EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4110465/2021

Held via Hybrid In-Person/ Cloud Video Platform (CVP) on Monday 20, Tuesday 21, Wednesday 22 June 2022, Wednesday 29 June 2022 and Friday 12 August 2022 and Members Meeting Friday 30 September 2022

Employment Judge: R McPherson

Members: N Elliot and J Haria

Ms Lesley Gorrie	**Claimant Represented by G Woolfson - Solicitor**
Mrs Phyliss Chuwen and Mr Isaac Chuwen	**Respondents Represented by S Smith - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Tribunal is that:

1. the claimant's claims in terms of s15 of the Equality Act 2010 (EA 2010) discrimination arising because of disability do not succeed and accordingly are dismissed.

2. The claimant's claims in terms of s19 of EA 2010 (indirect discrimination) do not succeed and accordingly are dismissed.

3. The claimant's claims in terms of s20&21 of EA 2010 (reasonable adjustments) do not succeed and accordingly are dismissed.

4. The claimant's claims in terms of s27 of EA 2010 (victimisation) do not succeed and accordingly are dismissed.

5. The claimant's claim for unfair dismissal does not succeed and accordingly is dismissed.

6. The claimant's claim for holiday pay does not succeed and, accordingly, is dismissed.

7. The claimant's claim for breach of contract/ notice pay succeeds and the respondents are ordered to pay to the claimant the sum of **ONE THOUSAND, ONE HUNDRED AND FORTY POUNDS AND FORTY-EIGHT PENCE (£1,140.48).**

8. The respondents are ordered to pay the claimant the sum of **TWO HUNDRED AND EIGHTY-FIVE POUNDS AND TWELVE PENCE (£285.12)** in respect of the respondents' failure to provide a written statement of particulars.

9. There being no prescribed element both those sums are payable immediately by the respondents the claimant.

10. the application made by the claimant's representative for expenses against the respondents is granted, and the Tribunal Orders that the respondents, shall make payment to the claimant's representative, within 21 days of the issue of this Judgment, to the claimant the sum of **ONE THOUSAND, FOUR HUNDRED AND NINETY-TWO POUNDS (£1,492.00)** by way of expenses reasonably and necessarily incurred in connection with the previous postponed Final Hearing on 25 and 26 May 2022.

REASONS

Preliminary Procedure

1. The claimant presented her ET1 on **Tuesday 20 July 2021,** following ACAS Early Conciliation (ACAS certificate identifying receipt of EC notification on **Thursday 27 May 2021** and issue of the ACAS Certificate on **Thursday 8 July 2021)** against the respondents following termination of her employment with the respondent as a Beauty Therapist.

2. The ET3 was presented timeously.

Preliminary Issues

3. The claimant was represented by Mr Woolfson, while the respondents were represented by Mr Smith. The claimant attended in person along with her representative as did witnesses called for the claimant Ms Graham and Dr Livingston. The first respondent and her representative attended remotely along with the respondent witness Ms McFadyen, there being no objection to same.

4. The Tribunal was provided with a Joint Inventory (which included a List of Claims) supplemented with a copy of a Post Office Certificate of Posting dated Friday 23 April 2021.

5. The Tribunal was also provided with an additional inventory of documents in support of the respondent's submissions on the claimant's application for expenses; which included a report from the first respondent's GP dated Tuesday 7 June 2022, previously exhibited to the Tribunal in advance of Preliminary Hearing on Monday 13 June 2022 which refused the respondent application of Friday 10 June 2022 for postponement of this Final Hearing. The Tribunal's Note of 13 June 2022 issued to the parties that day summarises the history of this claim.

6. Prior to this Final Hearing, and in relation to an earlier postponed Final Hearing, the claimant had raised an issue of expenses, which the claimant insisted upon in respect of the postponement of that earlier Final Hearing. This Tribunal reserved the issue of expenses, and this Judgment deal with that matter also.

Existing expenses application

7. The claimant had made an application for expenses following the Tribunal's Note of 31 May 2022 in respect of postponement, noting that the Tribunal had at paragraph 10 considered evidence in support of the first respondent's (un)fitness to give evidence was unsatisfactory, setting out that there was no medical evidence to support the respondent's position, and at paragraph 11 described that if the postponement were to be granted the prejudice to the

claimant could be compensated in terms of (expenses). The respondent provided separate written submissions to this Tribunal in respect of the claimant's application for expenses which are referred to below. The question of expenses was reserved to the conclusion of this Hearing.

Exchange of written submissions and supplementary comments following this Final Hearing.

8. Following the evidential hearing on Friday 12 August 2022, parties were directed to exchange written submissions and thereafter provide written submissions, including any supplementary comments, to the Tribunal, which initial comments were provided Friday 9 September 2022 with supplementary written comments provided Wednesday 14 September 2022.

9. On Wednesday 14 September 2022, the respondent representative provided a letterfrom the respondents' accountant dated Tuesday 6 September 2022 which set out profits for 2018 to 2021 , described that profits for the year ended 2021 were higher due to payments from the Coronavirus Job Retention Scheme and grants from the local authority, noted that due to a downturn in current takings coupled with rising costs the respondents have had to pay some of the wage costs personally, and the business had been unable to make rent costs.

10. The claimant argued in a subsequent email of Thursday 22 September 2022 which included an extract from Practical Law in relation to ET costs that while the Tribunal is not required to take the ability to pay into account it may do so, but requires to do so on the basis of sufficient evidence and provided an extract of an (English) County Court Record of Examination form which, Practical Law noted that EAT (in England) had encouraged parties to use, the Tribunal may take into account the paying party's future position and if ability to pay is to be taken into account the Tribunal should consider that party's whole means including capital and savings, arguing the accountant's letter did not provide a sufficient basis to conclude that the respondents do have the ability to pay the expenses.

11. In addition, the Tribunal notes from email exchanges between representatives, including on 30 September 2022 that the respondent paid the sum of holiday pay as intimated by the claimant in submissions.

Claims relied upon

12. By Judgment of the Tribunal dated **Monday 13 June 2022,** and issued to the parties on **Thursday 16 June 2022** those claims predating the termination on **Thursday 20 May 2021 ,** asserted in terms of

a. s15 Equality Act 2010 (EA 2010) (discrimination arising); and

b. s19 EA 2010 (indirect discrimination); and

c. s20 & 21 EA 2010 EA 2010 (reasonable adjustments); and

d. s26 EA 2010 (harassment)

were dismissed, while the remaining termination and post-termination claims in respect of

a. S15 EA 2010 (discrimination arising)

b. S19 EA 2010 (indirect discrimination)

c. S20 & s21 EA 2010 (reasonable adjustments)

d. s27 of EA 2010 (victimisation); and

e. unfair dismissal; and

f. breach of contract (notice pay).

g. holiday pay;

h. failure to provide written terms

all proceeded.

Issues for Tribunal at this Final Hearing

Disability discrimination

13. Section 6 Equality Act 2010 (EA 2010) "Qualifying Disability".

14. The question of a qualifying condition at relevant times in terms of s 6 EA 2010 was not conceded.

15. The Tribunal had regard to the following questions:

a. Did the claimant have a physical or mental impairment at the relevant times (which, by reference to Tribunal Note Issued to parties on **25 February 2022,** had been agreed to be **August 2020** to **May 2021).** Specifically, and as set out in the List of Claims, did the claimant have a mental impairment, namely Complex Trauma/Post Traumatic Stress Disorder [PTSD], due to the claimant's severe anxiety and trauma when wearing a face covering or mask, at the relevant time?

b. Did the impairment have a substantial adverse effect on the claimant's ability to carry out normal day-to-day activities?

c. If so, is that effect long-term? In particular, when did it start and;

i. has the impairment lasted for at least 12 months?

ii. Is, or was, the impairment likely to last at least 12 months or the rest of the claimant's life if less than 12 months?

d. Are any measures being taken to treat or correct the impairment? But for those measures, would the impairment be likely to have a substantial adverse effect on the claimant's ability to carry out normal day-to-day activities?

16. In relation to S15 of EA 2010: discrimination arising from asserted disability, a person discriminates against a disabled person if they treat that person unfavourably because of something arising in consequence of that person's disability. This requires consideration of whether the claimant was a disabled person for the purpose of s6 EA 2010 at the relevant time.

17. Beyond that, the issues for s15 EA 2010, having regard to the List of Claims (provided within the bundle) which were not otherwise dismissed, would be; was the unfavourable treatment of being dismissed and not being permitted to return to work, unlike other members of staff, because the claimant was not able to wear a face covering or mask arising from her asserted (but not conceded) disability of complex trauma/PTSD due to her severe anxiety and trauma when wearing a mask. The thing which was said to have arisen because of the claimant's asserted disability was the dismissal. Had the respondent shown that the alleged unfavourable treatment was a proportionate means of achieving a legitimate aim?

18. In relation to s19 of EA 2010 (indirect discrimination because of disability) a person discriminates against another if they apply a PCP which is discriminatory in relation to a protected characteristic of that other person.
* That requires consideration of whether the claimant is a disabled person for the purpose of s6 EA 2010 at the relevant time.

19. The *"provision, criterion or practice"* (PCP) relied upon by the claimant for s19 EA 2010 as being generally applied (or would be generally applied) was that of dismissing employees if they did not wear a face covering or mask, but which put those, such as the claimant, who were said to have the relevant asserted disability of complex trauma/PTSD as a disadvantage. From this, the Tribunal would consider whether the respondents applied the PCP to the claimant at any relevant time. If so, the Tribunal would consider did the respondents apply (or would have applied) the PCP to persons who did not share the protected characteristic and did the PCP put persons with whom the claimant shares the characteristic at one or more disadvantages. Further, did the PCP put the claimant at that disadvantage at any relevant time? If so, has the respondent shown the PCP(s) to be a proportionate means of achieving a legitimate aim?

20. In relation to s 20 & 21 EA 2010, reasonable adjustment, the issues would include the PCP relied upon put a disabled person at a disadvantage.

21. That requires consideration of whether the claimant was a disabled person for the purpose of s6 EA 2010 at the relevant time. If so, whether the respondents know, or could they reasonably have been expected to know, that the claimant was a person with the disability.

22. The claimant asserted, for s20, 21 EA 2010, a PCP of requiring employees to wear face coverings and/or dismissing employees if they did not and/or refusing to acknowledge the entitlement of an employer to have a self-certified face covering or mask-wearing exemption. Did the asserted PCP, put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled? By reference to the List of Issues, that substantial disadvantage is being dismissed in comparison with *"those who do not have complex trauma/PTSD".* The List of Issues identifies that the substantial disadvantage relied upon was being dismissed, as compared with *"those who do not have complex trauma /PTSD".*

23. In relation to s27 EA 2010: victimisation, the issues were

a. Did the claimant do a *"protected act",* and/or: did the respondent believe that the claimant had done or might do a protected act. The claimant relied upon the following as protected acts:

i. asserting *"discrimination"* in her letter to the respondents dated 17 May 2021, and

ii. contacting ACAS on 27 May 2021 (to 8 July 2021), and

iii. her presentation of ET1 on 20 July 2021.

b. Did the respondent subject the claimant to detriments being the respondents' failure to notify the relevant authorities of the termination of the claimant's employment and failure to issue a P45 (with the result that the claim claimant's name and national insurance number were still linked to the payroll for around 6 months (after termination) delay in P45?

c. If so, was this because the claimant did a protected act and/or because the respondent believed the claimant had done or might do a protected act?

24. In relation to Unfair Dismissal, the issues were:

a. Was the principal reason for the claimant's dismissal a potentially fair reason in accordance with section 98(1)(b) of the Employment Rights Act 1996 (ERA 1996)? It was asserted (but disputed by the claimant) by the respondent that it was for some other substantial reason of a kind such as to justify dismissal (SOSR).

b. If so, did the respondent act reasonably in treating that reason as sufficient for dismissing the claimant within the meaning of section 98(4) of ERA 1996?

c. If not, what is the appropriate remedy, including having regard to the claimant's assertion that the dismissal was not for SOSR, the extent that the Tribunal considers there were any procedural defects in the process followed by the respondent, and the dismissal was procedurally unfair would the claimant have been dismissed in any event? Whether it would be just and equitable for there to be a reduction to compensation to reflect any blameworthy conduct on the part of the claimant contributing to dismissal. Whether there should be an increase to compensation to reflect an unreasonable failure to follow the ACAS Code of Practice on Disciplinary and Grievances?

Holiday Pay

25. The ET3 set out that that it was accepted that holiday pay would have accrued and was due to the claimant following dismissal.

Breach of Employment Contract/ Notice Pay

26. Section 86 ERA 1996 provides for notice of termination to be given to an employee. An employee with more than 1 month's continuous service, but less than 2 years, is entitled to weeks' notice and thereafter is entitled to 1 further week for each year worked up to 12 years. Failure to pay amounts to a breach of contract.

Provision of Terms and Conditions

27. In terms of s1 of the Employment Rights Act 1996 (ERA 1996) an employee was entitled to receive from their employer, not later than two months after the beginning of their employment, a written statement of the major terms upon which she is employed. The Employment Rights (Employment Particulars and Paid Annual Leave (Amendment) Regulations 201 8 amended Section 1 to 7 B of ERA 1996 with effect from 6 April 2020, making the right to a written statement of employment particulars a *"day one"* right for all workers. Section 38 of the Employment Act 2002 (EA 2002) makes provision for an award in relation to same. If (and only if) the Tribunal finds for the employee in respect of a claim listed at Schedule 5 of the EA 2002, the Tribunal will make an award of 2 weeks' pay unless it would be unjust and inequitable to do so and may, if it considers just and equitable, in the circumstances make an award of 4 weeks' pay.

Remedy

28. If the claimant was discriminated against, issues in relation to remedy would include assessment of any injury to feelings award.

29. If the claimant was unfairly dismissed, issues in relation to remedy would include, what loss is attributable, did the claimant minimise her loss; whether it be just and equitable to reduce the amount of the claimant's award because of any blameworthy or culpable conduct before the dismissal, under Section 122(2) and 123(6) ERA 1996, and if so, to what extent?

Findings in Fact

30. The respondents jointly operate a beauty salon and a neighbouring hairdresser, there was a range of ages of the customers. They operate as a joint partnership, that is they are joint and severally liable, although the first respondent has operational day-to-day control, they employ 8 people, 4 of whom including the claimant worked at Beauty World in Clarkston Road Glasgow. The employees worked a mix of different hours although none work on Monday. The respondent had also engaged self-employed beauty therapists from time to time. This was a small employer with limited resources. The first respondent operates the business on a day-to-day basis.

31. The claimant commenced employment with the respondent on **Tuesday 3 July 2012** as a Beauty Therapist working 16 hours per week 3 days a week until March 2020 the working days being Tuesday, Wednesday and Thursday mornings totalling 16 hours per week, the specific days, and times she worked were amended by agreement between the claimant and respondent. The claimant was not provided with written particulars of employment at any time.

32. In **December 2019** the claimant returned to work after a period of absence and commenced holidays in January 2020 thereafter. The respondent did not seek to terminate her employment at that time.

33. On **Monday 23 March 2020** what has become known as the UK lockdown was announced, it had the effect that most workers were required to stay at home, with formal regulations coming in on **Thursday 26 March 2020.**

34. On **Wednesday 22 April 2020** the claimant had an engagement with her GP. The claimant elected to redact elements of her GP records including for that date.

35. The claimant was furloughed. Since the innovation of Furlough in 2020, there have been different versions of furlough up to September 2021 .

36. On **Friday 24 July 2020** the claimant had a telephone consultation with GP who recorded *"issues with mucus production for years … Been off work and asking for advice for clearing her throat when wearing protective equipment*

at work. Suggest discussed with (GP redacted) as *she is unsure what mask/visor will be required so discuss* (GP redacted) *with* (GP redacted) *…Declines any trial of treatment as chronic issue, get in touch as required".*

37. On **Monday 3 August 2020,** the claimant indicated by text to the first respondent that she was unsure of the treatments "we *can give".* The first respondent responded by asking for the claimant's email indicating that something had been sent via Facebook. The claimant responded on Tuesday 4 August 2020 confirming that she would read what had been made available.

38. On **Friday 7 August 2020** Mrs Chuwen issued a letter confirming the respondent salon had re-opened and offered the claimant the chance to come back and work at *"your normal hours and on the same days as you worked prior to lockdown. However, as you have stated that you feel uncomfortable coming back to the shop to work at present, we are willing, for the time being, to continue to keep you on furlough pay.* We *will review this position in the coming weeks and will inform you when this position changes."*

39. On **Tuesday 11 August 2020,** the claimant issued a text message to the first respondent describing that she was willing to return whenever *"you let. .. I was just confused when you said you were keeping me on furlough & then contacted me again after your meeting with other staff members and said you had some to cover for me. I know the nail desk has a screen & that's no problem, just worried about social distancing & how lip/chin waxes should be done. That's why I wanted guidance as I was am genuinely unsure of the new regulations in beauty, especially in small shop. Some clear guidelines & briefing/training in new working conditions are all I require so I can do my job properly."*

40. On **Wednesday 12 August 2020,** the first respondent telephoned the claimant and indicated that the claimant would be kept on furlough as the salon was quiet.

41. On **Thursday 13 August 2020** the claimant, via her son, sent a letter to the first respondent which acknowledged the letter of 7 August (describing it as 12 August) and set out the wording of the Tuesday 11 August text to the first

respondent, adding that she was available to resume her normal day/hours whenever the first respondent wanted, and she could come in for a walk through of new rules before her return.

42. In **October 2020** the first respondent phoned the claimant along with other employees to explain that they wished to re-open the salon but that changes would be made due to Covid rules. Those changes included a requirement that employees would wear face protection in the salon. The claimant agreed to this. The claimant did not mention any health issues and, did not describe that she had been experiencing anxiety and /or a panic attack. There was no discussion of exemption. The first respondent was only aware of issues around mucus.

43. The first respondent asked the claimant to return to work on Tuesdays only, for 6 (reduced from 16) hours.

44. On **Thursday 22 October 2020** the claimant made telephone contact with her GP practice for an appointment who recorded only *"ongoing problem with mucus, advice thanks".*

45. On or about **Tuesday 27 October 2020** the claimant attended meeting at the salon with the first respondent and Ms Kelly McFadyen, as a walk-through. The first respondent confirmed that the claimant was required to wear a mask when attending to a client in a treatment room. That was also confirmed by the claimant's colleague Kelly McFadyen. Ms McFadyen was aware that the claimant found mask-wearing uncomfortable, as Ms McFadyen and others did, but was not aware, and not made aware by the claimant, of any restriction or impediment in the claimant's ability to wear a mask. The claimant is mistaken in her recollection that she was told she would not require to wear a mask. No mention was made to the first respondent or Ms McFadyen of the claimant having any health or breathing problems in October 2020.

46. On **Wednesday 28 October 2020** the claimant had a telephone consultation with her GP who created a detailed history describing mucus /phlegm. The GP noted, at that time, that the claimant described that she had looked at the evidence around mask-wearing and thought it was questionable. The GP

recorded that he *"would strongly encourage her to wear a mask",* the claimant, as recorded by the GP, was disappointed by that advice. The GP noted that the claimant was due to return for a 6-hour shift, the claimant got a bus to work, and the claimant suggested that she struggled to breathe when wearing a mask in shops and wondered if she would be medically exempt. The GP prescribed a nasal spray. The problem was identified as Catarrh unspecified. The GP recorded *"History chronic"* (GP redacted) *"with mucous phlegm. .. has tried various type of face masks for covid feels can breathe properly 'looked at evidence for masks &, think it is questionable"* the GP recommended steroid spray and noted that *"I would strongly encourage her to continue to wear a mask".* The claimant did not raise any issues beyond mucus phlegm causing breathing issues connected with mask-wearing in any context.

47. On **Tuesday 3 November 2020** the claimant attended work at the salon, the claimant wore glasses for work and having tried to use a face visor used a face mask instead. The claimant did not have any adverse response to wearing a mask while at work on that date. No one saw the claimant having any adverse response to wearing a mask on that date. The claimant did not tell anyone contemporaneously of any alleged issues on Tuesday 3 November 2020 related to mask-wearing. The claimant did not suffer from a panic attack while attending work. The claimant did not make either her employers or colleagues aware, at any point prior to this litigation of an asserted panic attack on 3 November 2020.

48. On **Tuesday 10 November 2020,** the claimant again attended work at the salon and utilised a face mask. The claimant did not have any adverse response to wearing a face mask on that date. The claimant did not tell anyone contemporaneously of any alleged issues on Tuesday 10 November 2020 related to mask-wearing. The claimant suffered no adverse effect from mask wearing or face covering.

49. On **Tuesday 17 November 2020** the claimant again attended work at the salon and utilised a face mask. The claimant did not have any adverse response to wearing a mask on that date. The claimant did not tell anyone contemporaneously of any alleged issues on Tuesday 17 November 2020

related to mask-wearing. The claimant suffered no adverse effects from mask-wearing or face covering. After November the claimant did not subsequently work at the respondent premises. This was the last day the claimant worked at the respondent's salon premises and wore a face mask at work.

50. On **Friday 20 November 2020** the claimant had an engagement with her GP, the claimant elected to redact part of this GP record. No reference was made to a panic attack or any impact of the use of any face covering at work.

51. On **Monday 23 November 2020** the claimant attended *a* telephone consultation with her GP, the claimant redacted the first part of the GP record in advance of the GP noting "We//", noting that she had a blood pressure check at work. The claimant made no reference to any alleged panic attack or adverse impact of any face covering.

52/ The respondent salon was required to close again during the *'second lockdown'* at the end of November 2020, and the respondent employees including the claimant were again placed on furlough.

53. On **Friday 15 January 2021** the claimant attended her GP, although the claimant elected to redact the reason for doing so.

54. In **April 2021 ,** the first respondent again contacted employees by phone to discuss the salon reopening in May 2021. The first respondent sought to agree on the hours that the claimant would work. The first respondent initially asked the claimant to work 2 days Tuesdays & Thursdays for 7 hours each day. The claimant explained she could not work on Thursday afternoons due to *"other commitments"* being caregiving responsibility. The claimant did not describe that that she could not wear a face covering because of anxiety nor that she could not breathe through a face mask and or that it caused the claimant to panic.

55. The first respondent discussed the arrangements for wearing masks with the employees explaining it was mandatory.

56. The first respondent had further phone calls with the claimant. The claimant did not describe that she could not wear a face mask because of anxiety nor

that she could not breathe through a face mask and or that it caused the claimant to panic.

57. On **Wednesday 21 April 2021** the first respondent issued the **April 2021** continued furlough letter, which set out, that as the claimant had previously agreed she was designated a furloughed worker and the first respondent described that *"due to the pandemic there is not enough work, and your period of furlough is to be extended. You will continue to be designated as a furloughed worker until further notice",* and that the claimant would continue to receive 80% of her pay and the respondents would keep the claimant's status as a furloughed worker under continuous review, and if the position changed the claimant would be notified. The furlough scheme was extended to September 2021.

58. Around this time the first respondent had briefly engaged with a firm of HR consultants, which brief engagement was subject to a cooling-off period. The firm of HR consultants in that period provided the first respondent with a style letter directing an employee to attend an Investigation Meeting. The first respondent adopted that into the respondent's April 2021 Investigation Meeting direction letter, which letter was also issued to the claimant on Wednesday 21 April 2021.

59. The respondent's April 2021 Investigation Meeting direction letter directed the claimant to attend an investigation meeting on **Tuesday 27 April 2021** to be held by remotely with a consultant from that firm of HR consultants which letter had been provided to the respondents by that firm of consultants. That letter set out that the *"purpose of the meeting is to discuss some concerns about your conduct. At the meeting you will be given the opportunity to provide an explanation. "*

60. The respondent's April 2021 Investigation Meeting direction letter described that the meeting would be conducted by a consultant from the HR consultant firm, it requested the claimant's contact details and described that the meeting would be audio recorded and *"a copy of the transcript will be made available to you. Possible outcomes from the meeting are that we may decide that it is*

necessary to pursue a formal disciplinary procedure with you, or alternatively we may decide that there are no grounds for this…. You are expected to make every effort to attend this meeting because if you fail to attend the meeting without good reason, or fail to inform us of the good reason for your non-attendance in advance of the meeting, " the consultant *'"will proceed with the investigation in your absence. In such circumstances"* the consultant *"will make their recommendation based on the information available to them at the time of this meeting. If you have any queries regarding the contents of this letter please contact me".*

61. On **Friday 23 April 2021,** the claimant issued to the first respondent an undated letter (the claimant's April 2021 Liability Letter) which identified that the claimant was happy to return to work on **Tuesday 27 April 2021** *"initially and hopefully can resume my other usual days /hours soon when work picks up. As you are insisting on me wearing a mask, please sign this'. Thank you."* Providing was what set out as Notice of conditional acceptance, that she would *"wear a mask as directed"* subject to 4 specified conditions:

a. The first respondent provides proof that masks can prevent the inhalation of substances or micro-organisms at the scale of "viruses."; and

b. The first respondent provide proof *"that prolonged use of such masks will not cause Hypercapnia, Hypercarbia or Respiratory Acidosis in the wearer or worsen any underlying conditions in the wearer* and

c. The first respondent provides a signed witness statement accepting full responsibility and full commercial liability should the claimant be subsequently diagnosed with Hypercapnia, Hypercarbia or suffer an Asthmatic attack or any other respiratory distress resulting from prolonged mask-wearing, or any other condition related to mask-wearing; and

d. The first respondent provides *"A complete list of medical qualifications".*

62. The claimant's April 2021 Liability letter further set out that *"Failure to do so will be deemed to mean no such proof exist and you are not medically qualified to make a determination of the effects of prolonged mask use, nor are confident enough to take financial responsibility for my safety as a result of your mask enforcement actions. "*

63. The claimant's April 2021 Liability letter contained a Liability Statement which set out that the named first respondent, (whose name was inserted by the claimant) "as *the official enforcing wearing of masks according to parliamentary preference, am fully aware that the prolonged use of surgical and non-surgical mask/face coverings reduces the levels of oxygen to the wearer and increases dangerous levels of carbon dioxide and toxins that are expelled by the breadth. I am also aware that mask wearing could cause anxiety, psychological and mental distress on wearer or increase such conditions. I therefore accept full responsibility and commercial liability should the bearer* (the named claimant) *experience or be subsequently diagnosed with any of the above conditions as the result of prolonged mask use."*

64. Had the first (or second) respondent signed the claimant's April 2021 Liability letter agreeing to its terms, the claimant would not have returned due to the claimant's (unsupported and unexpressed) view that she was unable to wear a mask. The claimant's view had not been supported by her GP in 28 Oct 2020 and the claimant had not subsequently sought support for same from her GP. The claimant had previously described (only) to the respondent that the impact of masks was that it would steam up her glasses and issues round mucus/phlegm.

65. Except for embedding the extra comment including in the Liability section that *"I am also aware that mask wearing could cause anxiety, psychological and mental distress on wearer or increase such conditions. ",* the claimant's April 2021 Liability letter was a pro forma letter to employers which the claimant had secured from the internet.

66. The claimant elected not to give any notice that she did not seek to rely upon the entirety of the claimant's April 2021 Liability Letter as a condition of

returning to work including the express requirements for proof being provided to her as set out therein. The claimant did not and had not given any notice that she sought to rely upon a face-covering exemption card. The claimant did not give and had not given, notice that she was suffering from severe anxiety and or trauma associated with complex trauma/PTSD at all, nor that she had been suffering from the symptoms of severe anxiety and or trauma associated with complex trauma/PTSD having any substantial adverse effect on the claimant's ability to carry out normal day-to-day activities. The claimant was not and had not been suffering from a mental impairment with substantial adverse effects on her ability to carry out normal day-to-day activities at the relevant times.

67. On **Tuesday 27 April 2021,** the claimant attended that telephone investigation meeting with a consultant of the firm of HR Consultants who were briefly engaged by the respondent, that engagement did not, however, cover beyond that meeting and the respondents were not provided with notes/ and or transcript and neither was the claimant.

68. On **Tuesday 27 April 2021 ,** the claimant provided to the HR consultant (only) by text a picture of a face covering exemption badge which described *"My hidden disability makes me exempt from wearing a face covering',* the claimant had provided her email address in order that the HR consultant could forward to the claimant *"a copy of our chat from April 27Th".*

69. On **Thursday 13 May 2021** the first respondent wrote to the claimant (the respondent's May 2021 Termination letter) and set out that when they were given a date they were allowed to re-open the salon, the first respondent had contacted the claimant to request that the claimant return to work in her part-time position of 16 hours per week spread over Tuesday and Thursdays which it was said the claimant had refused on basis the claimant was getting any younger and it was suggested that the claimant did not want to work those two days as *"in your words working on a Tuesday and a Thursday was "back - back". Also, you stated that you were unable to work on a Thursday all day as you had other commitments and furthermore"* it was suggested that the claimant indicated there could be impact on receipt of Universal Credits.

70. The May 2021 Termination letter further set out that *as your employer, feel that I did my very best to accommodate you, however, you made It clear to me that the offer was not suitable and that your outlook on wearing a face covering had not changed as it would steam up your glasses. "*

71. The first respondent further described in the May 2021 Termination letter that "/4s *your employer it my responsibility to ensure that my employees adhere to the government guidelines stipulated fora close contact business such as that conducted in a beauty salon. It is up to me to ensure that both my employees and clients are in a safe environment within my salon."*

72. The first respondent set out in the May 2021 Termination letter that the claimant had voiced her *"opinion many times on Covid 19 and have made no secret of the fact you do no acknowledge that the pandemic exists and furthermore you are not prepared to follow the guidelines laid down by the government.*

Under the circumstances you leave me no alternative but to end your employment, therefore please accept this letter as formal notice.

You will be paid the following:

In lieu of notice: £142.56 x 4 =£570.24

Holiday Pay: £142. 56x2 = £285.12

£855.36

73. The first respondent May 2021 Termination letter concluded that *"Furlough payments will cease on Friday 20th May"* and that if the claimant did not *"choose to acknowledge this letter by Wednesday 19th May, I will deposit the above sum"* The respondents did not subsequently deposit the sum in the claimant's bank account prior to this Final Hearing.

74. The respondent did not have information which reasonably demonstrated that the claimant would not have been able to work her notice. The claimant would have been capable of working her statutory provided contractual period of notice at that time and receive weekly pay of £142.56.

75. The respondent relied upon their accountants to arrange for the issue of a P45 to the claimant and to otherwise notify the authorities including around cessation of furlough payments to the claimant, the respondents did not delay in doing so.

76. On **Sunday 16 May 2021,** the claimant provided the HR Consultant with her email address requesting the HR Consultant to forward a copy of the meeting on 27 April 2021 . There was no response.

77. On **Monday 17 May 2021,** the claimant replied to the dismissal letter in a letter (the claimant's May 2021 reply to dismissal), setting out that

a. she disagreed with the first respondent's interpretation on several points, that the first respondent did not offer the previous 3 contracted days back, as the first respondent said there was not enough work, *"you offered Tuesday 10 -5, which I accepted. You also previously told me that you would be renting space to a chiropodist /podiatrist, who would use the room during the pandemic"',* and

b. the claimant had kept her contracted days of Tuesday, Wednesday & Thursday until lunch *"exclusively for Beauty World for 9 years"* and described that the first respondent had tried to dismiss the claimant in December 2019 upon return from sick leave *"…It appears now, you are using the pandemic to my detriment again".',* and

c. "As for *PPE (face covering), I am mask exempt as you know, you said I could wear either a visor or mask when I returned previously for 1 day's work (Tues);* and

d. the claimant further described that *"unfortunately the visor provided was unfit for purpose"* describing that it was scratched *"& completely steamed up my glasses on the first exhalation. This left me unable to see to do my job. And I was forced to wear the mask instead. Gov.uk clearly states guidelines on mask exemption. Your remarks*

on this trivialised me and discriminates against me on age and my need for glasses for the close work I do"; and

e. there had never been any doubt in her competence or cleanliness at work as the claimant adhered to high standards of customer care & health and safety in the workplace; and

f. "As *an employer you also a duty of care for your staff. I have asked you to formally accept liability for any harm prolonged mask wearing causes me & to show me a risk assessment for my H&S as you are enforcing this in the work. This letter was ignored"* (that is the undated April 2021 Liability Letter); and

g. '7 *have been phone interviewed by your HR agent on this issue and recorded. Upon the invite for this call, I was told this was not a disciplinary meeting which I have in writing";* and

h. *7 *believe I am being discriminated against and your letter constitutes unfair dismissal. "*

78. While the claimant's May 2021 reply to dismissal expressly referred to guidelines on mask exemption, she offered no description of a clinical health reason for being unable to wear a mask beyond what she set out as her need for glasses. The claimant did not give any notice of the basis of any alleged discrimination, beyond the claimant's described need for glasses. The claimant did not give and had not given, notice that she was suffering from severe anxiety and or trauma associated with complex trauma/PTSD at all, nor that she had been suffering from the symptoms of severe anxiety and or trauma associated with complex trauma/PTSD having any substantial adverse effect on the claimant's ability to carry out normal day-to-day activities. The claimant was not and had not been suffering from a mental impairment with substantial adverse effects on her ability to carry out normal day-to-day activities at the relevant times.

79. The claimant's May 2021 reply to dismissal did not suggest that the claimant would be unable to work her notice period. The claimant would have been

capable of working her statutory provided contractual period of notice at that time.

80. On **Thursday 27 May 2021** the claimant, initiated ACAS Early conciliation.

81. On **Friday 11 June 2021** the claimant made a telephone appointment to attend her GP on **17 June 2021,** she did not wish to disclose the reason for doing so at that time.

82. On **Thursday 17 June 2021,** the claimant attended via telephone her GP, having not done so since Friday 15 January 2021. The GP recorded problem as acute reaction to stress and recorded her history (redacted by GP) *equipment seems to be a trigger and clearly the last few months have therefore been very difficult* (GP redacted). The GP recorded an urgent referral for a Community Mental Health Nurse and provided a Fit Note for 1-month recording *"acute reaction to stress Duration 17.6.2021 - 17/07/2021".* The GP did not record any clinical health reason for the claimant being unable to wear a mask, nor despite the claimant's earlier attendances during the claimant's employment (including in November 2020 when the claimant had last worn a mask at work) did the GP offer a diagnosis that the acute reaction to stress predated that appointment or was otherwise related to the claimant wearing a mask at while at work.

83. On **Friday 18 June 2021** the claimant again texted the HR consultant requesting a tape of the phone meeting with the consultant on 27 April 2021. There was no response.

84. On **Friday 25 June 2021** the claimant wrote to the first respondent requesting a copy of the interview on 27 April 2022 be emailed to her. It was not as the respondent did not have a copy. There was no description of any health-related issue.

85. On **Wednesday 30 June 2021** the claimant attended a community psychiatric nurse. The claimant elected to redact elements of the CPN's short 4-paragraph report to the GP issued on 7 July 2021, which set out that the claimant *"gave a good account of her history. She described* (redacted by the

claimant) *and also being in* (redacted by the claimant). *The symptoms described are consistent with her experience of* (redacted by the claimant) *trauma which as you* (redacted by the claimant) *in your referral, which has been recently triggered by the mask wearing during Covid.*

86. In around **Sunday 4** and **Monday 5 July 2021** the claimant had a series of WhatsApp text messages with her friend Ms Christina Graham in which the claimant described feeling ill, going in & out of consciousness and *"heavy mucus on my chest".*

87. On **Thursday 8 July 2021** ACAS Early conciliation concluded

88. On **Thursday 15 July 2021** the claimant attended via telephone her GP who recorded problem as acute reaction to stress and recorded her history including reference to severe asthma and requested a Fit Note extension. Her GP provided a Fit Note to 12 August 2021 describing that the claimant had an *"acute reaction to stress"*

89. **On Tuesday 20 July 2021** the claimant presented her ET1, she did not identify a representative at that time in her ET 1. The claimant ET 1 set out her position in 7 paragraphs describing that:

    a. she initially noticed she was singled out when she asked about H+S measures when shop was opening after being in lockdown when she received an official letter implicating that she had not wanted to return when offered her days back 12/8/2020 *"which was untrue".*

    b. she *"Got to return Tue 3/11/220 Tue 10/11/20 Tue 17/11/20 short days- had problem with masking - restricted breathing because of phlegm/constant blocked nose/chest - panic attacks start. Not able to wear PPE properly. Mrs Chuwen aware of allergies/phlegm+ made her aware of anxiety verbally My doctor let me have an inhaler/salt spray to help breathing issues on my return. "*

    c. *There were many calls to my home from Mrs Chuwen all saying there was not enough work for me but other staff were offered back and new staff offered a room.*

d. *The next time I was offered back was only for my Tue 24/4/21, by phone. I reminded Mrs Chuwen I was having severe problems with anxiety/panic attacks brought on by mask wearing as my breathing/chest phlegm restricted breathing anyway. I was then texted that I was to attend a HR meeting at short notice, to see if there were disciplinary procedures required. This was by phone and recorded. Tve not received a copy of this but was told I could not have a copy of this tape. I was not allowed to attend work on 27/4/20.*

e. *I* was *then dismissed on 20th May*

f. *I wasn't offered the correct severance money and have received no holiday pay etc or any monies owed. I sent a copy of lanyard/exemption for mask/photo.*

g. *No concessions made or attempts to work round my problem. I am receiving medical help for issues resulting from this direct discrimination.*

90. On **Tuesday 3 August 2021** the claimant sent a letter to the respondents in terms *"Please immediately report to tax/NI/UC that I am not receiving a wage from Beauty world, and that I am not on the payroll. As you know my furlough stopped on 20th May 2021 when you terminated my employment. I require confirmation that this has been done by email. .. or by letter to my address. Could you also send a copy of my P4S'.* Until the receipt of this letter on Friday 6 August 2021 , the respondents were unaware that their accountants had not arranged for the issue for the P45 and they subsequently arranged for the issue of same.

91. On **Friday 6 August 2021** the claimant attended, via telephone, her GP who recorded a request for a continued *"sick note"*- dated 12 August - extend as long as possible, diagnose as before.

92. On **Wednesday 11 August 2021** the claimant attended, via telephone, her GP who provided a Fit Note for 2 months describing that the claimant had an *"acute reaction to stress".*

93. On **Friday 20 August 2021** ET3 was lodged timeously by the respondent's current representative setting out the respondent's position.

94. On **Tuesday 12 October 2021** the claimant's GP provided a Fit Note for 3 months describing that the claimant had an *"acute reaction to stress"* (page 103).

95. On **Wednesday 1 September 2021,** the Community Health Care Team- issued a *"to whom it may concern"* report to the claimant, which report repeated the description from 30 June 2021 that the claimant was "a *patient* of'the Community Mental Health Team *following a referral from her GP where she was presenting symptoms of severe anxiety and* (redacted by the claimant) *which appear to have been triggered by mask wearing during covid pandemic"*

96. On **Monday 27 September 2021** the claimant sent a WhatsApp message to her friend Ms Graham describing that she was trying to do breathing exercises and had a horrible feeling of nonspecific disease and sensation again of slipping in and out of present.

97. On **Thursday 4 November 2021 ,** 5 pages of extract of GP records, including notes coving the period 13 December 2019 to August 2021 were provided to the respondents' agent and the Tribunal by the claimant for the period **January 2008** to **August 2021** while certain aspects of the records were reacted by her GP with asterisks, the claimant also elected to redact (by obscuring) further aspects on each page prior to providing same.

98. On **Wednesday 12 January 2021** the claimant's GP provided a Fit Note for 3 months describing that the claimant had an *"acute reaction to stress" (page* 103).

99. On **Thursday 27 January 2022** the claimant was notified that due to limited capability she did not require to provide further Fit Notes to maintain entitlement to Universal Credit.

100. On **Monday 21 February 2022** the Tribunal appointed a Preliminary Hearing to consider whether the claimant was disabled which was allocated to take place on Thursday 7 April 2022.

101. On **Wednesday 6 April 2022,** that preliminary hearing appointed for **Thursday 7 April 2022** to consider whether the claimant was disabled within s6 of the Equality Act 2010, was postponed upon the respondent's representative request, there being no opposition, due to the first respondent's health, following a hip operation the first respondent had undergone in **December 2021.**

102. On **Tuesday 26 April 2022** the claimant attended for clinical assessment by Dr Livingston.

103. At the time of assessment and preparation of her 5-page report dated **Thursday 29 April 2022,** and supplementary comments responding to specific questions and Supplementary Report of **Tuesday 18 May 202,** Dr Livingston had a 9-page Impact Statement prepared by the claimant dated **Tuesday 29 March 2022** signed by the claimant, prepared for this litigation together with two letters from within the claimant's GP records being Community Psychiatric Nurse letter dated **Wednesday 7 July 2021** to the GP and the *to whom it may concern letter* dated **Wednesday 1 September 2021.**

104. Specifically, Dr Livingstone did not have GP records secured by the claimant covering the period **January 2018** to **August 2021** (3 pages which have the footnote page 1 of 144 to page 3 of 144) which the claimant, after redacting aspects of the same while she was unrepresented, had provided to the Tribunal and respondents in **November 2021** in advance of telephone case management hearing on **5 November 2021 .**

105. Following the assessment on Tuesday 26 April 2022, Dr Livingston prepared a report dated **Friday 29 April 2022** reflecting the information provided by the claimant. The report described erroneously that the claimant last worked in November 2021, the claimant had last worked in November 2020. The diagnosis made at the time of the report was that the claimant had at that time symptoms of PTSD and had severe psychological distress. While Dr

Livingstone described in her summary and conclusions an exacerbation of traumatic symptoms Dr Livingston had not considered contemporaneous GP records when preparing her reports and erroneously reported the claimant's description of a heavy panic attack at work and a breakdown following the episode at work (by implication following within a short period of time), there was no such panic attack nor breakdown which followed within a short period of time or at all during the claimant's period of employment with the respondent.

106. On **Monday 16 May 2022,** the Tribunal refused a respondent representative to application to postpone the then-final listed hearing **(Wednesday 25 to 27 May 2022)** but stated that the Tribunal was prepared to permit the first respondent to attend and give evidence by CVP.

107. On **Wednesday 25 May 2022** a Final Hearing appointed to commence **Wednesday 25** to **27 May 2022** was postponed at the request of the respondent representative that request, made at the outset of that hearing, was set out as being made on account of the first respondent's then health. The panel in May set out its decision in the May 2022 Note issued to the parties on 31 May 2022 th t there was (at that time) no medical evidence to support the respondent's position. There was no evidence and no satisfactory explanation as to why the respondent could not give evidence remotely with the assistance of her solicitor. That remains the position. The Tribunal ordered the respondent to produce a medical report within 14 days addressing her fitness to give evidence in person and/or remotely and the claimant representative informed the Tribunal that he intended to make an application (for) costs(expenses) incurred. As set out, including in the subsequent case management Note issued 13 June 2022 at paragraph 15 the May panel *"With the parties agreement"* listed this Final Hearing 20 to 22 June 2022.

108. On **Friday 10 June 2022** the claimant's representative made an application for (expenses) order, in terms of Rule 76(1)(c) of the 2013 Rules, that is where a hearing has been postponed on the application of a party made less than 7 days before the date on which the relevant hearing begins. The claimant representative referred to the Tribunal Note of 31 May 2022 and set out it

described that the evidence in support of the first respondent's fitness to give evidence was unsatisfactory, and there being no medical evidence to support the respondent's position and no evidence or satisfactory explanation as to why the (first) respondent could not give evidence remotely referring to para 10 and 11 of the Note.

109. On **Monday 13 June 2022** the respondent's further application to postpone this Final Hearing, again by reference to what was said in respect of the first respondent's health, was refused. The Tribunal noted the terms of the GP statement dated 7 June 2022 which was produced as directed by the Tribunal in May 2022 and which set out an update on the first respondent's health, describing that she had suffered a significant pelvic and hip injury in November 2021 which required surgery, that following her inpatient stay she *"is doing extremely well. She has got a very good range of motion and mobilises without any obvious sign of a limp. She has some swelling in the left foot towards the end of the day and there is some evidence of arthritis on in the mid foot. .. The other main issue causing"* the first respondent" *distress at this time is flashbacks of an unpleasant experience she had in hospital."* The GP described that he discussed this with the first respondent on 7 June and set out that experience **7believe this has left"* the first respondent *"with a degree of post-traumatic stress disorder"* and described that he discussed with her *"possibly exploring some private counselling options to help her overcome this".* The GP concluded *"At this moment in time"* the first respondent *"does not feel ready to participate in the employment tribunal. I have suggested to her that perhaps postponing this for a month or two would be reasonable in the circumstances, but she is aware this cannot be put off indefinitely".* The Tribunal on Monday 13 June had referred to the 2014 ET Presidential Guidance on Seeking Postponement. The GP statement dated 7 June 2022 was included in the respondent's Inventory of Documents in support of the respondent's submission on the claimant's application for expenses.

Conclusions on witness evidence

110. The Tribunal heard evidence from the claimant, her friend Ms. Christina Graham, Dr Joanna Livingstone Clinical Psychologist, the first respondent (who effectively operates the respondent partnership business) and Ms. Kelly McFadyen an employee of the respondents.

111. The Tribunal's conclusion is that the claimant, whom the Tribunal accept currently and since June 2022 has suffered from a severe mental health impairment after the date of termination of employment and around 7 months after her last working day at the respondent salon premises in November 2020, was in relation to matters relevant to this Tribunal a consistently unreliable historian as to contemporaneous relevant issues as to the circumstances which led to the termination, although we do not consider that the claimant was seeking to be untruthful. The Tribunal has had regard to the claimant's decision to redact elements of the GP records she provided to the Tribunal. The Tribunal further notes that within, the claimant's ET1 presented on Tuesday 20 July 2021 the condition relied upon in relation to asserted *"problem with masking"* was - *"restricted breathing because of phlegm/constant blocked nose/chest - panic attack start. Not able to wear PPE properly.".* The Tribunal concludes on the evidence that the claimant is mistaken when she describes a *"panic attack"* having occurred in the course of her attendance at work.

112. The Tribunal concludes that Ms. Graham was understandably seeking to support her friend but did not find her recollection of the events at the time consistent with contemporaneous records (albeit the claimant had elected to redact elements of the GP records) and in event preferred the respondent's evidence.

113. The Tribunal was not assisted by Dr Livingstone, it found her report which was prepared based essentially upon what the claimant, who the Tribunal have concluded was an unreliable historian had told her, without the benefit of contemporaneous GP records. While in evidence Dr Livingstone sought to support the relevant historical assessment elements of her report including

conclusions on the claimant's condition at relevant times, the Tribunal did not, while having due respect for Dr Livingstone's professional role, accept same including having regard to the contemporaneous evidence before this Tribunal.

114. The Tribunal preferred the respondent evidence of Mrs Chuwen, the first respondent, to that of the claimant, having been given in broadly neutral terms with the exception of the timing of the brief referral to an employment consultant which the first respondent had considered, erroneously followed receipt of the claimant's April 2021 Liability Letter, and the Tribunal considered that her avowed statement of compassion in evidence for her employees was belied by a practical indifference given her reliance on the accountants to provide the claimant with a P45, the failure to provide over many years the claimant with written term and conditions and failure to pay holiday pay which she had agreed was due upon termination in May 2021 but did not arrange payment until September 2022. The Tribunal was satisfied that the first respondent was fully able to participate remotely throughout this Final Hearing both in the giving evidence and instructing her representative.

115. The Tribunal found the evidence of Ms. Kelly McFadyen, an employee of the respondent, as compelling and wholly straightforward and preferred to the claimant's evidence.

116. The Tribunal is satisfied that it preferred the respondent's evidence to that of the claimant in relation to matters of substance.

Submissions

117. Both parties provided detailed written submissions by 9 September 2022 which were supplemented by additional comments within supplementary submission; the claimant by way of responsive submission the respondent by way of addendum 14 September 2022 embedded commentary within the claimant submission of 9 September 2022; and the

Claimant submissions

118. It is not considered necessary to repeat the claimant's submission and responsive supplementary submission (for the claimant). They were detailed, the submissions extended to some 181 paragraphs over 22 pages while the responsive submission extended to 124 paragraphs over 25 pages addressing issues for this Tribunal.

119. It is, however, considered useful to briefly summarise elements of the claimant's position in relation to the heads of claim.

120. The claimant argued that this was a conduct dismissal (rather than SOSR) and that the claims for unfair dismissal, breach of contract (notice pay), holiday pay, and written particulars, should be upheld. Further, if it was an SOSR dismissal the respondent should in any event have followed the ACAS code.

121. In relation to the disability discrimination element of the claim, it was argued that on the evidence:

a. the claimant was disabled in terms of s6 EA 2010 at the relevant time; and

b. in breach of s15 EA 2010 (discrimination arising), she had been treated unfavourably because of something arising in consequence of her disability; and

c. in breach of s19 EA 2010 (indirect discrimination) the respondents had applied a PCP of dismissing employees if they did not wear a face covering or mask had indirectly discriminated against the claimant, the claimant being put at a particular disadvantage as she was dismissed; and

d. in breach of s20, 21 EA 2010 (reasonable adjustments) the respondents had applied a PCP of dismissing employees if they did not wear a face covering or mask and/or dismissing employees if they

do not do so, with either or both those PCP's putting the claimant at a substantial disadvantage with the result that she was dismissed; and

e. in breach s27 EA 2010 (victimisation) the claimant having carried out 3 actions which are asserted as protected acts (the claimant's May 2021 response to dismissal letter, contacting ACAS, and in raising of these proceedings), the respondent subjected the claimant to the detriment of not notifying HMRC of the termination of claimant's employment and in failing to provide the P45 until after she had been dismissed (it being argued that in consequence, the claimant had been unable to use her national insurance number for Universal Credit purposes causing delay in benefit payments).

122. The claimant further set out her position in respect of compensation in respect of the respective claims, including arguing for a 25% uplift, it being argued that this was a claim which raised a matter to which the ACAS code applied.

123. The claimant referred to the Tribunal to ***Sharkey v Lloyds Bank PLC*** [201 5] UKEAT/0005/1 5 (Sharkey); ***Department for Work and Pensions v Boyers*** [2022] EAT 72 ***(Boyers); Homer v Chief Constable of West Yorkshire*** [2012] UKSC 15 ***(Homer); Griffiths v Secretary of State for Work & Pension*** [2015] EWCA Civ 1265 ***(Griffiths); Rentplus UK v Coulson*** [2022] EAT 81 ***(Rentplus); Slade v Biggs*** [2022] IRLR 216 ***(Slade),*** together with the EHRC 2010 Code of Practice, ACAS Code of Practice on Disciplinary and Grievance Procedures and the Judicial College Guidelines. The claimant in responsive submissions referred to ***A Ltd v Z*** [2019] UKEAT 0273/18 (A ***Ltd); BAE Systems (Operations) Ltd v Konczak*** [2018] ICR 1CA ***(Konczak); Docherty & Anr v SW Global Resourcing*** [2013] CSIH 72 ***(Docherty); Hussain v Jury's Inn Ltd*** [2016] UKEAT/02383/15 ***(Hussain); Ishola V Transport for London*** [2010] EWCA Civ 112 ***(Ishola); Klusova v London Borough of Hounslow*** [2008] ICR 396 ***(Klusova); Pnaiser v NHS England & Anor*** [201 6] IRLR 170 ***(Pnaiser); Phoenix House Ltd v Stockman*** [201 6] UKEAT/0264/15 ***(Stockman); Software 2000 Ltd v Andrews*** [2007] UKEAT/0533/06 ***(Andrews)*** and ***Steen v ASP Packaging Ltd*** [2013] UKEAT/0023/13 ***(Steen).***

Respondent submissions

124. It is not considered necessary to repeat the respondent submission and responsive supplementary embedded submission within the claimant submission of 9 September 2022. They were detailed, the respondent submissions extended to some 101 paragraphs over 32 pages, while the responsive respondent supplementary embedded submission extended to 17 areas of comments within the claimant's original submission.

125. It is however considered useful to briefly summarise elements of the respondent's position in relation to the heads of claim:

126. In relation to Unfair Dismissal, the respondent, argued that the dismissal was *"for some other substantial reason"* in terms of s98(1) (b) ERA 1996 and proposes what are argued as 3 substantial reasons being in accordance with a legal duty, to protect the business and personality clash and that claim should be dismissed.

127. In relation to the Breach of Contract/ notice pay claim, the respondent argues that as the claimant argues she was not fit to work at the relevant stages no notice is due, and that claim should be dismissed.

128. In relation to failure to pay holiday pay, the respondent has accepted that this was due. Subsequently, and as above, the respondent set out that the claimant's calculation was correct, and that sum has been paid in advance of the Tribunals deliberation.

129. In relation to failure to provide Particulars of Employment, the respondent observed that this is not a stand-alone claim, and on the respondent remaining submissions this also falls to be dismissed.

130. In relation to the disability discrimination element of the claim, for the respondent, it was argued that on the evidence:

a. the claimant was riot disabled in terms of s 6 EA 2010 at the relevant times and thus the related claims should be dismissed; and

b. that the asserted claim in terms of s15 EA 2010 (discrimination arising), should be dismissed the respondent arguing that there was not an impairment and, it is understood, that the respondent denies that it dismissed the claimant because of anything which arose in consequence of the claimant asserted impairment, esto the dismissal was a proportionate means of achieving a legitimate aim; and

c. in relation to s19 EA 2010 (indirect discrimination), the asserted PCP was a one-off, there was no clear group disadvantage and that in any event the respondents' actions were a proportionate means of achieving a legitimate aim and this head of claim should be dismissed; and

d. in relation to s20, 21 EA 2010 (reasonable adjustments) the respondent did not accept that they had actual of constructive knowledge of the asserted disability, further respondents did not accept that the PCP relied upon in the List of Claims can amount to a PCP as it was a one-off, and further regard should be had to the respondent resources, and this head of claim should be dismissed; and

e. in relation to s27 EA 2010 (victimisation) the respondent did not subject the claimant to a detriment of not notifying HMRC of the termination of the claimant's employment and in failing to provide the P45 until after she had been dismissed, the respondent had relied upon their accountant to provide the P45 and notify HMRC, there was no causal link.

131. The respondent argued that in respect of the discrimination claim where extraneous factors contribute to the claimant's loss, any injury to feelings award should be apportioned, and in relation to unfair dismissal, if the Tribunal finds the dismissal to be unfair, there should be no award arguing for 100% Polkey reduction failing which loss should be restricted to 11 weeks net loss of salary.

132. The respondents referred to *A Ltd* **v** *Z* [2019] UKEAT 0273/18 (A **Ltd);** *Acetrip Ltd v Abhishek Dogra* [2019] UKEAT/0329/18 *(Acetrip); BAE Systems (Operations) Ltd v Konczak* [2018] ICR 1CA *(Konczak); Basildon & Thurrock NHS Foundation Trust v Weerasinghe* [2015] UKEAT/0397/14 *(Weerasinghe); Copsey v WWB Devon Clays Ltd* [2004] UKEAT/0438/03 **(Copsey);** *Cruickshank v VAW Motorcast Ltd* [2002] ICR 729 *(Cruikshank); Dignity Funerals v Bruce* [2004] Scot CS 230 *(Dignity Funerals); Docherty & Anr v SW Global Resourcing* [2013] CSIH 72 *(Docherty); Gallacher v Abellio Scotland Ltd* [2020] UKEATS/0027/19 *(Abellio); Homer v Chief Constable of* **West** *Yorkshire* [2012] UKSC 15 *(Homer); Ishola v Transport for London* [2020] EWCA Civ 2011 *(Ishola); J v DLA Piper UK LLP* [2010] UKEAT/0263/09; *Klusova v London Borough of Hounslow* [2008] ICR 396 *(Klusova); Land Registry v Houghton* [2015] UKEAT/0149/14 *(Houghton); McDougall v Richmond Adult Community College* [2008] ICR 431 *(McDougall); Nottingham City Transport Ltd v Harvey* [2012] UKEAT0032/12 *(Harvey); Pnaiser v NHS England & Anor* [2016] IRLR 170 *(Pnaiser); Paterson v Commissioners of Police of the Metropolis* [2007] ICR 152 *(Paterson); Perkins v St George NHS* [2006] ICR 617 *(Perkins); Phoenix House Ltd v Stockman* [2016] UKEAT/0264/15 *(Stockman); Scott v Richardson* [2005] UKEAT/0074 *(Richardson); White v Reflecting Roadstuds* Ltd [1991] ICR 733 *(White); Wilcox v Birmingham CAB Services Ltd* [2011] UKEAT/0293/10 *(Wilcox)* and a January 2022 ET decision *Deimantas Kubilius v Kent Foods* 3201960/2020

Relevant Law

Unfair Dismissal

Statutory Framework

133. Section 94(1) of the Employment Rights Act 1996 (ERA 1996) provides

"An employee has the right not to be unfairly dismissed by his employer."

134. Section 98 ERA 1996 states

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

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

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

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

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(4) In any other case where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) —

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

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

Relevant Case Law

135. It falls to the Tribunal to determine which, if any, of the potentially acceptable reasons the employer's factual reasons for dismissal falls [UPS ***Ltd v Harrison*** [2012] UKEAT/038/11 [UPS]), further the Tribunal is required to make findings as to the employer's own reasons (that is the reason which the

Tribunal finds, as a matter of fact, led the employer to dismiss on the information available to the employer at the material time). The Tribunal should not substitute its own view as to the reason for dismissal.

136. When assessing whether the dismissal was reasonable, in all the circumstances, the Tribunal is required to have regard to the operative (actual/live) reason.

137. Where (as is the case here) the claimant asserts a different reason for dismissal, the Tribunal should first consider the potentially fair reason for dismissal advanced by the employer, before considering the alternative reasons for dismissal including that advanced by the employee ***[Whitelock and Storr v Khan*** [2010] UKEAT/0538/10 ***(Khan)].***

138. The burden is on the respondent to show the reason for dismissal and that it is potentially fair.

139. Assessing the reason for dismissal involves considering the subjective state of mind of the employer. As Cairns L J stated *in* ***Abernethy v Mott, Hay and Anderson*** [1974] IRLR 213, (subsequently approved by Viscount Dilhrone and the House of Lords in the case of ***Devis v Atkins*** [1977] ICR 9620): 'A *reason for the dismissal of an employee is set of facts known to the employer, or it may be beliefs held by him, which cause him to dismiss the employee. If at the time of his dismissal the employer gives a reason for it, that is no doubt evidence, at any rate as against him, as to the real reason, but it does not necessarily constitute the real reason. He may knowingly give a reason different from the real reason out of kindness or because he might have difficulty in proving the facts that actually led him to dismiss; or he may describe his reasons wrongly through some mistake of language or of law.'*

140. Once the employer has shown the reason for dismissal, it is then for the Tribunal to determine whether the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissal.

141. That question is to be determined in accordance with equity and the substantial merits of the case and the circumstances to be taken into account

include the size and administrative resources of the employer's undertaking. The burden as to fairness under s 98(4) ERA 1996 is neutral.

142. The Tribunal must assess the reasonableness of the employer's decision and must not substitute its view of the right course of action. There is a band of reasonable responses within which one employer might take one view and be acting fairly and another quite reasonably another view and still be acting fairly ***(Iceland Frozen Foods Ltd v Jones*** [1982] IRLR 439).

143. It is for the Tribunal to decide if the reason is both substantial and justifies dismissal.

144. The ACAS Code does not in terms apply to dismissal for some other substantial reason dismissals ***[Phoenix House Ltd v Stockman*** [2016] IRLR 848 ***(Stockman)].***

145. The approach to be taken to procedural questions is a wide one. A Tribunal should view it if appropriate as part of the overall picture, not as a separate aspect of fairness ***Taylor v OCS Group Ltd*** [2006] IRLR 613.

Face Covering Regulations/Guidance

146. The Tribunal has had regard to the copy of the Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) Scotland Regulations 2020 SSI No 334 (2020 Face Covering Regulations) provided within the Inventory setting out in Schedule 7 (2) of the regulations that a person who enters or remains within a place listed in paragraph 3 must wear a face covering *"unless the person is (I) unable to put on, wear or remove a face covering - (I) because of any physical or mental illness or impairment of disability within the meaning of s6 of the Equality Act or (ii) severe distress"* .

147. Guidance (2021 Face Covering Regulations) published 30 October 2020 and updated for 6 April 2021 set out those exemptions and provided that *"Where an exemption applied, an individual should not be made to wear a face covering. However, there may be other occasions when they can wear a face covering so they should consider whether they are able to wear a face covering on each given day, and in the particular circumstances.*

Alternatively, they may be able to wear a face shield, rather than not wearing any covering at all. It is not mandatory for those who are exempt from having to prove their exemption. However, the person can request a free face covering exemption card on 0800 121 6240 or through the exemption card website. Those exempt under the Regulations should not be forced to wear a face covering and no one should be abused or treated in an unacceptable way. We ask for people to be aware of the exemptions and to treat each other with kindness, especially when asking why someone is not wearing a mask."

Disability Discrimination

Statutory Framework

148. S6 of EA 2010 provides:

Disability

(1) A person (P) has a disability if—

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

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

(2) A reference to a disabled person is a reference to a person who has a disability.

(3) In relation to the protected characteristic of disability

(a) a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;

(b) a reference to persons who share a protected characteristic is a reference to persons who have the same disability.

(4) This Act … applies in relation to a person who has had a disability as it applies in relation to a person who has the disability; accordingly—

(a) a reference (however expressed) to a person who has a disability includes a reference to a person who has had the disability, and

(b) a reference (however expressed) to a person who does not have a disability includes a reference to a person who has not had the disability.

149. Schedule 1 to the EA 2010 provides that:

(1) The effect of an impairment is long-term if—

(a) it has lasted for at least 12 months,

(b) it is likely to last for at least 12 months, or

(c) it is likely to last for the rest of the life of the person affected.

(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur. "

150. It is not considered necessary to set out the respective provisions of s15, 19, 20 and 27 of EA 2010 in full.

Claimant's expenses application

Relevant Law

151. The Tribunal has noted the claimant's submissions dealing with expenses, including email of Thursday **22 September 2022** which included an extract from Practical Law in relation to ET costs that while the Tribunal is not required to take the ability to pay into account it may do so, but requires to do so on the basis of sufficient evidence and provided an extract of an (English) County Court Record of Examination form which, Practical Law noted that EAT (in England) had encouraged parties to use, the Tribunal may take into account the paying party's future position and if ability to pay is to be taken into account the Tribunal should consider that party's whole means including capital and savings, arguing the accountant's letter did not provide a sufficient basis to

conclude that the respondents do have the ability to pay the expenses; and tthe respondents' submissions including their detailed 6-page submission.

152. The Tribunal has considered matters in full reminding itself of the terms of Rule 75 of the 2013 Rules which are set out therein

153. Rule 75 of the 2013 Rules provides:

(1) A (an expenses) order is an order that a party ("the paying party") make a payment to-

(a) another party ("the receiving party") in respect of the costs that the receiving party has incurred while legally represented. ..

154. Rule 76 of the 2013 Rules provides that

(1) A Tribunal may make (an expenses} *order or a preparation of time order, and shall consider whether to do so, where it considers that-*

(a) A party... has acted vexatiously, abusively, disruptively or otherwise unreasonably in ....the way that proceedings (or part) have been conducted.

(b) ...

(c) A hearing has been postponed or adjourned on the application of a party made less than 7 days before the date on which the relevant hearing began.

(2) A Tribunal may also make such an order where a party has been in breach of any order or practice direction or where a hearing has been postponed on the application of party.

155. Rule 77(1) of the 2013 Rules provides;

"Procedure

A party may apply for a costs order or a preparation time order at any stage up to 28 days after the date on which the judgment finally determining the proceedings In respect of that party was sent to the parties. No such order

may be made unless the paying party has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order) in response to the application. "

156. Rule 78 of the 2013 Rules provides

(1) A costs order may

(a) order the paying party to pay the receiving party a specified amount, not exceeding £20,000, in respect of the costs of the receiving party;

(b) order the paying party to pay the receiving party the whole or a specified part of the costs of the receiving party, with the amount to be paid being determined, in England and Wales, by way of detailed assessment carried out either by a county court in accordance with the Civil Procedure Rules 1998, or by an Employment Judge applying the same principles …

(3) for the avoidance of doubt, the amount of a costs order under sub-paragraphs (b) to (e) of paragraph (1) may exceed £20,000.

157. Rule 84 of the 2013 Rules provides

Ability to pay

In deciding whether to make a costs, preparation time, or wasted costs order, and if so in what amount, the Tribunal may have regard to the paying party's (or, where a wasted costs order is made, the representative's) ability to pay."

158. The claimant has made an application for expenses (using the Scottish terminology) in accordance with Rule 76 (1) (c) on the basis, there had been a postponement of the Final Hearing which had been set down for Tuesday 25 to Thursday 27 May, on the application of the respondents made on the morning of the first day of that allocated 3-day Final Hearing and which application was allowed after the second day.

159. That application had followed the refusal on Monday 16 May 2022 of earlier postponement application by the respondent made on Wednesday 4 May 2022, and in terms of which the Tribunal stated that it was prepared to let the first respondent attend and give evidence by CVP. In this Final Hearing the first respondent attended and gave evidence by CVP. There was no objection to same.

160. The Tribunal recognises that expense cases are very much fact-dependent and that it is a fact-sensitive exercise.

161. The respondent sets out that in considering such an application, the principle is that an award of expenses is the exception and not the rule as described by the Court of Appeal in ***Lodwick v London Borough of Southwark*** [2004] ICR 884 ***(Lodwick).*** The respondent additionally refers to ***City of Edinburgh Council v Wilkinson*** [2009] UKEAT/0062/08 ***(Wilkinson)', McPherson v BNP Paribas (London Branch)*** [2004] ICR 1398 ***(McPherson), Sunuva Ltd v Martin*** [2017] UKEAT/0174/17 ***(Sunuva).*** The Tribunal has considered the claimant's position including noting the claimant's reference to UK Practical Law extract and English County Court record of examination process.

162. Costs orders in the Employment Tribunal are the exception, rather than the rule ***[Yerrakalva v Barnsley Metropolitan Borough Council*** 2012 ICR 420, CA ***(Yerrakalva)]',*** Rule 76 uses the word "may" when talking about circumstances which may lead to the making of such an order. Yerrakalva sets out that costs should be limited to those *"reasonably and necessarily incurred".*

163. The ability of the paying party can be a relevant factor in deciding how to exercise the Tribunal's discretion (and also when considering how much should be paid).

164. The EAT described in ***Shields Automotive Ltd v Grieg*** [201 1] UKEATS/0024/10 (Grieg) that *"Assessing a person's ability to pay involves considering their whole means.* [11] In that case the issue was less assessable capital such as equity in a former matrimonial home. Any assessment of a paying party's ability to pay is not restricted to the paying party's means at the

date the order is determined, provided that there is a *"realistic prospect that [he or she] might at some point in the future be able to afford to pay a substantial amount"* an expenses order can be made against a person of limited ability to pay ***(Vaughan v London Borough of Lewisham and others*** [2013] IRLR 713 EAT ***(Vaughan)).***

165. The Tribunal is not required to consider ability to pay, but it may choose to do so and if a Tribunal is asked to consider the ability to pay it should tell the parties if it has done so, and if so, how it did so. In ***Jilley v Birmingham and Solihull Mental Health NHS Trust and others*** [2007] EAT 0584/06 ***(Jilley),*** the Employment Appeal Tribunal said if a Tribunal was asked to consider the ability to pay and refuses to do so, it should say why.

166. The case of ***Abaya v Leeds Teaching Hospital NHS Trust*** [2017] UKEAT 0258/16 ***(Abaya)*** confirmed that in principle a Tribunal can take into account the position of a third party, however it should consider what impact the third party's position had, if any, on the paying party's ability to pay if it also considers the impact of the spouse's means on the paying party's ability to pay; Tribunals are encouraged to exercise their discretion according to common sense and with "a *very real regard to the real world".*

167. The Tribunal has reminded itself of the guidance set out in ***Abaya.***

168. In ***Abaya,*** Mr Justice Singh, at paragraphs 14 to 16, identifies that there are, in essence, three stages in the exercise involved when an Employment Tribunal considers a costs (in Scotland, expenses) application:

"14 …

The first stage is to ask whether the precondition for making a Costs Order has been established. For example, in the present case, whether the claim or part of the claim had no reasonable prospect of success. However, that precondition is merely a necessary condition; it is not a sufficient condition for an award of costs.

This is because the second stage of the exercise that has to be performed is that the Tribunal must consider whether to exercise its discretion to make an award of costs.

*15. The position was summarised by HHJ Eady QC in the **Ayoola** case at paragraphs 17 and 18. As she said at paragraph 17, at the second stage of the exercise:*

"17. …

The Tribunal must then specifically address the question as to whether it is appropriate to exercise its discretion to award costs. Simply because the Tribunal's costs jurisdiction is engaged, costs will not automatically follow the event. The Employment Tribunal would still have to be satisfied that it would be appropriate to make such an order …"

16. The third stage of the exercise only arises if the Tribunal decides that it is appropriate to make an award of costs. The third stage is to assess the quantum of that award of costs. …"

169. In ***Abaya,*** Mr Justice Singh emphasises, at paragraph 20, that all cases are fact-sensitive, that the assessment of whether to award expenses will depend on the particular circumstances of each case, and that *"the discretion under the 2004 Tribunal Rules is very broad [and I would say the same of the 2013 Rules]".*

Unfair Dismissal

Discussion and Decision

170. The respondent had, in terms of the April 2021 continued furlough letter, already stated in April 2021 that the claimant would remain on furlough, such arrangements were foreseeably able to continue in May 2021, the scheme having been by that time extended to September 2021. The Tribunal does not accept that in April 2021, including having regard to the continued furlough letter that the respondent considered that there had been a material

deterioration in the relationship that the claimant and or that the claimant could not continue in holding the position that she had at that time.

171. While the respondent issued the respondent April 2021 Investigation Meeting direction letter on the same date as the April 2021 continued furlough letter, the terms of both those letters were superseded by the claimant's April 2021 Liability Letter.

172. The respondent elected not to continue the arrangement with the HR consultant and while the claimant attended with the HR consultant by telephone 27 April 2021 and on the same day elected to provide (only) to the HR consultant a scan of a free face covering exemption card, the terms of the claimant's telephone discussions and the provision of that free face covering exemption card were not provided to the respondents.

173. Neither the claimant's April 2021 Liability letter, nor the claimant's response to dismissal letter identified to the respondent that the claimant was seeking to rely upon the 2020 Face Covering Regulations 2021 Face Covering Regulations. The claimant's April 2021 Liability letter did not reference a free face covering exemption card. The claimant did not in her May 2021 reply to dismissal letter, set out that she considered that she would suffer either severe distress from the use of a face covering or that she considered that that suffered from an illness or impairment or disability from which she was unable to wear a face covering. The claimant's April 2021 Liability letter sought to create unreasonably onerous obstacles to the claimant's attendance at work including describing that the first respondent was the official "enforcing unlawful wearing of masks accordingly to parliament privilege" and without basis insisting that she would return on conditions which she could not reasonably expect the respondent to meet.

174. The Tribunal has carried out a carefully considered analysis of the decision maker. The claimant's intentions were set out in the April 2021 Liability Letter, that letter was reasonably taken by the respondents to have fully ventilated the claimant's position as at the time. That position was not altered by the claimant's May 2021 reply to dismissal letter.

175. The respondent's May 2021 Termination letter sets out that the claimant had described (only) that the impact of masks was that it would steam up glasses. The Tribunal notes in this regard the claimant's May 2021 reply to dismissal letter expressly sets out that *"unfortunately the visor provided was unfit for purpose"* describing that it was scratched *"& completely steamed up my glasses on the first exhalation. This left me unable to see to do my job. And I was forced to wear the mask instead. ".* While the claimant intimated that she was mask exempt *"as you know",* that was a reference to the claimant having provided an image of a free face covering exemption card to the consultant, the claimant had not provided that to the respondents.

176. The Tribunal concludes that the claimant's April 2021 Liability Letter would reasonably be read to reflect a view that the person issuing it was not, as set out by the respondent, *"prepared to follow the guidelines laid down by the government..."* amounting to a substantial reason of a kind as to justify the dismissal of an employee holding the position which the claimant held.

177. The Tribunal was mindful that, in cases where SOSR is asserted as the reason for dismissal, the Tribunal requires to carefully consider whether the employer was using SOSR as a pretext to conceal the reason for dismissal. The Tribunal is satisfied that this is not the case. The first respondent had issued the April 2021 continued furlough letter on 21 April 2021, which described that the claimant would continue to be furloughed. While the respondent had simultaneously issued the April 2021 Investigation Meeting direction letter, requiring the claimant to attend an investigation hearing on Tuesday 27 April 2021 both those letters and the matters contained therein were effectively superseded by the claimant's issue on Friday 23 April 2021 of the April 2021 Liability Letter.

178. The issue by the claimant of the claimant's April 2021 Liability Letter caused the breakdown in the working relationship between the claimant and the respondents.

179. The Tribunal was mindful that the May 2021 Termination letter did not expressly deploy the term SOSR nor irretrievable breakdown in the

relationship. However, the Tribunal notes that the May 2021 Termination letter set out that *"Under the circumstances, you leave me no alternative but to end your employment".* Those circumstances (or set of facts) were the claimant's Liability Letter of April 2021 taken as a whole. There was nothing to alert the respondents to any suggestion that the claimant did not seek to rely upon the entirety of the claimant's April 2021 Liability Letter as a condition of returning to work. The Tribunal notes that the claimant's May 2021 reply to dismissal letter, expressly sets out that *"As an employer you also a duty of care for your staff. I have asked you to formally accept liability for any harm prolonged mask wearing causes me & to show me a risk assessment for my H&S as you are enforcing this in the work. This letter was ignored".* The claimant did not articulate what harm she sought to rely upon, beyond by implication the entirely of her position as set out in the claimant's Liability Letter of April 2021. The principal reason for the dismissal was the breakdown in the relationship arising from the claimant's Liability Letter of April 2021.

180. In all the circumstances, including having regard to the claimant's May 2021 reply to dismissal, the Tribunal is satisfied that there would have been no utility in further procedure including offering an appeal. It was apparent that the claimant's concern was that the respondent had ignored and not accepted her terms set out in the claimant's April 2021 Liability letter for a return to work.

Section 6 Equality Act 2010 "Qualifying Disability".

Discussion and Decision

181. The claimant relies upon mental impairment namely Complex Trauma/Post Traumatic Stress Disorder [PTSD], due to the claimant's severe anxiety and trauma when wearing a face covering or mask, at the relevant time

182. The Tribunal has carefully considered all the evidence including the contemporaneous evidence. The Tribunal's conclusion is that the claimant was not and had not been suffering from a mental impairment with substantial adverse effects on her ability to carry out normal day-to-day activities at the relevant times.

183. The claimant did not have a disability within the meaning of s6 of EA 2010 at the relevant times.

S15 EA 2010 discrimination arising from a disability.

Discussion and Decision

184. The claimant did not have a disability within the meaning of s6 of EA 2010 at the relevant times.

185. While the claimant had secured a face-covering exemption card, described in copy Guidance, and exhibited that to the HR consultant who had been retained by the respondent, neither the consultant nor the claimant exhibited same to the respondents. The claimant's April 2021 Liability Letter did not set out that the claimant asserted that she qualified as exempt nor that she had secured an exemption card.

S19 EA 2010 Indirect Discrimination

Discussion and Decision

186. The claimant did not have a disability within the meaning of s6 of EA 2010 at the relevant times.

187. The respondent did not operate what was asserted as a PCP. While the claimant had secured a face-covering exemption card, described in copy Guidance and exhibited that to the consultant who had been retained by the respondent, neither the consultant nor the claimant exhibited same to the respondents. The claimant's April 2021 Liability Letter did not set out that the claimant asserted that she qualified as exempt nor that she had secured an exemption card.

S20, 21 EA 2010 Reasonable Adjustments

Discussion and Decision

188. The claimant did not have a disability within the meaning of s6 of EA 2010 at the relevant times.

189. 'The respondent did not operate the asserted PCP. While the claimant secured a face-covering exemption card and exhibited that to a consultant who had been retained by the respondents, neither the consultant nor the claimant exhibited same to the respondents. The claimant's April 2021 Liability Letter did not set out that the claimant asserted that she qualified as exempt nor that she had secured a face-covering exemption card.

190. It is not necessary in the circumstances to consider whether the respondent knew or could reasonably have been expected to know the claimant was a person with a disability. However, and beyond the respondent being aware (as many employees including her colleague) that the claimant was uncomfortable due to phlegm issues with face mask-wearing, the respondent was not aware that the claimant had any disability.

191 . The claimant had not in the course of her employment, taken steps to identify to the respondents (or their staff) she was unable to put on, wear or remove a face covering within terms that of Regulation 1(1) of the Health Protection (Coronavirus) (Restrictions and Requirements) (Local levels) (Scotland) Regulations 2020 (i) because of any physical or mental illness or impairment or disability within the meaning of s6 of the Equality Act 2010) or (ii) without severe distress. Nor did the claimant communicate to the respondent directly in the course of her employment that she had secured a free face-covering exemption card.

Section 27 (Victimisation)

Discussion and Decision

192. The Tribunal's conclusion is that respondents did not subject the claimant to any detriment because the claimant asserted discrimination in her letter dated 17 May 2021 or otherwise because of she contacted ACAS and /or presenting her claim, or otherwise because the respondents believed that the claimants might do those acts.

193. The respondents relied upon their accountants to issue the P45 and otherwise notify the authorities of the termination of claimant's employment. The

respondents were unaware that their accountants had delayed in those actions until the claimant drew this to their attention by her letter issued on Tuesday 3 August 2021 following upon which the respondents arranged for those matters to be addressed.

Holiday Pay

Discussion and Decision

194. The respondent agent confirmed on **Thursday 22 September 2022** to the Tribunal and claimant representative that admitted holiday pay of £898.13 would be paid in two instalments of £500 and £398.13 and the claimant representative confirm by 4 pm on Tuesday 27 September 2022. By email **Friday 30 September 2022** the respondent representative intimated that it understood that the sum set out by the claimant in submission, in respect of holiday pay had been paid.

195. The Tribunal notes from email exchanges between representatives including on 30 September 2022 that the respondent paid the sum of holiday pay as intimated by the claimant in submissions. In those circumstances there is no outstanding claim for holiday pay and that claim is therefore dismissed.

Breach of Employment Contract/ Notice Pay

Discussion and Decision

196. The respondent asserts that no notice pay is due as the claimant was unable or would not have worked her notice.

197. The claimant was entitled to statutory notice pay equivalent to 8 weeks' pay. The respondent, in their May 2021 termination letter set out that they accepted that the claimant was entitled to notice pay, albeit 4 weeks based on her weekly pay of £142.56. There were no contractual terms as between the claimant and respondent restricting notice to that 4-week period. The Tribunal does not accept that at the relevant time including date of termination the claimant had a qualifying disability.

198. The Tribunal does not accept that as at the date of termination the claimant was unable to work her notice, nor that the respondent had information which demonstrated that the claimant was or would be unable to work her statutory notice at that time.

199. The Tribunal concludes in all the circumstances that the claimant was entitled to notice pay in the sum of £142.56 x 8 weeks (having regard the claimant's length of service as at the date of termination) in the **£1,140.48.** Failure to make that payment amounted to breach of contract.

Provision of Terms and Conditions

Discussion and Decision

200. In light of the Tribunals decision in respect of the breach of contract claim/ Notice Pay above, having regard to Section 38 EA 2002 and Schedule 5 of EA 2002, the Tribunal makes an award of 2 weeks' pay in respect of the failure to provide written particulars. While the Tribunal recognises that the respondents operate a small business, the Tribunal does not consider that it would be unjust and inequitable to do so. The Tribunal does not, however, consider that an award of 4 weeks' pay is just and equitable, having regard to the size of the respondent's business.

Expenses Application

Discussion and Decision

201. The Tribunal has fully considered the terms of the parties' submissions in respect of the claimant's application for expenses.

202. While recognising that expenses are an exception, as a first stage, the Tribunal has considered whether the precondition for making an Expenses Order has been established.

203. The Tribunal notes that the application for postponement on which the claimant relies was made on the morning of the 3-day Final Hearing.

204. In all the circumstances, the Tribunal accepts that the precondition for making an Expenses Order has been established.

205. As the second stage, the Tribunal has considered whether to exercise its discretion to make an award of expenses.

206. The Tribunal notes the earlier application for postponement had been refused on 16 May 2022, it being indicated by the Tribunal that the first respondent could attend remotely.

207. Thereafter a further application for postponement by the respondent on the same grounds, the first respondent's health (and on which the claimant relies in its application for expense) was made on the morning of the first day of the then scheduled 3-day Final Hearing Wednesday 4 May 2022.

208. Subsequent medical evidence provided by the respondent, including the GP statement dated 7 June 2022 produced as directed by the Tribunal in May 2022, included in the respondent's Inventory of Documents in support of the respondent's submission on the claimant's application for expenses.

209. The Tribunal has had regard to the first respondent's remote attendance at Tribunal at this Final Hearing, together with the Note dated Monday 30 May issued to the parties on Tuesday 31 May 2022, in respect of the earlier Final Hearing and in respect of which the Tribunal sat on Wednesday 25 May and Thursday 26 May 2022 and the medical evidence provided.

210. The Tribunal notes the proximity of this Final Hearing to the May Final Hearing and, while noting the terms of the GP letter 7 June 2022, is not persuaded that there was any difference in the first respondent's ability to attend remotely to give evidence and instruct her representative, on the originally assigned dates of 25 and 26 May and this Final Hearing which commenced 20 June 2022.

211. In all the circumstances, and while recognising expenses are the exception, the Tribunal is satisfied that it should exercise its discretion to make an award of expenses.

212. As the third stage, the Tribunal has assessed the quantum of that award of expenses. The Tribunal notes the claimant representative's submission set out a breakdown of limited costs in the 9 September 2022 submission, which included an element reporting to the claimant after the second day it is not suggested that the claimant could not have attended on the second day of the Final Hearing, in those circumstances the element of expenses restricted to reporting on that day is not allowed.

213. The Tribunal had regard to the respondent accountant statement dated 6 September 2022 setting out profits for 2018 to 2021 which describes that profits for year ended 2021 were higher due to payments from Job Retention and Scheme and grants from the local authority and which noted that due to a downturn in current takings coupled with rising costs the respondents have had to pay some of the wage costs personally and the business had been unable to make rent costs. The respondents operate a partnership, in so far as the focus is on the partnerships ability to pay the respondent current position describe that they have access to their personal funds to meet current expenditure that it considered to reflect the real world of such partnerships, it was not suggested that the respondents were intending to close the salon and /or that the business was not intending to continue the partnership business. In these circumstances the Tribunal is satisfied that the respondents, who operate a joint business in partnership together have the ability to pay the sums sought.

214. The Tribunal has concluded after due consideration of the respective parties' positions, including having regard to the respondents' ability to pay, in all the circumstances, the amount reflects a breakdown of legal costs reasonably and necessarily incurred restricted to the extent of

(a) Attendance at the hearing on 25 May 2022, including travel to a from the office, calculated at £660 inclusive of VAT: and

(b) Attendance at the hearing on 26 May 2022, including travel to a from the office, calculated at £342 inclusive of VAT: and

(c) Cancellation fee of the instructed expert £480.

Conclusions

215. The respondent has established that the principal reason for dismissal was some other substantial reasons of such a kind to justify dismissal of the claimant. The respondent acted reasonably in all the circumstances in treating that reason as sufficient reason to dismiss the claimant, and the claimant's claim for unfair dismissal is dismissed.

216. The claimant did not qualify as a disabled person as asserted at the material time and accordingly the claims in terms of s15, 19, 20& 21 EA 2010 are dismissed.

217. The claimant's claim in terms of s27 EA 2010 is also dismissed.

218. The claimant's claim for holiday pay is dismissed.

219. The claimant's claim for breach of contract/ notice pay succeeds in the sum of **£1,140.48.**

220. The claimant's claim in respect of the respondents' failure to provide written particulars of employment succeeds in the sum of £285.12.

221. In conclusion, the Tribunal make an expenses Order that the respondents, as the paying party jointly and severally, make payment to the claimant's representatives, in the sum of £1,492.00 and Orders that the respondents shall pay that sum within 21 days of this judgment.

Employment Judge: **R McPherson**
Date of Judgment: **24 October 2022**
Entered in register: **28 October 2022**
and copied to parties