notice of the possibility that the Claimant was disabled. At the very least even if the Respondent did not have 'actual knowledge' by virtue of these factors, it was clear to us that the Respondent had done nothing to investigate the Claimant's asthma and its effects with her. There was no suggestion of referral to the Respondent's Occupational Health advisers, no suggestion of a discussion with the Claimant to enquire in some detail as to the effects of her asthma on her at home and work or legal advice being sought. Therefore, we do not find that the Respondent has established that it had done all that it reasonably could to discover whether or not the Claimant might be disabled. Had the Respondent done so and been provided with even the summary of medical evidence set out in the Claimant's GP records, it would have identified that the Claimant was in fact disabled within the meaning of s.6 EqA 2010. Accordingly, we find that even if the Respondent did not have actual knowledge of disability, pursuant to the guidance set out

above, it was not objectively reasonable for the Respondent to remain ignorant of the Claimant's disability.

Discrimination arising from Disability (s.15 EqA 2010)

85. We find that the Claimant was evidently subjected to *'unfavourable treatment'*. Such treatment only needs to be objectively viewed as a disadvantage and we find that the Claimant being informed that she would be given no work for foreseeable future / being dismissed clearly amounted to an objective disadvantage and the Claimant clearly viewed it that way. The Respondent had in any event not advanced a suggestion to the contrary during the Tribunal hearing.

86. The Claimant was unable to wear a face mask for more than 10 minutes due to her asthma. This was clearly stated to Ms Kirk on 2 December 2020 and was not challenged at any point by the Respondent during this hearing or otherwise. Furthermore, the Respondent was well aware of this it seems from its own evidence and the file note of the visit on 25 September 2020. This was quite evidently therefore '*something which arose in consequence of her disability'*.

87. Likewise, it appeared evident to us and not to be disputed that a reason (if not the reason) that the Claimant was subjected to the unfavourable treatment was because of her inability to wear a face mask. The Claimant had, therefore, discharged the primary burden of proof pursuant to s.136 EqA 2010 and it was for the Respondent to establish a justification defence or that it lacked knowledge of disability (already addressed by us above).

88. It was not disputed by the Claimant that the asserted '*legitimate aims'* (the safety of service-users and staff/ the requirement to comply with government guidelines/legislation) in principle could amount to legitimate aims. However, given the '*general*' legal duty on the Respondent to take due care and the fact that the *'recommendations'* existed from April 2020 when the Claimant was (as accepted) working without a surgical mask from mid-September to the end of October 2020 to the Respondent's knowledge and without any reprimand from the Respondent, we find that the Respondent has not established as at that time a true legal requirement was in existence as opposed to '*guidance*'. The Claimant did not dispute that immediate dismissal on 2 December 2020 could, in principle, further those aims. We find that the Respondent has not proven, on the balance of probabilities, that immediate dismissal was reasonably necessary, appropriate and certainly not *'proportionate'* when balancing the discriminatory effect of a knee jerk dismissal against the other potential means of achieving those aims.

89. In a nutshell we find that the Respondent did not investigate at the time as to alternatives to dismissal. It did not consider alteration of working practices or allow the Claimant to undertake administration duties. It did not reasonably consider whether the Claimant could wear a full-face shield. Ms Kirk accepted, that perhaps SU (one service user that complained) could have been asked if they were happy for the Claimant to not wear a mask and some other form of protection (such as visor or full-face shield). In short, we find that clear and full evidence as to why any or all of these measures would have been futile was not advanced to us by the Respondent.

90. Assumptions regarding the efficacy and or availability of alternative protective measures had been made by the Respondent, but evidence was not provided to us. Particularly however, in terms of furlough it was evident to us that fair and full investigation

would have enabled the Claimant to be furloughed again and thus this was a less discriminatory measure that would have achieved the stated aims. It was accepted that the Claimant raised being furloughed again, but without investigation or checking Ms Kirk dismissed this as a possibility out of hand due to a misunderstanding of the current state of law by her. We do not attribute blame for this failure on Ms Kirk. As we have said above the Respondent did not provide adequate or proper training to Ms Kirk in the role of HR Manager which was relatively new to her. Indeed, to her credit, Ms Kirk herself accepted that with the benefit of hindsight the Respondent did not act proportionally or reasonably in dismissing the Claimant on 2 December 2020.

91. We find that it was the knee-jerk and immediate dismissal of the Claimant that was the discriminatory effect ultimately. Had investigation been undertaken, the Claimant may have been able to return to work and in any event could have been furloughed again and thus not dismissed. It was not about Ms Kirk's motives at the time that we were concerned about, but whether in short, the Respondent had satisfied us that the discriminatory effect of immediate dismissal was proportionate in all the circumstances. In conclusion, we find that the knee jerk reaction of dismissal following no process / investigation was not proportionate or reasonable. The discriminatory effect of that conduct grossly outweighed the furtherance of the legitimate aims as there were potential non-discriminatory actions that could have been taken and further investigated. We find that the Respondent has accordingly not proven that the discrimination was justified.

Failure to Make Reasonable Adjustments (s.20 EqA 2010).

92. As we have found above, the Respondent knew, or could reasonably have been expected to know, that the Claimant was disabled from the commencement of her employment with the Respondent and certainly at the relevant date of her dismissal.

93. We also find that requiring the Claimant to wear a blue surgical mask while on duty was a "PCP" (a provision, criterion or practice). We find that the Respondent clearly applied a PCP, namely the requirement that the Claimant and others wear a blue surgical mask whilst on duty / attending service user's homes, that clearly placed the Claimant at a comparative substantial disadvantage given her inability to wear a mask for longer than 10 minutes due to her severe asthma. The Respondent clearly knew this at the material time (as was the case from 25 September 2020 and it was stated during conversation on 2 December 2020) and given the Respondent did not explore or consider fully any potential adjustments with the Claimant at the time, we find that the Respondent did not take all reasonable steps to avoid that disadvantage. In particular: allowing her to exercise her exempt status and not be required to wear a mask; allowing her to wear a plastic forehead face shield, which she says was more effective than the surgical face mask that the Respondent required the Claimant to wear; varying the Claimant's duties; providing assistance with the Claimant's duties. If these adjustments were implemented, we find that they would have enabled the Claimant to be able to work without a mask (or for periods of no longer than 10-minute intervals) and therefore would have minimised the disadvantage and been effective in avoiding the substantial disadvantage. The Respondent did not adduce clear evidence to us (other than assumption and conjecture) as to why these adjustments would have been impractical. Accordingly, we find that the Respondent failed to make reasonable adjustments under section 20/21 EqA.

94. Accordingly, the Tribunal upholds the Claimant's claims in their entirety. A separate remedy hearing has been listed and directions given with regard to that hearing.

Employment Judge Hallen
Date: 2 August 2022

EMPLOYMENT TRIBUNALS

Claimants: **Ms S. Bartlett**

Respondent: **Heheals Pharmaceutical Ltd t/a Christ Church Care Agency**

Heard at: **East London Hearing Centre (by Cloud Video Platform)**

On: **30 May and 1 June and (in chambers) 18 July 2022**

Before: **Employment Judge Hallen,**
Members: **Ms. A. Berry**
Ms. S. Harwood

Representation

Claimant: Mr. S. Tibbits- Counsel
Respondent: Mr. S. Joshi- Solicitor

This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was V by Cloud Video Platform. A face-to-face hearing was not held because the relevant matters could be determined in a remote hearing.

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that: -

1. **The Claimant was dismissed by the Respondent by reason of capability pursuant to section 98 (2) (a) Employment Rights Act 1996 and her claim for unfair dismissal contrary to section 98 ERA is made out and succeeds.**

2. **The Claimant was wrongfully dismissed and was entitled to 5 weeks notice or pay in lieu of notice pursuant to section 86 (1) ERA.**

3. **The Claimant is a disabled person pursuant to section 6 Equality Act 2010 (EqA) and her claim under section 15 (discrimination arising out of disability) EqA is made out and succeeds.**

4. The Claimant's claim for reasonable adjustments pursuant to section 20/21 EqA is made out and succeeds.

3. The case will be set down for a remedy hearing and separate directions will be made in that respect including listing the case for hearing on this issue.

REASONS

Background and Issues

1. The Respondent operates as a care agency which provides domiciliary care services with up to 100 carers in its employment as well as an additional 20 employees in its associated companies. The Claimant was employed by the Respondent between 1 April 2015 and 2 December 2020 as a Community Care Assistant. The Claim Form was presented on 14 April 2021, after an ACAS early conciliation period between 17 February 2021 and 15 March 2021. The Claimant complained of unfair dismissal, disability discrimination and wrongful dismissal (notice pay). The disability relied on was severe asthma. The claims relate to the Respondent's requirement that employees wear a blue surgical face mask while working their shift. The Claimant contended that she told the Respondent that she could not do so because of her severe asthma. She said that she proposed alternatives but was summarily dismissed the same day on 2 December 2020.

2. This case came before Judge Massarella on 19 November 2021 who defined the legal claims and issues. The Claimant is making the following complaints: unfair dismissal; wrongful dismissal (notice pay); discrimination because of something arising in consequence of disability (s.15 Equality Act 2010) and failure to make reasonable adjustments.

3. With regard to unfair dismissal, the Tribunal had to answer the following questions: Was the Claimant dismissed? If the Claimant was dismissed, what was the reason or principal reason for dismissal? Was it a potentially fair reason? Did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant? The Claimant said that the dismissal was unfair because the Respondent: failed to obtain any medical evidence or occupational health opinion in order to obtain the full medical picture before dismissing the Claimant; failed to consider any alternative PPE the Claimant to wear other than a surgical mask; failed to follow a fair process in terminating the Claimant's employment; failed to conduct any meaningful investigation; failed to invite the Claimant to a meeting to discuss her termination; failed to afford the Claimant a right of appeal; breached the ACAS code; failed to consider any alternative duties for the Claimant to undertake or whether any changes could be made to the Claimant's working practice to accommodate her disability.

4. With regard to wrongful dismissal / notice pay, the Tribunal had to answer the following questions: What was the Claimant's notice period? Was the Claimant paid for that notice period? If not, did the Claimant do something so serious that the Respondent was entitled to dismiss without notice?

5. In relation to disability, the Tribunal had to ask the following questions: Did the Claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about? The Tribunal will have to decide: Did she have a physical

impairment of asthma? Did it have a substantial adverse effect on her ability to carry out day-to-day activities? If not, did the Claimant have medical treatment, including medication, or take other measures to treat or correct the impairment? Would the impairment have had a substantial adverse effect on her ability to carry out day-to-day activities without the treatment or other measures? Were the effects of the impairment long-term? The Tribunal will decide: did they last at least 12 months, or were they likely to last at least 12 months? if not, were they likely to recur?

6. With regard to the claim for discrimination arising from disability (Equality Act 2010 section 15), the Tribunal had to ask itself the following questions: Did the Respondent treat the Claimant unfavourably by: dismissing her; alternatively stopping giving her shifts? Did the following things arise in consequence of the Claimant's disability: the Claimant's inability to wear a surgical face mask for longer than ten minutes? Was the unfavourable treatment, in part at least, because of that inability? Was the treatment a proportionate means of achieving a legitimate aim? The Respondent says that its aims were: the safety of service-users and staff; The requirement to comply with government guidelines/ legislation. The Tribunal had to decide in particular: was the treatment an appropriate and reasonably necessary way to achieve those aims; could something less discriminatory have been done instead; how should the needs of the Claimant and the Respondent be balanced? Did the Respondent know, or could it reasonably have been expected to know that the Claimant had the disability? From what date?

7. Finally in relation to reasonable adjustments (Equality Act 2010 sections 20 and 21), the Tribunal had to ask itself the following questions: Did the Respondent know, or could it reasonably have been expected to know, that the Claimant had the disability? From what date? A "PCP" is a provision, criterion or practice. Did the Respondent have the following PCP: requiring the Claimant to wear a blue surgical mask while on duty. Did the PCP put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that it exacerbated her asthma? Did the Respondent know, or could it reasonably have been expected to know, that the Claimant was likely to be placed at the disadvantage? What steps could have been taken to avoid the disadvantage? The Claimant suggests: allowing her to exercise her exempt status and not be required to wear a mask; allowing her to wear a plastic forehead face shield, which she says is more effective than the surgical face mask that the Respondent required the Claimant to wear; varying the Claimant's duties; providing assistance with the Claimant's duties? Was it reasonable for the Respondent to have to take those steps, and when? Did the Respondent fail to take those steps?

8. The Tribunal had an agreed bundle of documents in front of it made up of 313 pages including relevant government guidance operating at that time dealing with the covid pandemic and obligations placed upon employers. During the hearing, parties produced additional documents and the Tribunal permitted this late disclosure in the interests of justice. The Claimant produced a witness statement made up of 22 paragraphs along with a disability impact statement made up of 6 paragraphs. The Respondent called two witnesses, Mr. Baba Akomolafe, the Managing Director who prepared a written witness statement made up of 7 paragraphs and Ms Michelle Kirk, the Respondent's Human Resources Manager who prepared a witness statement made up of 12 paragraphs. The Claimant and the Respondent's' witnesses gave oral evidence and were subject to cross examination and questions from the Tribunal. At the end of the two-day hearing, there was no time to hear oral submissions, so we ordered the parties to provide written submissions

to us (and then subsequently comment upon them in writing) which we considered in coming to this reserved judgment.

Facts

9. It was accepted by the parties that the Claimant was employed by the Respondent for over 5 years and that (save for the exceptional pandemic situation) the Claimant had throughout her working time with the Respondent been provided with regular care work, regularly and repeatedly tending to the needs of particular service users every week. Under normal circumstances there was an implicit expectation that the Respondent would provide the Claimant with regular work and the Claimant would undertake that work. No evidence was presented to us by the Respondent that showed any breaks in continuity of employment other than for legitimate reasons such as furlough leave during the pandemic or paid holidays. We therefore found that albeit the Claimant's contract was on the face of it a 'zero hours contract', the 'zero-hours' clauses in the contract did not reflect the true agreement between the parties. She was a full-time employee who undertook regular hours with the Respondent in the expectation that she would do such hours.

10. The Claimant clearly specified on her application for employment with the Respondent dated 18 March 2015 that she suffered from asthma, and it was accepted that the Respondent knew throughout her employment that she suffered from asthma. The Tribunal accepted the Claimant's evidence contained in her disability impact statement that she suffered from severe asthma since birth. The effects of her asthma on her ability to do day to day activities at the relevant time were: difficulty in breathing along with an inability to walk for long distances due to her being out of breath. Household chores, such as cooking, and cleaning were undertaken slowly or had to be done sitting down to allow the Claimant to get her breath back and then carry on. On a very bad day, the Claimant was unable to get out of bed or do anything around the house and struggled to breathe. The effects of the Claimant's asthma were expected to be lifelong. To treat her severe asthma, the Claimant had to take the following medication: (i). Spiriva respimat 2 puffs a day; (ii). Relvar 184/22nd 1 puff a day and (iii). Salamol easi breathe use when required. If she did not take her medication, she would not be able to breathe and would have a serious asthma attack which could lead to death.

11. The Respondent produced no evidence to counter the evidence of disability from the Claimant other than observational evidence from Mr Akomolafe that she appeared to deal with her asthma well and was not out of breath when he saw her on the stairs. It should be noted that the Respondent did not produce any medical evidence to counter the evidence of the Claimant, so we preferred the evidence of the Claimant with regard to her disability.

12. Prior to the start of the pandemic in March 2020 we found that the Respondent was aware that the Claimant's asthma did have an effect on her working activities to some degree at very least: Ms Kirk openly stated in evidence to the Tribunal that the Claimant moved from double to single rounds to accommodate her asthma. The Claimant could not work with persons who smoked due to her asthma. The Respondent in its Grounds of Resistance stated that *'The company has always accommodated her medical condition and she has had no problem getting regular work in the past'*.

13. The Claimant was identified by the government as being *'extremely clinically vulnerable'* due to her asthma in various letters contained in the trial bundle which led to her being furloughed by the Respondent on receipt of such letters for example between April

2020 and mid-September 2020. Government advice was that persons with '*severe asthma'* are defined as meeting the requirement of *'extremely clinically vulnerable*.'

14. The Claimant returned to work in or around mid-September 2020 after furlough leave and expressed a happiness to be back at work to Ms. Kirk at that time.

15. The Claimant worked for the Respondent between mid-September 2020 to early November 2020 when she was again furloughed for a month after receiving a letter from the government stating that she was a clinically extremely vulnerable person. During this time, it was readily apparent that it had come to the Respondent's attention that that the Claimant was unable to wear a surgical face mask due to her severe asthma and that the Claimant was not wearing such during any of her care duties which were both reported directly by the Claimant to 'Sam' and in the electronic record / note the Claimant submitted to the Respondent. In fact, the Respondent's case as confirmed by Ms Kirk in her evidence was that whilst the Claimant may not have been aware, two other service users had raised an *'issue'* or complaint about the Claimant not wearing a surgical face mask (AB and JA).

16. The Public Health England Recommendations that the Respondent sought to rely upon were in force throughout this period, indeed from early April 2020. In addition, the Respondent at no stage suggested at the hearing that Ms Kirk nor anyone else even spoke to the Claimant about this, let alone reprimanded her for her actions or instructed her that she must wear the surgical mask rather than a face visor which she was happy to do. Rather even following the reports that the Respondent received from the electronic record/note the Claimant submitted to the Respondent that she was unable to wear a face mask, Ms Kirk held a supervisory session and made no reference to any discussion of requirements of PPE the Claimant was required to adhere to. The Respondent did not consider it appropriate even at this stage (i.e. September to November 2020) to discuss the Claimant's asthma with her or seek medical advice or raise any such enquiry – in fact at no stage had the Respondent sought or suggested that this should be done or carried out any investigation or discussion with the Claimant even though the Respondent was aware that she was categorised as clinically extremely vulnerable by the government due to her severe asthma. Indeed, we saw a note of a supervision meeting with the Claimant dated 6 October 2020 in which it was noted, 'she feels safe with her visor and other PPE'. We find that it would have been appropriate and reasonable for the Respondent at this time to have discussed the matter with her if it had concerns about her actions or her reasons for not wearing a face mask.

17. The Claimant received a *'top up'* of Universal Credit to her furlough pay from April 2020. Indeed, in the Claimant's summary table it was clear that the Universal Credit top up from April 2020 to November 2020 was an average of around £285 per month. The Claimant continued to receive this top-up during the period she returned to work (September to November 2020) in addition to wages received from the Respondent and outside of this she was being paid 80% of her £1200 / £1300 of her normal take home pay. Following the termination of her employment, the Claimant was not paid any Universal Credit for December 2020 and only from January 2021 was she in receipt of Universal Credit of around £800 per month which overall was significantly less than the overall sum she received by way of furlough / wages and Universal Credit top up whilst employed by the Respondent.

18. On 2 December 2020, Ms Kirk called the Claimant to discuss her return to work after her furlough leave during November 2020 and her expected return date in December. At

the time, the Claimant's shielding letter was expiring on 2 December 2020, and she was getting paid 80% of her wages through the CVJRC (Corona Virus Job Retention Scheme). The Claimant had not obtained a further shielding letter on the expiry of the current one expiring on 2 December 2020 nor had she received a doctors sickness certificate to cover any sickness absence thereafter.

19. During her telephone conversation with the Claimant, she had told Ms Kirk that she was able to come back to the service users' homes with her asthmatic condition but could only do so if she could wear a face visor rather than a surgical mask. The Respondent was already aware that the Claimant could not wear a surgical mask due to her asthma. Ms Kirk explained to the Claimant that as the call times were for a minimum of 30 minutes, the legislation stated that face masks were to be always worn during the home visit to service users in domiciliary care. It was not properly explained to us why the Claimant was able to visit service users as she previously did whilst wearing a face visor but could not do so after her return to work after her last shielding letter was expiring. Nevertheless, we find that Ms Kirk did tell the Claimant that as she was not able to wear a surgical mask, she could not return to work after her shielding letter had expired and that as a consequence, her employment was being terminated with immediate effect. In order to assist the Claimant in respect of claiming state benefits in the future, Ms Kirk agreed to help the Claimant by saying that her employment had been terminated as this would mean that she could claim state benefits without any period of suspension. The Tribunal were not persuaded as to the legality of such an approach but accepted that Ms Kirk was trying to assist the Claimant by ensuring that she would be able to claim state benefits so that she would not be immediately penniless. There was no discussion with the Claimant about her notice entitlement and nor indeed was the Claimant provided with any notice of her termination or payment in lieu of such notice. We find that during this telephone discussion, there was little if any discussion about any alternative options other than dismissal and neither was the Claimant given the right of appeal against dismissal.

20. The Respondent sought to persuade us in evidence that Ms Kirk could not terminate an employee's services without the authority of Mr Akomolafe, the company's Managing Director. We did not accept that Ms Kirk could not terminate the employment of an employee without Mr Akomolafe's agreement. We did not accept this. Rather, we found that Ms Kirk's actions were those of an inexperienced HR professional under pressure who had not been given appropriate training or guidance by the Respondent with regard to the pandemic and/or disabled employees. She acted on the spur of the moment not being fully cognisant of the consequences of her actions.

21. The return-to-work form prepared by Ms Kirk as a record of the telephone discussion with the Claimant of 2 December 2020 was dated 19 November 2021 (nearly a year after the termination) was actually prepared on 11 May 2021 some six months after the termination and in contemplation of legal action after the Claimant had indicated that she was proceeding with this claim. We found that this document was a self-serving document that was prepared to support the Respondent's contention that this was a termination by mutual consent. As a consequence, we did not accept the accuracy of the note and in particular its assertion that the termination was by way of mutual agreement. We did not consider that this was the case at all. We reproduce the email of dismissal (a contemporaneous document) in its entirety which confirmed clearly to us that the Claimant was dismissed by the Respondent. It can be seen that the word mutual agreement was not used in it. We found that the reason for the dismissal was capability in that the Claimant could not wear a surgical face mask for more than ten minutes due to her severe asthma.

The wording of the dismissal email dated 2 December 2020 is as follows:- *'Dear Steph, Following our telephone conversation, I am writing to confirm what was discussed. You are employed as a community Care Assistant. To abide with the law at this time all care workers must wear full PPE. This includes gloves, aprons and masks. Due to your health condition, you advised me that you cannot wear a mask for more than 10 minutes. So summing this up you cannot go into a service users home without a mask on. Unfortunately, we have no other choice than to terminate your employment with immediate effect. My apologies for this decision, It's not us as a company, It's the guidance we are provided to follow by law. Stay safe. Kind Regards Michelle Kirk HR'.*

22. During her evidence to the Tribunal, Ms Kirk accepted that *'we could have'* looked at whether certain service users would have agreed to the Claimant wearing just a face shield or visor but did not as people were becoming more worried. Ms Kirk disputed whether the Claimant could have undertaken alternative duties (such as administration work) and whether adjustments to her working practices could have been made but fully accepted that there was no discussion with the Claimant about any of this during their conversation on 2 December 2020 or that Ms Kirk carried out any investigation into alternatives with anyone else at the time (either with Mr Akomolafe, taking legal advice, or contacting Public Health England or otherwise).

23. Ms Kirk's evidence to us was that because the Claimant had not received another formal shielding notification for after 2 December 2020 and because the Respondent had work there was no option to furlough the Claimant. However, the government guidance that we were referred to clearly showed us that because the Claimant was classified as *'clinically extremely vulnerable'* she was able to be furloughed past 2 December 2020. We produce the extract from the government guidance published in May 2020 and operative at the time of the Claimant's dismissal as follows: - '*If your employee's health has been affected by coronavirus or any other conditions. Your employee is eligible for the grant and can be furloughed, if they are unable to work, including from home or working reduced hours because they: are clinically extremely vulnerable, or at the highest risk of severe illness from coronavirus and following public health guidance …… these employees remain eligible for the Coronavirus Job Retention Scheme even whilst shielding guidance is not in place'* Ms Kirk however did not make any enquiries or check on the position with any Government agencies prior to terminating the Claimant's employment.

24. Ms Kirk accepted in oral evidence that by refusing to offer the Claimant any work for the foreseeable future and immediately terminating the Claimant's employment on 2 December 2020 was not a proportionate / reasonable course of action in hindsight and that *'everything gets done properly now'*.

Law

Nature of Employment and Zero-Hour Contracts

25. Albeit trite law, it was pertinent to remind ourselves that in order for a relationship of employment to exist in the first place, the contract must provide for the three irreducible elements of control, mutuality of obligation and personal performance, without which no contract of employment can be said to exist **(Carmichael and anor v National Power plc 1999 ICR 1226, HL).**

26. If a contract does not oblige an employer to offer work, and the other party to the contract was not obliged to accept any work that is offered, then that contract that would be regarded as lacking the mutuality of obligation necessary to form a contract of employment.

27. Zero-hour Contracts ('ZHCs') commonly include wording that expressly denies the existence of any obligations to offer and do work. It is invariably on this ground that ZHCs lack the requisite mutuality of obligation to amount to 'contracts of employment'. Indeed, not infrequently, ZHCs will not amount to a contract of employment.

28. However, 'the contract' (as referenced above) is not purely defined by reference to the written contractual terms between the parties but rather the reality of the working relationship between the parties. This has been made clear several times in the authorities, notably by the Supreme Court in **Autoclenz Ltd v Belcher and ors 2011 ICR 1157, SC**. The SC authoritatively stated that a Tribunal has and should look beyond the contractual documentation that describes an employment relationship and consider the reality of the situation when determining employment status. In Autoclenz one of the clauses stated that there was no obligation on A Ltd to offer work or on the claimants to accept it. However, the evidence before the Tribunal showed that the reality of the working situation was that the claimants were obliged to carry out the work offered, and the employer was under an obligation to offer work. The contract, as performed, was therefore a contract of employment.

29. Indeed, the Tribunal's focus in defining the nature of a relationship between the parties to a contract will be on the true intentions of the parties on the questions of whether the employer is expected to offer work and whether the zero-hours worker is expected to do it if offered. In **Pulse Healthcare Ltd v Carewatch Care Services Ltd and ors EAT 0123/12** the claimants had each signed documents entitled 'zero-hours contract agreement'. These documents contained a number of provisions consistent with a more casual working relationship: work was to be done at such times and hours as agreed, there was no obligation to offer work, and the employer retained the right to reduce working hours whenever necessary.

30. The EAT upheld the Employment Tribunal's finding that the 'zero-hours' clauses in the contracts did not reflect the true agreement between the parties. What made the claimants' case particularly compelling was the nature of the work they carried out. They were engaged as carers to provide critical care to a single patient on a shift system around the clock. The EAT considered it 'fanciful' that such care would have been provided through reliance on ad hoc arrangements and that it would have been 'unrealistic' to reach any conclusion other than that the claimants worked under contracts of employment.

31. It is furthermore, surely disingenuous in an employer being able to avoid the risk of an unfair dismissal claim or the obligation to make a redundancy payment by the simple expedient of reducing the employee's hours to zero and never dismissing.

Termination of Employment

32. The EAT concluded that the employee's employment was not terminated by agreement where both options put to him by the employer involved his dismissal. The crucial issue was who brought the contract to an end, and where, as in this case, an employee is given two options, both of which involve dismissal, the only sensible conclusion is that the dismissal is intended by the person offering those options. (Francis v Pertemps

Recruitment Partnership Ltd EATS 0003/13). Termination by mutual agreement or by way of a dismissal by the employer is a question of both fact and law. The question *'who really terminated the contract of employment?*' is one of fact (**Martin v Glynwed Distribution Ltd 1983 ICR 511, CA**). However, whether those facts amount to a dismissal or a consensual termination — is a question of law (**Birch and anor v University of Liverpool 1985 ICR 470, CA**).

33. The effect of a *'termination by agreement'* is to deny the employee statutory employment protection rights, thus courts and tribunals should be wary and exercise caution in making such a finding unless there is very clear evidence that an entirely voluntary arrangement has been entered into. Several authorities provide support for this: -Finding that an employee had voluntarily resigned after agreeing severance terms at the same meeting at which the employer told him that he was being dismissed was held to be perverse (**Sandhu v Jan de Rijk Transport Ltd 2007 ICR 1137, CA**); Tribunals should look at such situations carefully to ensure that the employer's words do not, in reality (as a matter of law), amount to a dismissal. The intention of the employer and the attitude of the employee need to be considered: if there is no threat of dismissal and the employee acts voluntarily, termination is by agreement. (**Hart v British Veterinary Association EAT 145/78);** The EAT concluded that the employee's employment was not terminated by agreement where both options put to him by the employer involved his dismissal. The crucial issue was who brought the contract to an end, and where, as in this case, an employee is given two options, both of which involve dismissal, the only sensible conclusion is that the dismissal is intended by the person offering those options. **(Francis v Pertemps Recruitment Partnership Ltd EATS 0003/13).**

Unfair Dismissal

34. Section 98(1) Employment Rights Act 1996 provides that it is for the employer to show the reason or principal reason for dismissal of the employee and 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. If the Respondent fails to do so the dismissal will be unfair.

35. If the Tribunal decides that the reason for dismissal of the employee is a reason falling within Section 98(1) or (2) ERA it will consider whether the dismissal was fair or unfair within the meaning of Section 98(4) ERA. The burden of proof in considering Section 98(4) is neutral.

36. Section 98(4) ERA provides: -

> "the determination of the question whether the dismissal is fair or unfair (having regards to the reason shown by the employer) –
>
> 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 shall be determined in accordance with equity and the substantial merits of the case."

37. In the case of **Iceland Frozen Foods Ltd v Jones [1982] IRLR 439 EAT**, guidance was given that the function of the Employment Tribunal was to decide whether in the particular circumstances 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 outside the band, it is unfair.

38. In the case of **Sainsburys Supermarket Ltd v Hitt [2003] IRLR 23CA**, guidance was given that the band of reasonable responses applies to both the procedures adopted by the employer and the sanction, or penalty of the dismissal.

39. The Tribunal should not substitute its own factual findings about events giving rise to the dismissal for those of the dismissing officer (**London Ambulance NHS Trust v Small [2009] IRLR 563**).

40. In the case of **British Home Stores v Burchell [1978] IRLR 379 EAT**, guidance was given that, in a case where an employee is dismissed because the employer suspects or believed that he has committed an act of misconduct, in determining whether the dismissal was unfair, an Employment Tribunal has to decide whether the employer who discharged the employee on the grounds of misconduct in question and obtained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at the time. This involved three elements. First, there must be established by the employer the fact of that belief, that the employer did believe it. Second, it must be shown that the employer had in its mind reasonable grounds upon which to sustain that belief. Third, the employer at the stage on which he formed that belief on those ground, must have carried out as much investigation into the matter as was reasonable in all of the circumstances of the case.

Wrongful Dismissal

41. Pursuant to s.86(1)(b) ERA 1996 an employee is entitled to receive notice of dismissal which is contractual notice of statutory notice whichever is the greater up to 12 weeks maximum statutory notice unless the employee's employment was terminated due to the employee's repudiation of the contract (i.e. gross misconduct).

Disability.

42. Whether an individual is considered disabled for the purposes of S.6 EqA 2010 clearly can differ from a more generalised public perception of who is and who is not disabled. Disability is not always obvious and those with disabilities often adjust their lives and often will not advertise their difficulties to others. The EAT's observations in (**Goodwin v Patent Office 1999 ICR 302**) are worth noting in this context at the outset: *'What the Act is concerned with is an impairment on the person's ability to carry out activities. The fact that a person can carry out such activities does not mean that his ability to carry them out has not been impaired. Thus, for example, a person may be able to cook, but only with the greatest difficulty. In order to constitute an adverse effect, it is not the doing of the acts which is the focus of attention but rather the ability to do (or not do) the acts. Experience shows that disabled persons often adjust their lives and circumstances to enable them to cope for themselves. Thus, a person whose capacity to communicate through normal speech was obviously impaired might well choose, more or less voluntarily, to live on their own. If one asked such a person whether they managed to carry on their daily lives without undue problems, the answer might well be "yes", yet their ability to lead a "normal" life had obviously been impaired. Such a person would be unable to communicate through speech and the ability to communicate through speech is obviously a capacity which is needed for carrying out normal day-to-day activities, whether at work or at home. If asked whether they*

could use the telephone, or ask for directions or which bus to take, the answer would be "no". Those might be regarded as day-to-day activities contemplated by the legislation, and that person's ability to carry them out would clearly be regarded as adversely affected.'

43. The Tribunal has the assistance in determining whether someone is disabled in the form of Guidance on **Definition of Disability (2011) ('GDD'**), the **Code of Practice on Employment 2011, App1 – Meaning of** Disability ('COP 2011') and Sch 1 to the EqA 2010.

44. 'Substantial' is defined as 'more than minor or trivial' (s.212(1) EqA 2010).

45. The time taken and way in which a person with that impairment carries out a normal day to day activity are relevant factors to be considered in determining whether the effects are substantial (**GDD – Para B2 / 3**).

46. The cumulative effects of an impairment should also be considered. A person whose impairment causes breathing difficulties may, as a result, experience minor effects on the ability to carry out a number of activities such as getting washed and dressed, going for a walk or travelling on public transport. But taken together, the cumulative result would amount to a substantial adverse effect on his or her ability to carry out these normal day to day activities. (**GDD – Para B5**).

47. Care needs to be exercised when considering an individual's coping mechanisms or avoidance strategies to minimise or prevent the effects of an impairment. It would not be reasonable to expect an individual to give up or modify normal activities that might exacerbate symptoms (**GDD – Para B7 / 8**).

48. Para 5(1), Sch 1, EqA 10 provides that an impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day to day activities if measures are being taken to treat or correct it and but for that it would be likely to have that effect. Likely meaning of course 'could well happen' (**Boyle v SCA Packaging Ltd [2009] ICR 1056**). This is often referred to as 'deduced effects'. This provision is applied even if the measures result in the effects being completely under control or not at all apparent **(GDD – Para B13**).

49. Relatively little evidence is required to raise the issue of 'deduced effects'. If there is material before the tribunal to suggest that measures were being taken that may have altered the effects of the impairment, then the tribunal must consider whether the impairment would have had a substantial adverse effect in the absence of those measures. Indeed in **Fathers v Pets at Home Ltd and anor EAT 0424/13** the EAT held that a tribunal had erred in not making findings as to the deduced effects of F's depression were she not taking medication or receiving counselling. The EAT agreed with the obiter observation in **J v DLA Piper UK LLP 2010 ICR 1052, EAT**, that 'there is nothing particularly surprising in the proposition that a person diagnosed as suffering from depression who is taking a high dose of anti-depressants would suffer a serious effect on her ability to carry out normal day-to-day activities if treatment were stopped', though that proposition 'could of course be challenged'.

50. The EqA 2010 states that if the impairment has had a substantial adverse effect on a person's ability to carry out normal day to day activities but that effect ceases, the substantial adverse effect is treated as continuing if it is likely to recur (**GDD – Para C5**)

51. It is not necessary for the effect to be the same throughout the period being considered in relation to determining whether the 'long term' element of the definition [of disability] is met. It may change, for example activities which are initially very difficult may become possible to a much greater extent. The effect might even disappear temporarily. (**GDD – Para C7**)

52. Normal day to day activities are not defined by the EqA 2010, but are things people do on a regular or daily basis such as shopping, having a conversation, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and taking part in social activities as well as normal-work related activities such as keeping to a timetable or a shift pattern etc (**GDD - D3**)

53. Similar points of guidance are set out in COP 2011 and the tribunal is referred in particular to **Paras 8 – 10, 13 and 16** of App 1 in this regard.

Knowledge of Disability

54. Whether an employer has actual or constructive knowledge of disability is determined (like the issue of disability itself) as at the material time in question – i.e. the date of the alleged discriminatory treatment (in this case 2nd December 2020).

55. It is not simply a question as to actual knowledge, but rather also whether the employer 'could not reasonably have been expected to know that the Claimant was disabled' whether for a claim of reasonable adjustments and / or arising from disability (s.15(2) EqA 2010 / Para 20, Sch8 EqA 2010). This is an objective question for the tribunal in light of the evidence before R at the material time.

56. An employer has a defence to a claim under S.15 EqA if it did not know that the claimant had a disability — S.15(2). This stipulates that subsection (1) does not apply if the employer shows that it 'did not know, and could not reasonably have been expected to know' of the employee's disability.

57. The Tribunal found assistance in guidance provided by the EHRC Employment Code (i.e. COP 2011) and particular reference to the following points is made: Employers should consider whether a worker has a disability even where one has not been formally disclosed, as, for example, not all workers who meet the definition of disability may think of themselves as a "disabled person"' — **para 5.14.** An employer must do 'all it can reasonably be expected to do to find out whether a person has a disability' - **Para 5.15 / 6.19** (together with the examples referenced under those Paras). Where information about a disabled people may come through different channels employers need to ensure that there is a means…for bringing that information together to make it easier for the employer to fulfil their duties under the Act – **Para 5.18**

Justification Defence.

58. Pursuant to s.15(1)(a) EqA 2010, an employer can defend a claim of discrimination arising from disability if the employer shows that the discriminatory treatment is a proportionate means of achieving a legitimate aim. The burden of proving this accordingly rests with the employer.

59. The test is an objective one for the tribunal, not a 'band of reasonable responses' test and tribunals must engage in 'critical scrutiny' by weighing an employer's justification against the discriminatory impact, considering whether the means correspond to a real need of the undertaking, are appropriate with a view to achieving the aim in question and are necessary to that end (**Stott v Ralli Ltd 2022 IRLR 148**)

60. Whilst the measure adopted by the employer does not have to be the only possible way of achieving the legitimate aim, the treatment will not be proportionate if less discriminatory measures could have been taken to achieve the same objective (**COP 2011 - Para 4.31)**

61. 31. Indeed, a failure to consider whether a lesser measure could have achieved the employer's legitimate aim may mean that the tribunal fails to take a relevant factor into account in the proportionality exercise required under s.15(1)(b) EqA 2010 (**Ali v Torrosian and ors (t/a Bedford Hill Family Practice) EAT 0029/18.**

Discrimination Arising from Disability

62. An employer discriminates against a disabled employee if it treats that person unfavourably because of something arising in consequence of his disability and the employer cannot show that the treatment is a proportionate means of achieving a legitimate aim (Section 15 EA).

63. Simler P in **Pnaiser v NHS England (2016) IRLR 170 EAT** gave the following guidance as to the correct approach to a claim under section 15: – "*A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects of respects relied on by B*."

64. The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for the impugned treatment in a direct discrimination context, so too, there may be more than one reason in section 15. 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 of it.

65. The Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is "something arising in consequence of B's disability'. That expression "arising in consequence of' could describe a range of causal links. The causal link between the something that causes unfavourable treatment, and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

66. For employer to show the treatment in question is justified as a proportionate means of achieving a legitimate aim, the legitimate aim being relied upon must in fact be pursued by the treatment. The principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and reasonable needs of the undertaking. The Tribunal must weigh the reasonable seeds of the undertaking against the discriminatory

effect of the employer's measure or treatment and make its own assessment as to whether the former outweigh the latter: **Hardys and Hansens plc v Lax (2005) IRLR 726 CA.**

Reasonable Adjustments

67. Under section 39 (5) of the EA, a duty to make reasonable adjustments applies to an employer. A failure to comply with that duty constitutes discrimination (section 21 EA).

68. Section 20 of the EA provides that the duty to make reasonable adjustments comprises three requirements set out in that section. This case is concerned with the first of those requirements which provides that where a provision, criterion a practice of an employers puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, the employer must take such steps as is reasonable to have to take to avoid that disadvantage. Section 21 (1) provides that a failure to comply with this requirement is a failure to comply with the duty to make reasonable adjustments.

69. In considering whether the duty to make reasonable adjustments arose, a Tribunal must consider: – 1. Whether there was a provision, criterion or practice (PCP) applied by way or on behalf of an employer; 2. The identity of the non-disabled comparators (where appropriate); and 3. The nature and extent of the substantial disadvantage in relation to a relevant matter suffered by the employee.

70. The EAT has held that a "practice connotes something which occurs more than on a one-off occasion and which has an element of repetition". **Nottingham City Transport Ltd v Harvey (2013) EAT**. There will not have been a breach of the duty to make reasonable adjustments unless the PCP in question placed a disabled person concerned not simply at some disadvantage generally, but at a disadvantage which is substantial and which is not to be viewed generally but to be viewed in comparison with persons who are not disabled: **Royal Bank of Scotland v Ashton (2011) ICR 632 EAT**.

Conclusion and Findings

Unfair Dismissal

71. In the first instance, albeit the Claimant was described as a 'zero hours' employee, we considered the guidance in **Autoclenz Ltd v Belcher and ors 2011 ICR 1157, SC**. We looked beyond the contractual documentation that described the employment relationship in this case and considered the reality of the situation when determining employment status of the Claimant. We found that the evidence before us showed that the reality of the working situation was that the Claimant was obliged to carry out the work offered by the Respondent, and the employer was under an obligation to offer work. The contract, as performed, was therefore a contract of employment with the Claimant having over five years continuous employment without any breaks in continuity. Indeed, the Respondent did not adduce any evidence in this case that there was not the requisite mutuality of obligation to form a contract of employment such as breaks in continuity of employment, where, for example, the Claimant undertook employment elsewhere.

72. We next had to determine whether there was a dismissal. In answering this question, we had to ask ourselves, *'what ultimately caused'* the Claimant's termination of employment. We found this to be clear from the evidence presented to us. Ms Kirk in telling the Claimant

during the call on 2 December 2020 that because of her inability to wear a mask for longer than 10 minutes the Respondent was dismissing her and could not/would not offer the Claimant any further work. That in our view amounted to a dismissal in law. It was this decision as relayed to the Claimant that ultimately led to the Claimant's employment being terminated but pertinently it was this statement which confirmed the Respondent's withdrawal from any implied mutuality of obligation to provide any work or any other ongoing obligation to the Claimant and thus brought an end to the employment relationship.

73. We did not find any merit in the Respondent's submission to us that the dismissal was somehow coerced or agreed upon between Ms Kirk and the Claimant during this call on 2 December 2020. Firstly, and principally, we found that given the actual contemporaneous documentation quoted by us above being the email of dismissal, the Claimant's own evidence and that of Ms Kirk, we preferred the Claimant's evidence of what in fact happened. We found that there was no coercion on the Claimant's part nor agreement to dismiss. Ms Kirk might out of thoughts of sympathy for the Claimant decided to dismiss the Claimant, (rather than retain her but offer no work), to assist her with her claim for state benefits and confirm this decision in writing, but it was her decision to dismiss. Ms Kirk's own evidence and recollection was vague, and this was understandable as no note taken at the time was produced to us, Ms Kirk having confirmed that her own handwritten notes of the meeting were destroyed. The only note that was produced to us (a return to work form) was prepared five months later after the claim had been presented and at same time as the Respondent was seeking legal advice. We placed little weight on this note as we make clear in the facts section of this judgment. Furthermore, the wording in itself that was used referred to termination by '*mutual agreement*,' which we treated with extreme caution. We noted that this phrase was not used by Ms Kirk anywhere in her witness statement and in the dismissal email. The phrase is a somewhat legal phrase, Ms Kirk had little to no formal training in HR, let alone in law and read in context we find that that Ms Kirk was clearly trying to help her employe in preparing this note.

74. The second consideration for us was to determine the reason for the Claimant's dismissal on 2 December 2020. Initially the Respondent did not provide a reason for dismissal but only in closing submissions raised as the reason under s 98(1)(b) ERA 'some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held'('SOSR'). We noted that the Respondent bears the burden of proving a potentially fair reason for dismissal (s.98(2) ERA 1996).

75. The Respondent set out the basis of it's SOSR case namely that the '*Claimant's inability to wear a mask for more than 10 minutes was a substantial reason of a kind such as to justify dismissal'*. We note, however, that it was accepted that that restriction was clearly stated by the Claimant to Ms Kirk to be because of her asthma. If the reason for dismissal was this, we find that the reason clearly and evidently was one which was '*related to'* capability and accordingly we find that this was the principal reason for dismissal. We find that there was no need or possibility of seeking recourse to the label of SOSR.

76. It was accepted by the Respondent that it followed no process let alone a recognised fair process in dismissing the Claimant and nor did it follow its own disciplinary procedure. For example, there was no warning of potential dismissal, no opportunity for the Claimant to adduce evidence or make considered representations or have support from a work colleague in any meeting, no investigation undertaken by the Respondent prior to deciding to dismiss, limited (if any real) consideration of alternatives to dismissal and no offer of a

right to appeal. In short, the dismissal was clearly therefore procedurally unfair and, on this basis, alone did not fall within the band of reasonableness.

77. Furthermore, such a dismissal was substantively unfair, especially in light of the fact that the Respondent had not fully informed itself of the true medical position pursuant to **East Lindsey DC v Daubney [1977] ICR 566**, thus again placing this immediate dismissal outside the band of reasonableness. As to other matters of contribution and 'Polkey' these will be dealt with at the remedy hearing.

Wrongful Dismissal

78. We note that the Claimant was contractually entitled to 28 days notice on termination. It was agreed by the parties that the Claimant, however, had worked for more than 5 years as at date of termination. Pursuant to s.86(1)(b) ERA 1996 we find that she was therefore statutorily entitled to 5 weeks' notice.

79. We find that the Claimant was not dismissed for a repudiation of the contract (i.e. gross misconduct). It was accepted that the Claimant was not given any notice of termination or payment in lieu of notice. Accordingly, we find that the Claimant was dismissed in breach of contract and is entitled to 5 weeks' notice pay.

Was the Claimant disabled at the material time (date of dismissal 2 December 2020)?

80. We noted that principally the Respondent's defence to the fact that the Claimant was disabled was based on the fact that the Claimant's asthma was *'well controlled with prescribed medication*.' We find that this was clearly a misconceived defence in law as set out above by us in the legal section. We find that the Respondent neither in its denial of disability, nor its witness evidence adduced any substantive evidence itself to undermine or challenge the contents of the Claimant's impact statement prior to the Tribunal hearing. The legal issues or questions pertaining to whether the Claimant was disabled was clearly identified for the Respondent back in November 2021, clearly setting out the issue of *'substantial adverse effect on day-to-day activities'*. The Claimant's impact statement was received by the Respondent prior to exchange of witness statements. Yet we noted that no reference, examples or evidence was sought to be adduced to us to challenge the Claimant's account as set out in her disability impact statement.

81. The Respondent sought to advance some evidence (through supplementary questions) to undermine the Claimant's account, but at best we found it to be vague, generalised and uncertain. This evidence predominantly consisted of anecdotal evidence from Mr Akomolafe passing the Claimant on the stairs at head office, in which he observed she was coping well with her asthma. In any event, even if he passed her on the stairs at the office looking unaffected by her asthma on one or more occasions, it does not, undermine the Claimant's evidence at all if proper account is taken of the legal principles set out above and steps persons with disabilities (particularly those that are long standing) invariably take. To reiterate disabled persons, adapt their lives to accommodate their disabilities to minimise or eradicate the adverse effects where possible, that is not to say there are no effects. Furthermore, the effects of a disability such as asthma can fluctuate yet they still remain disabled. Mr Akomolafe might have seen the Claimant on a 'good day', she may have just moments before taken medication to ease her symptoms, she may have been taking the stairs at a slower pace, stopped to converse and have a break, there were numerous potential permutations. What was clear and irrefutable to us was the Claimant's

own medical records which clearly recorded examples of '*shortness of breath on inclines and stairs and feels this is worsening', Having shortness of breath 'once a day', 'Asthma causes daytime symptoms most days', 'Asthma limits activities 1 to 2 times per week'* is triggered by cold air, respiratory infection and exercise. We find that medical records clearly indicated the Claimant's asthma had more than a minor / trivial impact on normal day to day activities over a prolonged period, albeit they may have been worse or better at different points in time.

82. Accordingly, we find that on the evidence which was largely unchallenged that the Claimant suffered from a long-term impairment of asthma; that the Claimant's asthma had been having effects on the Claimant for several years prior to December 2020; that the extent of effects as set out in the Claimant's impact statement were not fully challenged by the respondent and were corroborated broadly by the Claimant's GP records. For the Respondent to suggest that those effects, cumulatively considered, at no point prior to December 2020 met the relatively low threshold of being more than minor or trivial on the Claimant's ability to undertake normal day to day activities was therefore misconceived. In short, we find, therefore, that the Claimant's asthma on the balance of probabilities had more than merely a minor or trivial adverse effect on her ability to undertake normal day to day activities and accordingly she was disabled during the course of her employment with the Respondent.

83. We also must consider the '*deduced effects'* had the Claimant not been taking medication, namely 2 preventative inhalers and 1 reliever inhaler at the material time and a whole host of other medication (steroids, antibiotics etc) in the past. We find that given breathing is a fundamental bodily function required for any day-to-day activity, the fact she was on several inhalers and her GP records record the need and use of those inhalers and the fact such medical treatment was clearly not curative of her condition, and was for prevention / alleviation of her symptoms. We find that it is frankly obvious that a severe asthmatic without 3 prescribed inhalers, would be in a far worse condition without such medication and her ability to do many daily activities involving any physical exertion would be impaired by more than what may be regarded as a 'minor or trivial' sense.

84. Given the Respondent had knowledge throughout her employment that the Claimant suffered from asthma, had made accommodations in working practices for her asthma in the past (as referenced above) and by the material time was aware that the Claimant was considered to be a severe asthmatic and adjudged to be '*clinically extremely vulnerable'* and was unable because of her asthma to wear a surgical face mask, we find that objectively viewed an employer in the position of the Respondent had more than sufficient evidence to be on notice of the possibility that the Claimant was disabled. At the very least even if the Respondent did not have 'actual knowledge' by virtue of these factors, it was clear to us that the Respondent had done nothing to investigate the Claimant's asthma and its effects with her. There was no suggestion of referral to the Respondent's Occupational Health advisers, no suggestion of a discussion with the Claimant to enquire in some detail as to the effects of her asthma on her at home and work or legal advice being sought. Therefore, we do not find that the Respondent has established that it had done all that it reasonably could to discover whether or not the Claimant might be disabled. Had the Respondent done so and been provided with even the summary of medical evidence set out in the Claimant's GP records, it would have identified that the Claimant was in fact disabled within the meaning of s.6 EqA 2010. Accordingly, we find that even if the Respondent did not have actual knowledge of disability, pursuant to the guidance set out

above, it was not objectively reasonable for the Respondent to remain ignorant of the Claimant's disability.

Discrimination arising from Disability (s.15 EqA 2010)

85. We find that the Claimant was evidently subjected to *'unfavourable treatment'*. Such treatment only needs to be objectively viewed as a disadvantage and we find that the Claimant being informed that she would be given no work for foreseeable future / being dismissed clearly amounted to an objective disadvantage and the Claimant clearly viewed it that way. The Respondent had in any event not advanced a suggestion to the contrary during the Tribunal hearing.

86. The Claimant was unable to wear a face mask for more than 10 minutes due to her asthma. This was clearly stated to Ms Kirk on 2 December 2020 and was not challenged at any point by the Respondent during this hearing or otherwise. Furthermore, the Respondent was well aware of this it seems from its own evidence and the file note of the visit on 25 September 2020. This was quite evidently therefore '*something which arose in consequence of her disability'*.

87. Likewise, it appeared evident to us and not to be disputed that a reason (if not the reason) that the Claimant was subjected to the unfavourable treatment was because of her inability to wear a face mask. The Claimant had, therefore, discharged the primary burden of proof pursuant to s.136 EqA 2010 and it was for the Respondent to establish a justification defence or that it lacked knowledge of disability (already addressed by us above).

88. It was not disputed by the Claimant that the asserted '*legitimate aims'* (the safety of service-users and staff/ the requirement to comply with government guidelines/legislation) in principle could amount to legitimate aims. However, given the '*general*' legal duty on the Respondent to take due care and the fact that the *'recommendations'* existed from April 2020 when the Claimant was (as accepted) working without a surgical mask from mid-September to the end of October 2020 to the Respondent's knowledge and without any reprimand from the Respondent, we find that the Respondent has not established as at that time a true legal requirement was in existence as opposed to '*guidance*'. The Claimant did not dispute that immediate dismissal on 2 December 2020 could, in principle, further those aims. We find that the Respondent has not proven, on the balance of probabilities, that immediate dismissal was reasonably necessary, appropriate and certainly not *'proportionate'* when balancing the discriminatory effect of a knee jerk dismissal against the other potential means of achieving those aims.

89. In a nutshell we find that the Respondent did not investigate at the time as to alternatives to dismissal. It did not consider alteration of working practices or allow the Claimant to undertake administration duties. It did not reasonably consider whether the Claimant could wear a full-face shield. Ms Kirk accepted, that perhaps SU (one service user that complained) could have been asked if they were happy for the Claimant to not wear a mask and some other form of protection (such as visor or full-face shield). In short, we find that clear and full evidence as to why any or all of these measures would have been futile was not advanced to us by the Respondent.

90. Assumptions regarding the efficacy and or availability of alternative protective measures had been made by the Respondent, but evidence was not provided to us. Particularly however, in terms of furlough it was evident to us that fair and full investigation

would have enabled the Claimant to be furloughed again and thus this was a less discriminatory measure that would have achieved the stated aims. It was accepted that the Claimant raised being furloughed again, but without investigation or checking Ms Kirk dismissed this as a possibility out of hand due to a misunderstanding of the current state of law by her. We do not attribute blame for this failure on Ms Kirk. As we have said above the Respondent did not provide adequate or proper training to Ms Kirk in the role of HR Manager which was relatively new to her. Indeed, to her credit, Ms Kirk herself accepted that with the benefit of hindsight the Respondent did not act proportionally or reasonably in dismissing the Claimant on 2 December 2020.

91. We find that it was the knee-jerk and immediate dismissal of the Claimant that was the discriminatory effect ultimately. Had investigation been undertaken, the Claimant may have been able to return to work and in any event could have been furloughed again and thus not dismissed. It was not about Ms Kirk's motives at the time that we were concerned about, but whether in short, the Respondent had satisfied us that the discriminatory effect of immediate dismissal was proportionate in all the circumstances. In conclusion, we find that the knee jerk reaction of dismissal following no process / investigation was not proportionate or reasonable. The discriminatory effect of that conduct grossly outweighed the furtherance of the legitimate aims as there were potential non-discriminatory actions that could have been taken and further investigated. We find that the Respondent has accordingly not proven that the discrimination was justified.

Failure to Make Reasonable Adjustments (s.20 EqA 2010).

92. As we have found above, the Respondent knew, or could reasonably have been expected to know, that the Claimant was disabled from the commencement of her employment with the Respondent and certainly at the relevant date of her dismissal.

93. We also find that requiring the Claimant to wear a blue surgical mask while on duty was a "PCP" (a provision, criterion or practice). We find that the Respondent clearly applied a PCP, namely the requirement that the Claimant and others wear a blue surgical mask whilst on duty / attending service user's homes, that clearly placed the Claimant at a comparative substantial disadvantage given her inability to wear a mask for longer than 10 minutes due to her severe asthma. The Respondent clearly knew this at the material time (as was the case from 25 September 2020 and it was stated during conversation on 2 December 2020) and given the Respondent did not explore or consider fully any potential adjustments with the Claimant at the time, we find that the Respondent did not take all reasonable steps to avoid that disadvantage. In particular: allowing her to exercise her exempt status and not be required to wear a mask; allowing her to wear a plastic forehead face shield, which she says was more effective than the surgical face mask that the Respondent required the Claimant to wear; varying the Claimant's duties; providing assistance with the Claimant's duties. If these adjustments were implemented, we find that they would have enabled the Claimant to be able to work without a mask (or for periods of no longer than 10-minute intervals) and therefore would have minimised the disadvantage and been effective in avoiding the substantial disadvantage. The Respondent did not adduce clear evidence to us (other than assumption and conjecture) as to why these adjustments would have been impractical. Accordingly, we find that the Respondent failed to make reasonable adjustments under section 20/21 EqA.

94. Accordingly, the Tribunal upholds the Claimant's claims in their entirety. A separate remedy hearing has been listed and directions given with regard to that hearing.

Employment Judge Hallen
Date: 2 August 2022