EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4110642/2021 and 4101741/2022

Held in Glasgow on 10 to 12 October 2022

Deliberations held on 13 and 14 October 2022

Employment Judge D Hoey
Members I Ashraf and A McFarlane

Ms M Shields	**Claimant** **Represented by:** **Ms K Orriss - Friend**
Alliance Healthcare Management Services	**Respondent** **Represented by:** **Ms S Mackie - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. The claims of direct disability discrimination, unlawful disability harassment and unlawful victimisation are dismissed following their withdrawal.

2. The unanimous judgment of the Tribunal is that the remaining claims are ill founded and they are dismissed.

REASONS

1. By ET1 presented on 4 August 2021 the claimant raised a claim for disability discrimination. While it was not clear what the specific disability discrimination claims the claimant had indicated these were direct discrimination, indirect discrimination, harassment, reasonable adjustments and victimisation (all of which stemmed from the respondent's face mask policy). The respondent disputed the claims. In a further ET1 presented on 5 April 2022 the claimant raised a claim for unfair dismissal which was resisted. The claims were combined.

2. A number of preliminary issues had arisen in this case. The claimant had amended her claims. In the course of the hearing the claims and issues were refined and the claimant withdrew her claims of direct disability discrimination, harassment and victimisation which are therefore dismissed.

3. The hearing was conducted in person with both parties being represented (with the claimant's agent attending remotely). Given the limited time that was available it was agreed that written witness statements would be provided for each witness with the exception of Mr Jamieson who provided his evidence orally. Each witness was asked relevant supplementary questions and was cross examined, with the Tribunal able to ask relevant questions.

Case management

4. The parties had worked together to focus the issues in dispute and had, by the conclusion of the Hearing, provided a statement of agreed facts and a list of issues. A large amount of the facts relevant and necessary to determine the claims were not in dispute. The Tribunal is grateful for the parties working together to assist the Tribunal deal with matters fairly and justly and thereby achieve the overriding objective

Issues to be determined

The parties had agreed the issues to be determined by the Tribunal which were as follows:

Time limits

1. The respondent contends that the claim for failure to make reasonable adjustments (in relation to a meeting on 27 October 2021) introduced on 20 June 2022 was not made within the time limit in section 123 of the Equality Act 2010. Was the claim made within three months (plus early conciliation extension) of the act to which the complaint relates or was there conduct extending over a period such that the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

2. If not, were the claims made within a further period that the Tribunal thinks is just and equitable?

Disability discrimination

3. On 16 February 2022 the Tribunal determined that the claimant was disabled by virtue of Vertigo from 1 October 2021. Did the respondent know or ought it reasonably to have known that the claimant was a disabled person in the course of the welfare meeting held on 27 October 2021?

Indirect discrimination (Equality Act 2010 section 19)

4. The respondent accepted that it had a provision, criterion or practice ("PCP"), its mandatory face mask policy effective from 18 January 2021.

5. The respondent accepted it applied the facemask policy to the claimant and to persons with whom the claimant does not share the characteristic.

6. The respondent accepted that the facemask policy put persons with whom the claimant shares the characteristic at a particular disadvantage when compared with persons with whom the claimant does not share the characteristic, being that she was unable to attend site and work.

7. The key issue in this claim was whether the facemask policy was a proportionate means of achieving a legitimate aim, to protect the health and safety of the workforce, specifically against the transmission of COVID-19.

Reasonable adjustments (Equality Act 2010 sections 20 and 21)

8. The first issue is whether the respondent knew of the claimant's disability or of the substantial disadvantage.

9. The respondent accepted that it had a PCP, that PCP being its mandatory face mask policy effective from 18 January 2021 which applied to the claimant and to persons with whom the claimant does not share the characteristic and that the policy put persons with whom the claimant shares the characteristic at a particular disadvantage when compared with persons with whom the claimant does not share the characteristic as she was unable to attend site.

10. The issue is whether there were other steps the respondent could have taken that could have avoided the disadvantage, the specific steps being to stagger start/finish and break times and carry out a risk assessment with the claimant's disability considered.

Constructive unfair dismissal

11. Was the claimant entitled to resign without notice? In other words, did the respondent commit a fundamental breach of contract by its decision not to uphold her grievance of 31 January 2021 or by preventing the claimant from returning to work?

12. If so, did the claimant resign in response to the breach(es)?

13. Did the claimant unreasonably delay her resignation or waive the breach?

Remedy

14. What remedy should be awarded?

Findings in fact

5. The Tribunal is able to make the following findings of fact which it has done from the evidence submitted to it, both orally and in writing. The Tribunal only makes findings that are necessary to determine the issues before it (and not in relation to all disputes that arose nor in relation to all the evidence led before the Tribunal). Where there was a conflict in evidence, the conflict was resolved by considering the entire evidence and making a decision as to what was more likely than not to be the case. The Tribunal was assisted by the parties reaching agreement, in respect of some of the facts.

Background

6. The respondent had a number of warehouses which produce (and distribute) medication for hospitals, NHS health services and pharmacies among others. The site was operational 24 hours a day. The respondent was responsible for sending our over 11,000 different medicines, distributing to customers

twice a day Monday to Friday, once on a Saturday. Ordinarily the respondent can produce 1.2 million units on site per day.

7. When the pandemic hit, a normal shift volume increased from 90,000 units to 330,000 units due to the pressure with regard to the need for medication. All staff employed by the respondent were key workers. The units the respondent provide are often provided to vulnerable people and the units can be life saving. At any one point it was possible for there to be around 150 staff moving around site which was organised with most areas having groups of people working or passing each other.

8. The claimant commenced employment with the respondent on 5 August 2019. She was employed as a Warehouse Operative working on the automat machine. The claimant worked backshift. She worked in the Coatbridge site. The warehouse was around 120,000 square feet processing inbound and outbound deliveries.

9. The claimant worked in the warehouse which sorted medication into batches for delivery. One of the main machines in the warehouse was the automat which is 44 metres long. It was fixed into the ground. Five warehouse operatives work on the automat machine at one time. *"*Exceptions*"* that come off the automat machine are collected at various intervals and other warehouse personnel work around the machine. There is limited space around the machine and on the floor. The nature of the work within the warehouse was such that lone working was not feasible. It was also not possible for the claimant to work from home.

10. The warehouse has one main entrance and exit.

11. Supervisors carried out temperature and PPE checks at the entrance. The warehouse had several communal areas. Warehouse operatives need to pass through these communal areas to get to their station. It was not possible to work on site without coming into contact with colleagues (intentionally or otherwise).

COVID steps

12. Given the importance of the nature of the work the respondent did, it was essential the respondent took as many precautionary steps as were practicable to minimise (if not extinguish) the risk of COVID in the workplace. The respondent had to keep the risk of an outbreak as low as possible since the business required to operate at maximum capacity during the pandemic. If there was an outbreak of COVID on site it was possible that 1.2 million units would not be capable of being distributed which would have a massive impact upon public health. The respondent therefore took COVID and risk seriously and expected staff to do so too.

13. The demand for units (medication) significantly increased during the pandemic and the operation was working at capacity.

14. The COVID-19 risk assessment and health and safety rules were displayed on the noticeboard and when issues arose that required to be communicated to staff, oral briefings took place when notices would be read out. A notice was also placed at the entrance to ensure staff knew the position.

15. Prior to July 2020 face coverings were not mandatory although most staff chose to wear them. A risk assessment had taken place in May 2020. Staff could choose which face coverings to wear, from cloth masks, medical masks to snoods and visors

16. From July 2020 face coverings had become mandatory and staff were required to wear face coverings within the site (and when moving around). Anti-bacterial sprays were in place throughout, and the site was regularly fogged to reduce risk. Screens were introduced where possible at relevant workstations and there were regular unannounced audits to ensure all requirements were being met. A weekly rota system was in place for senior managers to ensure COVID measures were being implemented properly 24 hours a day. Anyone found not properly wearing a face covering would be asked to do so and any issues during the audit would be recorded. The HSE would also visit the site on occasion to ensure sufficient steps were being taken.

Face masks become mandatory

17. From July 2020 when face coverings were mandatory, following another risk assessment, staff were able to choose which covering best suited them, provided (and this was essential) the covering covered the mouth and nose properly. This was important since at the time it was understood that the virus could be transmitted by droplets from the mouth and nose and therefore it was essential any face covering covered the mouth and nose properly. The respondent provided face coverings. If staff had difficulties with face coverings this would be raised with a line manager and an alternative found with the respondent seeking to identify a solution that worked for the individual whilst ensuring risk was properly minimised.

18. The steps the respondent took were reviewed regularly centrally and disseminated to each of the sites. It was the site manager's responsibility to ensure the rules were cascaded down to each team. Warehouse operatives were managed by team leaders who would brief staff.

19. Until January 2021 the claimant had worn a face covering. She would often place it on her face but have it around her ears but not fully covering her face. On occasion she would be told to put it on properly. The site manager believed that the claimant had been wearing a face covering. He had personally seen her wear it and had, on occasion, to remind her of the requirement to have it worn properly. The claimant had not advised the respondent that she had any difficulty wearing a face covering at this point or that she could not wear it. The claimant knew of the respondent's policy that wearing a face covering was mandatory (which was why she had worn one during her time on site).

20. There were around 4 staff on site who had raised difficulties wearing face coverings at this time. One employee had been medically suspended as it was not possible to resolve the issues that person had by coming on site. The respondent worked with the remaining 3 to find alternatives, such as wearing a face mask when moving around and coming into contact with colleagues but having a place to remove the covering to take a breather.

21. It was not possible for the respondent to allow any staff to be free from a face covering where they came into contact with other employees at this time. Their knowledge of the virus at that time was that there was a higher risk of transmission where staff came into contact with each other, which includes entrances and exits and the machines where staff worked together. It was not possible to enter or leave the site without a face covering nor work in the vicinity of the machines without a face covering given the risks as understood at the time. This was the respondent's approach to seeking to keep everyone safe in light of the knowledge that existed at the time.

22. A further risk assessment had been carried out on 12 January 2021. This had been done at a point the virus transmission rate had increased. Prior to this date the respondent had allowed any form of face covering to be worn provided mouth and nose had been covered. That included visors which had previously been permitted provided they covered nose and mouth. They were now no longer permitted given the risk of droplets escaping and consequently only fully fitted face coverings were permitted. Face coverings had become mandatory.

23. The policy was introduced after it was announced by the Government that COVID-19 was continuing to spread and that the new variants of the disease were more infectious and transmissible through the nose and throat than previous strains.

24. All staff were advised as to the change in position. Staff with an issue were to discuss matters with their managers. The claimant had not raised any issue and had not been identified as someone for whom wearing a face covering was an issue, as she had previously worn a face covering (albeit not fully nor correctly) and not raised any concerns with the respondent about this.

Claimant told to leave if she refused to wear mask

25. On 28 January 2021 the claimant attended site and refused to wear a face mask. She was told that it was mandatory to wear a face mask in order to access the site. The claimant refused. The claimant was asked to leave site

because she refused to wear a facemask. The claimant had not been sent home for not wearing a facemask before 28 January 2021.

26. The claimant did not return to site after 28 January 2021.

27. On 29 January 2021 at 1655 the claimant sent Mr Lee, site manager, an email She said, *"I am writing to inform you that as of today I have sick line which will cover me until 13 February and my doctor will post my sick line out to me and I will get it forwarded to yourself in due course. I did not appreciate the embarrassment that was put on me last night being told to leave the building in front of a fellow colleague. I was told last night someone would be in touch. Noone has contacted me today. This has left me feeling let down by the company"*. The claimant had a good working relationship with the site manager.

28. The claimant's email had been sent prior to the start time of her shift (which was 1800) which was when her line manager would have been in touch. The claimant was aware of the policy that required mandatory face coverings on site.

29. The claimant submitted a fit note stating the claimant had been assessed on 29 January 2021 and she was unfit for work due to work related stress. The note expired on 15 February 2021.

Grievance

30. The claimant raised a grievance on 31 January 2021. She stated that she believed she was subjected to bullying and harassment at work. The example she gave were that she said she was exempt from wearing a face covering and yet her line manager repeatedly pulled her up at the end of the shift. She believed she was repeatedly asked to wear it. She also said she was advised that she could not carry forward holidays when others had and she felt she was treated differently. She also was unhappy how one absence had been recorded. Finally, she said she was unhappy at being told to go home on 28 January as she refused to wear a mask.

31. On 31 January 2021 at 1749 the claimant sent Mr Lee a further email stating: *"On Thursday I was told by Stuart that if I refused to wear a mask he had been told to tell me to go home and someone would be in contact with me. All day on Friday I heard nothing. I had in the meantime spoken to my doctor who signed me off with work related stress. I emailed you at 1655 to advise you of this and received an acknowledgment at 1702. I then received a call from James at 1818 on Friday to ask me if I would be in work that night. Peter had previously told me at my meeting that if there was a sick line in place there was no need to call in. Today Monday I emailed you a copy of the sick note from my doctor. Despite this at 1638 James called and left another message to call him back. I would like you to add these 2 instances into the grievance I emailed to you on Friday and please instruct James not to contact me as this is adding to my stress and anxiety and I believe this is just another example of why I feel my bullying and harassment grievance is more than justified."*

32. Mr Jaimeson replied at 1701 on 2 February thanking the claimant for her emails. He explained that he had instructed James to call the claimant and as Mr Jamieson had left site the claimant's sick line had not been communicated to him which was why he had contacted the claimant. He explained that it was rare for a sick line to be sent directly to him rather than the line manager. He noted that Mr Colville, Warehouse Operations Manager, would take over communication with the claimant going forward who would be in touch to organise a grievance hearing.

Grievance meeting

33. The grievance meeting took place on 11 February 2021. The claimant was present along with her trade union representative. The hearing was chaired by Mr Colville with Ms McIntosh present as note taker. Each of the claimant's issues was dealt with separately

34. Firstly *"repeatedly bring pulled up for not wearing a face covering"*. Mr Colville said that it was company policy that face coverings were mandatory. He said it would appear that being asked to wear a face covering is an attempt to protect everyone. He asked if there was anything to consider here and the

trade union representative said *"medical reasons"* without specifying what she meant by that. Mr Colville noted that there were no exceptions given the importance of face coverings.

35. The claimant's trade union representative said that the respondent would be in *"a very sticky wicket"* if the company were seen to be going against government guidance and the equalities or disabilities act. Mr Colville asked which act she was referring to and she said, *"The Equalities Act"*. She said the company was going against those who are medically exempt. Mr Colville said that everyone needed to wear a face covering. He said that the claimant had not provided evidence that she cannot wear a face covering nor said that there any problem over the months this had been done.

36. The representative said the claimant said she was exempt. Mr Colville said that he had no record of that. Mr Colville said that if the claimant was unable to wear the necessary equipment she was not permitted on site. He said: *"If we have a huge COVID outbreak here then the supply of medical goods around the country to hospitals doctors and pharmacies could be affected. Please understand we need to operate as safely as possible and face coverings are required at this time"*.

37. The claimant said that it had been mandatory for 5 months, but she had not worn the mask. Mr Colville said that it had been mandatory for all that time and he had not seen a single worker not wearing a face mask. He said he had spoken with the claimant's line manager and team leaders and they had understood the claimant was wearing a face mask.

38. The claimant said that she would take a face covering when on site and wear it *"under her chin"* but she would not put it on

39. Mr Colville said that the company policy was that the mask be worn on site covering the nose and mouth. He said he had occasion to remind people of that and require them to put it on properly as it was mandatory.

40. Mr Colville said that to get on site a face mask was needed. The rules had been in place for many months for all workers and there had been no formal

reason or request from the claimant to not comply. He said that he did not find it credible that the claimant had not worn a mask for 5 months when he had not seen a single worker not weaking a mask all the time he had been on site during different shifts.

41. Mr Colville indicated that he did not consider the grievance about being bullied by the claimant's line manager to have merit as he was applying company policy in requiring the claimant to wear a face mask in order to move around the site

42. The second issue related to holidays and a discussion took place around carrying forward holidays. The discussion concluded by Mr Colville stating that the claimant was paid for her full entitlement and there were no holidays to carry forward. There was no basis for the assertion the claimant had been treated differently.

43. The third section related to an absence from work. After a discussion Mr Colville noted that the claimant's line manager had followed company policy as to how an absence was recorded in light of how the claimant clocked in and out.

44. The final section of the grievance meeting dealing with the final part of the claimant's grievance which was about being asked to leave site due to the claimant's refusal to wear a mask. The claimant asked why she had not been pulled up about this before. Mr Colville said that it was denied that the claimant had not been wearing a mask before or that this had gone unchecked. Mr Colville said that the managers had said they would ask staff to put masks on properly where they saw there were not being worn correctly. He said he had asked 3 team leaders and they agreed. Mr Colville said that there had been no bullying or harassment as the policy was being applied fairly.

45. With regard to the claimant being exempt, My Colville noted that it seemed strange that if the claimant had indicated that she was exempt why did her line managers have to repeatedly remind her to put it on properly. It was unlikely they would have done so if they believed there were reasons why the claimant was not doing so.

46. With regard to moving things forward, the claimant's representative suggested a visor might work. Mr Coville noted that at that point only face masks were permitted. The claimant's trade union representative stated that there needed to be collaboration. Mr Colville said that would be taken into account, but the meeting was about resolving the claimant's grievances.

47. The claimant said she felt embarrassed at being told to leave if she would not wear the mask. Mr Colville said he had asked if anyone else was present and the manager said he could not recall anyone else being there at the time. He emphasised the importance of the policy and having chats with staff to ensure they fully complied.

48. After around an hour the meeting finished, the claimant's grievances having been dismissed.

Outcome letter

49. On 26 February 2021 Mr Colville sent the claimant a letter summarising the outcome of the meeting. He indicated that face coverings had been mandatory for many months to protect all staff on site and their dependents. The claimant had been told about company policy which was part of a manager and team leader's role. There was no leave the claimant had to carry forward and so the treatment she received was fair. The claimant had been treated fairly as to the time she had worked on site in relation to the day she left early. Finally, the claimant had been asked to leave site for refusing to wear a mask at the start of her shift. This was a mandatory requirement and was not bullying or harassment. She was advised of her right to appeal.

Appeal against grievance

50. The claimant appealed her grievance outcome. She sent it to Mr Jamieson. The grounds of appeal were that *"no reasonable adjustments have been made, no requests for occupational health involvement and my rights under the equalities act have been ignored."* She said she would be happy to share he medical information with occupational health and she believed she had been put to stress as a result of the way she was treated.

First appeal meeting

51. The claimant attended two grievance appeal meetings. The first meeting was on 15 March 2021. The claimant attended with her union representative and the appeal was chaired by Mr Jamieson, General Manager. Ms McIntosh attended as note taker.

52. The claimant said she was unhappy at being told she had to wear a face mask to get on side as she believed she had not worn one prior to that. Mr Jamieson noted that at no point had the claimant raised any concerns about wearing a face covering with anyone. He noted that the claimant had been told on a number of occasions to wear the mask properly and he was concerned if the instruction she had been given was not being followed. Mr Jamieson noted that he was aware of the cases where individuals had an issue wearing a face mask and they were supported in finding an alternative. The claimant had never raised any issue.

53. The claimant was asked if she had received the letters confirming the position and initially she said she had not received them. She said she had been present at the briefing where staff were told those not wearing a face mask would be sent home. The claimant said she had said she would not put her mask on.

54. The claimant said she suffered vertigo and was on medication for a number of concerns. Mr Jamieson asked if she had tried anything differently with face masks to ease anxiety. She said she had not and Mr Jamieson noted the respondent had been working with others to find alternatives and there are a number of different types of mask. The claimant said she should be up for trialling those. He said it was made of plastic and had been used at different sites. Mr Jamieson sent the claimant a picture of the items but the claimant said it looked too close to the face to be suitable for her. He said the picture was not perfect but there was space between the face and the covering. The trade union representative suggested it would be worth the claimant trialling these types of products. Mr Jamieson said he was keen to support the claimant and be flexible in looking at alternatives, which the respondent would

fund. He noted that the visor did not at that stage work given the risks and current state of thinking. The claimant said, *"I would need to try but seriously looking at it gives me the fear"*. In fact she did not do so.

55. Mr Jamieson said the policy was masks were needed to attend site and if it was not possible the business worked with people to find a safe alternative. It was about being safe for everyone. The claimant noted it was possible to access shops without a face covering. Mr Jamieson explained that each business set its own requirements, but the respondent had to consider its position.

56. Mr Jamieson said he was trying to work with the claimant to find a solution. Her trade union representative noted that the claimant was worried she was going to lose her job if she could not wear a mask. Mr Jamieson said it was important that they worked together. It was agreed she would try the alternative face masks. It was agreed to refer the claimant to occupational health and commence welfare meetings.

57. The claimant was also reminded of the private and confidential counselling company that the respondent offered to all staff. The clamant was sent the details. The meeting concluded after around 50 minutes.

Occupational health

58. The respondent referred the claimant to occupational health and the report was dated 19 March 2021 which was when the referral took place. No medical records were reviewed during the report which was based upon a telephone discussion with the claimant.

59. The report noted that the claimant said she had been absent since 29 January 2021 when she said the company made it mandatory to wear face masks. The claimant said she had been undergoing treatment for vertigo and would undergo unannounced episodes. Medication had been prescribed but the claimant was dizzy and nauseous. This led to the claimant being anxious and panic and she seeks to avoid anyone who may have an illness that causes vomiting.

60. The claimant had said she had never been able to tolerate any object, solid or fabric near her face or breathing area as this causes shortness of breath, anxiety and panic which could trigger a vertigo episode. She had been diagnosed as having vasovagal syncope, a response to severe emotional distress. She said she did not use any type of face covering as she used an exemption letter.

61. As to outcome and recommendations, the occupational health advisor recommended the report be discussed with the claimant, that finding an alternative to a face covering would be a management and business led decision and that the claimant may find it useful to speak with the counselling service run by the respondent. She also recommended regular catch up meetings with her manager.

62. She stated that *"As you can note from the above, the solution here is an employment matter as there are no medical solutions to this situation. I am unable to recommend an alternative type of appropriate face covering or sanction any exemptions."* She suggested a meeting to explore alternatives. Given the ongoing pandemic the adviser noted that the claimant should be prioritised for control measures.

Second appeal meeting

63. A second meeting was arranged for 29 March 2021 following the receipt of her occupational health report. The claimant attended this session herself with Mr Jamieson and Ms McIntosh taking notes. Mr Jamieson noted that the occupational health meeting had taken place. He also noted that the claimant had not answered Ms Colville's calls to fix a welfare meeting.

64. Mr Jamieson noted that the occupational health report said the claimant was unable to have anything near her face. He asked if she had tried any of the options he had sent her and she said she had not. He asked if the claimant had looked for alternatives as had been discussed at the last meeting with the claimant's union representative. She said she had not done this.

65. Mr Jamieson said that the company policy was that masks were required to attend site. If someone was unable to wear a mask the company would work with the individual to try and find a solution. That was done through the welfare process. He said that reasonable adjustments were being considered, such as alternative face coverings such as the ones she had been sent.

66. The claimant said she was unhappy at having been pulled up for not wearing a mask. Mr Jamieson noted that the claimant had received the communication about the policy and she had not raised any issue about her wearing a mask. The claimant said she had told her manager she was exempt. Mr Jamieson said the welfare meetings would explore ways of helping her back to work.

67. The claimant said she had been treated differently. Mr Jamieson explained he believed the claimant had been wearing a mask and there had been no reports that she was exempt. The meeting concluded after 20 minutes.

Outcome of appeal

68. The claimant was issued with a letter dated 6 April 2021. The claimant was advised that her appeal was not being upheld. With regard to the no reasonable adjustments point, Mr Jamieson referred to the January 2021 policy which made it clear face masks were mandatory for safety reasons. The occupational health report had been received and welfare meetings were to take place.

69. Mr Jamieson noted that the claimant had said she felt she was being treated unfairly. Mr Jamieson explained that it was important company policies were being followed and if there were reasons for not doing so, they should be discussed. He noted that the claimant had not explained her position despite being fully aware of the company policy.

70. Mr Jamieson noted that the matter would progress via the welfare process. He said that the business was trying to support people with conditions during the difficult time and support the claimant and all colleagues. As no face

coverings were identified as suitable this would be progressed via welfare meetings. The grievance was dismissed.

Welfare meetings

71. The first welfare meeting was held on 14 April 2021 to discuss the claimant's absence.

72. Correspondence was issued from 22 April 2021 until October 2021 with a view to arrange another welfare meeting. The claimant was unfit during some of this time and did not return Mr Colville's calls.

73. The respondent purchased two alternative face coverings and sent these to the claimant. One was a silicone mask suggested by the claimant's trade union representative. The other was a plastic cover, suggested by the respondent's HR team. The claimant did not attend site to try such coverings and did not trial any face coverings (or look for alternatives).

Restrictions loosen

74. The respondent's risk assessment was updated in October 2021. Employees could not wear a visor if they were double vaccinated. It was therefore now possible for colleagues to enter the site without a face mask provided they had been double vaccinated and wore a visor. The claimant did not wish to do so. Restrictions in the country were also beginning to loosen as the picture as to the virus and its transmission began to emerge.

27 October 2021 welfare meeting

75. A welfare meeting took place on 27 October 2021 which discussed the change in the risk assessment and what this could mean for the claimant returning to work. The claimant explained she was suffering from vertigo which affected her balance. She said she suffered from stress which had started when she had left site. She believed it had been caused by being sent home and not fully knowing the answers why she had to leave and problems wearing a mask and the stress at not being at work. She said she had been diagnosed with vestibular migraines which could be the result of cause of the

vertigo. She was on medication which would run for 4 weeks and is seeing specialists. The claimant believed her position had not changed as she was too stressed and the vertigo was difficult to live with and she believed wearing a mask exacerbated the vertigo problems.

76. The claimant's position during the meeting was that she would not be able to return to work if she had to wear a mask. The respondent sought to support the claimant and seek alternatives to assist the claimant. Upon asking what the respondent could do to help the claimant return to work she said there was "no real chance" until she could work on site without a mask.

77. The claimant was advised that it was possible to wear a visor if double vaccinated due to the reduced transmission rate. The claimant said she remained unable to wear any form of device over her facial area, whether that be mask, face covering or visor.

78. With regard to other roles, the claimant was advised that there were no other roles available at that time. Home working was not possible and there were no "isolated roles". Furlough had also ended.

79. The claimant explained her impairment affected her on a day to day basis and on occasion she could faint. She said she did not think she would be able to return to work until there was a change that allowed her to return without a mask. The claimant said there was no other support the respondent could offer. It was agreed a further meeting would take place 4 to 6 weeks later to assess the position.

80. The claimant remained absent from work at this time. The position in respect of face coverings and the respondent's policy did not change.

Resignation

81. The claimant resigned by letter on 28 January 2022 by emailing Mr Jamieson. She said that she was resigning with immediate effect. She said she was *"resigning in response to a fundamental breach of contract by my employer alongside a breach of trust and confidence and I consider myself constructively dismissed. As you have not upheld any of my grievances I now*

consider my position untenable an my working conditions untenable leaving me no option but to resign in response to your actions. As you have not allowed my return to work for the past year despite the fact your own occupational health have said I cannot tolerate anything on or near my face the only way you suggested my return to work was possible was if I was double jabbed and wore a visor none of my grievances have been upheld and have had no contact since October except to ask for another slickline. You have caused my health to deteriorate and forced me into financial hardship I do not in any way believe I have affirmed or waived your breach".

82. Mr Jamieson, on 1 February 2022, asked the claimant to reflect on her decision and gave her time to change her mind. He provided the claimant with LifeWorks information and grievance procedure notes in his communication on 1 February 2022.

83. On 7 February 2022, the claimant confirmed she would like her letter of 28 January 2022 to be taken as her resignation. The claimant did not work her notice period.

84. In fact, the reason why the claimant resigned was because she wished to focus on her own health and move on. It was not because of anything the respondent had done. She had decided that things were not going to change and she wanted to start afresh.

Exemption

85. The claimant obtained an NHS exemption card that was sent to her on 15 February 2021. The claimant first shared her exemption card with the respondent on 10 February 2022 in the disability status preliminary hearing. Prior to that date she had found an exemption card online but this had not been shown to the respondent.

Earnings

86. The claimant earned £1,087.00 (gross) per month.

Advice and support

87. The claimant was a trade union representative and a member of a trade union and had the benefit of their input during her employment (and thereafter). She also had independent legal advice regarding their claim of discrimination in relation to the 27 October 2021 welfare meeting.

88. The claimant knew of the Tribunal and time limits at all material times. She did not raise a claim following the issues in October as she wished to wait and see what happened with her employment. She raised a claim following her decision to resign and move on with her life.

Observations on the evidence

89. This was a case where there were few disputes in relation to the material issues that required to be determined. Each of the witnesses sought to provide their evidence as best they could and there were no real issues arising.

Law

Burden of proof

90. The Equality Act 2010 provides for a shifting burden of proof. Section 136 so far as material provides as follows:

> *"(2) If there are facts from which the Court could decide in the absence of any other explanation that a person (A) contravened the provision concerned, the Court must hold that the contravention occurred.*
>
> *(3) But subsection (2) does not apply if A shows that A did not contravene the provision."*

91. The section goes on to make it clear that a reference to the Court includes an Employment Tribunal.

92. It is for a claimant to establish facts from which the Tribunal can reasonably conclude that there has been a contravention of the Act. If the claimant establishes those facts, the burden shifts to the respondent to show that there

has been no contravention by, for example, identifying a different reason for the treatment.

93. In **Hewage v Grampian Health Board** 2012 IRLR 870 the Supreme Court approved guidance previously given by the Court of Appeal on how the burden of proof provision should apply. That guidance appears in **Igen Limited v Wong** 2005 ICR 931 and was supplemented in **Madarassy v Nomura International Plc** 2007 ICR 867. Although the concept of the shifting burden of proof involves a two stage process, that analysis should only be conducted once the Tribunal has heard all the evidence, including any explanation offered by the employer for the treatment in question.

94. However, if in practice the Tribunal is able to make a firm finding as to the reason why a decision or action was taken, the burden of proof provision is unlikely to be material.

95. It was confirmed by Lord Justice Mummery in the Court of Appeal that it is not always necessary to address the two-stage test sequentially (see **Brown v London Borough of Croydon** 2007 ICR 909). Although it would normally be good practice to apply the two-stage test, it is not an error of law for a tribunal to proceed straight to the second stage in cases where this does not prejudice the claimant. In that case, far from prejudicing the claimant, the approach had relieved him of the obligation to establish a *prima facie* case.

96. The Tribunal was also able to take into account the recent Employment Appeal Tribunal decisions in this regard in **Field v Steve Pye & Co** EAT2021-000357 and **Klonowska v Falck** EAT-2020-000901. The Tribunal carefully considered the evidence and made findings in light of the facts found, applying the burden of proof provisions, where necessary. The Tribunal was able to make positive findings of fact on key issues.

Indirect discrimination

97. Section 19 of the Equality Act 2010 states:

"***19 Indirect discrimination***

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

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

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

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

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

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

98. Lady Hale in the Supreme Court gave the following general guidance in **R (On the application of E) v Governing Body of JFS** [2010] IRLR 136.

"Indirect discrimination looks beyond formal equality towards a more substantive equality of results: criteria which appear neutral on their face may have a disproportionately adverse impact upon people of a particular colour, race, nationality or ethnic or national origins."

99. The same principle applies for other protected characteristics, including disability.

Provision, criterion or practice

100. The provision, criterion or practice (PCP) applied by the employer requires to be specified. It is not defined in the Act. In case law in relation to the predecessor provisions of the 2010 Act the courts made clear that it should be widely construed. In **Hampson v Department of Education and Science** [1989] ICR 179 it was held that any test or yardstick applied by the employer

was included in the definition. Guidance on what was a PCP was given in **Essop v Home Office** [2017] IRLR 558*.*

101. In **Ishola v Transport for London** [2020] IRLR 368 Lady Justice Simler considered the context of the words PCP and concluded as follows:

"In context, and having regard to the function and purpose of the PCP in the Equality Act 2010, all three words carry the connotation of a state of affairs (whether framed positively or negatively and however informal) indicating how similar cases are generally treated or how a similar case would be treated if it occurred again. It seems to me that 'practice' here connotes some form of continuum in the sense that it is the way in which things generally are or will be done. That does not mean it is necessary for the PCP or 'practice' to have been applied to anyone else in fact. Something may be a practice or done 'in practice' if it carries with it an indication that it will or would be done again in future if a hypothetical similar case arises. Like Kerr J, I consider that although a one-off decision or act can be a practice, it is not necessarily one."

102. The Equality and Human Rights Commission Code on Employment at paragraph 4. 5 states as follows:

"The first stage in establishing indirect discrimination is to identify the relevant provision, criterion or practice. The phrase 'provision, criterion or practice' is not defined by the Act but it should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions. A provision, criterion or practice may also include decisions to do something in the future – such as a policy or criterion that has not yet been applied – as well as a 'one-off' or discretionary decision."

Disproportionate impact

103. There must be evidence that shows the PCP creates a disproportionate impact upon women (in respect of sex discrimination) and older people (in respect of age discrimination).. That is a matter also referred to in the Equality

and Human Rights Commission Code of Practice: Employment ("the Code") at paragraph 4.15 onwards.

Particular disadvantage

104. The wording of section 19 does not require statistical proof. As Baroness Hale put it in **Homer v Chief Constable of West Yorkshire Police** [2012] IRLR 601 the change in the Act over the predecessor provisions

"was intended to do away with the need for statistical comparison where no statistics might exist… Now all that is needed is a particular disadvantage when compared with other people who do not share the characteristic in question".

105. In **Essop v Home Office** [2017] IRLR 558 the Supreme Court made the following comments:

"A third salient feature is that the reasons why one group may find it harder to comply with the PCP than others are many and various … They could be social, such as the expectation that women will bear the greater responsibility for caring for the home and family than will men …"

106. In **Cumming v British Airways plc** UKEAT/0337/19 that quotation was referred to in relation to sufficiency of evidence as follows:

"there may be an argument that Lady Hale's general proposition was sufficient to establish the case along with the statistics relating to the whole of the crew or that in any event there was no reason to think that the proportion of men in the crew with childcare responsibilities differed materially from the proportion of females with such responsibilities".

107. Assumptions should be avoided and decisions made on the basis of evidence.

Objective justification

108. It is for the employer to establish the defence on the balance of probabilities. It has the elements of:

(i) The means to achieve the aim must correspond to a real need for the organisation

(ii) They must be appropriate with a view to achieving the objective

(iii) They must be reasonably necessary to achieve that end.

109. In **Chief Constable v Homer** 2012 ICR 704 Baroness Hale emphasised that to be proportionate a measure has to be both an appropriate means of achieving the legitimate aim and reasonably necessary in order to do so.

110. The Employment Appeal Tribunal held in **Land Registry v Houghton and others *UKEAT/0149/14*** that the Tribunal requires to balance the reasonable needs of the respondent against the discriminatory effect on the claimant. That was explained further in **City of Oxford Bus Services Ltd v Harvey** UKEAT/0171/18 as follows *"proportionality requires a balancing exercise with the importance of the legitimate aim being weighed against the discriminatory effect of the treatment……an employer is not required to prove there was no other way of achieving its objectives (***Hardys & Hansons place v Lax** [2005] IRLR 726*). On the other hand, the test is something more than the range of reasonable responses (again see* **Hardys***)."*

111. Guidance on that issue is also given at paragraphs 4.25 onwards in the Code.

Reasonable adjustments

112. Section 39(5) of the Equality Act 2010 provides that a duty to make reasonable adjustments applies to an employer. Further provisions about that duty appear in sections 20 and 21 and Schedule 8. Paragraph 20 of Schedule 8 states: *"A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know, … that an interested disabled person has a disability and is likely to be placed at the disadvantage".* This is considered in chapter 6 of the Code.

113. Section 20, so far as relevant, provides as follows –

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule

apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage."

(4) The second requirement is a requirement where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled to take such steps as it is reasonable to have to take to avoid the disadvantage.

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

114. Failure to comply with the duty to make reasonable adjustments is dealt with in section 21 which, so far as relevant, provides – *"(1) A failure to comply with the first…. requirement is a failure to comply with a duty to make reasonable adjustments. (2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person."*

115. The importance of a Tribunal going through each of the constituent parts of section 20 was emphasised by the Employment Appeal Tribunal in **Environment Agency v Rowan** 2008 ICR 218 and reinforced in **Royal Bank of Scotland v Ashton** 2011 ICR 632.

116. As to whether a "provision, criterion or practice" ("PCP") can be identified, the Code at paragraph 6.10 says the phrase is not defined by the Act but "should be construed widely so as to include for example any formal or informal policy,

rules, practices, arrangements or qualifications including one off decisions and actions". The question of what will amount to a PCP was considered by the Employment Appeal Tribunal in **Nottingham City Transport Limited v Harvey** UKEAT/0032/12 and **Ishola v Transport for London** [2020] EWCA Civ 11.

117. For the duty to arise, the employee must be subjected to "substantial disadvantage in comparison to a person who is not disabled" and with reference to whether a disadvantage resulting from a provision, criterion or practice is substantial, section 212(1) defines "substantial" as being "more than minor or trivial". The question is whether the PCP has the effect of disadvantaging the disabled person more than trivially in comparison to those who do not have the disability (**Sheikholeslami v University of Edinburgh**, 2018 IRLR 1090).

118. The obligation to take such steps as it is reasonable to have to take to avoid the disadvantage is one in respect of which the Code provides considerable assistance, not least the passages beginning at paragraph 6.23 onwards. A list of factors which might be taken into account appears at paragraph 6.28 and includes the practicability of the step, the financial and other costs of making the adjustment and the extent of any disruption caused, the extent of the employer's financial or other resources and the type and size of the employer.

119. Paragraph 6.29 makes clear that ultimately the test of the reasonableness of any step is an objective one depending on the circumstances of the case. It is for the Tribunal to assess this issue. Examples of reasonable adjustments in practice appear from paragraph 6.32 onwards.

Constructive unfair dismissal

120. The unfair dismissal claim was brought under Part X of the Employment Rights Act 1996. An unfair dismissal claim can be pursued only if the employee has been dismissed as defined by Section 95. Section 95(1)(c) which provides that an employee is dismissed by his employer if: "the employee terminates the contract under which he is employed (with or without

notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

121. The principles behind such a "constructive dismissal" were set out by the Court of Appeal in **Western Excavating (ECC) Limited v Sharp** [1978] IRLR 27. The statutory language incorporates the law of contract, which means that the employee is entitled to treat himself as constructively dismissed only if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract.

122. The term of the contract upon which the claimant relied in this case was the implied term of trust and confidence. In **Malik and Mahmud v Bank of Credit and Commerce International** [1997] ICR 606 the House of Lords considered the scope of that implied term and the Court approved a formulation which imposed an obligation that the employer shall not: *"…without reasonable and proper cause, conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."*

123. It is also apparent from the decision of the (then) House of Lords that the test is an objective one in which the subjective perception of the employee can be relevant but is not determinative. Lord Nicholls put the matter this way at page 611A: *"The conduct must, of course, impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer. That requires one to look at all the circumstances."*

124. The objective test also means that the intention or motive of the employer is not determinative. An employer with good intentions can still commit a repudiatory breach of contract.

125. In **Bournemouth University Higher Education Corporation v Buckland** [2010] ICR 908 the Court of Appeal confirmed that the test of the "band of

reasonable responses" is not the appropriate test in deciding whether there has been a repudiatory breach of contract of the kind envisaged in **Malik**.

126. Not every action by an employer which can properly give rise to complaint by an employee amounts to a breach of trust and confidence. The formulation approved in **Malik** recognises that the conduct must be likely to destroy or seriously damage the relationship of confidence and trust. In **Frenkel Topping Limited v King** UKEAT/0106/15/LA the Employment Appeal Tribunal chaired by Langstaff P put the matter this way (in paragraphs 12-15):

*"12. We would emphasise that this is a demanding test. It has been held (see, for instance, the case of **BG plc v O'Brien** [2001] IRLR 496 at paragraph 27) that simply acting in an unreasonable manner is not sufficient. The word qualifying "damage" is "seriously". This is a word of significant emphasis. The purpose of such a term was identified by Lord Steyn in **Malik v BCCI** [1997] UKHL 23 as being:*

"… apt to cover the great diversity of situations in which a balance has to be struck between an employer's interest in managing his business as he sees fit and the employee's interest in not being unfairly and improperly exploited."

*13. Those last four words are again strong words. Too often we see in this Tribunal a failure to recognise the stringency of the test. The finding of such a breach is inevitably a finding of a breach which is repudiatory: see the analysis of the Appeal Tribunal, presided over by Cox J in **Morrow v Safeway Stores** [2002] IRLR 9.*

*14. The test of what is repudiatory in contract has been expressed in different words at different times. They are, however, to the same effect. In **Woods v W M Car Services (Peterborough) Ltd** [1981] IRLR 347 it was "conduct with which an employee could not be expected to put up". In the more modern formulation, adopted in **Tullett Prebon plc v BGC Brokers LP & Ors** [2011] IRLR 420, is that the employer (in that case, but the same applies to an employee) must demonstrate objectively by its behaviour that it is abandoning and*

altogether refusing to perform the contract. These again are words which indicate the strength of the term.

15. Despite the stringency of the test, it is nonetheless well accepted that certain behaviours on the part of employers will amount to such a breach. Thus in ***Bournemouth University Higher Education Corporation v Buckland*** *[2010] ICR 908 CA Sedley LJ observed that a failure to pay the agreed amount of wage on time would almost always be a repudiatory breach. So too will a reduction in status without reasonable or proper cause (see* ***Hilton v Shiner Builders Merchants*** *[2001] IRLR 727). Similarly the humiliation of an employee by or on behalf of the employer, if that is what is factually identified, is not only usually but perhaps almost always a repudiatory breach."*

127. In some cases, the breach of trust and confidence may be established by a succession of events culminating in the "last straw" which triggers the resignation. In such cases the decision of the Court of Appeal in **London Borough of Waltham Forest v Omilaju** [2005] IRLR 35 demonstrates that the last straw itself need not be a repudiatory breach as long as it adds something to what has gone before, so that when viewed cumulatively a repudiatory breach of contract is established. However, the last straw cannot be an entirely innocuous act or be something which is utterly trivial. The Court of Appeal recently reaffirmed these principles in **Kaur v Leeds Teaching Hospitals NHS Trust** [2018] EWCA Civ 978.

128. The Tribunal must decide objectively whether there is repudiatory breach by considering its impact on the contractual relationship of the parties. The fact that the employer may genuinely believe that the breach is not repudiatory is irrelevant: **Millbrook Furnishing Industries Ltd v McIntosh** [1981] IRLR 309. The Tribunal must decide objectively whether there is repudiatory breach by considering its impact on the contractual relationship of the parties.

129. There is no rule that an act of discrimination will necessarily constitute a repudiatory breach of contract (as the Tribunal should apply the relevant legal test) – see **Shaw v CCL Ltd** 2008 IRLR 284. If an employer "seriously

breaches" its obligation to make reasonable adjustments over a period of time that is more likely to amount to a breach of the implied term of trust and confidence (**Greenhof v Barnsley** 2006 IRLR 98).

130. In short, in order for the employee to be able to claim constructive dismissal, four conditions must be met:

a. There must be a breach of contract by the employer.

b. That breach must be sufficiently important to justify the employee resigning, (or the last in a series of incidents which justify her leaving).

c. She must leave in response to the breach and not for some other, unconnected reason. The breach should be a reason in the sense of played a part in the resignation (but does not need to be the principal cause – **Wright v North Ayrshire Council** [2014] IRLR 4).

d. The claimant must not delay too long in terminating the contract in response to the employer's breach, otherwise he may be deemed to have waived the breach and agreed to vary the contract, called affirmation.

131. If the employee leaves in circumstances where these conditions are not met, she will be held to have resigned and there will be no dismissal.

132. If the claimant proves that her resignation was in truth a dismissal, Section 98 governs the question of fairness. This means that a constructive dismissal is not necessarily unfair. The Tribunal should making explicit findings on the reason for the dismissal and whether the employer has acted reasonably in all the circumstances: **Savoia v Chiltern Herb Farms** [1982] IRLR 166. In **Berriman v Delabole Slate Ltd** [1985] IRLR 305, Browne-Wilkinson LJ, said: *"…in our judgment, even in a case of constructive dismissal, [s 98(1) of the ERA 1996] imposes on the employer the burden of showing the reason for the dismissal, notwithstanding that it was the employee, not the employer, who actually decided to terminate the contract of employment. In our judgment, the only way in which the statutory requirements can be made to fit a case of constructive dismissal is to read section 98 as requiring the*

employer to show the reasons for their conduct which entitled the employee to terminate the contract thereby giving rise to a deemed dismissal by the employer."

133. The Tribunal must consider what the reason for the employer's actions were that led to the dismissal (which is an objective question) and then apply the statutory wording to determine whether the dismissal was fair in all the circumstances. See **Buckland v Bournemouth University** [2010] IRLR 445.

134. If the claimant proves that her resignation was in truth a dismissal, Section 98 governs the question of fairness.

Reinstatement and reengagement

135. Sections 112 onwards of the Employment Rights Act 1996 set out these remedies which gives the Tribunal the power to order an employer to reinstate or reengage an employee who has been unfairly dismissed in certain cases.

Compensation

136. Where an employee has been unfairly dismissed, compensation can be awarded which would comprise a basic award and a compensatory award.

Basic award

137. This is calculated in a similar way to a redundancy payment, namely half a week's gross pay for each year of employment when the claimant was under 22 (section 119 of the Employment Rights Act 1996).

Compensatory award

138. This must reflect the losses sustained by the claimant as a result of the dismissal. Section 123 of the Employment Rights Act 1996 states it shall be such amount as the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer. The amount that can be awarded is subject to a statutory cap.

Submissions

139. Both parties made submissions and the parties were able to comment upon each other submissions and answer questions from the Tribunal. The Tribunal deals with the parties' submissions as relevant below but does not repeat them in detail. The parties' full submissions were taken into account in reaching a unanimous decision.

Decision and reasons

140. The Tribunal spent a time considering the evidence that had been led, both in writing and orally and the full submissions of both parties and was able to reach a unanimous decision on each of the issues. The Tribunal deals with issues arising in turn.

Time limits

141. The issue here was whether the claim in respect of the failure to make reasonable adjustments was within time. The parties accepted that the in terms of the facts, the time started to run at the meeting on 27 October 2021. The claim was introduced on 3 April 2022 and properly specified on 20 June 2022.

142. The respondent argued that the allegations were brought out of time. The claimant accepted in evidence that she had a legal advisor and a trade union representative. She accepted that she conciliated with ACAS twice.

143. It was argued that it was not just and equitable to extend time. The claimant advised that the reason she sought leave to amend in April was because she wanted to wait and see what was going to happen. She confirmed that she knew the tribunal process and had knowledge of the procedure. It was the respondent's position that the claimant's decision to introduce new allegations was motivated by the disability status determination of EJ Kemp dated 16 February 2022. In his note, EJ Kemp acknowledged that he was unsure whether the claimant's claim could continue. Her claims at that time relied on allegations prior to 1 October 2021. It is submitted that the Claimant sought to introduce new allegations in reaction to the disability status judgement.

Otherwise, little or no discrimination allegations would have remained. At the latest, they could have been raised in the December 2021 preliminary hearing.

144. The claimant argued her claim was lodged within the time limit and early conciliation was attempted but the respondent failed to respond. The claimant's agent submitted that there should be a just and equitable extension of time because after the initial act of sending her home in January 2021 the claimant followed the company's grievance policy and lodged a grievance with a subsequent appeal lodged, along with a request to be referred to Occupational Health, when the grievance failed. The appeal also failed, despite OH stating she was unable to wear a mask, and since then the company's refusal to allow her to return to work continued until she ultimately resigned in January 2022. The company continued to conduct welfare meetings with her during the period that she was not allowed to work and each time it was stated that she could not return to work without wearing a face covering - initially this was a mask but from October 2021 this changed to a visor, which they argued was not a face covering.

Decision on time bar

145. The claim had been raised outwith the statutory time period. The Tribunal was satisfied it was not just and equitable to extend the time limit. The claimant had the benefit of legal advice. She understood the Tribunal process and knew about time limits. The claimant chose not to raise a claim about the issues that occurred at that time as she wished to wait and see what happened with her employment. She could have raised a claim if she had wished to do so but decided not to do so. This particular claim was only raised as she had decided to resign. The Tribunal balanced the impact of not being allowed to proceed with the claim with the impact upon the respondent and the full factual matrix.

146. Despite it not being just to extend the time limit, the Tribunal considered the merits of this claim below and found that it is ill founded. Had it been necessary to determine the time limit issue, the Tribunal would have found in favour of the respondent and that the claim had been raised late and it was

not just to extend the time limit. The claimant had known about the time limits and had chosen not to raise a claim within time. This particular claim was only raised following the preliminary hearing determination. It would not have been just and equitable to extend the time limit.

Disability discrimination

147. On 16 February 2022 the Tribunal determined that the claimant was disabled by virtue of Vertigo from 1 October 2021. Did the respondent know or ought it reasonably to have known that the claimant was a disabled person in the course of the welfare meeting held on 27 October 2021?

148. The respondent's agent argued that none of the witnesses was aware that the claimant had a disability. Mr Coville understood that she was working through symptoms with medical professionals and following the October 2021 meeting, he wanted to allow the claimant time to trial new migraine and vertigo medication. A review period of 4-6 weeks was agreed after the claimant advised that the specialists would then review 'how she was getting on' with it.

149. The Tribunal considered the evidence. It had been made clear to the respondent that the claimant had been unable to wear a face mask during the grievance process. Reference had been made to the Equality Act (and to reasonable adjustments). The issues the claimant raised were self evidently related to her health and impairments she had.

150. During the course of the meeting on 27 October 2021 the claimant made it clear that she was struggling with her day to day activities. For example, she would faint and could not wear a mask. The respondent had sufficient information to alert them to the fact that the claimant's impairments were likely to amount to a disability and that she was unable to attend work due to the impact upon her.

151. Looking at the facts objectively, the Tribunal is satisfied that the respondent that the claimant had a disability at the 27 October 2021 meeting or ought to have known. By that stage the claimant had not returned to work due to her

inability to wear a face mask which stemmed from her disability, as set out in the occupational health report.

Indirect discrimination (Equality Act 2010 section 19)

152. The respondent accepted that it applied a PCP to all staff, including the claimant, namely that the mandatory face mask policy effective from 18 January 2021. The respondent accepted it applied the facemask policy to the claimant and to persons with whom the claimant does not share the protected characteristic. The respondent also accepted that the facemask policy put persons with whom the claimant shares the characteristic at a particular disadvantage when compared with persons with whom the claimant does not share the characteristic. That substantial disadvantage was that she was unable to attend site and work without a face mask unless it complied with the risk assessment requirements.

153. The key issue in this claim was therefore whether the facemask policy was a proportionate means of achieving a legitimate aim, that legitimate aim being to protect the health and safety of the workforce, specifically against the transmission of COVID-19.

154. The respondent's agent noted that the respondent's witnesses explained the scope of the policy and that it was implemented in response to a strain of coronavirus that was considered by the Government to be transmissible through the nose and throat. Adjustments and control measures were introduced to assist employees who were identified as exempt. They were ultimately asked not to attend site and medically suspended or furloughed if the exemption was on medical grounds. The respondent regularly reviewed its risk assessment and made proportionate updates that accorded with the government guidance at the relevant time. As such, visors were introduced as a possible PPE alternative from October 2021 when the vaccination programme was rolled out. The claimant accepted Coronavirus was a life-threatening virus and their production of medication significantly increased during the pandemic. She understood measures had to be put in place to

reduce the risk of COVID-19 transmission to each other and to the end consumer, who could be reliant on the respondent for 'life saving' medication,

155. The claimant argued that there was no legitimate aim and the respondent showed no regard for government guidance or the Health and Safety Executive advice on risk assessments. The respondent's aim for introducing a face mask policy was in response to the global pandemic. The claimant accepted that and that prior to the introduction of the facemask policy, she wore a facemask in the workplace, albeit at times admitted that she wore it 'under her chin'. The respondent's agent submitted that the claimant understood, and engaged with, the Scottish government guidance on facemasks at that time. Therefore, as the January 2021 policy 'matched' the mandatory mask requirement indoors, the respondent was entitled to expect the claimant to comply with the policy in the same way.

156. With regard to the aims for the facemask policy, the respondent's agent submitted that the respondent was a key operator in the pharmaceutical industry during the height of the pandemic. Alliance healthcare is a supplier to the four emergency services in the UK, and directly supplies pharmaceutical products to the NHS, Doctor practices and independent pharmacies. As they supplied their pharmaceutical products or supported the industry throughout the pandemic, there would have been a large strain on the UK's health resources if a COVID-19 outbreak were to occur on site. Lee Jamieson advised that the supply chain was so crucial that military assistance was offered, should deliveries become problematic.

157. The policy acknowledges that there are circumstances when it cannot be complied with for medical reasons. As employees had already been wearing masks on the premises, it set up welfare meetings with those who were known to be exempt. It considered reasonable adjustments such as isolated working and made a referral to occupational health where necessary. When the claimant asserted in her grievance meeting on 11 February 2021 that she was exempt, despite not providing evidence at that time, the respondent acted with caution and took the steps required by the policy regardless. Despite the claimant never producing evidence of her exemption or engaging with the

alternatives, the respondent did not manage her formally under its capability or disciplinary procedure despite this being a possible outcome as outlined in the policy.

158. It was argued that the measure of requiring facemasks on site was proportionate to achieve the aim of protecting health and safety in the pandemic. The claimant accepted that an outbreak of COVID-19 within the warehouse would have had serious detrimental impact on both the supply of life saving medicines and the well-being of staff and customers. She accepted that at that time, it was not known how the virus could be transmitted. She accepted that droplets landing on medication boxes or other people could have had serious consequences. The policy was a necessary response at an unprecedented time. Nevertheless, the respondent put structured steps in place to support affected employees insofar possible and all known exempt employees had reasonable adjustments in place or were medically suspended before the policy went live. Finally, the policy was also proportionately applied to the claimant. Although the policy outlined that capability and disciplinary sanctions could be applied in some cases, the claimant acknowledged this step was never taken. The respondent considered that both parties were exploring potential adjustments together. The respondent kept her job available at all times, should she return to work.

Decision on objective justification

159. The Tribunal accepted that the aim relied upon, namely to protect health and safety of the workforce, specifically to limit transmission of COVID19, was a legitimate aim.

160. The Tribunal was satisfied that the measure was capable of achieving the aim. At the time in question, knowledge about the pandemic was not the same as it is now. At the time in question there was uncertainty as to how the virus was transmitted and how things were going to progress.

161. There was no doubt that the policy was capable of achieving the aim as it sought to reduce the risk of droplets being exposed into the working environment. It was not possible to extinguish risk but it could be minimised

as much as possible by adopting the policy in question, recognising that those who could not comply would meet with their manager to identify a solution, if possible. The PCP was also reasonably necessary to achieve the aim.

162. The key issue was whether the measure taken to achieve the aim, the no mask no entry policy, was a proportionate way of achieving that aim. In assessing proportionality, the Tribunal must balance the discriminatory effect of the requirement with the legitimate aim in question, considering matters both quantitatively and qualitatively. The Tribunal also considered whether a lesser form or measure would achieve the aim. The Tribunal intensely analysed the measure and its impact upon the claimant and generally.

163. Having considered the evidence the Tribunal noted that the impact of the measure was in essence to prevent the claimant from attending the workplace. She was unable to wear anything on or near her face even for a short period to access site or in areas there were colleagues were present. The information available to the respondent at the time showed that any exposure to droplets had the potential to increase transmission of the virus. While the risk for some may be low, businesses such as the respondent's required to take extra precautions to ensure the risk was reduced as far as possible (particularly for those who were vulnerable, which included the claimant herself). The respondent required to adopt a position that was more draconian than other employers for sound business and health reasons.

164. The measure in question was introduced to protect not just individuals (such as the claimant) but to ensure the integrity of the entire operation was preserved (and thereby ensure important medication for the public was delivered timeously). If there was a breakout of COVID, that could have a very serious impact upon the delivery of life saving medication to many people in need of it. To adopt a lesser policy would imperil the process given the knowledge of transmission at the time. For those reasons the respondent had to adopt a more stringent approach than say operated in other employers, shops or public places.

165. The Tribunal was mindful of the impact of the measure upon the claimant (and others who were unable to comply with the policy) but had to balance that with the impact upon the respondent and its staff and customers. Having intensely analysed the impact of the measure the Tribunal found that the respondent had shown that the aim in question was legitimate and the measure in question was proportionate having balanced the effect of the PCP with the impact upon the respondent. There were no alternatives which would ensure safety was preserved in light of the prevailing knowledge. The claimant was not prepared to wear a face covering at all, even for a short period of time. She was not prepared to explore the other options that were presented to her to seek to minimise the impact upon her health. The respondent did seek to explore alternatives but on the facts of this case there were no alternatives which would have allowed the claimant to return to work. There were no lesser forms of the measure which would serve the legitimate aim on the facts of this case, the respondent having explored the alternatives.

166. Having balanced all the relevant factors in light of the evidence and the applicable law, the Tribunal found that the PCP was a proportionate means of achieving a legitimate aim. It was objectively justified. The indirect discrimination claim is ill founded and is dismissed.

Reasonable adjustments (Equality Act 2010 sections 20 and 21)

167. The first issue is whether the respondent knew the claimant was disabled and that she was likely to be placed at the substantial disadvantage relied upon.

168. The respondent denied they knew of the claimant's status at the meeting of 27 October as any adjustments that were proposed were done so in accordance with the facemask policy, which steps equally apply to people without disabilities and with a view to help the claimant back to work.

169. The Tribunal found that the respondent knew or ought to have known of the claimant's disability by 27 October 2021. It also knew that the claimant was likely to be placed at a substantial disadvantage because it was clear by the meeting that the claimant was unable to attend work as she could not wear a face mask.

170. The respondent accepted that it had a PCP, that PCP being its mandatory face mask policy effective from 18 January 2021 and that the facemask policy applied to the claimant and to persons with whom the claimant does not share the characteristic. The respondent also accepted that the policy put persons with whom the claimant shares the characteristic at a particular disadvantage when compared with persons with whom the claimant does not share the characteristic since the claimant was unable to attend site to work. The issue is therefore what steps should the respondent to have taken that could reasonably have removed the substantial disadvantage. The claimant's case was that staggered start/finish and break times together with a "risk assessment with the claimant's disability considered" were steps the respondent should have taken.

171. The respondent's agent argued that these were not reasonable steps in the circumstances. It was submitted that all reasonable steps had been taken, particularly looking to alter the fabric (surgical) face mask for a silicone face cover that sits under the eye and against the nose, a clear plastic face cover that stood on the face and a visor from October 2021 if the claimant was double vaccinated.

172. The respondent's agent submitted that a risk assessment is not capable of being considered as a reasonable adjustment since there is no PCP that is being adjusted. Had the respondent carried out a risk assessment, it would not amount to an alteration, avoidance or removal of the facemask policy. It would have no effect. The function of a risk assessment is to report circumstances and provide focussed information on a particular subject. Applying the principles set down in **Tarbuck v Sainsbury Supermarkets Ltd** UKEAT/0136/06/LA, there is no separate and distinct duty to provide 'consultation' which extends to risk assessments.

173. The respondent's agent also noted that the claimant did not make a request for either of the suggested adjustments while she was employed and they were raised during the Tribunal process.

174. The respondent's agent submitted that the evidence was such that staggered start/finish and breaktimes was not possible without wearing a facemask as there were communal areas upon entry and exit to the building that the respondent could not prevent the remainder of the warehouse from accessing at the same time. This would bring them into contact with someone who wasn't wearing a mask. He also explained that it would not be viable to have staggered start/finish times while fulfilling production demands.

175. The respondent's agent also noted that the respondent considered other adjustments, including isolated working and furlough. On the facts a warehouse operative role could not be carried out from home and the nature of the machinery and production operation was such that it was not possible for the claimant to carry out an isolated role. There was no evidence of any other role that could be done without coming into contact with other staff. The furlough scheme had ended when the issue was raised and so this was not possible.

176. The question for the Tribunal is whether there were steps the respondent could reasonably have taken that could have removed the disadvantage the claimant suffered. The Tribunal requires to make its own assessment as to the position in light of the facts. The fact the claimant did not raise specific issues at the time is relevant but not conclusive. As the claimant's agent pointed out, the respondent, as employer, is responsible for ensuring it considers these matters.

177. The claimant had made it clear that she was unable to wear any face covering or mask. She was fearful of trying alternatives and did not do so (despite saying she would). There were no alternatives available that would reasonably have removed the disadvantage.

178. Staggering start and end times (even for a short period) or breaks did not avoid the disadvantage. This was because the claimant was unable to attend work with a face mask and would necessarily come into contact with others. It was the risk that existed which the respondent wished to minimise, if not extinguish, and their approach in that regard, from the information and

knowledgeable at the time which has to be considered, not the knowledge the world has now. The respondent's operation was such that it required to do all it possible could to reduce risk, both to the claimant and to others. It was not possible to allow the claimant on site without a face covering at all.

179. Other steps had been taken, such as to provide a space for those who required to take a break from wearing a face covering, provided face coverings were worn in areas frequented by colleagues. That was not an option open to the claimant. Staggering start and end times and staggering break times did not stop the claimant coming into contact with colleagues (whose movements could not always be controlled). The fact the claimant was unable to wear a face mask at all resulted in there being no reasonable alternatives that could be offered by the respondent. Her position meant she was unable to attend site. Adjusting the role or times etc would make no difference to the risk situation.

Decision on failure to comply with duty to make reasonable adjustments

180. The respondent's submissions with regard to a risk assessment are meritorious. Carrying out a risk assessment is not a step which would remove the disadvantage relied upon. As identified in the occupational health report, it is an employment issue. In other words, it was for the respondent to identify whether it was possible to identify a way of working that protected the claimant and others and would allow the claimant to return to work, when not able to wear any face covering. The Tribunal must consider objectively whether there were any steps that could have been taken in the circumstances.

181. The occupational health report noted that the claimant's health placed her in a vulnerable position and therefore steps that could be taken had to ensure that the claimant was not thereby placed at any risk. Allowing the claimant to attend site without a face mask would place her at risk given the risk of particles within the atmosphere being ingested by the claimant (and the prevailing circumstances). There was therefore a risk if the claimant had been permitted to attend work without a facemask that her impairments could have

been exacerbated. It would not have been reasonable to have facilitated such a position given the surrounding facts.

182. There was no suggestion that any risk assessment would have identified a specific step, in light of the claimant's disability, that could have been taken to remove the disadvantage. On the contrary it was likely that the position set out in the occupational health report would have been reiterated, that it was for the respondent, working with the claimant, to seek to identify if there was any way the claimant could carry out her tasks in a safe manner (safe for her and others). There was no way of doing her role (or any role) outside site. She required therefore to attend site. She was unable to attend the site wearing a face mask or face covering and there were no suggested steps on the facts.

183. Moving around the site resulted in the claimant coming into contact with colleagues (and products). Had she done so without a face mask, the risk to her and others would have increased. The respondent sought to identify solutions, including other face coverings. Those steps were reasonable.

184. The steps relied upon by the claimant were not practicable on the facts. Cost was not a factor in this case as there was no way to reasonably remove the disadvantage (irrespective of cost). The extent of any disruption caused was also not relevant as it was not reasonably possible to facilitate the claimant's presence on site given the prevailing circumstances. The extent of the employer's financial or other resources and the type and size of the employer did also not impact upon the suggested steps which were not reasonable.

185. The respondent did all it reasonably could to work with the claimant and to take such steps as were reasonable to remove the disadvantage the claimant encountered as a result of her disability. In all the circumstances the claimant's claim that the respondent failed to comply with its duty to make reasonable adjustments fails. It is ill founded and it is dismissed.

Constructive unfair dismissal

Was the claimant entitled to resign without notice? Did the respondent commit a fundamental breach of contract by its decision not to uphold her grievance of 31 January 2021 or by preventing the claimant from returning to work?

186. The claimant's case was essentially that the respondent's policy of not allowing her to come to work because she was unable to wear a face mask (and had refused to uphold her grievance about this) amounted to a fundamental breach of contract that entitled her to resign.

187. The respondent disputed this arguing that there was no fundamental breach. They argued that they were entitled to investigate a grievance without upholding the outcome. This was not a breach of contract. Further, the grievance was raised on 30 January 2021 and concluded by April 2021. The claimant did not complain about the way that the grievance was handled at that time, and she did not raise any further grievance. The claimant delayed her response. She continued to participate in welfare meetings. Even if there were a breach, it was accepted by the claimant's actions.

188. The respondent's agent noted that implementing the facemask policy that was created in response to the COVID-19 pandemic was not a breach and in any event the claimant delayed her resignation from 29 January 2021 when she was sent home until 22 January 2022.

189. Finally, the respondent's agent observed that the claimant resigned at a time where the rules on facemasks were publicly beginning to relax, resulting in her likely return to the workplace. Here resignation was "out of the blue". The claimant admitted that the trigger for resignation did not sit with the Respondent. She resigned due to personal factors - her mental health and financial reasons.

Decision on constructive dismissal

190. The Tribunal considered the evidence that had been presented. The claimant in giving evidence stated that she had resigned for "personal reasons". Her grievance had been refused and she was attending welfare meetings. She

was being asked the same questions about how she was and whether she was able to return to work. She said she needed a clean break. She needed to move on. While she believed things had not changed, she accepted that the policy had been relaxed, since the prohibition on a visor had been lifted. Things had changed and the restrictions were loosening. The claimant also accepted that in the wider world the restrictions were loosening and there was therefore the possibility (if not probability) that the respondent's policy would change once the risk had been properly assessed. Notwithstanding this, the claimant, naturally, wanted to put her health first (both physical and mental). She decided to resign and have a fresh start.

191. The first issue was whether or not the respondent had breached the claimant's contract of employment. The Tribunal was satisfied there was no breach of the claimant's contract. The way in which the grievance was handled was fair and reasonable. The claimant's concerns were listened to. Her appeal was properly and fully considered. The appeal was broken into 2 separate hearings to ensure the respondent had all the necessary information before it in considering the issues the claimant raised. It is not a counsel of perfection and the respondent's approach in dealing with the issues the claimant had raised in her grievance was fair and reasonable.

192. The Tribunal was satisfied that the respondent had not prevented the claimant from returning to work. The reason the claimant was unable to return to work was because she was unable to comply with the respondent's policies, which had been introduced for cogent, fair and lawful reasons. The respondent had a duty of care to the claimant and all those who entered their premises and otherwise dealt with the products for which they were responsible, which included vulnerable and ill people. The respondent had to be ultra-cautious in its approach in light of prevailing knowledge. The fact Government guidance had changed and other employers changed their policy did not render the respondent's approach unreasonable or unfair given their specific circumstances. The respondent did seek to work with those who were unable to comply with the policy and reasonably identify alternatives.

193. The respondent sought to work with the claimant to identify a way forward. There was no way, from the information before the respondent, that the claimant could attend work safely or carry out any work. The respondent sought to explore alternatives to assist the claimant and make her feel safe. The respondent supported the claimant. There was no suggestion that the claimant was at risk of dismissal. The respondent sought instead to support the claimant, work with her and find a reasonable way to allow her to attend work, whilst protecting her and the others for whom the respondent was responsible.

194. While other employers might well, reasonably, have dealt with the matter in a different way, the respondent in this case acted fairly and reasonably. The respondent had dealt with other individuals who were unable to comply with the policy and had managed their position fairly and sensitively. The respondent understood that some staff would find it difficult or impossible to comply with the policy and accordingly sought to identify ways to protect their position, whilst minimising, if not extinguishing risk.

195. Looking at matters objectively, the Tribunal is satisfied that the respondent did not breach the claimant's contract of employment. The respondent fairly determined the claimant's grievance and her appeal. She may not have liked the outcome, but it was a fair and reasonable outcome from the information before the respondent at the time. Further, the respondent did not prevent the claimant from returning to work, The respondent wanted the claimant to return to work but wanted her return to be safe (both to her and everyone else). The respondent was mindful of its duties in terms of the Equality Act 2010 and had sought to identify adjustments to remove the disadvantage the claimant faced. As the claimant was unable to wear a face covering at all, there were no reasonable alternatives that could be identified at the time. Home working was not an option for the claimant. There were no alternatives identified that would allow the claimant to continue to work. Instead the respondent maintained reasonable contact with the claimant in the hope that the position would change, thereby allowing a return to work. The respondent had reasonably

supported the claimant and sought to identify reasonable adjustments to assist it. On the facts there was none.

196. The Tribunal is also satisfied that there was no breach of the implied term of trust and confidence. The respondent had sought to support the claimant and work with her to find a way that would allow her to return to work in a way that was safe for her and her colleagues. From the information before the respondent there was no reasonable alternative that would facilitate the claimant's return in light of her inability to wear any face covering and the prevailing risk (and state of knowledge). The respondent had acted with just and proper cause and had not breached any term of the claimant's contract, express or implied.

197. It was regrettable that the claimant resigned at a time when the world was opening up again and the respondent's policy was likely to change.

198. There was therefore no breach of contract and the claimant was not constructively dismissed.

199. Having considered the evidence the claimant gave carefully, the Tribunal is satisfied that the reason why the claimant resigned was because the claimant wished to focus on her health. The respondent's actions (with regard to the grievance and policy) was not a reason for her resignation. Instead, the claimant wished, reasonably, to focus on her health and "put things on an even keel" (in her words). The claimant did not resign because of any breach by the respondent but instead to allow the claimant to focus on getting herself fit.

200. In all the circumstances of this case the claimant was not constructively dismissed. There was no breach of contract by the respondent. The claimant resigned to focus on herself, which was entirely reasonable. The claimant did not resign because of any breach by the respondent.

201. The Tribunal would also have found, had it been necessary to do so, that the claimant had delayed too long in resigning. She had affirmed any breach by the respondent. The respondent was continuing to seek alternatives for the

claimant. Nothing had changed from the respondent's perspective. She decided to resign to focus upon herself. She had resigned months following the outcome of the grievance having been communicated to her and following the welfare meeting she had. She had affirmed any breach.

202. Her claim of constructive unfair dismissal is ill founded and it is dismissed.

Summary

203. In all the circumstances of this case, each of the claims is ill founded and they are dismissed. It is accordingly not necessary to consider remedy.

Observations

204. The Tribunal finally wishes to record its thanks to the parties for working together to ensure that the overriding objective was achieved.

Employment Judge: **D Hoey**
Date of Judgment: **26 October 2022**
Entered in register: **31 October 2022**
and copied to parties