EMPLOYMENT TRIBUNALS

Claimant: Michael Furlong (as it appears on the claim form)
(to be known as michael-henry, (using lower case type))

Respondent: Jaguar Land Rover Limited

Heard at: Liverpool **On:** 16, 17 and 18 November 2022

Before: Employment Judge Aspinall

Representation

Claimant: in person supported by Ms Wildman
Respondent: Miss Kight, Counsel

JUDGMENT having been sent to the parties on 24 November 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Background

1. By a claim form dated 26 February 2022 and having achieved an ACAS Certificate on 26 February 2022 michael-henry brought his Tribunal claim for unfair dismissal. He had worked for the respondent for nine years when he was dismissed for gross misconduct on 12 November 2020 for refusing to follow safety procedures, refusing a reasonable management instruction to wear a face covering and for his vexatious correspondences on the subject.

The hearing

2. The hearing began with us agreeing how each person would be addressed in Tribunal. michael-henry asked for a transcript of the case. I explained that I would make a note of his request and keep a list of business and come back to it. He also said that if he did not succeed he would be appealing.

3. I explained that at the end of the case a Judgment document would need to be produced and the names on that Judgment would match the names on the claim

and response form. michael-henry wished to be referred to as michael-henry, in lower case. He had a friend with him supporting him, Ms Wildman. michael-henry then said that he wanted an adjournment to get a solicitor. He said he knew the law and was entitled to be on an equal footing. I added this to the list of business.

4. I wished to be referred to as "Judge". The respondent's team were to be referred to as Miss Kight and Ms Dodd. The respondent's witnesses Mr Quinn, Mr Wilding, Mr Evans and Mr Roberts were happy to be known as Fred, Jason, Andy and Clive in the tribunal room.

5. There were also members of the respondent's HR staff present and an observer in the Tribunal who was a JLR employee, none of whom needed to be named.

6. I provided a pen and paper to Ms Wildman and outlined ways in which she could support the claimant, including note taking. I explained the provisions of the Equal Treatment Bench Book and the support that I would provide to michael-henry as litigant in person.

7. michael-henry wanted to know if this was a "taxable event". This was added to the list of business.

8. We then agreed the following list of business. I decided it would be addressed in the following order;

- The request for a transcript
- Taxable event issue
- The documents – to check everyone had the same papers
- A List of Issues – so we were all clear what the case was about
- A timetable – if the case were to go ahead how we would use the time
- Postponement application to get a solicitor

<u>Transcript</u>

9. michael-henry requested a transcript of the hearing. I explained no transcript exists. The proceedings are not recorded and are not to be recorded by anyone. michael-henry had propped his mobile phone up against a bottle of water at the start of the hearing and I checked that he was not recording. The respondent was using a laptop. It was not recording either.

10. At the end of the case there may be an oral judgment and following that either party would have 14 days from the date the short judgment of the decision is sent to the parties to apply for Written Reasons. Those Reasons would then be prepared using my handwritten notes and would form the definitive version of what happened at the hearing.

11. If there is no oral judgment and I decide to take more time to think about the

case before making a decision then a Reserved Decision would be sent out and that would be the definitive version of what happened at the hearing.

12. The Short Judgment and Written Reasons (if requested) or Reserved Decision would be published on the Employment Tribunal decisions website.

Taxable event issue

13. michael-henry had written to the Tribunal prior to the hearing seeking confirmation of the status of the hearing as a taxable event or not. There had been many correspondences with the Regional Employment Judge including requests for "wet ink copy oaths of office", W9 forms and summary judgment, which had resulted in a letter from the REJ saying that there would be no summary judgment as the respondent had sent a defence to the claim and that matters would be dealt with at the hearing. michael-henry had raised the taxable event point and request for W9's before the hearing and repeated it again at the hearing.

14. Following discussion, I understood the following:

(1) michael-henry believes his surname belongs legally to the Crown and he has an equitable interest in it. He prefers to be known as michael-henry as he is answerable only to his God and he prefers that Michael Furlong, his legal identity, is not used as that belongs to the Crown and it is part of his faith that he renders unto Caesar what is Caesar's. He does not answer to the Crown he answers in faith to his God.

(2) michael-henry accepts that a legal judgment in the case will bear the name that matches the name on the claim form Michael Furlong. He asks that if possible, capitalisation is not used. I said I will respect that request in any documentation that is produced and will ask that others at Tribunal do too, but I am concerned that a typographical error or auto-correct on the software should not cause offence. michael-henry says it will not.

(3) michael-henry believes that there is law that means his legal surname can be used as a surety or bond (he could not explain what this meant, whether it related to money or not, or to what harm he might be put or to what he might be afraid of in this regard, he referred to "double dipping" but couldn't explain what that meant other than that it was to do with the legal identity and property in a Birth Certificate and the Sesta Que Vie Act and was an infringement of his rights). If his legal surname is to be used as a surety or bond he wants to know that is happening and that this hearing is therefore a "taxable event". If it is a taxable event then he wants W9 statements which, he says, are legal tax status documents for the Judge and everyone involved in the case so as to protect his position.

15. I explained that whilst what he is saying makes no sense at all, what matters is that he feel safe in this Tribunal room and is able to engage in the proceedings. I was able to assure him that no one has asked the Tribunal for any form of surety or bond over him. I assured him that the Tribunal has no power to use either him michael-henry or him Michael Furlong or Michael FURLONG as any form of surety

or bond either against his person or financially. I explained the range of outcomes in an unfair dismissal complaint and the costs provisions.

16. On that understanding michael-henry confirmed that in his mind no taxable event had arisen and he withdrew his request for W9 statements. He asked that I inform REJ Franey that he was therefore released from his Trusteeship. Further discussion revealed that michael-henry believed that by sending a document "Asseveration" to REJ Franey he had, in law, made REJ Franey his trustee with some obligation, that michael-henry could not fully explain, to keep him safe from "surety" or "bond". I understood this to mean that michael-henry, who had acted on mistaken beliefs in what the law could do, now wanted to release REJ Franey from a situation he believed he had created, and I felt that, though mistaken, this was a courteous thing to do. I agreed to write this up and copy my written decision to REJ Franey.

17. I asked what was needed so that michael-henry would feel comfortable in the proceedings. michael-henry wished the Tribunal to acknowledge his Universal Cognate of Viva Voce and Sui Juris. I asked that he please explain in ordinary words how he wanted to be treated. He said that he wanted to be treated "as I speak" "in my own right". I assured him that he would be treated with respect, as he spoke, in his own right, as would everyone within the court room. michael-henry said that was it, no other issues arose in relation to identity or taxable event and thanked me for the respect shown for his beliefs.

Documents

18. I then took the parties to the documents. There was a bundle and I randomly opened it at a page and got the parties to check the pagination matched and asked michael-henry to tell me what the documents were about. During this process I could see that michael-henry had a good understanding of his case, of the arguments on each side and the relevant documents and oral evidence he would use to advance his case and refute the respondent's case.

19. The bundle had been prepared by the respondent and was 350 pages long. It included the letter convening the disciplinary hearing, the transcript notes of the investigatory, disciplinary and appeal meetings and the letter of dismissal. It also included documents michael-henry had attached to his witness statement. They were approximately 88 unpaginated pages which he had labelled and numbered as his annexures. They had been subsumed and paginated within the core bundle.

20. It mattered to michael-henry that his documents had been sworn before a notary public or were affidavits. He had included scripture quotations to support his view that a sworn document or affidavit was true in law unless rebutted. In places he had marked his documents with his fingerprint in red. It mattered to him that I see the originals. I told him I had seen them on the Tribunal file. His view was that by removing his annexure label and paginating the document within the core bundle the respondent had tampered with his documents and in some way reduced their value or weight to be attached to them. I checked each of the annexures with michael-henry page by page and he agreed that apart from removing his labelling the documents were the same. michael-henry agreed that by looking at the bundle I would be looking at all the content he wanted me to see.

21. I assured michael-henry that the same weight would be attached to the versions in the bundle as the versions he had attached to his statement and that in Tribunal we do not need documents to be sworn before a notary or marked with a fingerprint. michael-henry had the mistaken belief that if it was sworn it could not be refuted. I explained that getting it sworn or fingerprinted does not mean I have to believe it. I explained that it would be evidence on oath before me this week that mattered. I would listen, look at the documents, hear what everyone had to say and make a decision based on the law relevant to his claim. michael-henry understood this and was happy to proceed.

List of Issues

22. I took time to explain the law on unfair dismissal, referring to reason, potentially fair reason and reasonableness. I explained the Burchell test and the Iceland range of reasonable responses and substitution principle. Ms Wildman made notes. I explained that michael-henry may feel disappointed that broader issues that I can see mattered to him because of his documentation; like the existence or not of the COVID-19 virus, the health risks of mask wearing and whether or not there was a government or global conspiracy to commit genocide, would not be determined by the Tribunal. I said, no one's belief in the existence of a virus or not is on trial.

23. My "spotlight" would be on the law of unfair dismissal and that it might come down to whether or not the instruction to wear a face covering was a lawful and reasonable management instruction that he had refused to follow, and whether dismissal was a reasonable response to that. michael-henry understood but felt that the bigger background of his beliefs was relevant to the reasonableness of the instruction. Later, during cross examination he asked Fred was it not a war crime, under the Geneva Convention to force a medical intervention on him. He asked Andy was it not in breach of Nuremburg Code to force him to wear a face covering. He tried to ask questions about war crimes, genocide and treason. On each occasion I was able to help michael-henry to rephrase his question in unfair dismissal law.

24. The following list of issues was agreed

1. What was the reason for dismissal?

2. Was that a potentially fair reason?

The potentially fair reason relied upon by the Respondent is conduct.

3. Did the Respondent act reasonably in all the circumstances:

    a. Did the employer (Andy) have a genuine belief?

    b. Held on reasonable grounds?

    c. Of the guilt of the employee of that misconduct at that time?

(that michael-henry was refusing to wear a face covering?)

d. Having carried out such investigation as was reasonable in all the circumstances of the case?

4. Was that reason sufficient to justify dismissal (i.e. did it fall within the range of reasonable responses)?

5. If the dismissal was unfair, did michael-henry cause or contribute to the dismissal by any blameworthy or culpable conduct and, if so, to what extent?

6. If the dismissal was procedurally unfair, what adjustment (if any) should be made to any award to reflect the possibility that michael-henry would still have been dismissed in any event had a fair and reasonable procedure been followed?

25. michael-henry also wanted me to look at broader areas of law including Canon Law, the Geneva Convention, The Nuremburg Codes, the Fraud Act 2006 and criminal laws. I explained that these would not be relevant.

26. He did not want to add to the complaints on his claim form; there were references in his correspondence with his employer to discrimination and health and safety law. I checked this with him, there was no amendment application. His claim was unfair dismissal but he wanted to be able to refer to broader laws to show how unfair it was. It was agreed he could refer to any law he wished in his closing submission.

Timetable agreed

27. I explained what happens in what order, sitting times and on conducting cross examination and making submissions. We agreed that the respondent's witnesses would be called first and michael-henry would ask them his questions. He had his lists of questions ready and with him.

Wednesday morning:	Discussion about the case and reading time
Wednesday afternoon:	Fred, questioned by michael-henry A break Then Jason, questioned by michael-henry
Thursday morning:	Andy, questioned by michael-henry A break Then Clive, questioned by michael-henry
Thursday afternoon:	michael-henry questioned by Miss Kight With or without a break as needed

An overnight rest and time to prepare closing submissions

Friday morning:	Miss Kight would go first with her submission michael-henry would have the last word

	Deliberation I would take time to make my decision
Friday afternoon:	Judgment and if michael-henry succeeded a remedy hearing.

Postponement application

28. I provided copies so that everyone could see Rule 30A and Rule 2. Miss Kight had her own electronic copy.

29. I read Rule 30A aloud explaining that as the respondent objected to the application to postpone the relevant law was in Rule 30A(2) so that as it was less than 7 days before the final hearing when he had made his application michael-henry would need to show "exceptional circumstances". I read Rule 30A(2) and Rule 2 aloud.

30. michael-henry said he had this morning received confirmation that a solicitor based in Surrey would act for him but she is busy next week on a case in another court so can't be here. I asked for her details and the other case number and asked if she has told Manchester ET that she is representing him now.

Submissions

31. michael-henry said feels he is not on an equal footing and has had a torrid time since he commenced proceedings in February 2021 in trying to get a pro bono lawyer. The solicitor who has agreed to represent him is ADB. She is a self-employed lawyer hoping to join a law firm soon, based in Surrey, he has not yet met with her, first spoke to her a few of months ago following a contact he met in Birkenhead who gave him her details, he has not yet sent her the bundle or pleadings, he has sent her two documents, she is engaged in case number SC/154/20/0819 which is an appeal hearing in London. (Miss Kight checked the reference and could find no case). ADB cannot be here next week. He did not ask her why she could not be here this week. He had made other efforts to get representation earlier. His union would not support him, and he feels very let down by them. He had to commence proceedings unaided, he was not represented at the case management hearing. He does not think he will do his case justice without a solicitor.

32. Miss Kight said the respondent is ready for hearing. The witnesses are present, the bundle is ready. The respondent would be put to cost if the case were to be postponed. There is nothing to suggest that michael-henry will be represented next time and that we will not be in the same position again. Getting another date could take some time and the respondent wants to avoid cost and delay and go ahead.

Postponement decision

33. I went out of the hearing room to take time to decide. I came back and gave my decision that the postponement application is denied for the following reasons:

- michael-henry has not shown exceptional circumstances;
- he has had a long time, since February 2021, to get a representative if he wanted one and has not;
- he was not represented in July 21 at the case management hearing;
- he has never before said he needed to be represented;
- whilst he says he feels prejudiced in going ahead without a solicitor, he will be supported by me in accordance with the Equal Treatment Bench Book which gives guidance to judges as to how best to help people who don't have a solicitor;
- and the balance of prejudice lies with the respondent as it is ready to go ahead and would be put to cost if there is a delay. It might seek to have michael-henry pay those costs on the basis that it was unreasonable of him to say nothing about needing a solicitor, and do nothing / not enough, to get one until the morning of the final hearing.

34. I accept that there is a real risk that michael-henry would be no more ready after a postponement than he is today. ADB might not agree to represent him after all. She has not told the Tribunal she is his lawyer and has not asked for a postponement and given a time by which she could be ready to go ahead. I think he is well able to articulate his complaints. Most cases are brought by litigants in person, and I am experienced in supporting a litigant in person. michael-henry said again that he would appeal if he lost. I agreed that if the result is that he loses his claim he will be protected by his appeal rights.

35. I went out to read the documents and we agreed to start at 2.00pm.

Oral evidence

36. I heard evidence from Fred Quinn, the claimant's supervisor who had given the instructions to wear a face covering. Fred gave his evidence in a helpful way, explaining that he had tried and tried to get michael-henry to wear a face covering offering disposable masks, washable masks, glasses visor, forehead visor and JLR manufactured visor, before issuing the incident report that led to the disciplinary process. Fred remained calm and collected way when he was accused of committing a war crime under the Geneva Convention by forcing a medical intervention on michael-henry when requiring him to wear a face mask. Fred said he had not forced anyone to wear a mask or visor. He had tried to persuade michael-henry to comply with the rules. He printed out an article about there being no health risks of long-term use of mask if no underlying medical condition. He had offered to send michael-henry back to OH.

37. I heard evidence from Jason Wilding who had investigated the allegations. Jason gave a thorough account of the way in which the respondent formulated its return to work safety policy after lockdown in compliance with government guidance and requirements from Public Health England and under supervision of the Health

and Safety Executive. He helped me to understand that the requirements for reopening a factory were much more stringent than government guidelines for the general public. He was patient and cooperative with the claimant's wide-ranging questioning. I did not allow a repetition of the "war crimes" line of questioning but helped michael-henry to question Jason about the process. Jason was really clear about what he had done to investigate the case. He had spoken to Fred, to michael-henry and had got Phil from the union involved too, to support michael-henry. He had looked at policies and procedures and the instruction from 17 September 2020 to all staff that face coverings were mandatory.

38. I heard evidence from Andy Evans who was the dismissing officer. Andy gave his evidence in a helpful and patient way, often having to repeat the same answer (to questions about the existence of the virus or the harm caused by masks), that it wasn't about people's beliefs but about his role being to decide if michael-henry had followed the respondent's instructions, policies and procedures or not. He was very clear about why he though the letters michael-henry had sent were offensive and in breach of the Dignity at Work Policy.

39. I heard evidence from Clive Roberts who was the final stage appeal officer. Clive gave his evidence in a straightforward and helpful way. He had been surprised that michael-henry hadn't had anything new to say at appeal, that he hadn't produced evidence of the medical exemption he had claimed.

40. I heard evidence from michael-henry. He gave his evidence in a helpful way though he still tried to persuade people that his beliefs about the virus (non-existent, part of a government treason and genocide plan) and mask wearing (dangerous, would cause bacterial pneumonia and brain damage, part of the government plan to harm us, we must protect ourselves) were correct.

41. He was not credible, that means I did not believe him, when he said that he had an underlying medical condition in 2020 that meant he was exempt from mask wearing. I decided I didn't believe him by looking at his actions at the time. He didn't tell OH about any underlying medical condition, he had at least two occasions to do so, he didn't go to his GP in October 2020 or after he was dismissed but before appeal and ask for a letter about his underlying medical condition to be sent to the respondent. He had no reason why he did not do that. I contrasted that with the great efforts he has gone to in this case, in corresponding with the Tribunal and having affidavits prepared and documents sworn by a notary public to assert his rights. All he did in 2020 was go to a website and self-certify. Also, his medical related reasons for not wearing a face covering changed; dizziness, sickness; dry mouth, dry nose, anxiety, cumbersome, uncomfortable. He made the frank admission that he would not have worn a face covering even if he had been moved to a green role because of his beliefs. He was consistent, courteous and fully engaged in the hearing throughout. At the end of the hearing I thanked him for the way in which, having had his postponement request refused, he adapted rapidly and participated fully in the hearing.

The Facts

42. michael-henry worked as a production operative for the respondent from 21 April 2011 until his dismissal. He worked on the fast paced production line on trim and finish for the right hand side doors of the cars. He had 92 seconds in which to

do his bit of the fit or the line would stop. It was pressured work and it involved him bending and reaching into the car.

43. During 2020 the UK responded to the global coronavirus pandemic requiring periods of lock down. The respondent has over 140000 workers on its site. It was concerned to protect its staff and their loved ones and the local community. It issued instructions to its employees. The respondent worked with Public Health England, the company's chief medical officer and in collaboration with the respondent trade union to create a COVID-19 safety at work Risk Assessment.

44. Michael-henry did not believe in the existence of the COVID-19 virus or accept that it posed a threat to public health. He believed it was part of a government conspiracy to harm the population. He refused to participate in that conspiracy. He contacted his GP and asked for exemption from mask wearing. The GP told him that he would not provide him with an exemption certificate, that the GP understood it to be the case that the government was allowing people to self-certify and that he could go to a website and self certify.

45. The respondent worked rapidly to produce safety policies as a pre-requisite to being able to reopen in June 2020 and kept them under review as the impact of the virus changed. michael-henry wrote a series of letters in which he referred to, on 20 August 2020, "the alleged mandatory implementation of masks and visors". michael-henry said, "*I have studied this subject in depth and continue to do so and I must bring to your attention that the COVID-19 virus has never been isolated…Both the CDC and WHO say masks should only be worn by those infected to contain the spread."* michael-henry had had a dizzy spell whilst wearing a mask and said it made him anxious and he could not wear one. The respondent referred michael-henry to occupational health. He was assessed on 2 September 2020. The report of the same date said that michael-henry had become stressed when told it was mandatory to wear a face mask but that the stress was now resolved as there was no mandatory policy. In order to help michael-henry feel safe at work he was referred for talking therapy. There were no underlying health issues as to why he could not wear a mask, no adjustments at work were required.

46. On 17 September 2020, in response to an increase in COVID-19 cases in the North West, mask wearing became mandatory when the respondent issued specific guidelines about wearing face masks.

> *"We should all take this move to mandatory face covering as a stark reminder that this pandemic is not over and as an opportunity to reset our mindset and behaviours to protect our health and our livelihoods."*

47. The wearing of face masks was described as part of a set of "critical actions" including hand washing and social distancing that all must adhere to. These actions had been agreed with Public Health England, the respondent's chief medical officer, the Plant Convenor of the union and the respondent health and safety executives.

48. Detailed guidance was given as to why a mask must be worn, when it must be worn and when it could be removed at a workstation. There was a set of responses to frequently asked questions which included the question will I be disciplined for not wearing a face covering? the answer to which was:

> *"As everyone has a part to play in protecting themselves as well as their work colleagues, we hope that everyone will comply in this active support of each other to protect themselves, colleagues and the business. Please note that disciplinary action may be taken where employees are found to deliberately ignore advice, guidance or instructions provided that places a risk to yourself and others and the business."*

49. The frequently asked questions included: what if I am exempt from wearing a face mask due to medical reasons. What do I do? The reply was:

> *"If you are unable to wear a face mask because of a medical reason you must wear a JLR provided visor."*

50. The frequently asked questions also dealt with anxiety*:* what if I be anxious about wearing a face covering ? are there other options available ?:

> *"All employees will be required to wear a face covering attending their place of work. If you are anxious about wearing a face covering please visit our well-being website the details of our Employee Assistance Program (EAP) for helpful information and support and speak to your manager."*

51. The respondent had identified red, green and amber roles within the workplace and devised bespoke conditions for the wearing of face coverings in each of those designated roles. A red role required wearing of the mask at all times as social distancing could not be maintained. An amber role required wearing a mask at times when social distancing was not possible. A green role was allocated to members of staff known to be clinically vulnerable or to have medical reasons for not being able to wear a mask. Green roles did not have to wear masks whilst at their work station provided no one was within 2 metres of them. The respondent treated the person as clinically vulnerable or as having medical reasons where the person had provided evidence from a GP or a DDR form from occupational health to substantiate their status. All roles, green included, required individuals to wear masks when moving into and out of the workplace and around the premises or if someone came within 2 metres of them.

52. michael-henry was required to wear a face covering at all times. He was offered a glasses visor, a forehead visor, washable masks, disposable masks and a JLR engineered visor. michael-henry did not wear any of them consistently. His supervisor, Fred, saw michael-henry not wearing a face covering on numerous occasions in early October 2020. Fred saw michael-henry with the disposable type mask sitting under his chin and not covering the nose and mouth.

53. Fred provided masks and reminded michael-henry to wear a face covering. michael-henry gave a range of reasons why he could not from *not proven, virus not isolated, bad for my health as bacteria build up, make me short of breath, make me anxious, make me feel sick.* At first Fred tried a persuasive approach and printed out reports that showed no harm to doctors and nurses who wore masks and visors all day. When the claimant persisted in saying mask wearing was harmful to him Fred said that risks might arise for people with underlying medical conditions and that if michael-henry had GP evidence then that might make him exempt.

54. michael-henry did not say he had an underlying medical condition. He did not provide GP evidence. He continued to appear to comply with the requirement only to remove the mask later. When challenged again michael-henry repeated the reasons he had given. Fred said the reasons weren't good enough. Medical evidence was needed. michael-henry said he could self-certify as exempt. Fred again told michael-henry that he had to wear a face covering, mask or visor, unless he had GP evidence or a DDR from occupational health exempting him. Fred offered to refer michael-henry to OH. michael-henry did not want to be referred.

55. On 15 October 2022 michael-henry emailed the Chief Executive copying him in on correspondence of the same date with Fred and Paul Cooper:

> *"Due to your insistence on me wearing this mask under duress and anxiety I feel this to be a reasonable request."*

56. michael-henry attached a document he had created entitled "Notice: conditional acceptance – for wearing a face mask" it said:

> *"This document is lawful. Once you've taken it from me, you must read it stop you then have 2 choices. You either agree and sign it or return it to me, onside, having accepted my terms. This document may be used as evidence against you in a lawfully convened court of law.*
>
> *Please provide the following foundation evidence*
>
> 1. *Provide evidence of the existence of the Covid 19 virus. To date, no one individual, nor any organisational government has isolated an infection causing virus despite the offer of substantial rewards.*
>
> 2. *Provide evidence of the risk of Covid 19 is more serious than the seasonal flu. To date, it has not been suggested that we need to be tested for seasonal flu, nor is it ever been deemed necessary stop numerous studies now show that the risk of dying from Covid 19 is less than nought.2%. That is less than seasonal flu. What we are seeing substitution deaths, without Coroner certificates.*
>
> 3. *Provide evidence that the statistics on Covid 19 deaths are accurate.*
>
> 4. *provide evidence that the test kits are accurate.*
>
> 5. *please verify that you read and understand the Nuremberg code and its implications.*
>
> 6. *provide evidence that wearing a mask will not reduce my oxygen consumption or increase my risk of carbon dioxide poisoning.*
>
> 7. *provide evidence that wearing a mask will not increase my risk of lung infections.*
>
> 8. *please verify:*

- *you accept full responsibility for any inaccurate detail or false information that you provide, whether known or unknown at the time of sought consent*

- *any damage or health issues suffered badly for wearing a mask, short-term or long-term will render you liable your private individual capacity*

- *in addition if you provide false information knowingly or unknowingly, you agree to pay a significant penalty fee as determined by me, the living room and for providing misleading information*

- *then to provide all the foundation evidence is your tacit agreement that you and your organisation do not have such evidence. Without proof of claim, you cannot lawfully insist they wear a mask, the loss of my work, no withholding essential medical treatment.*

The undersigned, accept full responsibility for any inaccurate detail false information provided herein, whether known or unknown time of the agreement. Any damage caused by mask usage will be my responsibility and my employer's responsibility stop I understand I will be held liable in my private individual capacity. In addition, even if damage is not present and false information is provided I agree to pay a penalty fee as determined by the individual offering the restriction of human rights."

57. The respondent referred the claimant's letter and document to HR. The managers were advised by HR not to reply to it.

58. On 19 October 2020 Fred saw michael-henry working without a face covering. He told michael-henry that this time he had to wear a face covering or he would have to complete an incident report. michael-henry replied in terms that he had an underlying medical condition of anxiety and that he had inalienable rights and that Fred should do what he had to do. Fred prepared an incident report.

59. Richard Mann saw the report and with Fred went to michael-henry and having checked that michael-henry did not have GP evidence or a DDR, instructed him to wear a face covering. michael-henry refused so Mr Mann instructed him to go off site. michael-henry said that they should put him in a green role.

60. Janet Harkin from HR wrote to michael-henry that same day. She said that michael-henry had told his supervisor that he had an underlying medical reason that prevented him from wearing a face mask. She said that the company had no evidence of this so she was referring him to Occupational Health.

61. Ms Harkin said that when the OH report was available she would arrange a meeting to discuss the claimant's refusal to wear a mask and his "Notice of Conditional Acceptance" correspondence. She instructed michael-henry not to attend site without wearing a face mask.

62. michael-henry then wrote to Fred saying he had no problem wearing a lightweight visor. Fred knew this not to be true because michael-henry had refused to wear any face covering in the past. Jason Wilding was appointed to conduct an

investigation into the correspondence. An investigation meeting was arranged for 22 October 2020. On Monday 19 October 2020 michael-henry wrote to Paul Cooper saying that he had a medical condition "*my rights are being violated and I am being embarrassed in my place of work by having everybody in the knowledge that I suffer from anxiety".*

63. Paul Cooper replied:

> *"If you have a medical reason you need a specific type of face mask then get occupational health to assess you and we can get the company to provide you with one. Without a DDR stating that you either can't wear a mask or have to wear a specific type then the company have to treat you exactly the same as everyone else and enforce the wearing of masks to prevent the spread of COVID-19.*
>
> *Do you have a DDR stating either of those things?"*

64. michael-henry replied, attaching his Notice of Conditional Acceptance document:

> *"Thanks for your opinion mate but I'm afraid my health takes priority over your opinion….I get anxiety and panic attacks when my air supply is restricted…I am fit to work I was told to leave site and my pay would be withheld…JLR have violated my human rights and breached the equalities act and Nuremberg Codes….I am fit to work yet I am off the payroll. This is discrimination."*

65. Paul Cooper replied:

> *"You have to wear a face mask to protect yourself and your colleagues. That silly nonsense you have attached is quite distasteful…"*

66. The respondent had a Dignity at Work Policy and Procedure. It defined harassment as unwanted conduct that violates people's dignity or creates an intimidating, hostile, degrading, humiliating or offensive environment. An example of harassment might include:

- Circulation or sharing of offensive material or photographs including the use of email

67. Bullying was defined as persistent malicious behaviour that was intimidating and threatening.

68. The respondent's disciplinary procedure provided that the following were examples of gross misconduct for which an employee could be summarily dismissed:

- Serious disregard of company safety precautions
- Refusal to comply with a reasonable and authorised instruction

69. The OH report dated 23 October 2020 concluded that there was no underlying medical condition to prevent michael-henry from wearing a face covering. It also found there was no evidence of any psychiatric ill-health. It said:

> *"The emotional responses he has experienced are a reaction to a set of circumstances he finds difficult as opposed to any serious health condition. Certainly, if he wished to return to work there would be no medical basis to exclude him from doing so. Obviously the issue regarding face coverings would need to be resolved in some way to enable him to physically come on-site."*

70. michael-henry did not ask that a copy of the report be sent to his GP.

71. michael-henry attended an investigatory interview with Mr Wilding on 29 October 2020. That same day michael-henry again wrote to the Chief Executive and this time his correspondence was headed "Notice of Dishonour and Opportunity to Cure" and said:

> *"I hereby serve notice that I conditionally accept the demands you make for mask wearing. Please advise of the following*
>
> 1. *Evidence that masks prevent infection*
> 2. *evidence that must still cause oxygen deprivation which can lead to seizures*
> 3. *evidence that reeling in your own carbon dioxide does not cause bacterial respiratory disorders*
> 4. *evidence that wearing masks does not cause stress and anxiety*
> 5. *evidence that wearing masks prevent the spread of Spanish flu*
> 6. *evidence that dismissal for not wearing a mask work would not represent a breach of the equality act which entitles you to claim compensation for discrimination as well as unfair dismissal*
> 7. *evidence that the government lurgy has ever been proven to exist*
> 8. *evidence that the coronavirus act and the regulations which arose out of it are judged to be repugnant and void under the common law*
> 9. *evidence that it is not a crime ancillary to genocide to collaborate with the government which has already resulted in hundreds of thousands of deaths in care homes*
> 10. *evidence that the government has not relied on fraudulent data to put the population into fearful compliance with its legally unenforceable diktats"*

72. On 9 November 2020 Ms Harkin wrote to michael-henry inviting him to attend

a disciplinary hearing. He was informed of the allegations he was to face. They were:

- Serious disregard of company safety precautions by persistently failing to wear a face covering whilst on company premises
- refusal to comply with reasonable and authorised instruction to wear a face covering in line with company policy
- circulating appropriate communications to JLR management in breach of the company's dignity at work policy which could be considered to be offensive, threatening and/or vexatious.

73. The letter defined gross misconduct and warned michael-henry that if he was found to have committed an act of gross misconduct he may be summarily dismissed.

74. He was informed of his right to be accompanied at the hearing by a trade union representative or work colleague. He was referred to the disciplinary procedure and provided with documents management intended to rely on which were:

- Investigation outcome report
- Investigation meeting minutes interview with Michael Furlong
- Investigation meeting minutes from interview with Fred Quinn
- Investigation meeting minutes Phil Henderson
- Occupational health report

75. Ms Harkin also gave michael-henry details of the respondent's employee assistance program and other sources of support. Because michael-henry was declining to wear a face covering arrangements were made for the disciplinary hearing to take place remotely by conference call.

76. The disciplinary hearing took place on 12 November 2020 and was chaired by Andrew Evans lead production manager for the respondent. At the disciplinary hearing michael-henry confirmed he refused to wear any form of face covering. He had previously said that he would wear a visor but at the disciplinary hearing he said he would not as this would dry out his nose and mean that he was breathing in carbon dioxide. Mr Evans went through a range of suggestions of face covering, none of which were acceptable. Mr Evans formed the view that no matter what was offered to michael-henry he would refuse to comply with the company policy of wearing a face covering at work.

77. Mr Evans asked michael-henry did he have medical exemption from wearing face covering. Mr Evans knew that michael-henry had been to occupational health twice and on both occasions occupational health had found that there was no underlying medical condition which would prevent michael-henry from wearing a

face covering. Mr Evans knew that michael-henry had not produced any evidence from GP or other doctor as to any underlying medical condition which prevented him from wearing face covering. michael-henry told Mr Evans that he had self certified as exempt from wearing a face covering by obtaining an exemption certificate from a website. Mr Evans explained that the respondent did not accept exemption certificates that had been sourced by an individual online without medical certification.

78. Mr Evans then turned to talk to michael-henry about the allegation relating to his vexatious communications. The general content of the communications was that michael-henry was requiring the respondent to provide evidence to prove a number of statements that michael-henry had made as a precondition to michael-henry complying with the respondent's policy on face coverings. Mr Evans put to michael-henry that the correspondences were aggressive, intimidating and threatening and had no regard for the impact they might have on the recipient. michael-henry thought he was *being polite* and there were *no curse words* and he was just seeking answers. When asked if he realized it could cause distress, michael-henry said *it is what it is.* michael-henry said that the company needed to look into it as there was genocide, treason and skull-duggery going on.

79. Mr Evans adjourned the hearing to consider his decision. Mr Evans was satisfied that the respondent had gone to great lengths to provide a safe working environment for all of its employees. He was aware that Fred had offered michael-henry a number of options in terms of complying with the policy including, glasses based visor, forehead based visor, the visor manufactured by JLR and the option to bring his own face covering of his choice. Fred had provided michael-henry with disposable masks and washable masks but michael-henry had refused each option.

80. michael-henry had not denied that he had been instructed to wear a face covering or that he'd refused to comply with that instruction. He did say that he had been happy to wear a glasses style visor initially for a period of about 2 months until it had been stolen, but at the disciplinary hearing he was refusing to wear even a glasses based visor for the whole shift.

81. In relation to the correspondences Mr Evans felt that they were not just a request information but were a breach of the Dignity at Work policy because:

i. Of their pseudo legal status which people would find intimidating.

ii. They threatened legal action and personal fines on individuals if they did not comply with his request in correspondence.

iii. There had been no regard for the effect on the recipients. The letters had been sent to his colleagues. Mr Evans felt that the correspondence had the potential to cause offence to individuals for whom the pandemic had cause significant hardship, illness and bereavement. Mr Evans was aware, as michael-henry would have been aware, that the respondent had lost members of its own staff to the virus and that michael-henry and management may not be aware of the personal circumstances of the recipients of the correspondence, michael-henry may have written to someone who had lost a loved one to the virus. If that had been the

case the recipient would find his correspondence deeply offensive.

iv. The letter had been sent to the Chief Executive. This was inflammatory and designed to cause trouble for the managers above michael-henry who were seeking to apply the respondent's policies. Copying the correspondence to the Chief Executive to the managers was designed to rile and intimidate them.

v. The letters were asking people to sign to agree to things they would not understand, this was aggressive and intimidating.

vi. They threatened a significant penalty fee, that was aggressive and intimidating.

vii. The content was disingenuous, michael-henry knew that the questions could not be answered and he was using them to intimidate others and maintain his position of refusing to wear a face covering.

82. Mr Evans felt that the content of the correspondence and the lack of regard for colleagues and their personal circumstances and the potential impact of the correspondence on them amounted to circulation of offensive material within the Dignity at Work policy.

83. Mr Evans concluded that individually refusal to wear a face mask and the circulation of offensive material each amounted to gross misconduct. He adjourned the meeting at took time to consider was there any alternative to dismissal.

84. Mr Evans had seen the claimant's correspondences and heard his responses at investigatory interview and disciplinary hearing and knew the claimant's beliefs (for example that Covid 19 did not exist, was a "government lurgy" that the government was committing treason and genocide and killing people by mass induced pneumonia, that he would not wear a mask or take a test if he had symptoms) were deeply held beliefs that meant he would not adjust his position in relation to wearing a face covering. At the disciplinary hearing Mr Evans had asked michael-henry if he had any alternative suggestions for any way he would comply with the face covering policy. michael-henry did not.

85. Mr Evans concluded that there was no alternative short of dismissal. He couldn't allow michael-henry back on site if he would not wear a face covering. The hearing was reconvened and Mr Evans gave his decision. michael-henry indicated his intention to appeal.

86. Mr Evans confirmed his decision to dismiss in a letter dated 17 November 20 20. He set out each of the allegations and the evidence Mr Evans had relied on in reaching his finding in relation to each of them. It set out that Mr Evans had considered action short of dismissal but considered this was not an option as michael-henry had made it clear he would not under any circumstances wear a face covering at work. The letter confirmed arrangements for termination of employment, the process for appeal and the availability of the respondent's employee assistance program.

87. On 18 November 2020 michael-henry again wrote to the chief executive this time his letter was headed “Notice of Dishonour”. It repeated the content of the 29 October and 9 November letters.

88. michael-henry had been represented by his trade union representative Mr McGravie at the disciplinary hearing. He had guidance from Mr McGravie prior to his appeal. He wrote his appeal letter to Janet Harkin on 23 November 2020. As grounds of appeal were:

- breach of the GDPR 2018 regulations
- violation of the Equality Act 2010
- breach of the Nuremberg code

I informed management of my condition and exemption which was deemed not good enough and I was constantly harassed to wear a face covering and anxiety stress and duress.

you did not read my conditional acceptance letter, it contained 8 reasonable questions to be answered….. The fact that you receive a conditional acceptance as a refusal beggars belief of the English language. Acceptance be conditional or unconditional is exactly that, acceptance. So please do not insult me by twisting the truth.

89. The respondent wrote to michael-henry on 26 November 2020 informing him that he would not receive a response to the points listed in a letter to the Chief Executive and that his issues should be raised through the company process of appeal.

90. The appeal hearing took place on 30 November 2020. The appeal hearing was chaired by Mr Nick Teasdale. michael-henry was represented by Steve McGravie from the union. Janet Harkin was present as the senior case management adviser. There was no new evidence from the claimant and no change in position. The claimant had not brought evidence of an underlying condition. He had not changed his stance on wearing a face covering. Mr Teasdale upheld the decision to dismiss.

91. michael-henry then made a 2nd stage appeal.

92. On 1 December 2020 he wrote again to the Chief Executive. This time his letter was headed “Notice of Security of Interest”. It said:

… Pursuant to the clearly expressed terms of your companies Dishonour of Notice of Conditional Acceptance dated 29 October 2020, Notice of Dishonour and Opportunity to Cure dated 9 November 2020, and Notice of Dishonour served on 18 November 2020 I hereby serve notice of interest.

For the avoidance of doubt Michael Furlong intends to file a commercial injury claim against Jaguar Land Rover Ltd currently valued at 470,000 great British pounds Sterling

As debtor you have 7 days from service of this notice to raise any issues disputes or counterclaims pertaining to this matter

With sincerity and honour by Michael Furlong
authorised representative for Michael Furlong
all rights reserved-without prejudice-without recourse-non-assumpsit
errors and omissions excepted- strictly no rights of usufruct

93. On 16 December 2020 Mr Teasdale wrote to michael-henry setting out his reasoning for upholding the decision to dismiss and advising michael-henry of his further right to appeal. michael-henry lodged his further appeal and requested a copy of the company's indemnity insurance policy.

94. michael-henry submitted an affidavit with annexures. It set out 10 essential maxims or precepts in commercial law and provided scriptural references for each of them. They are not reproduced here in full. The 10 maxims were:

- *A workman is worthy of his hire*
- *equality before the law*
- *in commerce truth is sovereign*
- *truth is expressed in the form of an affidavit*
- *an unreported affidavit stands as truth in commerce*
- *an unreported affidavit becomes the judgment in commerce*
- *in commerce for any matter to be resolved it must be expressed*
- *he who leaves the battlefield first loses by default*
- *sacrifice is the measure of credibility.*
- *A lien or claim can be satisfied only through rebuttable by affidavit point by point, resolution by jury or payment.*

95. It went on to set up facts as michael-henry swore them to be and included appendices which sought to persuade the respondent of the claimant's views. They included extracts from a publication called "The Light" with headlines such as *government's disastrous policies breaking human rights law, quarantine is sick people being locked up, tyranny is healthy people being locked up… Freedom of information requests show just 100 Covid deaths… since crisis began… Masks causing brain damage says neurologist…..Police given access to track and trace…. Why we need to reclaim power over our health.*

96. A further appeal meeting took place on 1 February 2021. It was chaired by Clive Roberts. michael-henry was again represented by Mr McGravie. At this

appeal michael-henry continued to assert his views that the virus did not exist and that wearing a mask was dangerous to anyone and that he was exempt from mask wearing because of anxiety. michael-henry confirmed that he was not asking Mr Roberts to consider anything that had not already been considered at the disciplinary hearing or previous appeal. The claimant's arguments on appeal were:

- There ought to have been an individual risk / impact assessment under the Health and Social Care Act 2012 and as there hadn't been this was proof that mask wearing was a social experiment in which case under the Nuremberg code his consent was required and he had not given his consent.

- The information he had requested (answers to the questions in the Notice of Conditional Acceptance) not been produced.

- michael-henry had been constantly badgered to wear a mask by Fred and have been told that anxiety wasn't a valid reason by Fred and had been told by Richard that he was being silly.

- michael-henry said that he'd been discriminated against and felt embarrassed and unfairly dismissed.

97. He produced documentation in support of his appeal which included the documents that he had sent on 29 October 2020, 9 November 2020, 18 November 2020, his affidavit of 24 December 2020 and its appendices including the Light and Truth paper from November 2020 and a further Notice of Conditional Acceptance of Covid 19.

98. michael-henry asked if the respondent would be replying to his Notice of Conditional Acceptance as he would like a response to the questions. michael-henry also said that he had submitted an affidavit and the respondent only had 3 days left within its time limit before it could be rebutted.

99. Importantly for Mr Roberts michael-henry was still saying that he would not wear a face covering. Even if moved to a green role the claimant would need to wear a face covering during access to and egress from the site and his workstation and must put on a face covering if anyone came into his workstation within 2 metres of him. He said he would not wear a face covering.

100. On 3 February 2021 Mr Roberts wrote to michael-henry setting out the outcome of the appeal hearing. He upheld the decision to dismiss. michael-henry asked if he could progress to the final stage appeal and Mr Roberts confirmed that that request would be reviewed by the company and by the respondent's plant deputy convener and Unite union external official.

101. The respondent, the plant convener and the Unite union external official all subsequently agreed not to progress the case to a final appeal at extended plant conference. michael-henry was informed of this in a letter dated 8 March 2021. The reason for it was that all appeal points had already been addressed in previous stages of the appeal.

102. michael-henry commenced proceedings in the Tribunal. His union no longer supported him.

Relevant Law

103. Section 94 Employment Rights Act 1996 (ERA) provides that an employee has the right not to be unfairly dismissed by his employer.

104. Section 98 provides:

> **"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –**
>
> **(a) The reason (or, if more than one, the principal reason) for the dismissal; and**
>
> **(b) That it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.**
>
> **(2) A reason falls within this subsection if it –**
>
> **a) Relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do;**
>
> **b) Relates to the conduct of the employee;**
>
> **c) Is that the employee was redundant; or**
>
> **d) Is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.**
>
> b. **In subsection (2)(a) -**
>
> **a) 'Capability', in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality; and**
>
> **b) 'Qualifications', in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held."**

105. The burden of proof lies on the employer to show what the reason or principal reason was, and that it was a potentially fair reason under section 98(2). According to Cairns LJ in **Abernethy v Mott, Hay & Anderson [1974] ICR 323**:

> **"A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee."**

106. This requires the Tribunal to consider the mental processes of the person who made the decision to dismiss. In **Linfood Cash and Carry v Thomson**

"The Tribunal must not substitute their own view for the view of the employer, and thus they should be putting to themselves the question -could this employer, acting reasonably and fairly in these circumstances properly accept the facts and opinions which it did? The evidence is that given during the disciplinary procedures and not that which is given before the Tribunal".

107. Where the employer does show a potentially fair reason for dismissing the question of fairness is determined by section 98(4).

"(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

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

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

108. In **Iceland Frozen Foods Limited v Jones [1982] IRLR 439,** Browne-Wilkinson J formulated the correct test in the following terms

"…the correct approach for the Industrial Tribunal to adopt in answering the question posed by Section 98(4) Employment Rights Act 1996 is as follows:

(1) The starting point should always be the words of Section 98 (4) themselves;

(2) In applying the section the Industrial Tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the Industrial Tribunal) consider the dismissal to be fair;

(3) In judging the reasonableness of the employer's conduct an Industrial Tribunal must not substitute its decision as to what the right course to adopt for that of the employer;

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

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

109. When applying Section 98(4) the Tribunal must take into account the size and administrative resources of the respondent, any relevant Code of Practice and the Human Rights Act 1998. The ACAS Code on Disciplinary and Grievance Procedures provides that the following factors may be taken into account when assessing the reasonableness of a dismissal on the grounds of conduct. Paragraph 4 of the Code provides:

- Employers and employees should raise and deal with issues promptly and should not unreasonably delay meetings, decisions or confirmation of those decisions.

- Employers and employees should act consistently.
- Employers should carry out any necessary investigations, to establish the facts of the case.
- Employers should inform employees of the basis of the problem and give them an opportunity to put their case in response before any decisions are made.
- Employers should allow employees to be accompanied at any formal disciplinary or grievance meeting.
- Employers should allow an employee to appeal against any formal decision made.'

110. The Tribunal should consider procedural fairness together with the reason for dismissal **Taylor v OCS Group Ltd [2006] EWCA Civ 702.** The tribunal must decide whether in all the circumstances of the case the employer acted reasonably in treating the reason they have found for the dismissal as a sufficient reason to dismiss.

111. **Jhuti** in the Court of Appeal cited Arnold J in the EAT in **Burchell v British Home Stores [1978] IRLR 379** which set out the standards for determining whether dismissal for (mis)conduct is fair:

> **"First of all there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds on which to sustain that belief. And thirdly, we think that the employer, at the stage at which he formed that belief on those grounds...had carried out as much investigation into the matter as was reasonable in all the circumstances of the case."**

112. If the three parts of the **Burchell** test are met, the Employment Tribunal must then go on to decide whether the decision to dismiss the employee (instead of imposing a lesser sanction) was within the band of reasonable responses, or whether that band fell short of encompassing termination of employment. In a case where an employer purports to dismiss for a first offence because it is gross misconduct, the Tribunal must decide whether the employer had reasonable grounds for treating the misconduct as gross misconduct: see paragraphs 29 and 30 of **Burdett v Aviva Employment Services Ltd UKEAT/0439/13**.

113. The appeal is to be treated as part and parcel of the dismissal process: **Taylor v OCS Group Ltd [2006] IRLR 613.**

114. **Polkey v AE Dayton Services Limited** established that where a claimant is successful a reduction may be made to any compensation awarded on the basis that if the employer had acted fairly michael-henry would have been dismissed in any event at or around the same time. This may take the form of a percentage reduction, or it may take the form of a tribunal making a finding that the individual would have been dismissed fairly after a further period of employment (for example a period in which a fair procedure would have been completed). The question for the tribunal is whether the *particular employer* (as opposed to a hypothetical reasonable employer) would have dismissed michael-henry in any event had the unfairness not occurred.

115. The Employment Rights Act 1996 at section 122 provides for a reduction in compensation because of contributory fault by the claimant. The conduct must have been culpable or blameworthy.

Applying the Law to the Facts

Reason

116. The respondent met its burden of proof in establishing that the reason for dismissal was gross misconduct. Conduct is one of the potentially fair reason is contained within section 98 subsection 2.

117. In particular, dismissing officer Mr Evans, in both his verbal decision given to michael-henry and in his letter of dismissal dismissed because he found that michael-henry had been guilty of the following allegations

- Serious disregard of company safety precautions by persistently failing to wear a face covering whilst on company premises

- refusal to comply with reasonable and authorised instruction to wear a face covering in line with company policy

- circulating appropriate communications to JL are management in breach of the companies dignity at work policy which could be considered to be offensive, threatening and/or vexatious.

118. michael-henry did not dispute that he had initially worn a mask intermittently, had worn a glasses visor or forehead visor but found them cumbersome and then refused to wear a face covering at all.

119. michael-henry did not dispute that he'd been told by Fred to wear a face covering on 19 October 2020 and had refused to do so, saying that he was exempt and had self certified as exempt.

120. It was michael-henry's argument that the instruction was itself unlawful or unreasonable.

The reasonableness of the instruction itself

121. I find Mr Evans was reasonable in concluding that it was a reasonable instruction for the respondent to require in September 2020 the mandatory wearing of face coverings save for those who were exempt by reason of medical evidence or a DDR Form.

122. It was reasonable because:

(1) It was in the claimant's contract, he was bound by their policies procedures and safety regulations. The instruction issued on 17 September 2020 to take effect from 20 September 2020 formed part of the contract. michael-henry was obliged to comply with it.

(2) The respondent had a duty of care to all 14,000 workers, their families and the local community. It had worked with government guidelines, Public health England, its chief medical officer and upland convener to arrive at a risk assessment and set of practices and safety procedures that would give the best chance of reducing transmission of the virus, it was not necessary for them to believe in or prove the existence of the virus.

123. For the same reasons the instruction given by Fred on 19 October 2020 and by Richard Mann were lawful and reasonable instructions for michael-henry to work face covering. Michael-henry did not dispute that he refused to follow those instructions.

Reasonableness of rejecting self certification

124. The respondent was reasonable in not accepting michael-henry's self certification as exemption from its safety procedures. This was because self certification for the purposes of going to a supermarket or making a local journey is different from self certification in the context of a factory setting with 14,000 workers, where workers might be required to work in close proximity for long periods of time. In the context of the respondent's premises, allowing self certification might effectively frustrate or thwart compliance with the government, Public Health England and chief medical officer's advice in that it might lead to a significant proportion of workers self certifying so the transmission of virus could not be reduced. This might have had impact not just on respondent's own work force but also on their families and the local community.

125. The respondent was entirely reasonable in setting up a requirement that exemption be medically certified. Medical certification could be in the form of a letter from a GP or could be as a result of an occupational health referral which resulted in a DDR form.

126. The respondent referred michael-henry to occupational health on two occasions. On neither occasion did michael-henry tell OH that he had an underlying medical condition of anxiety that ought to make him exempt from wearing a face covering. michael-henry did not ask OH to consult his doctor or even to copy the report to his doctor. michael-henry did not go to see his doctor himself in October 2020 asking that a letter be written to tell his employer that you he had an underlying condition which meant that he could not wear a mask.

127. I find that he didn't go because he knew he had no underlying medical condition and because his doctor had already told him on the phone earlier in the year that he would not provide the information he wanted. I find that to be true because michael-henry had previously asked his doctor to certify him exempt from mask wearing and the doctor had refused to do so and had referred him to a website for self certification. I also find that even if he had achieved a letter from a GP or an OH report that said he experienced anxiety when wearing a face mask, or dry mouth or dry nose or reduced oxygen, the appropriate adjustment would have been for michael-henry to switch to wearing a visor style face covering. I find it extremely unlikely that any medical professional would have wholly exempted michael-henry from wearing any face covering at all at that time. His was not a respiratory issue.

128. And the respondent was entirely reasonable in concluding that michael-henry was not medically exempt from wearing the face covering.

Genuine belief in guilt of employee at the time

129. Andy had a genuine belief, because michael-henry had refused to wear a face covering, in the guilt of the claimant's non-compliance with safety procedures and reasonable instruction, on reasonable grounds because he had taken into account what Fred had said and what michael-henry said at investigatory interview and a disciplinary hearing.

Such investigation as was reasonable

130. The respondent carried out such investigation as was reasonable in reaching that view. Andy took into account Jason Wilding's investigation. Jason had looked at the respondent's risk assessment, the safety procedures, the 17 September brief and frequently asked questions document and he had interviewed Fred and michael-henry. He'd also seen the claimant's Notice of Conditional Acceptance.

What Andy knew

131. Andy was aware that michael-henry said that wearing a mask made him anxious, and that michael-henry had been referred to occupational health and talking therapy. He was aware that Fred had given michael-henry a range of options including glasses based visor and forehead based visor and none had been acceptable. He was reasonable in concluding that the reason they weren't acceptable was based on the claimant's beliefs about the virus and mask wearing.

132. Fred and Andy had done all they could to support michael-henry in relation to anxiety:

- referred to occupational health
- referred to talking therapy
- referred to employee assistance program
- offered a range of ways of wearing a face covering
- explained that he needed medical sign off for an exemption either by GP or OH
- Fred had offered to refer michael-henry to OH to try and get a DRR form
- Andy saw the second OH report that Janet Harkin had instigated
- michael-henry was saying that he would not wear a face covering.

Did the claimant refuse to wear a face covering

133. The claimant's argument that a Notice of Conditional Acceptance is not a refusal is utter nonsense. The document is drafted in such a way that the *preconditions* for mask wearing could not be met. That was done by design. michael-henry refused on multiple occasions when Fred told him to cover his face to do so and refused on 19 October 2020 when he was told to wear face covering to do so, and refused the final opportunity given to a 19 October 2020 by Richard Mann. The Notice of Conditional Acceptance document was a disingenuous attempt to engage with the respondent. michael-henry admitted in evidence that he did not expect them to respond, that he knew that no response could be given to the questions he has asked what he really wanted to do was to provoke the respondent into looking at what he believed to be the reliable information and into changing its view and removing its requirements that he wear a face covering.

134. I conclude, applying Burchell that Andy had a genuine belief held on reasonable grounds that michael-henry had breached the respondent's health and safety procedures and had unreasonably refused to follow a lawful management instruction when he had refused to wear face covering.

135. Turning to the Iceland case and the range of reasonable response. I asked was Andy right to think that the sanction for this misconduct was dismissal or was his response one that no reasonable employer would have reached.

136. I was impressed by Andy's evidence when he said the last thing he wants to do is take anyone's living from them. He clearly took his disciplinary decision making on sanction very seriously indeed. He took time to consider sanction. He thought about michael-henry's length of service. He had asked michael-henry would he be prepared to wear a face covering and been told he would not.

137. He had thought about the request for a green role. Fred was aware that even in a green role michael-henry would need to wear a face covering to keep, if not himself, then his colleagues their loved ones and the local community at reduced risk of transmission of virus. Green roles were for clinically vulnerable people and putting someone with them who had no evidence of clinical vulnerability himself and who had stated he would not wear a face covering would be to increase the risk to them. He knew michael-henry was absolutely intransigent and would not agree to wear a face covering.

The renegotiation of contract argument

138. I supported michael-henry to put legal words on points he raised including his argument that he was willing to renegotiate his contract. There was no breach of contract complaint here, but michael-henry was attempting to show that the respondent was being unreasonable in wanting him to wear a face covering when there was not requirement for a face covering in his contract of employment. I do not accept that michael-henry was seeking to renegotiate his contract, or that his Conditional Notice of Acceptance was an attempt to engage in any helpful conversation about how his beliefs could be accommodated at work in a way that the respondent considered safe.

139. I do not accept that the respondent was trying to unilaterally vary the terms of the claimant's contract of employment either. It was michael-henry who, had

there been a breach of contract claim or counterclaim, would have been found to be in breach of contract for unreasonably refusing a lawful and reasonable management instruction.

Sanction

140. The respondent reached a conclusion on sanction that fell within the range of responses of a reasonable employer. It could not allow him back on site without a face covering. No reasonable employer, in those circumstances of global pandemic and conditions for reopening, at that time, would have allowed a sanction which it perceived would put its workers, their families and the local community at increased risk of transmission of a virus.

The communications allegaon

141. In relation to the claimant's communications. I find that Andy Evans held a genuine belief on reasonable grounds that the communication sent by michael-henry in both their tone and content, were intimidating, aggressive and contained potentially offensive material, and had little or no regard to the effect of the communications on the recipients. He reasonably concluded that it was a breach of the Dignity at Work Policy.

Procedural arguments

142. michael-henry did not make any arguments about procedural failings but in accordance with my role in supporting him as a litigant in person I have looked at the process followed by the respondent. I find, as can be seen from the facts set out above, that the respondent complied with the ACAS code.

143. Putting it at its simplest, michael-henry knew the allegations he was to face, he was given a chance to talk about what had happened at investigatory interview, he saw the documents that the respondent would rely on before he went to the disciplinary hearing, he was told of his right to be represented was represented by a trade union at the disciplinary hearing. He was given further opportunity at the disciplinary hearing to say what if anything the respondent could do so that he could keep his job. He was consulted about mitigation and sanctions short of dismissal. There were notes made at the hearings and he was provided with copies of notes and given the opportunity to provide his own notes where we disagree with anything in the respondent's notes.

144. Was told the decision face-to-face and it was provided to him in writing with all reasons by Andy. He was given notice of his rights to appeal and kept informed about sources of support. He was supported at appeal by Mr McGravie and given to stages of appeal hearings even though there was nothing new that michael-henry was saying. At 2nd stage appeal Mr Roberts again consulted him about sanctions short of dismissal. This time michael-henry said there should have been an individual risk assessment.

145. Mr Roberts was entirely reasonable in concluding that would have made no difference, michael-henry would still have to have a face covering or medical exemption to be able to come back to work. michael-henry was given the written

reasons for appeal and when he appealed again 3rd stage the respondent and the union considered whether or not it should go to an extended plant conference. michael-henry was informed of the reasons that their decision not to recommend this for a 3rd stage appeal.

146. If there had been a procedural argument put it would have failed. I can find no fault in the respondent's process at suspension, investigation disciplinary or appeal stages.

147. The respondent was reasonable in treating the claimant's misconduct taken together as sufficient to justify dismissal. His claim fails so remedy does not arise. If his claim had succeeded then I would have reduced any compensation to nil because, applying Polkey, and having separate regard to Sections 122 and 123 Employment Rights Act I would have concluded that he would have been dismissed in any event for his misconduct and that he brought his dismissal on himself by refusing to wear any form of face covering.

148. michael-henry thinks he was dismissed because of his beliefs. He did not bring that as a discrimination complaint but put it forward to undermine the reason advanced by the respondent. I reject that argument. He was not dismissed for his beliefs, the reason for his dismissal was his conduct.

149. In this Tribunal I have afforded respect to the claimant's beliefs, both his beliefs about the virus on which I make no comment, and his beliefs about legal process (creation of a trusteeship over REJ Franey, his fear of "surety" or "bond" his assertions about affidavits being incontrovertible), which make no sense at all in the context of unfair dismissal law. I have heard him describe a requirement to wear a face covering as a forced medical intervention; that is nonsense, no one forced him to wear anything. I have heard him accuse the respondent's witnesses of genocide in their face covering policy, again, nonsense.

150. The claimant's dismissal was fair. He left the respondent with no other alternative than to dismiss him because he wouldn't adjust his actions, whilst retaining his beliefs, to comply with reasonable management instructions. The claimant's complaint fails. He was fairly dismissed

151. michael-henry requested Written Reasons before the evidence began. He indicated his intention to appeal before the evidence began. There are strict time limits for appeal to the Employment Appeal Tribunal.

Employment Judge Aspinall

Date: 2 December 2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

7 December 2022

FOR EMPLOYMENT TRIBUNALS