EMPLOYMENT TRIBUNALS

Claimants: **Mrs G Dimitrova**
Miss S Chadwick
Mrs J Hussain
Miss G Masiero
Mrs I Motiejuniene

Respondent: **Barchester Healthcare Ltd**

Heard at: **Leeds**
On: **5-7, 10-12, 14 ,18, 20 and (deliberations only) 21 October 2022**

Before: **Employment Judge Maidment**
(sitting alone in the claims of Miss Chadwick, Mrs Dimitrova and Miss Masiero)

Members: **Ms JL Hiser**
Mr G Corbett
(sitting in the claims of Mrs Hussain and Mrs Motiejuniene only)

Representation

Claimants: **Mx O Davies, Counsel (Mrs Hussain, Miss Chadwick and Mrs Dimitrova)**
Mr E Lowe, National Employees Union (Miss Masiero)
Mrs Motiejuniene, in person

Interpreters: **Ms A Klepajcz, Ms A Kwiecien and Mr A Brzoza (Mrs Hussain)**
Ms H Bakuniene and Ms A Perrio (Mrs Motiejuniene)
Miss M Sobrero (Miss Masiero)

Respondent: **Mr C Glyn, King's Counsel**

RESERVED JUDGMENT

1. The claimants' claims of unfair dismissal all fail and are dismissed.

2. Mrs Hussain's and Mrs Motiejuniene's claims of direct and indirect religion and belief discrimination fail and are dismissed.

3. Mrs Motiejuniene's claim of religion and belief related harassment fails and is dismissed.

REASONS

Issues

Unfair Dismissal – all Claimants

1. What was the Respondent's reason or principal reason for dismissing each of the Claimants? The Respondent says the Claimants were dismissed for, in the absence of any medical exemption, refusing to be vaccinated against Covid-19 in accordance with its Covid Vaccine Policy.

2. Was the reason or principal reason 'some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the [claimants] held' pursuant to s.98(1)(b) ERA?

3. If so, were each of the dismissals for that reason fair in the circumstances pursuant to s.98(4) ERA, considering both the substantive grounds for dismissal and the procedures adopted?

Religious or philosophical belief – Hussain and Motiejuniene

4. What is the religious or philosophical belief relied on by the Claimants in their Further Particulars?

5. Is that belief protected under s.10(2) EqA? In so far as the Claimants rely on either their Christian or Muslim belief, the Respondent admits that these beliefs

are protected under the EqA but it is denied that any belief against vaccination is part of such religious beliefs. It is denied that

a. a belief 'of liberty and harmony' or
b. 'bodily autonomy, my body, my choice'

is a protected belief.

Direct belief discrimination – Hussain

6. Was Ms Hussain subjected to any of the following by the Respondent:

    a. Subjecting the Claimant to an initial investigatory process and meeting on 23 April 2021; [This is admitted by the Respondent]

    b. Asking why she declined the COVID-19 vaccine at the investigatory meeting; [This is admitted by the Respondent]

    c. Summoning the Claimant to a hearing on 6 May 2021; [This is admitted by the Respondent]

    d. Making false claims about the COVID-19 vaccines that they are not experimental products and exaggerating their effectiveness;

    e. Making the vaccine mandatory or the Claimant would be dismissed despite her working in the laundry; [This is admitted by the Respondent]

    f. Dismissing the Claimant despite her philosophical belief; [It is accepted that the Respondent dismissed the Claimant because she would not comply with its Covid Vaccine Policy]

    g. Failing to uphold the Claimant's appeal following dismissal. [This is admitted by the Respondent]

7. If so, did that constitute dismissal or 'any other detriment' for the purposes of s.39(2) EqA 2010?

8. If so, was Ms Hussain, treated less favourably by the Respondent than it treats or would treat others? (Ms Hussain to clarify whether she is relying on a real and/or hypothetical comparator).

9. If so, was this because of the protected belief?

Indirect belief discrimination – Hussain

10. Did the Respondent subject Ms Hussain to any of the following:

    a. The Respondent's policy that all relevant staff absent a medically supported reason submit to receiving one of the Vaccines as a condition of continued employment; [This is admitted by the Respondent]

b. The policy and/or practice that all relevant staff refusing to submit to receiving one of the Vaccines be subject to investigatory and disciplinary measures; [This is admitted by the Respondent]

c. The policy and/or practice that all relevant staff refusing to submit to receiving one of the Vaccines be locked out of their company email and IT networks;

d. The policy and/or practice that all relevant staff refusing to submit to receiving one of the Vaccines be refused payment of bonuses to which they would otherwise be entitled;

e. The policy and/or practice that all relevant staff refusing to submit to receiving one of the Vaccines submit to medical examination;

f. The policy and/or practice that staff who get the vaccine also get monetary bonuses.

11. If so, did that constitute a Provision Criterion or Practice which was applied to Ms Hussain for the purposes of s.19(1) EqA?

12. If so, did that PCP put persons holding Ms Hussain's belief at a particular disadvantage when compared to those who do not hold the belief?

13. If so, did that PCP put Ms Hussain at that particular disadvantage?

14. If so, was the PCP a proportionate means of achieving a legitimate aim? The Respondent's states its aims were to reduce the risk of death and serious harm to its residents.

Direct belief discrimination – Motiejuniene

15. Was Mrs Motiejuniene
    a. deprived of bonus and profit share pay which the Respondent had previously announced; and
    b. dismissed. [It is accepted that the Respondent dismissed the Claimant because she would not comply with its Covid Vaccine Policy]

16. If so, was Mrs Motiejuniene, treated less favourably by the Respondent than it treats or would treat others? (Mrs Motiejuniene to clarify whether she is relying on a real and/or hypothetical comparator).

17. If so, was this because of the protected belief?

Indirect belief discrimination – Motiejuniene

18. Did the Respondent subject Ms Motiejuniene to any of the following:

    a. The Respondent's policy that all relevant staff absent a medically supported reason submit to receiving one of the Vaccines as a condition of

i. Receiving bonus and profit share pay; and
ii. continued employment; [It is accepted that the Respondent dismissed the Claimant because she would not comply with its Covid Vaccine Policy]

19. If so, did that constitute a Provision Criterion or Practice which was applied to Ms Motiejuniene for the purposes of s.19(1) EqA?

20. If so, did that PCP put persons holding Ms Motiejuniene's belief at a particular disadvantage when compared to those who do not hold the belief?

21. If so, did that PCP put the Ms Motiejuniene at that particular disadvantage?

22. If so, was the PCP a proportionate means of achieving a legitimate aim? The Respondent's states its aims were to reduce the risk of death and serious harm to its residents.

Harrassment - Motiejuniene

23. It is agreed by the Respondent that at the Appeal hearing Ms Crowley, the Appeal Officer, asked the Claimant
    a. "You believe God will protect you?"
    b. "You want me to reinstate you on the grounds of God created us perfectly and you haven't had it. Is there anything else?"

24. It is admitted that the conduct would be related to the Claimant's belief (if the belief is protected)?

25. If so
    a. Did that conduct have the purpose or effect of
        i. Violating the Claimant's dignity or
        ii. Creating an intimidating, hostile, degrading, humiliating, or offensive environment for the Claimant.
    b. In deciding whether conduct has the effect referred to in 19(a), each of the following must be taken into account—
        i. the perception of the claimant;
        ii. the other circumstances of the case;
        iii. whether it is reasonable for the conduct to have that effect.

General remedy issues

26. If the Claimants were unfairly dismissed / unlawfully discriminated against:

    a. Should any basic and or compensatory award be reduced on account of the Claimants causing or contributing to their dismissal?

    a. Should any compensatory award be reduced in accordance with the '*Polkey / Chagger* principle' and if so by what amount? This involves consideration of whether the Claimants:

        i. Would have been dismissed fairly in any event, notwithstanding any unfairness found by the Tribunal; and/or;

ii. Would have been dismissed fairly in light of the Health and Social Care Act 2008 (Regulated Activities) (Amendment) (Coronavirus) Regulations 2021 coming into force on 11 November 2021, making their continued employment impossible.

Evidence

1. These claims form part of a larger multiple. They have been listed to be heard together as sample cases, albeit not as lead cases pursuant to Rule 36 of the Employment Tribunals Rules of Procedure. They all relate to the effects of a policy implemented by the respondent, a major care home provider, that staff working in its care homes were required, as a condition of continued employment, to accept a vaccine against the coronavirus. The dismissals of the claimants do not arise out of the Health and Social Care Act 2008 (Regulated Activities) (Amendment) (Coronavirus) Regulations 2021 which came into force only on 11 November 2021, after these claimants had already left the respondent's employment. The respondent effectively pre-empted those Regulations with its own earlier policy decision of similar effect.

2. The claimants have been separately represented in these proceedings as set out above. Mrs Motiejuniene has represented herself. Mrs Motiejuniene, Mrs Hussain and Miss Masiero have been assisted to varying degrees by the services of a number of interpreters in Lithuanian, Polish and Italian respectively. The excellence of the interpreters provided has been a feature of this case allowing evidence to be heard relatively seamlessly and unimpeded by all of these claimants and the interpreters have taken part in the hearing by CVP video link. Except when the claimants were giving their own evidence or (in Mrs Motiejuniene's case) cross-examining witnesses, a telephone link was set up between the interpreter and the relevant claimant to provide a translation which did not interrupt or interfere with the hearing of other evidence/submissions. Of the claimants, only Mrs Dimitrova has attended in person. A number of the respondent's witnesses have also given evidence remotely, but a significant number have also attended in person.

3. These claims had undergone a process of case management producing what appeared to be a potentially ambitious timetable for hearing the case of each claimant in turn. In circumstances where only Mrs Hussain and Mrs Motiejuniene were bringing complaints other than of unfair dismissal, only the claims of those claimants were heard by a full tribunal consisting of an Employment Judge and 2 non-legal members. The cases of the other 3 claimants were heard by an Employment Judge sitting alone. It was, nevertheless, determined by the full tribunal, early in the progress of the hearing, that it would hear closing submissions in respect of all the individual claims together, after the evidence had been heard in respect of each individual claim. That obviously involved the non-legal members in hearing submissions in respect of cases where they were not involved in any decision making, but without any objection by any party that this had the risk of any form of

contamination or that the non-legal members would not be able to correctly focus on the evidence they had heard in respect of the claims of Mrs Hussain and Mrs Motiejuniene only.

4. The Employment Judge also raised with the parties that a single Reserved Judgment with reasons would be produced covering all 5 claims. To be clear, however, the factual findings in respect of Mrs Hussain and Mrs Motiejuniene set out below were made and then applied to the applicable law by the full tribunal. The factual findings in respect of the other claimants are those of the Employment Judge alone. The same applies to the conclusions in those cases. Unsurprisingly, this Employment Judge has reached the same conclusions on matters of principle when sitting alone as he had done in reaching a unanimous decision with the non-legal members in the claims of Mrs Hussain and Mrs Motiejuniene.

5. The tribunal had before it an agreed bundle of documents numbering some 1912 pages. During the course of the hearing a number of additional documents were added to that bundle. Whilst not without some prior argument between the representatives, this was achieved on an agreed basis. The additional documentation included a further disclosure by Mrs Motiejuniene of her (full) medical records (added at pages 980.17-980.43), a summary of the product characteristics of the Vaxzevira vaccine, product characteristics in respect of the ViATIM vaccine (pages 1081.86 – 1081.93), photographs evidencing documents sent to Mrs Hussain on 1 May 2021 (pages 1081.94 – 1081.98), Staff Handbook extracts (pages 1081.99 – 1081.102), a further document evidencing the contents of the AstraZeneca vaccine and a document giving guidance as to high consequence infectious diseases (HCID).

6. The tribunal was also provided with a separate bundle containing all of the witness statement evidence exchanged between the parties which ran to a further 469 pages.

7. The respondent at the outset had provided the tribunal with a list of issues (with which none of the parties or their representative disagreed), a chronology and a cast list. Written skeleton arguments were received also from Mr Glyn on behalf of the respondent and Mx Davies on behalf of the claimants they represented.

8. The hearing commenced on Wednesday 5 October 2021 with an identification of the issues, a discussion of the timetable and an application made by Mx Davies for the admission of expert witness evidence. The tribunal then spent the remainder of the morning reading the witness statements of Mr O'Reilly of the respondent and of the individual claimants. The tribunal then gave its decision on the application in respect of the expert witness before a discussion involving Mrs Motiejuniene on the respondent's application for the disclosure of her medical records to which she agreed. An order for disclosure was made for the primary purpose of Mrs Motiejuniene presenting it to her GP to expedite

that disclosure. The tribunal then spent further time reading the witness evidence and relevant documentation before hearing from Mr Michael O'Reilly, general counsel and director of quality, risk and compliance of the respondent. His evidence was heard in its totality with interpreters provided for the assistance of Mrs Hussain and Mrs Motiejuniene. Miss Masiero had elected not to attend this part of the hearing, although, as throughout, she was represented by Mr Lowe of her trade union. Mr O'Reilly's evidence was concluded at the end of the second day of hearing, Thursday 6 October.

9. On Friday 7 October (day 3) the full tribunal commenced hearing the case of Mrs Motiejuniene. It heard firstly, on behalf of the respondent, from Renata Kindereviciene, general manager at Park View care home, Jacqueline Turner HR business partner and Andrea Crowley, regional director for Essex and Ipswich. The tribunal then heard from Mrs Motiejuniene, whose evidence was concluded that afternoon.

10. The full tribunal commenced hearing the case of Ms Hussain on Monday 10 October (day 4). It heard firstly, on behalf of the respondent, from Rachel Smith general manager of Bluebell Park care home, Dawn Hallsgrove-Smith, general manager of Cheshire Grange care home, again from Jacqueline Turner and finally from Stacey Nicholson, senior general manager at Threshfield Court care home.

11. On 11 October (day 5) the tribunal heard from Mrs Hussain herself.

12. On 12 October (day 6) evidence was heard by the Employment Judge alone in the case of Miss Chadwick. Evidence was given firstly, on behalf of the respondent, from Wendy Sugden (nee Edge), general manager of Castle Park nursing home, Alice Walker (nee Tindall), hospital director and Sue Arnold, divisional director of hospitals and complex care services. Miss Sammy-Jo Chadwick then gave evidence on her own behalf.

13. The tribunal reconvened on 14 October (day 7) with the Employment Judge sitting alone to hear the case of Mrs Dimitrova. Evidence was given firstly, on behalf of the respondent, by Deborah Davies, general manager of Castle Rise, Stella Bolger, hospital director and then again by Sue Arnold. The tribunal then heard by video link the witness evidence on behalf of Mrs Dimitrova from Dr Niall McCrae. Mr Glyn put no questions to him in cross examination. The tribunal then heard from Mrs Galina Dimitrova herself.

14. The tribunal (Employment Judge sitting alone) convened next on Tuesday 18 October (day 8) to hear evidence in the claim of Miss Masiero. On behalf of the respondent, the tribunal firstly heard from Madalina Ilie, senior general manager. Miss Masiero then gave evidence in support of her own claim.

15. The full tribunal reconvened on 20 October (day 9) to hear submissions, the tribunal having been provided the previous day with written submissions by Mr Glyn, Mx Davies and Mr Lowe. These were supplemented by oral submissions with time allocated on a proportionate basis. The tribunal heard firstly from Mx Davies, Mr Lowe, then from Ms Motiejuniene. After a break for lunch, Mr Glyn made his submissions on behalf of the respondent. The tribunal then commenced its deliberations, concluding them on 21 October (day 10). The representatives all provided the tribunal with copies of a number of relevant authorities. Some of these are referred to by the tribunal below. A lack of reference to any particular authority does not mean that it has not been considered. The tribunal's summary of the applicable law and its reasoning has benefitted from all parties' submissions and it has been grateful for them. The tribunal has, however, not sought to summarise every submission made.

16. As already referred to, the tribunal heard an application on behalf of Mrs Dimitrova to hear expert witness evidence from Dr Niall McCrae in addition to evidence he was to give, clearly from reading his written witness statement, of his involvement as her Workers of England trade union representative, in the internal process which led to her dismissal. Dr McCrae described himself as a registered psychiatric nurse with a PhD in mental health who had sat on an NHS ethics committee and had almost 100 academic publications to his name, including several papers on research methods and ethics. He maintained that his experience and expertise qualified him to pass judgement on the merits of the Covid vaccine and what he termed "coercive policies" for staff. The application was opposed on behalf of the respondent.

17. In support of the application Mx Davies provided to the tribunal a copy of Dr McCrea's CV and the EAT authority of **Morgan v Abertawe Bro Morgannwg University Health Board 2020 ICR 1043** which referred also to the case of **De Keyser Ltd v Wilson 2001 IRLR 324**.

18. The tribunal refused the application. Dr McCrae's or any other expert's evidence of the effectiveness of the Covid 19 vaccine or risks inherent in a person being vaccinated (the main substance of the expert evidence which Dr McCrae wished to give) was not reasonably required to resolve any issues for determination by this tribunal. The tribunal was not required to determine the efficacy of the Covid vaccine, but whether the respondent acted reasonably or unreasonably in its implementation of its vaccine policy. Was it reasonable for the respondent to rely on the evidence it did, including in circumstances where contrary views existed? Contrary to Mx Davies' submission, Mr O'Reilly was not giving expert evidence on behalf of the respondent, but referring to the information upon which the respondent took its decisions. The reasonableness of his reliance on that information could be effectively challenged through cross-examination. Assuming Dr McCrae could properly be regarded as an expert in the Covid 19 vaccine, his evidence could not be viewed as independent, clearly in circumstances where he advocated on behalf of Mrs Dimitrova during the hearings which led to the termination of her employment. His evidence was inevitably partisan and his witness evidence disclosed his own strong personal

feelings on the vaccination programme. If this was a case where it was appropriate to accept expert evidence, which it is not, any expert evidence should have been produced in a carefully managed way prior to this final hearing and in accordance with the principles set out in the De Keyser case. That has not happened. No application has been made in the lengthy case management process and the respondent's awareness of Mrs Dimitrova's intentions arose only from the exchange of witness statements on 13 September. The application, therefore, to adduce expert witness evidence is late. If Dr McCrae was allowed to give expert evidence, the tribunal would have to accept Mr Glyn's request for an adjournment for the respondent to consider and potentially action the instruction of its own expert. That would not be a proportionate outcome in accordance with the tribunal's overriding objective. Dr McCrae can obviously still give his evidence regarding his involvement in the process of Mrs Dimitrova's dismissal.

19. Having considered all relevant evidence, the tribunal make the factual findings set out below.

Facts

20. The actions of the respondent in these complaints were against a background and have their origin in the coronavirus pandemic. On 23 March 2020 the Prime Minister announced the first lockdown in the UK (coming into force on 26 March) ordering people to "stay at home". In June 2020, a phased reopening of schools in England commenced with non-essential shops also reopening. More restrictions were eased in July 2020. However, restrictions were reintroduced on 14 September with a second national lockdown announced in England on 31 October (coming into force on 5 November) to prevent a "medical and moral disaster" for the NHS. That lockdown ended on 2 December with a 3 tier system of restrictions introduced in England. The Pfizer coronavirus vaccine became available from December 2020. Following a relaxation of restrictions over the Christmas period, however, England entered a third national lockdown on 6 January 2021. Hotel quarantine for travellers arriving in England from designated high-risk countries began on 15 February 2021. On 8 March schools were reopened with, however, a "stay at home" order remaining in place. On 29 March outdoor gatherings of either 6 people or 2 households were allowed. The "stay at home" order ended, but with people encouraged to stay local. On 12 April 2021 non-essential retail, outdoor venues, indoor leisure and self-contained accommodation reopened. However, no indoor mixing between different households was allowed. On 17 May, the rule of 6 for indoor social gatherings was introduced with greater flexibility for outdoor gatherings. On 19 July most legal limits on social contact were removed in England. On 10 December, however, facemasks became compulsory in most indoor venues with NHS Covid passes (proof of Covid vaccination) becoming mandatory in specific settings from 15 December.

21. The respondent is a private company and the second largest provider of care home services in the UK with around 12,600 residents and more than 17,000 employees. The respondent has 2 main offices. The respondent's most senior

management and various services including those dealing with recruitment and complaints are located in London. Its other office, in Inverness, houses back office finance functions and human resources. Both offices are staffed predominantly with graduate-level employees with specialist skills. Mr O'Reilly did not accept that any of the claimants in these proceedings would have been capable of working in any role at either of those sites. None of the claimants made any positive case of their own to the contrary. Mr O'Reilly's uncontested evidence was that even employees engaged, for instance, in HR and quality improvement roles had to visit the respondent's care homes.

22. The consequences of the coronavirus for the respondent (and its response to it) were determined at board level with particular input from Mr Michael O'Reilly as General Counsel, Director of Quality, Risk and Compliance and the CQC Nominated Individual for the care homes in which all of the claimants in these proceedings worked.

23. The respondent understood from the early stages of the pandemic, as Mr O'Reilly reasonably considered to be well known at the time, that Covid 19 presented a significant risk to those who were clinically vulnerable, but with the most important risk factor being age. The respondent's care home residents were typically of an advanced age, but also with one or more additional medical conditions. The respondent recorded the death of almost 1250 residents attributed (in the sense of a cause of death recorded on their death certificates) to Covid across 2020 – more than 10% of its total number of residents. A peak period of deaths occurred in April – May 2020, but with still 285 Covid attributed deaths of residents in the months from December 2020 to May 2021. 6 staff members with an average age of 62 died for reasons attributed to Covid comprising of 4 care staff, a maintenance manager and a hostess.

24. Mr O'Reilly told the tribunal that in a typical year the respondent would expect to see 110 resident deaths per week. Whilst he accepted that he had not supplied to the tribunal data showing typical deaths as against the death rate in 2020, he said that there was quite a remarkable difference. The tribunal accepts that deaths were in excess of the norm. Recorded deaths were clearly in excess of the normal weekly average. When put that he couldn't be sure that all of the recorded Covid deaths were in truth attributable to Covid, he said that in each of those cases a GP had been sufficiently confident to ascribe the resident's death to Covid on their death certificates.

25. In terms of information considered by the respondent, The Office of National Statistics reported in July 2020 that dementia and Alzheimer's was the most common main pre-existing condition found among deaths involving Covid 19 and was involved in 49.5% of all deaths of care home residents. By the end of 2020, a government report on confirmed deaths in England (up to 31 December 2020) showed mortality rates of those aged between 70 – 79 of 363.2 per 100,000 and of 1513.1 in those aged over 80. This contrasted to a mortality rate of 14.3 in those in their 40s. Mr O'Reilly noted that almost as many of the respondent's residents in 2020 died for reasons attributed to Covid 19 as the

number of deaths in the entire UK population up to the age of 50. He noted that other care home operators had a similar experience. He appreciated that if the respondent could reduce the risk, even by a few percentage points, a significant number of lives might be saved. He wished to stress in evidence that the respondent did not see deaths merely as statistics, but understood the personal tragedy involved in each death and the effect such deaths were having on staff. He also wished to stress to the tribunal that "history is written backwards but it is lived forwards". In early 2021 he considered it entirely feasible that further waves, with coronavirus variants which were more transmissible and/or had a higher impact, could well be experienced. The respondent took the view that this might render even those who had been infected by a previous variant less protected from a new variant.

26. The respondent's care homes were a place of work, where the respondent was obliged to deliver a safe working environment, a CQC registered care facility, where the respondent was obliged to deliver safe care in accordance with relevant legislation (and guidelines) and a home to their residents. The respondent's care homes were communities where people lived and worked in close proximity. When Covid 19 infections arose and infected individuals were isolated, during the next round of testing, the respondent noted a significantly higher proportion of the home's population testing positive. Many residents, including those suffering from dementia, did not understand the need to maintain social distance. This made it possible that if a resident was positive, but, for instance, asymptomatic and awaiting the results of a PCR test, they might infect other residents or staff. Whilst the respondent might have had the legal authority to permanently isolate residents at certain points in time, the respondent did not consider this to be acceptable for humanitarian reasons.

27. The respondent came to believe that the coronavirus was significantly spread by small particle airborne transmission. It gained support for that belief from an article in the Lancet in December 2020, which still recognized the other main method of transmission being from touching contaminated surfaces.

28. Care assistants, who frequently worked in pairs with a resident for periods of up to 25 minutes at a time, needed close contact with the residents to deliver the necessary personal care.

29. The respondent operated what it called a "whole home approach" where staff were required to be flexible, particularly during periods of high demand/staff absences. The respondent's view was that even those employees who had to enter a care home for a short period of time posed a risk in terms of the introduction and spread of infection.

30. The respondent had taken a significant variety of precautions, including involving enhanced hygiene and PPE, to mitigate the risk of Covid entering and spreading through its homes, but these had proven to be only partially effective.

31. A study published by the Care Inspectorate Scotland in August 2020 showed that the size of a care home was a major factor in its vulnerability and that how well a home was run was of little consequence. A study published by the Scottish Government in November 2020 concluded that: "Once Covid 19 has been introduced into a care home, it has the potential to result in high attack rates among residents, staff members, and visitors …". Care homes were encouraged to implement active measures to prevent the introduction of Covid 19.

32. The respondent introduced social distancing in its care homes insofar as was reasonably practicable in the context of a lack of recognition by many residents and the necessity for close personal care. This was made more difficult, from the respondent's perspective, by government guidance to homes to allow indoor visits, where visitors also had close contact with staff members when entering and leaving the building.

33. The respondent undertook PCR testing from 12 April 2020 but experienced difficulties with delays in receiving the results, which might result in a positive test result only after the infection had already had an opportunity to spread. From December 2020, the Department of Health and Social Care began to provide lateral flow tests, but these unfortunately had a high rate of false negatives. It was noted at a Sage meeting on 26 November 2020 that sensitivity dropped significantly when tests were conducted, firstly by laboratory scientists, then by trained healthcare staff and to 58% when used by self-trained members of the public.

34. The respondent had refused to accept sick patients discharged from hospital unless they showed a negative Covid test.

35. The respondent tried to ensure that its homes were properly ventilated. However, this sometimes was in conflict with the need to ensure the comfort of residents.

36. Any member of staff entering a care home breathed in and exhaled aerosol particles. Care assistants had the most concentrated contact with residents. However, kitchen staff would interact with residents discussing food preferences and needs. Laundry staff were required to bring clothes and bedlinen to residents' rooms, using shared lifts, as well as to and from designated drop-off/pick up points. The respondent operated a "resident of the day" programme across its homes where every month one or more residents were the subject of special attention and received visits from all those involved in their care, including ancillary staff. All staff had access to communal staffrooms where they changed and to staff toilets.

37. The respondent clearly anticipated that the arrival of Covid vaccines might be a significant tool in reducing the risk of Covid infections. The respondent considered that its healthcare workers had a "professional responsibility" to

accept the vaccine when offered. Mr O'Reilly considered such view to have been endorsed in media interviews by healthcare leaders, including the Deputy Chief Medical Officer. The respondent considered that there were similarities in the requirement of certain frontline health professionals to be vaccinated against Hepatitis B. In cross-examination, Mr O'Reilly accepted, however, that there was a significant difference in that immunisation against Hepatitis B had been known to science for a longer period than the Covid vaccine.

38. The respondent was also concerned regarding the number of hours lost amongst its workforce due to coronavirus infections and/or the needs to isolate. A reduction in staff was more than an inconvenience and might, in the case of significant staff shortages, present a danger to the well-being of residents. It was important, the respondent considered, that it did all it could to ensure that it had a sufficient pool of available staff to draw from and it considered that the vaccine represented an important way of achieving this. From March 2021 the government published guidance on restricting movement of staff between different care homes except in exceptional circumstances, which increased the respondent's concerns about a lack of flexibility in staff deployment.

39. The respondent intended that all visitors to its care homes who could access the vaccine, ought to be vaccinated. On 26 January 2021, it wrote to all residents and their relatives expressing its support for the vaccination programme and on 23 February 2021 that designated visitors should accept the vaccine and be able to evidence this. The respondent indeed wrote to the Government lobbying for a prioritisation of designated visitors to receive the vaccine, but received a negative response on the basis of a resident's right to choose his or her visitor.

40. Some of the respondent's staff who were clinically vulnerable were placed on furlough, but the respondent understood that there were limitations on who could fall within the Coronavirus Job Retention Scheme believing that it was designed to protect jobs and for those who could not work because of their clinical vulnerability. For instance, the respondent believed that the scheme could not be used for employees who did not wish to accept a Covid vaccine, regardless of the respondent's perceived likelihood of this being viewed negatively by those staff who continued to work. Furthermore, the Scheme was for a finite period and, when it ended, those employees would have had to return to work.

41. The respondent first published an announcement by email on 15 December 2020 to all staff that the first Covid vaccine had been given approval by the Medicines and Healthcare products Regulatory Agency ("MHRA"). The MHRA has a responsibility for regulating all medicines in the UK by ensuring they work and are safe. The respondent included a quote from the Chief Executive of the MHRA that: "Vaccines are the most effective way to prevent infectious diseases… We have carried out a rigorous scientific assessment of all the available evidence of quality, safety and effectiveness. The public's safety has always been at the forefront of our minds – safety is our watchword". The

respondent, in its announcement, "recognised" that there was a lot of "inaccurate information" about the vaccine and that some people might have concerns. It suggested that assurance could be taken from the vaccine having passed the MHRA's tests. Testing was said to have been across a wider sample group than usual with no serious side effects or complications reported. The respondent considered it to be a "privilege" to have the opportunity to get the vaccine first and the respondent's Chief Executive, Pete Calveley, in the announcement, referred to a moral and ethical duty to do the right thing i.e. receive the vaccine to protect vulnerable residents. Staff were pointed to a dedicated vaccine page on the respondent's intranet for further information including FAQs provided by the Department of Health and Social Care.

42. It was put to Mr O'Reilly that the vaccine had received a temporary authorisation from the MHRA for emergency use. Mr O'Reilly said that it was his understanding that this was a mechanism which had to be employed to allow its use. He knew that the vaccine had not gone through the normal process for approval and couldn't say the exact nature of the process it had gone through, but, fundamentally, from the respondent's perspective its use had been approved. The MHRA had said they had full confidence that it was safe and his understanding was that the vaccine wouldn't have received approval if it had not also been effective. He agreed that some of the vaccines used vector technologies which, whilst not entirely novel, had not been extensively used. He also noted, however, that more than one vaccine type had been approved. The respondent had never been prescriptive as to the exact vaccine received, he said. When put to him that the vaccines would only complete their phase 3 final trials in 2023 and that, therefore, anyone receiving vaccine before then was participating in a clinical trial, he said that he was not sufficiently familiar with the trial regimes to comment, but that he took his guide from authoritative government sources. He agreed that any long-term effects of the vaccine could not yet be known, but said that Prof Stonehouse had been put forward, as will be described, to discuss those concerns with staff. He accepted that in December 2020, in advance of the vaccine rollout, the Government had added the Covid vaccine to a vaccine damage payments scheme so that people could claim compensation if disabled as a result of taking the vaccine. When suggested again to him that this showed a degree of risk, he referred to the Government advising that there was no significant risk from the Covid vaccine in circumstances where he accepted that there must be some risk, of course, in receiving any vaccine.

43. Mr O'Reilly rejected the proposition that the MHRA could not be relied upon as impartial in circumstances where they received a significant amount of funding from pharmaceutical companies. They were still the agency which had to uphold standards and the Government, he said, was suggesting that they were the authoritative voice. That was the messaging from the Government to care home providers.

44. On 5 January 2021, shortly before the third national lockdown in England due to rising cases of Covid infection, the respondent emailed staff about the new

Alpha variant posing a huge risk to residents, with initial data suggesting that it was 70% more transmissible than previous variants. The respondent again said that it was strongly encouraging all staff to have the vaccine when it was available to them. The communication included a link to a vaccine survey. Around 1000 employees participated, with 88% agreeing that the MHRA would not have approved the vaccine unless it was satisfied that it was safe. Mr O'Reilly conceded in cross-examination that a reference to there being "no risk" from the vaccine should have been to "no substantial" risk.

45. He acknowledged that there had been reported cases of anaphylactic shock in people after them receiving the vaccine which, he said, usually occurred within 15 minutes with assistance on hand to deal with such occurrences in vaccine centres. He said that the respondent was, nevertheless, convinced the risks were so small - being vaccinated was worth any identified risk. He emphasised that the respondent's board had not asked staff to do something the entire board had not themselves been prepared to do – they had all received the vaccine.

46. He agreed that employee responses to the survey did include the expression of concerns regarding the effect of the vaccine, including long-term effects. Mr O'Reilly said that he understood some people's hesitancy, as the vaccine had not been around for very long. He agreed that it was well known subsequently that the AstraZeneca vaccine posed a risk of blood clots in people under the age of 30, but believed that the numbers affected were very small. Whilst he could not say that this risk had been explicitly brought to employees' attention, he believed it was so widely reported that no one could have been unaware. Further, there was one more than one vaccine available. One individual responding to the survey referred to feeling bullied into having the vaccine or threatened with the sack. He reiterated that in his view no one was pressured to have the vaccine, but rather that the respondent impressed on them that they had a professional duty to be vaccinated, if they wanted to work in the social care sector.

47. On 18 January 2021 the respondent introduced and published a vaccine policy which provided that any new staff would need to be vaccinated to be employed by the respondent. The respondent would only promote people or pay discretionary bonuses to existing staff if vaccinated against Covid. The respondent reserved the right, as a second stage, to make vaccination a condition for current staff of being employed by the respondent. It was stated that such option would be exercised only where there was continued evidence and professional opinion that the vaccine was safe and effective, a risk assessment determined that on balance this was in the best interests of all those affected, at least 2 months' notice was given to staff before the requirement was implemented and once "suitable Equality Act exemptions are created". It provided that exemptions to the need to vaccinate would include those with a clinically supported medical contraindication supported by a letter from their GP, including, for example, an evidenced allergy to the content of the vaccine. Currently, those who were pregnant would be exempted, subject to

new data showing that pregnant women might be safely vaccinated. If the respondent exercised this option, then staff were to be required to agree an addendum to their contracts of employment agreeing to be vaccinated, to maintain their immunisation status in line with government guidance and with an obligation to share reasonable evidence of immunisation status. In the event that an employee wished to be exempt from vaccination, they were to provide a GP letter in advance confirming the basis of the exemption.

48. Subsequent discussions took place at Board level regarding the implementation of the second stage of the policy in respect of current members of staff.

49. An announcement was circulated to staff by letter of 28 January advising that the respondent was seriously considering whether or not to bring into effect the second part of its policy. It was stated that this was influenced by the positive view of staff to date as well as the views of residents and relatives about the need to do whatever they could to make the homes as safe as possible. Before it came to a decision, it was said that the respondent wished to hear from staff. In the meantime, a risk assessment would be undertaken including any feedback from staff. Staff were told that the respondent had engaged the services of Prof Nicola Stonehouse, Professor of molecular virology at Leeds University, to advise on the latest developments. All staff were asked to share their views by 6 February. The results of the first survey were shared with staff. The announcement contained further links to FAQs and other information regarding the vaccine.

50. It was put to Mr O'Reilly that the tone of the respondent's correspondence at times suggested that people were stupid or ignorant if they refused to take the vaccine. He did not accept that the respondent or Prof Stonehouse had been belittling in any responses given to questions. He agreed that he had been present at a meeting of the senior staff team in December 2020 and confirmed that Mr Calveley had used the term "bollocks" with reference to anyone saying the vaccine was experimental. This was said, Mr O'Reilly told the tribunal, in an informal context and he was adamant did not reflect Mr Calveley's considered view.

51. A draft risk assessment was also subsequently provided to staff. Mr O'Reilly accepted that this was not conducted in accordance with any Health and Safety Executive template. He agreed that he understood that the respondent's legal obligation was to do all that was reasonably practicable and that this was not an absolute obligation to eliminate all risk. The risk assessment was subsequently amended to take account of feedback received, but the final version was not published and existed instead as an internal document within the respondent. The assessment included an extract from the above-mentioned article in the Lancet in December 2020 about airborne transmission. It was stated within the policy that there was continuing evidence that the vaccine was safe and effective and that exemptions would be granted to those with a medical reason.

52. It stated that 90% of residents had accepted the vaccine, but it was anticipated that up to 20% might not show a full immune response. Reference was made to an article from the Oxford Vaccine Group suggesting in some trials a reduction in transmissibility of the virus due to vaccination by up to 67%. It was recognised that vaccination provided an additional layer of protection, rather than a complete solution such that existing precautions would remain in place. The respondent recognised that vaccines could not (and should not) be mandated and it was entirely the choice of the individual whether or not they accepted the vaccine. It was stated that the respondent recognised that consent must be given freely and consent to future vaccinations could be withdrawn at any stage. The question was said to be whether requiring a member of staff to accept the vaccine, unless exempt, to be able to continue working in what was ultimately the home of the residents as well as a workplace, was reasonable and proportionate – whether "it is objectively justifiable". The risk assessment continued that this required the interests of the small and reducing proportion of staff who decided not to accept the vaccine to be weighed against the interests of others including the overwhelming majority of their staff colleagues. It was noted that around 6% of staff had declined the vaccine at this stage. The assessment set out some of the concerns raised by staff, including in terms of an infringement of their human rights, concerns regarding effects on fertility, allergic reactions, long-term effects and the vaccine being contrary to their religion. The respondent stated that vaccines generally posed no long-term effects and that no major faith or philosophical group had indicated an objection to being vaccinated. Reference was made to an Equality Act assessment (added after consultation with staff trade unions). A statement of the President of the Royal College of Obstetricians and Gynaecologists was included that there was "no biologically plausible mechanism by which current vaccines would cause an impact on women's fertility".

53. It was recognised that a requirement to be vaccinated would only be reasonable and proportionate if appropriate exemptions were permitted, with the respondent referring to safety (where the concern was medically based, for example, an allergy to the contents of the vaccine), accessibility (which was not a major concern given the rollout programme of the vaccine), pregnancy (where the vaccine was not necessarily recommended) and other exemptions where a reasonable employer might include circumstances which were evidenced by a GP letter. It was stated that it would be more difficult to permit exemptions based on unfounded concerns, given that this would conflict with the respondent's objectives of keeping residents, staff and visitors safe in circumstances of a concern of a genuine risk to life. Any individuals exempted and unvaccinated would continue to present a risk and the respondent would consider, for example, requiring enhanced PPE, increased levels of testing, working in areas of the home to minimise prolonged contact with others, working in individual units or relocation to other local lower risk services. Performing the necessary balancing of interests, the policy was seen as reasonable and proportionate and the recommendation to the board was that implementation should be seriously considered.

54. The respondent then arranged and invited staff to join webinar seminars conducted by Prof Stonehouse, where was an opportunity for questions to be submitted and answered. 8 such webinars were arranged from 9 – 25 February on a regional basis. Prof Stonehouse explained her credentials and set out the case for accepting the vaccine, addressing issues relating to the risks it posed and a number of widely held views which were described as inaccurate or not entirely accurate. There is no evidence that the respondent sought to influence Prof Stonehouse regarding the way in which she answered questions, albeit the respondent itself recognises that Prof Stonehouse was a supporter of the use of vaccines and comfortable with the position the respondent proposed adopting.

55. The respondent also provided information regarding its proposals to the Unison and GMB unions and the Royal College of Nursing. They made representations on 1 February that the policy would undermine trust and confidence in the vaccination process and reduce the overall number of care workers vaccinated. The unions described themselves as strong supporters of the vaccination programme and that a positive message had been given to their members. However, the respondent's policy was said to place it at odds with the vast majority of employers in the sector and good practice being urged by government. A change to terms and conditions and a requirement of the vaccine for future employment was described as a means to pressurise people which was described as, again, "not acceptable and is counter-productive". The unions described their primary concern as maximising the number of care workers vaccinated in the shortest possible time, but they considered the respondent's approach to be ill thought out. They provided further joint feedback on 19 February having been provided with a copy of the risk assessment on 16 February. This feedback was along similar lines, describing the linkage between the vaccine and continued employment/employment benefits to be "punitive" and the "wrong approach". It was suggested the policy be subject to a thorough Equality Impact Assessment. Such assessment was then undertaken by Mr O'Reilly and included in a revised final risk assessment.

56. By 15 February, at the latest, all care home workers were eligible to receive a Covid vaccine.

57. The respondent, despite the position taken by the unions, determined to introduce the second stage of the vaccine policy on 24 February 2021. In its communication to staff of that day it was recognised that employees had the right to make a personal choice and that the respondent respected a decision not to have the vaccine. However, that was, in the respondent's view, on balance, not compatible with the totality of its obligations to residents, staff and visitors. Staff were told that if they remained unwilling to get the vaccine voluntarily and were not exempt, they would be subject to investigation under the respondent's disciplinary procedures and potential dismissal. Notice (of 2 months before the implementation of stage 2) was said to be being given to allow staff an opportunity to further consider their choices, review the guidance made available and discuss any further concerns with either their GP, if they

felt they were medically exempt, or their general manager. The respondent expressed a preference to retain their skills and experience, but said that safety could not be compromised as they moved forwards.

58. The respondent continued to monitor scientific publications including the aforementioned publication by the Oxford Team, which it had seen initially on 7 February 2021, but which was published following a peer review and in a corrected version on 4 March 2021. The respondent relied upon the evidence of the vaccine reducing transmissibility as set out in that publication. The respondent considered that support was growing for that proposition. On 29 March 2021 an article was noted on the Bloomberg Business site regarding a real-world study of the Pfizer and Moderna vaccines stopping infection.

59. The respondent's HR director, Genevieve Glover, tabled a report to the respondent's board on 30 March 2021. This referred to the view of the trade unions, that comments regarding an equality impact assessment had been taken on board, but that the policy was not, contrary to the unions' view, regarded by the respondent as punitive. In excess of 90% of staff were now vaccinated. This meant that 406 employees (out of a workforce of around 17,000) were currently refusing to be vaccinated, albeit the respondent had some confidence that the number would reduce by 23 April. Of the 406 who were refusing the vaccine, 97 were either booked to have it or had committed to having the vaccine. At this stage there were within the respondent 14 Covid positive residents and 122 employees absent due to testing positive. At the time of deciding to implement the second stage of the vaccine policy, 27 of the respondent's residents were infected with Covid, with 20 of the infections concentrated in 2 care home services. The respondent continued to be mindful of a future that it assessed as difficult to predict. The board agreed to support her recommendation that the vaccine policy be implemented in full from 24 April 2021. Ms Glover set out within her report a proposed timetable for investigation meetings with staff who refused the vaccine, an invitation to a "some other substantial reason" meeting and a right of appeal likely to be timetabled for the week commencing 10 May 2021.

60. When put to Mr O'Reilly that the respondent was considering a failure to take the vaccine as a disciplinary matter, he said that he was not sure whether that was right in law. The respondent's concern was to ensure a fair process and that everyone was given support and encouragement. The aim was not to dismiss employees, but to get them on board with the respondent's policy. He conceded nevertheless that, if they were unable to obtain an exemption and refused to be vaccinated, the writing was on the wall if they were personally convinced that they wouldn't be vaccinated.

61. On 9 April, the respondent's board came into receipt of the decision of the European Court of Human Rights in a case (Vavricka) involving nursery school attendance of children being subject to a health vaccination. The respondent considered that this gave support for the stance it was taking on Covid vaccination as a condition of employment. A link to the case was provided to

employees. Mr O'Reilly accepted that the vaccination in issue in the Vavricka case had been around longer than the Covid vaccine.

62. On 28 April 2021 Public Health England issued a press release under the heading: "One dose of Covid 19 vaccine can cut household transmission by up to half". Mr O'Reilly accepted that the situation was a little more nuanced than the headline, with the report recording that individuals were between 38 – 49% less likely to pass the virus on to household contacts when vaccinated. On 30 May 2021 Public Health England's vaccine surveillance report indicated an effectiveness of between 55 and 70% of a single dose of the vaccine against symptomatic disease, with high levels of protection against severe disease, including hospitalisation and death. Additional protection was said to be seen after a second vaccine dose. There was also said to be evidence now from a number of studies that the vaccines were effective at protecting against infection and transmission.

63. The respondent had also kept under review publications and advice on the risk of vaccines. As already referred to, the Astra Zeneca vaccine had caused some adverse effects in respect of blood clotting. The respondent noted also that the MHRA restricted the use of Astra Zeneca to those under 30 from 7 April 2021. However, the advice the respondent received, including in publications and guidelines issued, was that Covid remained considerably more dangerous than the virus for all age groups.

64. Updates on the coronavirus/vaccines were issued by the respondent to all staff by email from a coronavirus helpline service on 5, 7, 12, 14, 26, 28 January, 16, 18 23, 25 February, 2, 4, 9, 11, 16, 18, 23, 25 and 30 March, 1, 6, 8, 13, 15, 22, 29 April and 6, 13, 20 and 27 May 2021. Many of these communications contained a significant amount of information on published materials about the vaccine including a variety of media articles and updates regarding the respondent's response. The update on 23 March 2021 reported that vaccine rates among staff stood at over 90% with 93% of residents vaccinated. Updates from 10 March onwards included links to the Government's weekly summaries of yellow card reporting. These included information about the side-effects/conditions individuals had reported experiencing after taking the vaccine. They did not constitute any evidence of a causal link between the vaccine and those effects. The yellow card reporting site existed to enable people to report suspected side-effects. Its purpose was to provide information that might highlight the need for further investigation by the MHRA into any risks which any pattern discernible from the self-reporting might expose.

65. The respondent was unwilling to indemnify people for long-term vaccine related symptoms in circumstances, Mr O'Reilly said, where it was clear that it was not insisting that people had the vaccine. It was their individual choice. He agreed that staff could have been more confident about the lack of long-term side effects from the vaccine if it had been around a longer time. He, however, made the point that it had been administered to many hundreds of thousands, if not

millions, of people with ample time to see whether there were any short or medium term effects.

66. Mr O'Reilly was mindful of the various challenges that had been raised against the vaccine policy. He did not believe that the policy was unlawful as he did not view the respondent as insisting on anyone having the vaccine. It was always their choice. It had been raised that, if all residents were vaccinated and therefore fully protected, there was no remaining risk to them. However, not all were vaccinated. For instance, some families had withheld consent where that was required on the basis that the resident could not themselves go into the community to become infected. Further, it was always expected that the protection offered by the vaccine would fade over time. In addition, new variants might emerge which were more resistant. Finally, some residents had compromised immune systems, meaning that they were unlikely to benefit from the vaccine to the same degree.

67. Mr O'Reilly rejected the suggestion that staff with strong immune systems could have been allowed to continue to work whilst unvaccinated. It was put to him that some vaccinated employees might still have a weak immune response to the virus.

68. He accepted that, including those with medical exemptions, the number of employees who ultimately were refusing to have a vaccine could constitute around 5% of the workforce. It was suggested that the respondent could have borne any increased risk. Mr O'Reilly believed that there was an issue of fairness. Some of the staff had taken the vaccine hesitantly and, if the respondent had said that it was satisfactory to have only 95% of the total staff vaccinated, he felt that more might have remained hesitant. In any event, if a small percentage chose not to be vaccinated, brought the virus into a care home and transmitted it, that was, he said, one transmission too many. He believed the respondent was acting legitimately in seeking to do all that it could to safeguard residents without trampling on human rights in an excessive way.

69. Mr O'Reilly felt that, before any employee was dismissed there was in effect an individualised risk assessment and that employees had an ample opportunity during the process to declare any medical conditions in support of a request to be exempt. Otherwise, the risk to residents and colleagues was regarded as uniform. He rejected the proposition that the respondent could have adopted a more tailored approach, referring to the respondent having 17,000 employees with around 1700 of them being vaccine hesitant. At the time, the respondent was, he said, in the grip of the Alpha variant wave of the virus, many employees were going off work sick and residents were dying. He believed it would have been disproportionate to carry out 1700 individual risk assessments. He suggested in cross-examination, he said with some hesitation, that it might be termed as "ridiculous" to have done so. He rejected the proposition in cross-examination that cost had been a factor in deciding not to conduct individual risk assessments.

70. Some staff had raised that residents were protected by the use of PPE, but, whilst this reduced risk, the respondent considered that it would not eliminate the risk and having staff vaccinated reduced risk regardless.

71. Some staff maintained that they were not resident facing, but they were considered by the respondent still to interact with residents as part of their normal duties.

72. Some of the respondent's facilities were for younger service users, but they too were regarded as people with clinical vulnerabilities, who ought reasonably to be protected in the same way as older residents.

73. Testing was being carried out on a regular basis, but again there was a delay in obtaining the results of a PCR test and the lateral flow tests were not as reliable. Whilst the respondent considered there to be multiple layers of defence against the virus, it considered that it was important also to use vaccination as an additional step to prevent death in its care homes.

74. The tribunal notes that on 14 April 2021 the Government expressed an intention to consult on the possibility of requiring staff deployed in care homes to be fully vaccinated. The results of that consultation were issued on 16 June with a decision to require those employed directly by care homes to be vaccinated. This was said to better protect residents from death and serious illness. On 11 November 2021 Regulations came into force mandating care home workers to be vaccinated (indeed all persons who entered a care home). Mr O'Reilly's evidence was that the Government had used the respondent's policy as a template for its own Regulations. He had sent the policy to a civil servant involved in the formulation of the Regulations on their request to the respondent to share information.

75. As referred to, the effect of one part of the respondent's policy was to deprive employees of a potential bonus. None of the respondent's bonuses are contractual. A bonus was nevertheless paid to care home staff in firstly July/August 2020 and next in December 2020/January 2021 relating to performance over the preceding 3 months. No bonus was, however, paid in March 2021 to employees who had not been vaccinated. The respondent's rationale was that those employees had had the ability to be vaccinated and accepting the vaccine was their professional responsibility. It seemed, to the respondent, to be perverse to offer a bonus to employees, a bonus meant to recognise their having gone above and beyond the requirements of their duties, when in fact they had decided not to do what had been declared by national healthcare leaders to be a professional responsibility. The respondent considered it would have seemed like a slap in the face for employees who received the vaccine, often in circumstances where they might themselves have been naturally hesitant, but ultimately recognised that it was in the interests of residents for them to be vaccinated.

76. It was put to Mr O'Reilly by Mr Lowe that with the death of around 8% of residents, the respondent had suffered a drop in its income stream and the vaccine policy was part of a corporate strategy to benefit the respondent financially in a loss of fewer residents and in the respondent being able to persuade more people to choose its care homes on the basis that all staff had been vaccinated. Mr O'Reilly's emphatic response was that that was absolutely wrong. The respondent had turned away a lot of revenue from the NHS who wanted the respondent's homes to accept residents who were untested (and might have had Covid, therefore). The respondent had further refused to accept new residents from the community who were untested.

Mrs Motiejuniene

77. Mrs Motiejuniene was employed as a care assistant at the Park View Care home in Dagenham from 1 May 2015. That home delivered nursing and residential care for people living with dementia and accommodated up to 108 residents over the age of 18. During the coronavirus pandemic, precautions were taken regarding hygiene, use of PPE and social distancing. Restrictions were in place for visitors and employees were only allowed to work at the single site.

78. Mrs Motiejuniene's role was essentially to deliver personal care, including assisting residents with washing/showering, getting dressed, pad changes, if required, and to assist with meals. Despite the aforementioned measures, 12 residents of the home died for reasons attributed to Covid. There was a particularly rapid spread of the virus across the home in December 2020 and January 2021. Staff absences created pressure for all staff. In December 2020, 30 staff members tested positive within a narrow window followed by another 27 in January 2021.

79. After the introduction of the respondent's vaccine policy, Mrs Motiejuniene indicated an unwillingness to be vaccinated. Ms Renata Kindereviciene, general manager, was asked by the home's HR business partner, to conduct an investigation in relation to Mrs Motiejuniene's decision not to accept the vaccine. Ms Kindereviciene had already had a number of informal meetings with Mrs Motiejuniene and other staff, who were anxious about the vaccine, to try to reassure them and answer any questions they had. They had been directed to the webinars arranged with Professor Stonehouse. Ms Kindereviciene reviewed Mrs Moitjuniene's personnel file to check whether there were any medical issues which might have prevented Mrs Motiejuniene from being vaccinated. None were recorded.

80. Mrs Motiejuniene was then invited to attend an investigation meeting on 13 April 2021. Ms Kindereviciene was accompanied by Katie Bradford, who took a note of what was said. Ms Kindereviciene advised that this was a fact-finding meeting. She explained that the respondent had given 2 months' notice of the

proposed implementation of the second stage of the vaccine policy with effect from 23 April. She explained the severe impact of Covid 19 as the reason for introducing the vaccine policy, to protect residents as well as colleagues and visitors.

81. Ms Kindereviciene's evidence to the tribunal was that she was always able to effectively communicate with Ms Motiejuniene in English (both of them are Lithuanian). Mrs Motiejuniene is indeed a capable English speaker. Mrs Motiejuniene was provided with a copy of the investigation minutes shortly after the meeting which she was able to read, understand and sign. She was provided with a copy to keep. There is no evidence to the contrary.

82. Mrs Motiejuniene confirmed that she was aware of the vaccine policy and had received all of the many communications which had been sent to employees regarding its implementation. Mrs Motiejuniene, when asked if she had a medical reason that would show she was exempt from taking the vaccine, explained that she did not need the vaccine. She did not take medication and looked after her health and immune system. Mrs Motiejuniene said that she understood that the respondent had the residents' and employees' best interests in mind, but that she wanted to ensure that she protected her own best interests. She explained that she did not need the Covid vaccine as she felt she was immune. Ms Kindereviciene asked Mrs Motiejuniene if she wanted an opportunity to speak to someone independent on a confidential basis. Mrs Motiejuniene said that she did not as she was 100% protected and did not need the vaccine. Ms Kindereviciene said that the respondent believed that it was Mrs Motiejuniene's right to choose whether or not to have the vaccine, but wanted to ensure she was fully informed about the effect of the policy. She said that the respondent did not want to lose any staff, but that if there was no medical evidence provided by Mrs Motiejuniene to explain a medical reason for not having the vaccine prior to 23 April, her employment could potentially terminate for some other substantial reason. Mrs Motiejuniene responded that she did not trust the vaccine.

83. Following the meeting, Ms Kindereviciene prepared a report summarising that Mrs Motiejuniene understood the policy, but was refusing to have the vaccine. She recommended the matter progress to a hearing to consider whether Mrs Motiejuniene's employment should continue.

84. Mrs Motiejuniene did not raise during this investigatory meeting that she had any philosophical belief whether in "liberty and harmony" or God or anything else. She simply said that she protected herself naturally and that she was 100% protected.

85. Ms Kindereviciene told the tribunal that she had conducted in total 9 investigation meetings with employees who were refusing the Covid vaccine. A number of them chose to comply with the policy, but 3, including Mrs Motiejuniene, were put through to a hearing at which their employment might

be terminated. Ms Kindereviciene explained that, in putting Mrs Motiejuniene through to a formal meeting, she was following the requirements of the policy in the case of an employee who had no medical exemption.

86. Ms Anu Jose, another general manager, met with Ms Motiejuniene on 7 May to discuss her future employment. Ms Motiejuniene had been invited by letter dated 28 April, giving her the right of accompaniment, enclosing various communications about the policy already issued by the respondent (including the policy itself, risk assessment and Covid updates) and told that a potential outcome might result in dismissal. At the meeting, Mrs Motiejuniene reiterated that she did not want to have the vaccine because she was immune and felt that she did not need it. Ms Jose reiterated that this was the claimant's personal choice to make. She told Mrs Motiejuniene that the vaccines had been approved for use in the UK and had met strict standards of safety, quality and effectiveness set out by the independent MHRA. During the meeting Mrs Motiejuniene said that she did not need the vaccine as she was immune. She had a strong immune system and the vaccine could damage a person. She said she had done research and the vaccine would only protect for a short amount of time. She rejected the offer of any outside help because, she said, she had done her own research. Ms Jose subsequently advised Mrs Motiejuniene by letter of 24 May that her employment would terminate on notice and her last working day would be 5 July 2021. Mrs Motiejuniene was given a right of appeal.

87. Mrs Motiejuniene exercised her right to appeal, setting out her grounds in an email of 7 June 2021. Arrangements were made for this to be heard by Andrea Crowley, regional director for Essex and Ipswich region. In her appeal letter, Mrs Motiejuniene said that she had been working hard to improve her well-being and had managed to boost her immune system. She said that health authorities had made clear that vaccinated people could still spread the virus and that the vaccines were only 70- 95% effective. She said that she believed that everything is in God's hands. God is the one who created the immune system in a perfect way. Her immune system protected against viruses and other threats 100%. That, she said, was her strong philosophical belief that could be protected under the Equality Act 2010.

88. The hearing took place on 21 June. Ms Crowley sought to understand the reason for Mrs Motiejuniene declining to be vaccinated and addressed each of her grounds of appeal in turn.

89. Ms Crowley did not agree that the termination of Mrs Motiejuniene's employment was unlawful. The decision not to have the vaccine was a personal choice. The respondent felt it necessary to require staff to be vaccinated to safeguard residents and patients. That decision had been implemented after extensive consultation with staff and unions. On 16 June the Government had announced that it would be introducing Regulations to make a Covid vaccination a condition of employment in care homes.

90. Mrs Motiejuniene said that Ms Jose had failed to explain what "some other substantial reason" was. Ms Crowley explained that Mrs Motiejuniene was not being terminated for conduct reasons, but because of her personal choice not to have the vaccine, which was contrary to the Covid policy introduced to protect health and safety.

91. Mrs Motiejuniene argued that she could be exempt on the grounds of a protected characteristic. She said that it was her philosophical belief that her immune system protected her against viruses and other threats. Ms Crowley referred to information about the number of deaths said to have been averted as a result of the Covid 19 vaccination programme. Mrs Motiejuniene said that her immune system was strong and that she could be exempted under the Equality Act. She said that she had proof that for 1 year she had been working with people who had been infected and yet still hadn't had Covid herself. Ms Crowley asked: "You believe God will protect you?". Mrs Motiejuniene responded that: "God created us perfectly with a good immune system." When asked if that was her belief or the belief of her church, she said it was her belief. Ms Crowley then raised: "You want me to reinstate you on the grounds of God created us perfectly and you haven't had it. Is there anything else?"

92. Mrs Motiejuniene raised with Ms Crowley, before the tribunal, that by these comments she was made to feel stupid, her feelings were hurt and that Ms Crowley did not take into account her beliefs. In cross-examination, Mrs Motiejuniene described Ms Crowley as laughing "on the inside". Ms Crowley apologised if that was the way Mrs Motiejuniene felt, saying that it had not been her intention. She was asking open questions to enable Mrs Motiejuniene to clarify her position. She said that she did consider Mrs Motiejuniene's belief, but the decision to uphold the dismissal decision was based on the respondent's policy. Her continuing in employment depended on her having evidence that she was medically exempt. Ms Crowley recognised that Mrs Motiejuniene wanted to be reinstated because of her religious belief, but said that she was following the vaccine policy regarding the need for medical exemptions. Mrs Motiejuniene then put it to Ms Crowley in cross-examination that she (Mrs Motiejuniene) was not saying that she could be exempt because of any religious belief, but because of a relevant philosophical belief. Ms Crowley reaffirmed that she was following the respondent's policy and looking for any evidence of a medical exemption. Ms Crowley confirmed that she did not go back to HR or any of her managers to ask whether Mrs Motiejuniene's philosophical belief ought to qualify her for an exemption. She did not consider her philosophical belief to be relevant, because it was not allowed for under the vaccine policy.

93. Ms Crowley told the tribunal that she had heard 4 appeals on the issue of vaccine refusal, all with the same outcome. In no other had an employee raised any philosophical or religious belief. Ms Crowley told the tribunal that she herself was an observant Christian.

94. Mrs Motiejuniene also argued that the procedure adopted had been unfair. She said that she did not have the notes from her meeting with Ms Jose and her explanation was not taken into account. Ms Crowley did not accept that her reason for not being vaccinated had not been taken into account. Notwithstanding this, she felt that Mrs Motiejuniene had had an opportunity to fully elaborate on her reasons for not having the vaccine at this appeal meeting. The notes of the hearing support that view. She upheld the decision to terminate Mrs Motiejuniene's employment which was confirmed in writing by letter dated 29 June 2021. Within this letter she repeated that Mrs Motiejuniene's dismissal was not because of her beliefs and that she admired the precautionary steps Mrs Motiejuniene had taken. However, the respondent's policy had been implemented to protect lives and there was no other role which Mrs Motiejuniene could undertake unvaccinated.

95. In cross-examination, Mrs Motiejuniene accepted that in the period from 2 March to 12 June 2020 there were 19,394 deaths in care homes involving Covid 19 – 29.3% of all deaths of care home residents. In the same period, she accepted that Covid 19 was the leading cause of death in male care home residents, accounting for 33.5% of all deaths and the second leading cause of death in female care home residents after dementia. Mrs Motiejuniene accepted that, aged 61, as she was in 2021, the mortality rate was in excess of 10 times lower than for those in their 80s. Mrs Motiejuniene accepted that 12 residents died for reasons attributed to Covid at her care home by the end of 2020. She said that she cared for 3 of them, with close face-to-face contact. She rejected the proposition put by Mr Glyn that she could potentially have been the person to have given them Covid 19. Mrs Motiejuniene did not accept that around a third of those with Covid showed no symptoms. She said that the people who died at the home had clear symptoms.

96. Mrs Motiejuniene accepted that inevitably residents and staff were unable to maintain social distancing at all times. She agreed that her work involved taking residents to the toilet, washing them, changing them, feeding them as well as brushing their hair, shaving them and attempting to soothe them. She would then move on and do the same for another resident. This could continue over the course of a 12 hour shift. She accepted that each death from Covid was a tragedy. She also accepted that the respondent had put in place a number of safety measures to assist in reducing the spread of Covid.

97. Mrs Motiejuniene accepted that laundry assistants would bring and collect laundry from designated areas within the home. They would use the staff toilets and eat alongside other staff members.

98. It was noted that in Mrs Motiejuniene's witness statement she referred to receiving "endless communication" reminding her about the consequence of her not being vaccinated. Mrs Motiejuniene had attended one of the webinars conducted by Prof Stonehouse and submitted questions to her. She was fully aware of the consequence of her refusing the vaccine, but said that it was "very

scary". She said she knew that she would be dismissed if she was not medically exempt.

99. She accepted that the respondent's key issue in 2020/2021 was to avoid the death of residents. She accepted that the respondent wanted to drive up the percentage of vaccinated staff, but maintained that this was still discriminatory against people who would not be vaccinated.

100. As regards bonus payments, she accepted that if there were 2 individuals who would not accept the vaccine, one for religious reasons, the other not, neither would get the bonus. However, she said that that is "not what happened in reality".

101. Mrs Motiejuniene said that she was grateful that those who felt the need for the vaccine took it, as that had driven up the percentage of staff vaccinated. She did not have a need for herself to be vaccinated. Her not being vaccinated did not take away anyone else's right to life. She did not accept the proposition that it was better for her to lose her income than for residents to lose their lives.

102. Mrs Motiejuniene confirmed again in cross-examination that she was not saying that she did not take the vaccine because of her being a Christian. She did not take it because she did not need it, which was because of the strength of her own immune system. Christians believe, she said, that God gave us a strong immune system which we should not destroy. She believed in "liberty and harmony". If you destroy your "aura" you destroy your body, she said. That could be applied to everyone. Her strong immune system arose from her lifestyle. It was put to her that if someone believed in God and in liberty and harmony, but had a low immune system, they would still require the vaccine. She agreed.

103. Mrs Motiejuniene said that, arising out of her belief in her immunity, she did not need the flu jab. If she were to travel to a country with a prevalence of particular diseases, she believed that she would not need to be vaccinated. This was not based on any research, but on her life experience. She had worked with people who had Covid, yet had not contracted it. She had done her research and ate healthily. Her immune system did not need improving. The vaccine was still in a trial stage.

104. Mrs Motiejuniene had disclosed medical records during the course of this final hearing, which showed that she had recorded an unknown test for Covid on 19 December 2020, whereas she had previously disclosed only negative tests on 16, 24 and 29 December. In her witness statement, she had referred to always producing negative tests. Mrs Motiejuniene told the tribunal that she had no intention to provide misleading information. The unknown test result had been accidentally omitted. She had been sure that she had been negative

when she produced the unknown test, because she did not have any symptoms.

Mrs Hussain

105. Mrs Hussain was employed as the sole laundry assistant at the respondent's Bluebell Park Care home in Derby from 19 December 2019 – after her transfer from another of the respondent's homes. The laundry area is accessed through a communal area with separate doors from it into the kitchen, a service lift and a bathroom used by staff. To get into the care home any laundry assistant would have to enter the reception area and go through a communal area.

106. Her role involved picking up and delivering laundry to residents. She also had to stock the laundry cupboards located on each floor of the home and empty dirty laundry from separate sluices. The laundry trolleys were too large to fit into the service lift and had to be taken through the main reception of the home to access a larger lift near the reception area. She agreed that when she was distributing linen and using the large trolley, she had to travel in the residents' lift. She would not accept that she had to take laundry to residents' bedrooms despite a reference to that in her job description and the contrary not having been suggested to any of the respondent's witnesses. She rejected the proposition that she talked to residents daily. The tribunal finds that Mrs Hussain did come into contact with residents on a daily basis. She took items of laundry into their rooms and was expected to and needed indeed to engage with them in some conversation, despite her language difficulties. She also participated in the respondent's "resident of the day" programme as directed by her manager. In her role Mrs Hussain would inevitably come into contact with potentially contaminated linen and would share a staff room with her colleagues. Mrs Hussain agreed that she touched, in her role as laundry assistant, laundry which went out to every one of the home's approximate 68 residents, but said that she would wash her hands all the time in gel.

107. She would use a toilet shared with staff and residents. The only staff toilet was on the third floor of the home, which would require her to travel through the home to access it.

108. The respondent did require laundry assistants to show some flexibility. Mrs Hussain accepts that at the commencement of her employment she worked a number of housekeeping shifts. Housekeeping involved cleaning communal areas as well as the bathroom/bedrooms of residents and additional Covid related cleaning of the visitor pods. From the respondent's rotas, it is accepted that she was rostered for housekeeping duties also, for instance, on 29, 31 March and 6 April 2021. The tribunal accepts that if those shifts had changed, they would have been shown as such on the rota. Saying that, the evidence of Rachel Smith, the claimant's general manager, was that Mrs Hussain was

required to work as a housekeeper "infrequently" and that Mrs Hussain did not enjoy the role.

109. PCR tests were taken weekly at the home and lateral flow tests twice weekly. Mrs Rachel Smith considered the lateral flow tests to be potentially inaccurate, as is supported by the evidence.

110. Rachel Smith spoke on a number of occasions to Mrs Hussain about the vaccine policy to try to support her in her obtaining relevant medical evidence, including asking if her issue was that this was held overseas. Whilst it was put to Ms Smith that the claimant told her in early February that she was of the Muslim faith, Ms Smith denied being told that and it was not part of Mrs Hussain's own evidence. Ms Smith did recall that Mrs Hussain said at some point that it was her choice what to put into her body. Ms Smith denied putting pressure on or harassing Mrs Hussain to take the vaccine. There is no evidence of any form of harassment or improper pressure. She accepted, however, that she had once been told by a colleague that Mrs Hussain was upset. There was no one else within the home refusing to be vaccinated except for a number of pregnant employees, who had decided not to take the vaccine until they had given birth.

111. Mrs Hussain wrote to Mr Calveley on 15 March 2021. She referred to the vaccine policy putting her under a lot of unnecessary stress. She said that she would not be able to accept the vaccine. One of the reasons was the fact that she suffered an allergic reaction in the past, describing an anaphylactic reaction to medicine where her tongue and throat swelled up and she had to be given an adrenaline shot to counteract the reaction. She said that the occurrence of this incident was viewed as a medical exemption in her medical history. She also did suggest that, as a laundry assistant, she did not come into direct contact with residents and was, therefore, not placing any persons at risk by not being vaccinated. She did, however, she said, have a duty to protect her own health and well-being and had discovered that the vaccine manufacturers were absolved of liability, as well as medical professionals administering the vaccine. She referred to having previously informed Rachel Smith of her medicine allergies. She said that there were no statutory provisions which could force individuals to become vaccinated and that any coercion would breach human rights and amount to an unlawful injury. She claimed that she was protected under the Equality Act and did not, when signing her contract of employment, consent to any vaccine.

112. Mrs Hussain was taken in cross-examination to a record of a call she made to the respondent's whistleblowing helpline on 30 March 2021. Within the record she was recorded as saying that she was being forced to vaccinate as a result of the respondent's policy. She explained that she felt she did not need to vaccinate as she had an exemption, but could not confirm this as it was when she worked in Italy and she did not have the documentation to confirm it. She said that she had several allergies and was trying to get her GP to put all of this in writing, but that they were being unhelpful. She said that she felt harassed and

pressurised by her immediate managers, Ms Solomon and Rachel Smith, as they asked her every day if she had booked a vaccine appointment yet.

113. Dawn Smith, general manager of Cheshire Grange care home, was asked by HR to undertake an investigation meeting with Mrs Hussain regarding her decision not to be vaccinated. Mrs Dawn Smith was unaware of Mrs Hussain's previous correspondence to Mr Calveley. Her purpose was to find out the reason why Mrs Hussain did not want the vaccine and, in particular, whether there were any underlying medical issues behind her decision. She agreed in cross-examination that if Mrs Hussain did not have a GP letter confirming a medical exemption, she would likely be dismissed. When put to her that the writing was effectively on the wall for Mrs Hussain, Ms Dawn Smith said that the policy required employees to either be vaccinated or have a medical exemption.

114. Mrs Hussain was invited to an investigation meeting by letter dated 19 April 2021. The meeting took place on 23 April. Ms Dawn Smith was accompanied by Andrea Finch, who took a note. Ms Dawn Smith confirmed that she had been provided with a script to follow and that she was just meant to ask the questions set out. She had not met Mrs Husain before, but said that she didn't struggle in communicating with Mrs Hussain in English. Mrs Hussain had attended the meeting with a colleague, Danielle Spencer, who was sent away by Ms Dawn Smith as the meeting was, in her view, of a purely fact-finding nature. Mrs Hussain was advised that this was an investigative fact-finding meeting in relation to her concerns about accepting the Covid vaccine.

115. Ms Dawn Smith explained that the respondent had given 2 months' notice of the proposed implementation of the vaccine policy effective from 23 April 2021. She explained that the meeting was to consider the impact Mrs Hussain's refusal would have on the respondent's responsibility to provide safe care to its residents. She explained that the severe impact of the coronavirus, particularly on residents, made it necessary to take the extraordinary step of requiring staff to be vaccinated if they were to continue in employment. Ms Dawn Smith accepted that she had not explained what "some other substantial reason" justifying dismissal meant.

116. Mrs Hussain confirmed that she was aware of the vaccine policy. When asked if she had a medical reason which would allow her to be exempt from the vaccine, she explained that she had an allergic reaction to medication and went into anaphylactic shock around 20 years previously. Ms Dawn Smith asked Mrs Hussain whether she had spoken to her GP, which Mrs Hussain confirmed she had, but that her GP would not give her a letter of exemption. Ms Dawn Smith asked Mrs Hussain if she had an epi-pen and if so whether she could see it. Mrs Hussain said that she did, but was unable to show it to her because it had been 23 years ago. Mrs Hussain did not disclose any particular medication behind her reason not to take the vaccine. She said that she could not recall what the medication had been. Mrs Smith did not ask for evidence of the claimant's allergic reactions, she said, because Mrs Hussain had said herself

that her GP had refused to provide a letter. She assumed that the GP would not provide such letter because Mrs Hussain was not medically exempt.

117. Mrs Hussain said that she did not work with residents, but rather in the laundry and that she wore a mask and washed her hands. Ms Dawn Smith explained that Covid could be transmitted through surfaces and clothing. She asked Mrs Hussain whether it would be useful to make a referral to occupational health, where any medical reason behind her refusal could be discussed further. Mrs Hussain did not want to be referred to occupational health.

118. Ms Dawn Smith said that the respondent believed that Mrs Hussain had the right to make her own decision, but wanted her to make a fully informed decision with reference to the policy. She said that they did not want to lose any staff, but that if the respondent continued to implement the policy in full and there was no medical evidence prior to 23 April, then Mrs Hussain's employment could potentially terminate for some other substantial reason. Mrs Hussain responded that she did not trust the vaccine.

119. Mrs Hussain did not during this meeting refer to her having a philosophical belief in bodily autonomy ("my body, my choice" or otherwise) or say that she was refusing the vaccine because of her religious beliefs, including that the vaccines use abortive foetal cells genetically modified by science. Ms Dawn Smith agreed, however, in cross-examination that when, in her notes of the meeting, she recorded a concern that Mrs Hussain had not disclosed the reason for her refusal to have a vaccine, that was not accurate. She had stated a reason relating to her allergic reaction.

120. Ms Dawn Smith then prepared a report confirming that 23 years previously Mrs Hussain had an adverse reaction to some medication and went into anaphylactic shock. Mrs Hussain had been unable to describe what the medication was and had said that her GP had declined to provide a letter. It was noted that during the meeting, Mrs Hussain had wanted to show Ms Dawn Smith articles about adverse reactions caused by the vaccine and legal action that was being taken. Ms Dawn Smith's evidence was that they included Facebook groups, referring then to there being a lot of negative media around the vaccine at the time. The articles were in English. She did not ask Mrs Hussain to send them to her, she said, as she was not medically trained and not in her words "qualified to debunk that". Mrs Hussain told the tribunal that the articles she showed Ms Dawn Smith were from a government site evidencing yellow card reporting to show the number of adverse effects experienced by vaccinated people. She agreed that all this information was in English. She said that she had used Google translate to understand what they said.

121. It was therefore recommended by Ms Dawn Smith that a hearing be convened to decide whether Mrs Hussain's employment could continue.

122. Mrs Hussain told the tribunal that she had lived in the UK for 9 years, but was not able to read or write in English. In terms of spoken English, people could understand her English and she said that she knew what she had to do at work. She conceded that she understood what her immediate manager Tracey Solomon needed from her. They would occasionally have coffee together, but mostly talk (in English) in generalities, rather than regarding personal matters. They did nevertheless, she conceded, had conversations together.

123. The tribunal concludes that Mrs Hussain's capabilities in understanding spoken and written English were significantly better than the impression she sought to give before the tribunal. Mrs Hussain described English as her fourth language, Polish being her native tongue. There were occasions when the claimant clearly understood Mr Glyn's questions before they were translated. This, together with the aforementioned evidence of her ability to interact with Rachel Smith, Ms Solomon and Dawn Smith cause the tribunal to reach this conclusion not least in circumstances where the notes of the investigation meeting would have read far differently if Mrs Hussain, without the benefit of an interpreter, had not had a reasonable understanding of what was being said to her. Saying that, Mrs Hussain was still disadvantaged by not having some help in translating what was being said. The evidence from her medical records, discussed below, indicate that she was not necessarily easily understood and required at times the assistance of her husband to translate for her.

124. Mrs Hussain was provided with minutes of the investigation meeting, but refused to sign to confirm their accuracy.

125. Mrs Hussain was invited by letter dated 30 April 2021 to a hearing to consider whether her employment could continue. This letter from Mrs Fiona Gough, another care home manager, stated that it was clear that having the vaccine, if you were able, was the right thing to do. An interpreter was arranged in advance of the hearing, albeit the tribunal has no evidence as to the circumstances which prompted that. Mrs Hussain said that she had made a request to Rachel Smith, which the tribunal accepts. Mrs Hussain was told that a potential outcome of the meeting was her dismissal and she was advised to forward any written evidence she had by 5 May.

126. Mrs Hussain had had a telephone consultation with a doctor, not her GP but one engaged by a health service provider called "gogodoc", prior to the meeting. She provided a summary of that consultation. This recorded Mrs Hussain referring to a possible allergic reaction to penicillin. Mrs Hussain had informed the doctor that 20 years ago she had an anaphylactic reaction when administered a drug during labour and was "unsure if penicillin". He recorded a penicillin allergy. The claimant was said to be currently taking the drug, sertraline.

127. The formal meeting was held by Fiona Gough on 6 May. The claimant was accompanied at the meeting by a colleague, acting as an interpreter. The claimant said that she had only received the invitation to the hearing together with a significant number of enclosures (including minutes of the previous investigation meeting, the vaccine policy, the staff risk assessment and various vaccine updates) on the day before, 5 May. Ms Turner agreed in evidence that this was not sufficient time for the claimant to read all of the documents, particularly in circumstances where her English was "not great". She agreed that Mrs Gough should have enquired why the information was not received earlier and agreed that the meeting should have been stopped. However, Mrs Hussain had been asked if she wanted to continue and, according to the unchallenged notes, Mrs Hussain had said that she would continue.

128. The reasons for the respondent's policy were explained to Mrs Hussain and she was asked to confirm the reason why she was not prepared to have the vaccine and that it was because of the aforementioned allergic reaction. Mrs Hussain confirmed that nothing had changed since the investigation meeting and her refusal was because she had had an allergic reaction. Mrs Gough said that she understood that, but that a certificate she had provided only outlined that she may have had an allergic reaction to antibiotics and those were not contained within the vaccine.

129. Mrs Hussain expressed the view that the vaccine was experimental until 2023 and that only after that date would she take it. She said that she was afraid for her health and asked if anyone could guarantee that she would be safe. Mrs Gough stated that every medication had side effects, no one was forcing Mrs Hussain to have the vaccine, but she wanted Mrs Hussain to be clear that, by not having it, she was making herself unavailable for work. Mrs Hussain said that she understood, but "I do not take medication". As already referred to, the claimant, at this point in time, was in fact taking sertraline. Her statement to Mrs Gough was misleading. When asked if she had been given information to assist her in making her choice, Mrs Hussain said that she had not and she had had to search Facebook for information. When asked if she had received various communication by email and letter from the respondent, she said that perhaps she had "but I don't read English". She hadn't thought to ask for anyone to translate the correspondence she received. The tribunal does not accept that as accurate. Mrs Hussain has explained how she used google translate to help her understand the meaning of other documents/information.

130. Mrs Hussain queried how she was a danger to anyone, if she was the only one not vaccinated at work. Mrs Gough explained that it was the policy that every member of staff be vaccinated to reduce the risk to residents, risks which remained regardless of other precautions taken. Mrs Hussain reiterated her disagreement with the stance the respondent was taking and said that when she signed her contract it did not say that she would have to take any medicines. Nor was the Government saying it was obligatory. Mrs Gough said that she wanted to ensure that Mrs Hussain had a further

opportunity to consider whether she would be willing to take the vaccine. Mrs Hussain said that her decision was final. She said that she understood that if she did not take the vaccine, then her employment might be terminated.

131. There was no discussion with Mrs Hussain regarding alternative roles. Mrs Turner told the tribunal that there wouldn't have been any alternative in the care home. In any alternative roles, the policy would still apply. The non-care home roles within the respondent involved staff qualified to undertake responsibilities such as payroll and IT. Nor was there any discussion of the claimant being put on furlough. Mrs Turner said that was not an option for staff able to work and with work to do. Mrs Turner was unable to say whether Mrs Gough knew that the claimant was a Muslim or had any belief in bodily integrity. From the list of documents referred to as being in the claimant's possession in the outcome letter, there was no reference to the claimant's letter to Mr Calveley, nor the articles the claimant had shown to Mrs Dawn Smith at the investigation meeting, nor the letter from the "gogodoc" doctor with whom the claimant had recently had a telephone consultation.

132. Mrs Gough wrote to the claimant by letter dated 18 May 2021 terminating her employment. The letter referred to a list of documentation said to have been provided including notes of the earlier investigation meeting, a copy of the vaccination policy, and various updates issued to staff. She was required to work her notice with employment ending on 15 June 2021. A right of appeal was given.

133. Mrs Hussain submitted her grounds of appeal on 24 May and was invited by email of 27 May to a hearing on 2 June before Stacey Nicholson, senior general manager at Threshfield Court care home. Mrs Hussain again had an interpreter present. Ms Nicholson went through each of the points of appeal in turn. Ms Nicholson agreed in cross-examination that if an employee had no exemption and was unvaccinated, they were going to be dismissed. When put to her that the appeal was pre-determined, she said that she wanted to see if there was new evidence - evidence of a medical exemption - and there wasn't. She agreed that within the respondent's risk assessment there was provision for additional precautions if an individual was not vaccinated. However, she did not believe that allowing Mrs Hussain to work with these additional precautions was appropriate, given that Mrs Hussain did not have a medical exemption. It was noted that the invitation letter to the meeting referred to the appeal being against a "disciplinary decision". Ms Nicholson was not sure why there was reference to any disciplinary action. There had been a formal meeting and that is how the meetings were termed which led to the termination of employment of employees refusing the Covid vaccine.

134. Mrs Hussain referred in her letter of appeal to 2 letters she had sent to Mr Calveley and the respondent's management, but without receiving any response. Ms Nicholson confirmed that she did not know what these were, had not asked the claimant for them or when they were sent and had not checked with Mr Calveley whether he had read them.

135. The tribunal has already referred to Mrs Hussain's letter to Mr Calveley. She also emailed the respondent's HR Department on 30 May 2021 with a number of documents. These included a "conditional acceptance" signed by Mrs Hussain on 7 May where she effectively declared that, under duress, she accepted the "offer" to be vaccinated subject to a number of conditions, which included the respondent acknowledging that the vaccine was still in an experimental stage, that there had been thousands of incidents of death and life changing events as a direct result of taking the vaccine, that forcing someone to take part in an ongoing medical experiment was against the Nuremberg Code and the respondent effectively indemnifying her against any consequences of her being vaccinated. Mrs Hussain told the tribunal that she would have accepted the vaccine if the respondent signed up to her conditions.

136. Other attachments included an American publication referring to federal law prohibiting employers from requiring a vaccination, a consent form in respect of submitting to a medical experiment, a document referring to the number of yellow card notifications in respect of the various vaccines available, evidence dated 10 May 2021 that Mrs Hussain showed coronavirus antibodies indicating that it was likely that she had had the virus already, a certificate dated 12 April 2015 confirming Mrs Hussain's conversion to Islam and a copy of the Nuremberg Code, which had the stated aim of protecting human subjects from enduring the kind of cruelty and exploitation endured by prisoners at concentration camps. Another enclosure referred to Mrs Hussian's mother suffering from dementia. Mrs Hussain told the tribunal that her mother had been very healthy, but had deteriorated after herself receiving the Covid vaccine.

137. Ms Nicholson was also not in possession of the note issued by the "gogodoc" doctor following the aforementioned telephone consultation.

138. Ms Nicholson was of the view that it would have been beneficial to Mrs Hussain to have received all of the documentation more than one day prior to the previous formal hearing.

139. She confirmed to the tribunal that she did not ask questions around the nature of Mrs Hussain's faith as a Muslim. She said that she was, however, aware of the MHRA website which Mrs Hussain referred to in her appeal giving descriptions of side effects of vaccines, including the potential for an anaphylactic shock, the risk of blood clots from the AstraZeneca vaccine and its potential to cause death.

140. Mrs Hussian put forward that she believed that the vaccine was still in the process of clinical trials and she was more comfortable making her decision when more data was available. Ms Nicholson explained that it was a requirement of all vaccines to be authorised, which the Covid vaccine had

been by the MHRA. Mrs Hussain reaffirmed that she had allergies and did not know what was in the vaccine. It was noted that she had not been able to provide a letter from her GP to support this and had previously declined an opportunity to attend occupational health.

141. Mrs Hussain reiterated her position that she did not take medication, "not even paracetamol". Mrs Hussain was referred before the tribunal to her medical records, disclosed during these proceedings, where there were references to her having taken antibiotics for a UTI and then for a cough and fever. Mrs Hussain said that she had taken them because she was suffering from an infection. She accepted that on 29 May 2013 she had consented to being vaccinated against, for example, tetanus and diphtheria. She had taken the morning after pill in June 2014. In October 2014 she had been vaccinated against hepatitis A and typhoid. She said that she had not been aware at the time that the hepatitis vaccine included foetal cells. Her religious objection to the Covid vaccine, she explained, was that it was forbidden to kill and the vaccine contained foetuses. In contrast, when she took the morning after pill, there was no foetus. Her medical records in January, February and August 2017 showed Mrs Hussain consenting to being vaccinated against hepatitis B – again Mrs Hussain told the tribunal she had not been aware that this vaccine contained foetal cells. In 2018 Mrs Hussain had taken an anti-smoking pill. She had been vaccinated against hepatitis A and typhoid again on 25 March 2019. When asked why she had not done any research into those vaccines if it was a concern about medication/vaccines containing foetal cells, she said that she had just started her research more recently. She had not been born a Muslim and was still learning.

142. When asked if Mrs Hussain's husband (as a Muslim) had had the Covid vaccine, she said that that was his own business and he didn't tell her things like that. She said, for example, that she did not know what he ate outside of the home. In the context of Mrs Hussain losing her job because of her reluctance to take the Covid vaccine, the tribunal found Mrs Hussain's answers to be problematical. It is simply not credible that Covid vaccination had not been discussed by Mrs Hussain with her husband to the extent that she would have known his vaccination status.

143. Mrs Hussain also maintained to Ms Nicholson that she had a belief in bodily integrity, bodily autonomy and had spiritual faith as a Muslim which led her to strongly oppose any vaccine that used aborted foetal cells. Ms Nicholson said that she respected Mrs Hussain's choice to use natural health remedies. She also confirmed and provided a link to the British Council of Muslims guidance to take the opportunity to receive the Covid vaccine and that no human or animal products were ingredients in any version of the vaccine.

144. Mrs Hussain said at her appeal hearing that all the science could say is that the vaccine reduces symptoms, but that was not a given. Ms Nicholson explained that Public Health England had carried out research and

concluded that, not only does being vaccinated significantly reduce a person's risk of being infected, but it also makes them less likely to transmit the vaccine.

145. Mrs Hussain said that the letter she received on 20 May caused her great distress in addition to previous communications which she said discriminated against non-vaccinated staff. Ms Nicholson explained that the respondent had gone through a lengthy period of engagement with staff before implementing the policy. She also explained the criteria for benefiting from the discretionary bonus scheme.

146. Ms Nicholson reiterated that in her view Mrs Hussain was not being asked to take an experimental drug, as the vaccine had been licensed by the MHRA for use in the UK.

147. Finally, Mrs Hussain explained that she was not going to risk her health in being forced to take a vaccine which she described as coercion. Ms Nicholson explained that the respondent took its obligation to ensure the safety of residents seriously, as well as providing a safe working environment for staff and visitors. She maintained that the severe impact of the coronavirus made it necessary for the respondent to take extraordinary steps to protect people.

148. On 11 June Mrs Hussain emailed Ms Nicholson asking why she had been "fired" and asking for the legal basis for her having the vaccine. Ms Nicholson did not respond, but forwarded the email to HR. The tribunal has not been shown any response received from them.

149. Ms Nicholson upheld the decision to terminate Ms Hussain's employment which was confirmed to her in writing by letter dated 18 June, addressing each appeal point in turn.

150. Mrs Hussain, in cross-examination, accepted that there was a 100 fold difference in the mortality rate of people suffering from Covid in their 80s compared to someone in their 40s, such as her. She agreed that by 2021 it had been experienced that Covid would spread quickly in a care home environment, albeit she thought that the spread would be limited by other precautions taken by employees, such as wearing masks and other PPE. She agreed that the residents lived close to each other and couldn't all be isolated in their rooms. She agreed that it was possible that once Covid was introduced into a care home, it had a potentially high attack rate amongst residents. However, she considered that, whilst residents died from Covid previously, there were still a lot of resident deaths now, saying that "people die in care homes". She agreed that it was her case that if the residents who had died had not died from Covid, they would have died from something else. Whilst she agreed that the respondent had taken every precaution to prevent the spread of Covid, she believed that gloves

could have been more easily accessible or provided in greater number. Otherwise, she accepted that there had been instructions given regarding hygiene and ventilation. There was a separate visiting suite with plastic glass down the middle and she had some awareness that the respondent had resisted placements from the NHS unless the prospective residents tested negative for Covid. She agreed that the results of PCR tests could take a number of days to come back and that lateral flow tests could give false negatives, but also, she said, false positives. She agreed that by December 2020 there was a real concern that Covid spread through small particle transmission. She accepted that normal surgical masks were not effective in preventing the transmission of small particles.

151. As regards her philosophical belief, she confirmed that, for her, "my body, my choice" meant that it was up to her to provide consent to any medical treatment. It was put to her that, in the case of the Covid vaccine, some people might share her belief and refuse the vaccine and others would consent and receive it. She agreed, but said that that was their personal choice. She rejected the proposition that effectively everyone subscribes to a belief that medical intervention ought to be subject to a patient giving consent. She agreed that she had received a hepatitis vaccine and that she had done so after she had been asked if she consented. However, she said that she was unaware at the time what that vaccine contained. She accepted that every doctor in the UK, before treating a patient, would ask if they consented. She said her belief meant that she decided what was going to be introduced into her body.

152. Mrs Hussain told the tribunal that she had made an appointment at a vaccine centre and attended on 14 February 2021. She said that she was told by a doctor there that the AstraZeneca and Pfizer vaccines were safe and, if anything happened, she could be injected with adrenaline. She said that she asked the doctor for a certificate, but he sent her away to her own GP. She agreed that she had no evidence of a medical exemption or that she was allergic to the contents of any Covid vaccine. She said that no doctor would conduct tests for potential allergies or provide an exemption certificate.

153. She agreed that, at the investigation meeting, she had referred to the severe reaction and, as she also told the tribunal, it had happened in Poland. She said that she had also experienced an allergic reaction whilst working in Italy prior to coming to the UK. However, at the investigation meeting, when asked if her allergic reaction had been recent, she had said that it hadn't been and had been around 20 years ago. When asked then if she had had any further problems, she replied in the negative. She told the tribunal that she had forgotten to mention the Italy incident in the investigation meeting.

154. The evidence from Mrs Husain's medical records was that on 11 February, her husband had attended her doctor's surgery asking for a GP

appointment to discuss the Covid vaccine and was advised to go on the gov.uk website for all vaccine information. Mrs Hussain told the tribunal that it was on that day that her husband booked her in for the aforementioned vaccine centre appointment on 14 February. She was unable to explain why she had not referred to her attendance at the vaccine centre in her witness statement. She maintained that she had a screenshot of her appointment, which she had shown to Rachel Smith. The screenshot has not been disclosed in these proceedings and Ms Smith was not asked when she gave evidence if she had ever seen evidence of such appointment. When put to Mrs Hussain that she had been happy to go to vaccine centre to be vaccinated, she said that she went to talk to a doctor to see what they could offer her. When put to her that if she had been told that the vaccine was safe, she would have taken it, she said that she wouldn't have taken it until she had been tested for allergies. When asked why she went to a vaccination appointment if she was never going to have the vaccine, she said that she wanted them to do the allergy tests for her. She wanted to make sure the vaccination would be safe for her. She denied being aware that allergy tests wouldn't be undertaken at a vaccine centre.

155. Mrs Hussain accepted that she had told her GP on 18 March 2021 that she had been allergic to a tablet in 1988, when she was 7 months pregnant in Poland. She had wondered if any allergy tests could be undertaken and her doctor advised her to chase up the hospital in Poland. Mrs Hussain's husband joined the telephone consultation on 18 March to help translate for her and they were described as being happy with the plan at the end of that conversation. Ms Hussain told the tribunal that she had looked into how she might get this information over the internet and then called the hospital, but they did not have the information due to the passage of time.

156. Mrs Hussain accepted that she had never told the respondent about this "plan". She said that she told Rachel Smith that she was trying to get allergy tests or a medical exemption. It was then put to the claimant that on 23 April, at the investigation meeting, it was misleading for her to tell the respondent that her husband was arranging to talk to the doctor. There had been no contact with the doctor made after that meeting. The doctor had said more than a month before that she should contact the hospital in Poland and Mrs Hussain had not told the respondent. Mrs Hussain said that she did not think it was important. Instead, she had told the respondent that her husband was trying to talk to her GP when he wasn't. The claimant said that she subsequently called the doctor and was told that if she had an allergic reaction more than 20 years ago, it was okay for her to take the vaccine, but allergy tests would not be made available to her because they were expensive. Without such test she said that she would not take an experimental vaccine.

157. When put to Mrs Hussain that she was saying that, if she had been allergy tested and found to be safe from the vaccine, she would have taken a vaccine, she said

that she would not and would still have considered what to do because the vaccine was effectively in a clinical trial until 2023. It was then put to Mrs Hussain that, if she had found herself to be safe from the vaccine in terms of allergies and if the period of any vaccine trial had ended, she would have had the vaccine, she said she would not have, because of side-effects disclosed by the yellow card reporting and her not knowing how her body would react. She maintained that there are a lot of undisclosed components in the vaccine and she was not sure if she was not allergic to them. If the vaccine was safe, she would accept it, but she could not be sure about the side-effects.

158. Mrs Hussain then told the tribunal that on 23 April her husband made an appointment for her to see a doctor to get allergy tests.

Miss Chadwick

159. Miss Chadwick had worked as a care assistant at Castle Park, Hull from 14 August 2014. As such, she was required to carry out all the usual aspects of close personal care associated with that role. At Castle Park the respondent looked after residents with complex needs and learning disabilities, including those with brain injuries, MS, Parkinson's and Huntington's disease. The majority needed significant support in personal care and feeding and the majority of the home's complement of around 22 residents were deemed clinically vulnerable. All but one resident was under the age of 65, with an average age of late 40s. Whilst precautions were taken at the outset of the coronavirus pandemic, including enhanced cleaning, the use of PPE and attempts to limit social distancing, there were 3 confirmed deaths amongst the residents where there was a positive coronavirus test and another which the respondent deemed as likely. At the peak of the pandemic, between 7-13 staff, out of a total of around 48, were off each week self-isolating.

160. On Miss Chadwick notifying the respondent that she did not wish to accept the Covid vaccine, Wendy Sugden, general manager, was asked to conduct an investigation meeting with her. She was given a script to follow. Her evidence was that medical exemptions had been accepted in respect of 2 employees at the home, who were recovering from cancer or still going through radiotherapy/chemotherapy. Prior to the meeting, Ms Sugden was clear that Miss Chadwick was adamant that she did not want the vaccine. An investigation meeting was held on 16 April 2021 where the implementation of the respondent's Covid vaccine policy was explained, as well as the respondent's wish to fully understand Miss Chadwick's reasons for not taking the vaccine and whether there was any further support that was required. Miss Chadwick confirmed that she was aware of the policy and that she did not have a medical exemption. She said that she understood that the respondent wished to implement the policy to protect residents, however she was concerned that the vaccine was experimental and that its long-term effects were not known. She also confirmed that she had already had Covid and had been okay. Ms Sugden said that accepting the vaccine was Miss

Chadwick's choice. She said that the respondent did not wish to lose staff, but if there was no medical evidence prior to 23 April of an exemption, then Miss Chadwick's employment could potentially terminate for some other substantial reason. When asked if she wished to add anything further, Miss Chadwick said that she did not trust the vaccine.

161. On reviewing the notes of the meeting, Ms Sugden realised she had not expressly asked Miss Chadwick whether she had read the vaccination policy, in circumstances where there was no tick in her training records against the box to confirm that she had read and understood the policy. Miss Chadwick was therefore invited to a second meeting on 20 April where Ms Sugden asked if there was anything else she could do to support the claimant to help assure her about the vaccine. Miss Chadwick said that she could find whatever information was necessary out for herself. She also declined an offer to speak to a medical expert or anyone else within the respondent.

162. Following this meeting, Ms Sugden summarised Miss Chadwick's comments in a report and recommended that the matter progress to a hearing to consider whether her employment should terminate.

163. Thereafter, Alice Tindall, hospital director was asked by Ms Sugden to undertake a formal hearing to determine whether Miss Chadwick's employment could continue. Miss Chadwick was invited to attend a formal meeting by letter of 28 April. The formal meeting then took place on 4 May 2021. The claimant was accompanied by her colleague and the deputy home manager, Mrs Dimitrova. Miss Chadwick, on receiving an explanation again of the respondent's policy, confirmed that she understood that the respondent had a duty of care to its residents, but said that she did not want to have the vaccine because it was an experimental drug and she was not prepared to have it unless the respondent confirmed in writing that it would be liable if anything happened to her. Ms Tindall explained the MHRA approval that the vaccine had achieved in the UK.

164. After considering what had been said, Ms Tindall confirmed that Miss Chadwick's employment would terminate after 6 weeks' notice on 17 June 2021. She was given the right of appeal.

165. Miss Chadwick submitted grounds of appeal by email of 14 May 2021. She was invited to a hearing by letter of 17 May. The hearing took place on 3 June 2021 before Sue Arnold. Miss Chadwick was accompanied by her union representative, Dr McCrae.

166. Miss Chadwick's appeal was rejected. In particular, with reference to her grounds of appeal, Ms Arnold believed that the correct dismissal process had been followed and that there had been a dismissal legitimately for some other substantial reason. She appreciated that there was no provision in Miss Chadwick's contract of employment requiring her to accept a vaccine. However, the respondent's decision was based upon the implementation of a new policy.

Ms Arnold did not agree that the respondent tried to coerce her to take the vaccine against her will. She considered that this had been a personal choice open to Miss Chadwick. She understood that this had been a stressful time for staff and the respondent's priority she considered had been to ensure that all staff were making a fully informed decision. However, the respondent was not forcing anyone to have the vaccine. It was also raised that the respondent had falsely denied that the vaccines were experimental. Ms Arnold did not accept this on the basis that it had passed the MHRA's safety and effectiveness tests. She was also the view that a sufficient risk assessment had been undertaken.

167. Miss Chadwick said at the appeal hearing that she had a medical exemption which related to her current condition. She did not, however, disclose what this was and this not been raised before. Miss Chadwick was told that, if she had provided information in respect of her condition, this could have been reviewed. Miss Chadwick referred to hypertension and blood clots in her family history. When asked if Miss Chadwick had been to her GP for advice, she said that it was impossible to get an appointment. When asked if there was potentially an undisclosed condition which made her exempt, Miss Chadwick replied in the affirmative. Dr McCrae said that Miss Chadwick did not have to disclose a condition, asserting that it was the respondent's responsibility. Ms Arnold told the tribunal that she felt Miss Chadwick had been given sufficient time to obtain any relevant medical advice, including through a referral to occupational health. She said that she had dealt with a lot of people who had got medical exemptions and they had all been able to get written authorisation from their GPs.

168. Miss Chadwick herself said to the tribunal that she had never been seeking a medical exemption. There was nothing she knew about in her family history which might have classified her as exempt. She was clear that the respondent could have said nothing that would have changed her mind about accepting the vaccine.

169. Ms Arnold, at the appeal, rejected the allegation that the respondent's policy amounted to discrimination against workers of low pay and status. Miss Chadwick also raised that she had a philosophical belief in "my body, my choice", but Ms Arnold did not consider that Miss Chadwick had been able to expand on this further. Ms Arnold concluded that it was not the intention of the respondent to override any legal requirements. The decision to terminate Miss Chadwick's employment was accordingly upheld.

170. Miss Chadwick reiterated in evidence to the tribunal that the reason for her refusal of the vaccines was that they were still in experimental stages until 2023 and there was no data to support their safety or long-term effect. She had an antibody test which came back positive, such that she believed she had antibodies which would fight off Covid 19 as her body had previously. She said that she was concerned that if she wanted to have another child in the future, the vaccine would affect her fertility given its experimental nature.

171. The issue of redeployment was not raised by Miss Chadwick during the internal process. The Castle Park service was one of 4 nearby services, part of the Castle Care Village, which included also Castle Park Lodge, an independent hospital and 2 nursing homes, Castle Keep and Castle Rise. All 4 facilities were serviced by a common laundry and kitchen located in separate buildings in the same location. Since the coronavirus, laundry and kitchen assistants had brought laundry/food to the entrance of each service and handed them over to the care assistants there. There were around 6 laundry assistants and 8 or 9 working in the kitchen with additionally a single maintenance person, who would go into those buildings. The respondent's vaccination policy was applied to all those working in the laundry and kitchen. They all handled items which went into and came out of the 4 care services on site.

Mrs Dimitrova

172. Mrs Dimitrova is a qualified nurse and had worked at the Castle Park care home since 2004, firstly as a care assistant, then as a qualified nurse and since May 2019 as deputy manager. Mrs Dimitrova's view was that deaths at Castle Park had probably been put down as Covid related, because the residents had positive tests. One of them she said suffered from Parkinson's disease which was deteriorating and he couldn't take medication. She recalled one death where an individual had been tested for Covid one day, had a heart attack the next and the following day a test for Covid came back in the negative. Nevertheless, she said, that person's death had been put down to Covid. Another individual had gone to hospital and died there with the hospital reporting a positive Covid test. Another individual had been suffering from Huntington's disease and had stopped eating and drinking. This had caused colleagues to call for an ambulance twice, but paramedics had said that the resident could not be taken because they were prioritising Covid positive residents. She said she did not know why any resident's death had been classified as attributable to Covid. None of this had been put to Mrs Sugden and, in the absence of her having an opportunity to challenge such account of residents' deaths, cannot be accepted.

173. Mrs Dimitrova's evidence was that the same issues of risk could have been raised with seasonal flu as were raised relating to the coronavirus. Flu caused death amongst residents in a similar way. She thought it was probably wise to vaccinate those who were at high risk and accepted the use of vaccinations generally. However, she considered that the Covid vaccine needed to be tested for longer.

174. Deborah Davies as, at the time, general manager of one of the services on the same site, Castle Rise, was asked by Ms Sugden to hold an investigation meeting with Mrs Dimitrova to understand her decision not to accept the Covid vaccine. The meeting took place on 15 April. The policy was explained. Mrs Dimitrova said that she was aware of it and had received all communications, which had been sent to employees. She was aware that protecting residents was the reason why the policy was being introduced. She said that she did not have a medical exemption. The reason for not taking the vaccine was that she did not trust it. Ms Davies did not look into any concerns expressed – she understood that the policy

represented the respondent's position on the efficacy of the vaccine and assumed that Mrs Dimitrova's fears were wrong. Whilst Mrs Dimitrova was told taking the vaccine was her choice, but she was also told that she was at risk of dismissal. Ms Davies completed a report recommending that the matter be taken to a formal hearing.

175. Such formal hearing took place on 6 May 2021 with Denise Findley, general manager. The claimant was accompanied by Dr McCrae, as her union representative. Following the hearing, Stella Bolger, hospital director, was asked to conduct a further meeting. She was told that Ms Findley had felt intimidated by Dr McCrea and the manner in which he put questions to her. That second meeting took place on 14 May where Mrs Dimitrova was again accompanied by Dr McCrae. Mrs Dimitrova confirmed that she was refusing to have the vaccine because she believed it was still at a trial stage. Ms Bolger explained that it had satisfied the MHRA.

176. Ms Bolger decided to terminate the claimant's employment on notice effective on 3 August. Whilst deputy manager, Mrs Dimitrova was also a registered nurse, who would be required to have direct contact with both residents and colleagues. Whilst Ms Bolger regarded accepting the vaccine as Mrs Dimitrova's personal choice, that was not one compatible with her continued employment.

177. Mrs Dimitrova submitted grounds of appeal on 21 May and by a letter of 24 May she was invited to an appeal hearing on 3 June before Ms Arnold. Mrs Dimitrova was again accompanied by Dr McCrea. Having gone through the points of appeal, Ms Arnold decided to uphold the decision to dismiss. She believed that a fair process had been followed. She accepted that there was no contractual right to require an employee to be vaccinated. The reason for dismissal was based upon the implementation of a new policy. She did not accept that there had been any coercion and believed that the respondent's priority had been to ensure that Mrs Dimitrova was making an informed decision. She did not consider that Mrs Dimitrova had provided any evidence to support her position that the Covid vaccines were experimental or that the respondent had provided false or misleading information. She considered that an appropriate risk assessment had been undertaken. Mrs Dimitrova said during the appeal that she had a medical exemption relating to hearing issues which would increase her chances of adverse side effects. This was the first time such medical issues had been raised and Mrs Dimitrova confirmed that she was not receiving any medical care relating to hearing issues. Ms Arnold did not believe that this information ought to change her decision, nor Mrs Dimitrova expressing that she had a philosophical belief in "my body, my choice". The policy introduced was regarded by Ms Arnold as lawful and considered Mrs Dimitrova's dismissal reasonable in all the circumstances. Ms Arnold checked after the appeal whether any information Mrs Dimitrova had provided was supportive of the vaccine being an experimental drug – she concluded that it did not.

178. Before the tribunal, Mrs Dimitrova's position remained that she considered the vaccines to be experimental until they had completed phase 3 trials around early

2023. She considered that anyone who took them, when the respondent introduced its policy, was participating in a clinical trial. There was no data for medium and long-term safety. She believed that the protective measures in place in the home were good enough to keep people safe and a good alternative to the vaccine. She said that at the time of the first Covid vaccinations in January 2021, around 40% of the staff at the home did not consent to the vaccine, although when it became clear that the vaccine would be mandatory, most of those agreed to receive it. She said that at the time of her dismissal at Castle Park, 95% of staff had been vaccinated and all but one of the residents. She had asked at the appeal why that was not sufficient to not necessitate the termination of her employment. She said she was told by Ms Bolger and Ms Arnold that they were working in accordance with the respondent's policy.

179. It was put to the respondent's witnesses that Mrs Dimitrova could have been placed elsewhere within the respondent's 17,000 workforce. They denied that to be the case. No suitable alternative role was put to them, other than the role of a remote support worker to Ms Arnold. Her position was that Mrs Dimitrova was a clinical nurse and any role she could perform would include contact with residents. For her, Mrs Dimitrova working in the kitchen or laundry would have increased the risk of a wider transmission of the coronavirus. It was clear that Mrs Dimitrova was a highly regarded nurse and that he respondent's managers did not want to lose her.

Miss Masiero

180. Miss Masiero worked as a care assistant from 1 April 2009 team in the Leonard Lodge care home in Brentwood. A Senior General Manager, Madalina Ilie, was asked to conduct a formal meeting with her because of a decision Miss Masiero had taken not to accept the Covid vaccine. This followed an investigation meeting on 20 April when she indicated that she did not have a medical exemption. Miss Masiero was invited to a formal meeting by letter of 18 May and warned that this would involve considering the continuance of her employment. Various documentation was sent with the invitation letter, including policy information and updates which had been sent to staff throughout the preceding months. The formal meeting took place on 24 May. Miss Masiero was accompanied by a Unison trade union representative.

181. Miss Masiero explained at the meeting that she was not having the vaccine on the basis that her body and immune system were able to fight off any virus and this was her decision. She explained that she used to work during the flu pandemic, wore PPE and was still negative. Her reasons for refusal were personal to her. She confirmed that she understood why respondent was implementing the policy, but queried why people were exempt because of medical and religious beliefs. She said that long-term data was not available and she was unable to make a fully informed decision. She raised potential risks to fertility. She accepted in cross-examination that she was aware of the position taken by the president of the Royal College of Obstetricians and Gynaecologists, but felt she needed more information and to wait for statistics. She said that she would feel more comfortable in making

a decision when there was more data and that it should become clear whether the benefits outweighed the risks. She also said that she was on a journey of natural health for over 20 years, ate healthily and no genetically modified food. She said that she believed in bodily integrity, autonomy and had a lifelong "spiritual phase". She said that taking the vaccine went against her beliefs. She said that she was Catholic and objected to any vaccine which used abortive foetal cells and was genetically modified by science.

182. After considering what had been said, Ms Ilie determined that Miss Masiero's employment should be terminated for some other substantial reason effective after a period of notice on 15 July 2021. She explained in an outcome letter that the policy had been introduced to enhance and secure the safety and well-being of residents, employees and visitors. She said that she had explained that the vaccine had been approved for use in the UK having met strict standards of safety quality and effectiveness set out by the MHRA. Miss Masiero was given a right of appeal, but chose not to exercise it.

183. Miss Masiero told the tribunal that she felt she had been subject to coercion, with the respondent presenting a one-sided story pretending that everything was settled when it was not. She said that there were many doctors and scientists who had very different views to what was being promoted by the mainstream media, but they were being silenced. She said that, as a rational and empowered human being, she felt she was being treated like a second-class citizen. She told the tribunal that she would never change her mind about the Covid vaccine. She agreed, finally, that she had never produced a medical exemption.

Applicable law

184. In a claim of unfair dismissal, it is for the employer to show the reason for dismissal and that it was a potentially fair reason. The respondent relies on Section 98(1)(b) of the Employment Rights Act 1996. Under Section 98(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—
the reason (or, if more than one, the principal reason) for the dismissal, and
that it is….. some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held."

185. If the respondent shows a potentially fair reason for dismissal, the tribunal shall determine whether dismissal was fair or unfair in accordance with Section 98(4) of the Employment Rights Act, which provides:-

" [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 upon 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".

186. The tribunal must not substitute its own view as to what sanction it would have imposed in particular circumstances. The tribunal has to determine whether the employer's decision to dismiss the employee fell within a band of reasonable responses that a reasonable employer in these circumstances might have adopted. It is recognised that this test applies both to the decision to dismiss and to the procedure by which that decision is reached.

187. As the Court of Appeal held **British Leyland v Swift [1981] IRLR 91**:

"The Industrial Tribunal had wrongly applied a test of whether a reasonable employer would have considered that a lesser penalty than dismissal was appropriate. The correct test is was it reasonable of the employer to dismiss the employee? If no reasonable employer would have dismissed him, then the dismissal is unfair. But if a reasonable employer might reasonably have dismissed him, then the dismissal is fair. There is a band of reasonableness within which one employer might reasonably dismiss the employee whilst another would quite reasonably keep him on. It depends entirely on the circumstances of the case whether dismissal is one of the penalties which a reasonable employer would impose. If it was reasonable to dismiss, the dismissal must be upheld as fair even though some other employers might not have dismissed."

188. The case of **Catamaran Cruisers Ltd v Williams[1984] IRLR 384** involved a dismissal reliant on "some other substantial reason". Catamaran needed to save money and proposed changes to the contracts of its employees some employees refused to accept the changes, claimed unfair dismissal and the Tribunal held that:

"If….the new terms are, when examined, much less favourable to the employee than were the old terms, then unless the business reasons are so pressing that it is absolutely vital for the survival of the employer's business that the terms be accepted, then the employee is not, in our view, unreasonable in refusing to accept those terms and, consequently, any dismissal of him for a refusal to accept is unfair."

189. The EAT rejected this test and held that the test was whether the employer had shown *"a sound good business reason….even if the alternative to taking the course they propose is not that the business may come to a standstill but is merely that there would be some serious effect upon the business."*

190. In **Scott & Co v Andrew Richardson EAT/0074/04** the EAT held that a Tribunal had erred by expressing its own view as to the commercial decision leading to the business re-organisation rather than addressing the employer's reasons.

191. A dismissal, however, may be unfair if there has been a breach of procedure which the tribunal considers as sufficient to render the decision to dismiss unreasonable. In cases where dismissal relates to an employee's conduct, the tribunal must have

regard to the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015.

192. If there is such a defect sufficient to render dismissal unfair, the Tribunal must then, pursuant to the case of **Polkey v A E Dayton Services Ltd [1998] ICR 142**, determine whether and, if so, to want degree of likelihood the employee would still have been dismissed in any event had a proper procedure been followed. If there was a 100% chance that the employee would have been dismissed fairly in any event had a fair procedure been followed, then such reduction may be made to any compensatory award. The principle established in the case of **Polkey** applies widely and beyond purely procedural defects.

193. The respondent, as a private organisation, is not under any direct obligations imposed by the Human Rights Act 1998 as would an emanation of the state. It is, however, subject, in respect of the Employment Rights Act 1996, to the statutory obligations placed upon it. The application of human rights to the respondent is achieved through an indirect route.

194. Section 3(1) of the Human Rights Act 1998 places the tribunal under the following obligation:

"So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights."

195. As the tribunal is a public authority under section 6(3) it must, therefore, under section 6(1) act in a way which is compatible with the Human Rights Act.

196. The approach to take to arguments on human rights was given structure by the Court of Appeal in **X v Y [2004] ICR 1634** as follows:

(a) "Do the circumstances of the dismissal fall within the ambit of one or more of the Articles of the ECHR? If they do not, the Convention is not engaged and need not be considered
(b) Does the state have a positive obligation to secure enjoyment of the relevant Convention right between private persons? If it does not, the Convention right is unlikely to affect the outcome of an unfair dismissal claim against a private employer
(c) If it does, is the interference with the employee's Convention right by dismissal justified?
(d) if it is not, was there a permissible reason for the dismissal under the ERA that does not involve unjustified interference with a Convention right? If there was not, the dismissal will be unfair for the absence of a permissible reason to justify it
(e) if there was, is the dismissal fair, tested by the provisions of S.98 ERA, reading and giving effect to them under S.3 HRA so as to be compatible with the Convention right?"

197. Nevertheless, in **Turner v East Midlands Trains Ltd 2013 ICR 525** the Court of Appeal accepted that the band of reasonable responses test provided a sufficiently robust, flexible and objective analysis of all aspects of the decision to

dismiss under Human Rights legislation. There the Court cited **Sanchez v Spain 2011 54 EHRR 872** where the ECHR observed that:

"Disciplinary authority is one of the essential prerogatives of the employer, whether private or public. In this connection employers have a broad discretion to impose the sanction that they consider the best adapted to the accusations against the employee; the scale of possible sanctions encompasses the power to dismiss a person who has seriously compromised the interests of the company or the public service….."

198. The Court of Appeal noted that when the ECHR observed that: *"the measure of dismissal taken against the applicants was not a manifestly disproportionate or excessive sanction . . ."* The word manifestly of itself suggests that some deference should be paid to the views of management that dismissal is an appropriate sanction. It continued:

"Strasbourg therefore adopts a light touch when reviewing human rights in the context of the employment relationship. It may even be that the domestic band of reasonable responses test protects human rights more effectively…. "

199. The respondent asserts that its vaccine policy was in furtherance of the Article 2 right to life, with particular regard to its residents. There is compelling evidence that whatever precautions were taken to prevent transmission of Covid in care homes, once Covid infection entered a care home it spread and caused a risk to life or serious harm. Any assertion to the contrary is, the tribunal accepts, untenable.

200. The right to life is absolute save in defence of another, lawful arrest or escape or quelling riot or insurrection. The tribunal accepts that of all the rights protected by the Convention, the right to life demands that the greatest weight be afforded to it, which will be significant in any balance of proportionality against non-absolute rights.

201. Pursuant to Article 5 of the Convention rights, everyone has the right to liberty and security of person. No one shall be deprived of his liberty.

202. In **R (on the application of Peters) v Secretary of State for Health and Social Care [2021 EWHC 3182**, Whipple J addressed the argument that the subsequent Government Regulations mandating Covid vaccination for care home workers violated liberty or security of person. She held:

"The claimants say that the effect of the 2021 Regulations is to mandate vaccination and that mandate is precluded by s. 45E. They say that this is a real world understanding and analysis of what occurs or will occur in light of the 2021 Regulations, because care workers will be forced to undergo vaccination to keep their jobs, and that is contrary to the statutory prohibition. They argue that s. 45E has primacy over the 2021 Regulations, on the basis that primary statute prevails over secondary legislation.

I am unable to accept that submission. I do not consider it to be arguable. On its face, s.45E says that no person can be compelled to undergo medical treatment, but that is not, on a proper understanding, the effect of the 2021 Regulations, which do not mandate vaccination. The way they work is that the individual

retains the autonomy to decide whether to be vaccinated or not; the 2021 Regulations impose a consequence, depending on the choice a person makes, and preclude someone who has chosen not to be vaccinated from taking up work in a care home unless they come within an exempted category, which neither of these claimants does. I conclude that this is not a situation where s.45E is even arguably engaged."

203. By way of contrast, the ECHR case of **Solomakhin v Ukraine 24429/0** involved a case where a patient was vaccinated against his wishes and without his consent. This forced vaccination was an interference with the Article 8 right to respect a person's private life, which included a person's physical integrity.

204. In **Vavricka & Ors v The Czech Republic 47621/13,** the ECHR held that compulsory involuntary vaccination was an interference with private life. The consequences of not getting vaccinated was not being admitted to pre-school and meant that there had been an interference with their Article 8 rights.

205. Referring again to the **Peters** case, the claimants there raised an Article 8 ground in seeking to impugn the Regulations making Covid vaccination a condition of working in a care home effective from 11 November 2021. Whipple J said:

"26. As to ground 3, that is an Article 8 ground, suggesting that the Regulation gives rise to a breach of Article 8. This is answered in large part by the recent case of Vavřička v. Czech Republic: if children can be barred from school because they are not vaccinated, as was the circumstance of that case, it must follow, by analogy, that there is no breach of Article 8 to legislate so that workers, who are not vaccinated, can be prevented from working in care homes. I see no merit in this ground.

There are other aspects to the Article 8 argument. As the defendant says, the whole point of this measure is to protect lives, namely, the lives of elderly residents in care homes. So the measure itself is intended to protect the Article 2 rights of those who are residents in these care homes. That is a very weighty justification for any interference with Article 8 which might be established."

206. Whipple J was clear that the circumstances in **Vavricka** were analogous. The tribunal accepts that they were not identical – as Mr Lowe submits, the vaccine involved in **Vavricka** had been around longer than the Covid vaccines. The tribunal considers, in any event, that Whipple J's reasoning can be read across to the application of any qualified human right in potential conflict with the Article 2 right.

207. Article 9 of the Convention provides that "e*veryone has the right to freedom of thought, conscience and religion and to manifest their religion or belief, in worship, teaching, practice and observance".* The freedom to manifest one's religion or beliefs *"shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others".*

208. In **Cha'are Shalom Ve Tsedek** (27417/95) the ECHR deal with a case where ultra-orthodox Jews complained of a breach of Article 9 because the method of slaughter of animals required under their beliefs was illegal in France They wished to be authorised to carry out such slaughter. However, the Court held that as the claimants could obtain meat compliant with their beliefs from Belgium easily, there was no interference with their right.

209. The respondent submits that the freedom of religion and belief that the claimants seek to engage is not the freedom to decline vaccine, it is to decline the vaccine and then work in the respondent's care homes. It is put that the claimants could work in another health care setting - they could have circumvented the requirement in the circumstances of the pandemic by pursuing work elsewhere in another care home or another health care setting. The respondent submits that health care settings were crying out for more staff because of the pandemic.

210. That approach gains supported from the ECHR in **Konttinen v Finland 24949/94** where a man who had become a Seventh Day Adventist was unable to work Fridays from sundown and all of Saturday. Whilst the tribunal is mindful that the employee in that case had a pre-existing contractual obligation to work particular shifts, it notes the Commission's findings that:

"… the applicant was not dismissed because of his religious convictions but for having refused to respect his working hours. This refusal, even if motivated by his religious convictions, cannot as such be considered protected by Article 9 para. 1 (Art. 9-1). Nor has the applicant shown that he was pressured to change his religious views or prevented from manifesting his religion or belief.

The Commission would add that, having found his working hours to conflict with his religious convictions, the applicant was free to relinquish his post. The Commission regards this as the ultimate guarantee of his right to freedom of religion. In sum, there is no indication that the applicant's dismissal interfered with the exercise of his rights under Article 9 para. 1 (Art. 9-1) (cf. the abovementioned No. 8160/78, loc.cit.)"

211. Mrs Hussain, Miss Chadwick and Mrs Dimitrova also seek to rely on Article 10 (freedom of expression), 14 (prohibition of discrimination) and 17 (prohibition of abuse of rights).

212. Whipple J in **Peters** recognised that the Government would have a wide margin of discretion in implementing measures to protect care home residents. So then must a care home employer.

213. The tribunal recognises that these are not cases solely about the claimants' rights to protection of their religious freedoms or their respect to private life. This is not a case such as **Eweida & Ors v United Kingdom 48420/10**, where the claimant's right to manifest her religious belief by wearing a cross conflicted only with British Airway's desire to have a single corporate image – which is not a human right.

214. By contrast, in the conjoined claim of **Ladele,** her employer relied on the convention rights of protecting and promoting equality and diversity (of gay and lesbian couples right to celebrate civil partnerships) under Article 14 of the

convention. Ms Ladele, a registrar, refused to carry out civil partnership ceremonies because of her religious beliefs The ECHR held:

"On the other hand, however, the local authority's policy aimed to secure the rights of others which are also protected under the Convention. The Court generally allows the national authorities a wide margin of appreciation when it comes to striking a balance between competing Convention rights. In all the circumstances, the Court does not consider that the national authorities, that is the local authority employer which brought the disciplinary proceedings and also the domestic courts which rejected the applicant's discrimination claim, exceeded the margin of appreciation available to them. It cannot, therefore, be said that there has been a violation of art.14 taken in conjunction with art.9 in respect of the third applicant."

215. Mrs Motiejuniene and Mrs Hussain bring claims of discrimination based on a religious belief, but also a separate philosophical belief. Section 10 of the Equality Act 2010 provides that:

"(1) Religion means any religion and a reference to religion includes a reference to a lack of religion.
(2) Belief means any religious or philosophical belief and a reference to belief includes a reference to a lack of belief."

216. In order to be protected, a philosophical belief must satisfy criteria set out in the case of **Grainger plc v Nicholson [2010] ICR 364** satisfy the *Grainger* criteria. There are five requirements. The belief must be: (1) Genuinely held; (2) be a belief, not an opinion or a viewpoint; (3) relate to a weighty and substantial aspect of human life (not disputed by the respondent); (4) attain a certain level of cogency, seriousness, cohesion and importance; and (5) be worthy of respect in a democratic society. The EAT noted in **Harron v Chief Constable of Dorset Police [2016] IRLR 481** that the criteria should not be set too high. If the claimants satisfy that test it is still necessary to ask, in the context of a protected belief and religion, whether it is only the freedom to believe in that religion or belief that the claimant seeks or a right to manifest that religion or belief by one of, or more of "worship, teaching, practice and observance." Is then the manifestation of that religion or belief intimately linked to the religion or belief?

217. In **Forstater v CGD Europe 2022 ICR 1***,* the EAT recognised that beliefs may have a diverse range of concepts and principles that defy precise or concise definition. In Choudhury J's view the standard was described as follows:

"The tribunal did not reject any part of that evidence. However, that did not mean that the tribunal was obliged to set out the entirety of the claimant's written and oral evidence in its reasons in order to satisfy the requirement to define exactly what the belief is. The standard of exactitude cannot mean, in our judgment, setting out a detailed treatise of a claimed philosophical belief in every case. A precise definition of those aspects of the belief that are relevant to the claims in question would, in our judgment, suffice. In this regard, we do not consider it incorrect for a tribunal to seek to identify the core elements of a belief in order to determine

whether it falls within section 10 of the Equality Act. There may be aspects of a belief that are peripheral or merely practical instances of its main tenets, which need not form part of the definition of the belief that falls to be tested against the Grainger criteria."

218. In considering whether the belief is genuinely held the tribunal is limited to considering whether the belief is held in good faith (see **Williamson v Secretary of State for Education and Employment [2005] 2 AC 246***).*

219. There is a distinction to be drawn between a belief and *"an opinion based on some real or perceived logic or based on information or lack of information available"*. In **McClintock v Department of Constitutional Affairs [2008] IRLR 29** the EAT considered whether a magistrate's refusal to place children with same sex couples constituted a belief. The EAT held that:

"To constitute a belief there must be a religious or philosophical viewpoint in which one actually believes; it is not enough to have an opinion based on some real or perceived logic or based on information or lack of information available."

220. A philosophical belief protected by the Equality Act must be backed up by a coherent belief system. The bar, however, must not be set too high. As was stated in the **Williamson** case:

"The belief must also be coherent in the sense of being intelligible and capable of being understood. But, again, too much should not be demanded in this regard."

221. Both Christianity and the Muslim faith are protected religions. As set out in **Williamson:**

"It is necessary first to clarify the court's role in identifying a religious belief calling for protection under article 9. When the genuineness of a claimant's professed belief is an issue in the proceedings the court will inquire into and decide this issue as a question of fact. This is a limited inquiry. The court is concerned to ensure an assertion of religious belief is made in good faith: "neither fictitious, nor capricious, and that it is not an artifice", to adopt the felicitous phrase of Iacobucci J in the decision of the Supreme Court of Canada in Syndicat Northcrest v Amselem (2004) 2441 DLR (4th) r, 27, para 52. But, emphatically, it is not for the court to embark on an inquiry into the asserted belief and judge its ""validity" by some objective standard such as the source material upon which the claimant founds his belief or the orthodox teaching of the religion in question or the extent to which the claimant's belief conforms to or differs from the views of others professing the same religion. Freedom of religion protects the subjective belief of an individual. As Iaccobucci J also noted,F at p 28, para 54, religious belief is intensely personal and can easily vary from one individual to another. Each individual is at liberty to hold his own religious beliefs, however irrational or inconsistent they may seem to some, however surprising."

222. Mrs Hussain and Mrs Motiejuniene complain of direct discrimination because of religion/belief. In the Equality Act 2010 direct discrimination is defined in Section 13(1) which provides: *"(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."*

223. Section 23 provides that on a comparison of cases for the purpose of Section 13, *"there must be no material difference between the circumstances relating to each case".* The Act deals with the burden of proof at Section 136(2) as follows:-

"(*2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravenes 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 provisions".

224. In **Igen v Wong [2005] ICR 935** guidance was given on the operation of the burden of proof provisions in the preceding discrimination legislation, albeit with the caveat that this is not a substitute for the statutory language. The tribunal also takes notice of the case of **Madarassy v Nomura International Plc [2007] ICR 867**.

225. It is permissible for the tribunal to consider the explanations of the respondent at the stage of deciding whether a prima facie case is made out (see also **Laing v Manchester CC IRLR 748**). Langstaff J in **Birmingham CC v Millwood 2012 EqLR 910** commented that unaccepted explanations may be sufficient to cause the shifting of the burden of proof. At the second stage the employer must show on the balance of probabilities that the treatment of the claimant was in no sense whatsoever because of the protected characteristic. At this stage the tribunal is simply concerned with the reason the employer acted as it did. The burden imposed on the employer will depend on the strength of the prima facie case – see **Network Rail Infrastructure Limited v Griffiths-Henry 2006 IRLR 865**.

226. The tribunal refers to the case of **Shamoon v The Chief Constable of the Royal Ulster Constabulary [2003] ICR 337** for guidance as to how the tribunal should apply what is effectively a two stage test. More recently the Supreme Court in **Hewage v Grampian Health Board [2012] UKSC 37** made clear that it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. However, they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other.

227. In the **McClintock** case, the EAT held in differentiating between a complaint of direct and indirect discrimination:

"35. The Tribunal appear to have dismissed the indirect discrimination claim at the outset on the first ground. They held that since the Department applied the same rule to all, namely the obligation to abide by the judicial oath that negated any possibility of there being an indirect discrimination claim.

36. We agree with Mr Diamond that whilst this will be an answer to a direct discrimination claim, it is no answer to one of indirect discrimination. The very concept of indirect discrimination is premised on the assumption that a criterion or policy will ostensibly be applied equally to all, but will in practice adversely affect a particular group. If an employer's rules provide that everyone must work on Saturday that nonetheless clearly adversely affects Jews and Moslems who take their religions seriously. Accordingly, that particular reason given in paragraph 48 for rejecting the claim displays an error of law."

228. The tribunal is also referred to the decision of the Court of Appeal in **Ladele v London Borough of Islington [2010] ICR 532** where it was said:

The tribunal's conclusion that Ms Ladele suffered direct discrimination on the core issue, namely, by being required by Islington to conduct civil partnerships, is, as the appeal tribunal said in Elias J's impressive and cogent judgment [2009] ICR 387, para 52, 'quite unsustainable'. As he went on to explain, Ms Ladele's complaint 'is not that she was treated differently from others; rather it was that she was not treated differently when she ought to have been,' and her complaint was 'about a failure to accommodate her difference, rather than a complaint that she is being discriminated against because of that difference'. As Elias J said in the next paragraph of his judgment: 'It cannot constitute direct discrimination to treat all employees in precisely the same way. This error also applied to virtually all of the other findings of direct discrimination by the tribunal, as summarised in para 19 above…….

The notion that Islington, or any officers or employees responsible or the acts of alleged discrimination, were motivated by Ms Ladele's religious beliefs, rather than by her refusal to officiate at civil partnerships is inconsistent with the fact that Islington s concerns would undoubtedly have been put to rest if Ms Ladele had agreed to perform all her assigned civil partnership duties. As the appeal tribunal pointed out in para 88 of Elias J s judgment, the evidence showed that if she had been willing to carry out the ceremony . . . then no further action would be taken against her. Indeed, Islington s proposed compromise, although temporary, further supports this conclusion. So too does the fact that no action was taken against one of the other registrars who held the same views but agreed to move to another post. (The third registrar who held such views has, as I understand it, retired).

229. Mrs Motiejuniene's complaint of harassment is brought pursuant to Section 26 of the Equality Act 2010 which states:

"(1) A person (A) harasses another (B) if -
1. A engages in unwanted conduct related to a relevant protected characteristic, and
2. the conduct has the purpose or effect of—
3. violating B's dignity, or
4. creating an intimidating, hostile, degrading, humiliating or offensive environment for B….

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
(b) the perception of B;
(c) the other circumstances of the case;
(d) whether it is reasonable for the conduct to have that effect."

230. Harassment will be unlawful if the conduct had either the purpose or the effect of violating the complainant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment.

231. A claim based on "purpose" requires an analysis of the alleged harasser's motive or intention. This may, in turn, require the tribunal to draw inferences as to what the true motive or intent actually was. The person against whom the accusation is made is unlikely to simply admit to an unlawful purpose. In such cases, the burden of proof may shift from accuser to accused.

232. Where the claimant simply relies on the "effect" of the conduct in question, the perpetrator's motive or intention – which could be entirely innocent – is irrelevant. The test in this regard has, however, both subjective and objective elements to it. The assessment requires the tribunal to consider the effect of the conduct from the complainant's point of view. It must also ask, however, whether it was reasonable of the complainant to consider that conduct had that requisite effect. The fact that the claimant is peculiarly sensitive to the treatment accorded her does not necessarily mean that harassment will be shown to exist.

233. Indirect discrimination, as defined in Section 19 of the Equality Act 2010, occurs where:

"(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"

234. As regards group disadvantage, Baroness Hale said in **Homer v Chief Constable of West Yorkshire Police 2012 UKSC 15**:

"….. Previous formulations relied upon disparate impact – so that if there was a significant disparity in the proportion of men affected by a requirement who could comply with it and the proportion of women who could do so, then that constituted indirect discrimination. But, as Mr Allen points out on behalf of Mr Homer, the new formulation was not intended to make it more difficult to establish indirect discrimination: quite the reverse (see the helpful account of Sir Bob Hepple in Equality: the New Legal Framework, Hart 2011, pp 64 to 68). It was intended to do away with the need for statistical comparisons where no statistics might exist. It was intended to do away with the complexities involved in identifying those who could comply and those who could not and how great the disparity had to be. Now all that is needed is a particular disadvantage when compared with other people who do not share the characteristic in question. It was not intended to lead us to ignore the fact that certain protected characteristics are more likely to be associated with particular disadvantages."

235. In **Games v University of Kent [2015] IRLR 202 EAT** Judge Richardson stated:

"It follows that it was not necessary for the Claimant, in order to establish particular disadvantage to himself and his group, to be able to prove his case by the provision of relevant statistics. These, if they exist, would be important material. But the Claimant's own evidence, or evidence of others in the group, or both, might suffice. This is, we think, as it should be: the experience of those who belong to groups sharing protected characteristics is important material for a court or Tribunal to consider. They may be able to provide compelling evidence of disadvantage even if there are no statistics at all. A court or Tribunal is, of course, not bound to accept such evidence. It should, however, evaluate it in the normal way, reaching conclusions as to its honesty and reliability, and making findings of fact to the extent that it accepts the evidence."

236. Another key passage in **Homer** relates to what is now section 19(2)(d) – the issue of justification. Consideration of section 19(2)(d) involves approaching the issue of justification in a structured way, asking the right questions. These questions were outlined as follows.

"19. The approach to the justification of what would otherwise be indirect discrimination is well settled. A provision, criterion or practice is justified if the employer can show that it is a proportionate means of achieving a legitimate aim. The range of aims which can justify indirect discrimination on any ground is wider than the aims which can, in the case of age discrimination, justify direct discrimination. It is not limited to the social policy or other objectives derived from article 6(1), 4(1) and 2(5) of the Directive, but can encompass a real need on the part of the employer's business: Bilka-Kaufhaus GmbH v Weber von Hartz, Case 170/84, [1987] ICR 110*.*

237. *20. As Mummery LJ explained in R (Elias) v Secretary of State for Defence* [2006] EWCA Civ 1293*,* [2006] 1 WLR 3213*, at [151]:*

". . . the objective of the measure in question must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be

necessary to that end. So it is necessary to weigh the need against the seriousness of the detriment to the disadvantaged group."

He went on, at [165], to commend the three-stage test for determining proportionality derived from de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing [1999] 1 AC 69*, 80:*

"First, is the objective sufficiently important to justify limiting a fundamental right? Secondly, is the measure rationally connected to the objective? Thirdly, are the means chosen no more than is necessary to accomplish the objective?"

As the Court of Appeal held in Hardy & Hansons plc v Lax [2005] EWCA Civ 846*,* [2005] ICR 1565 *[31, 32], it is not enough that a reasonable employer might think the criterion justified. The Tribunal itself has to weigh the real needs of the undertaking, against the discriminatory effects of the requirement."*

238. At paragraph 22 in **Homer** Lady Hale added 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." "A measure may be appropriate to achieving the aim but go further than is (reasonably) necessary in order to do so and thus be disproportionate."* [23]. The availability of non-discriminatory alternatives is relevant: see [25]

239. In performing the required balancing exercise, the tribunal must assess not only the needs of the employer, but also the discriminatory effect on those who share the relevant protected characteristic. In **University of Manchester v Jones 1993 ICR 474** the Court of Appeal held that this involved both a quantitative assessment of the numbers or proportions of people adversely affected and a qualitative assessment of the amount of damage or disappointment that may result to those persons, and how lasting or final that damage is. Particular hardships suffered by the claimant may also be taken into account provided proper attention is paid to the question of how typical those hardships are of others who are adversely affected. The greater the discriminatory effect, the greater the burden on the employer to show that the PCP corresponds to a real commercial objective and is appropriate for achieving that objective. The degree of justification required is "proportionate" to the degree of disparate impact caused by the employer's practice or policy.

240. Applying the legal principles to the facts as found, the tribunal reaches the conclusions set out below.

Conclusions

241. The tribunal accepts that the reason for the respondent's introduction of its vaccine policy (and in particular the second stage of it) was to reduce the risk of spread of Covid infection in its homes and, therefore, death and serious illness amongst primarily its residents, but also its staff and any visitors. Mr O'Reilly was utterly convincing in his evidence to that effect. The only significant challenge to this being the reason behind the policy was that there was a financial imperative to maximise income by keeping residents alive and as a marketing tool to encourage new

residents, more confident of entering a care home with a policy of compulsory vaccination amongst staff. There may have been (to put it crudely) a financial benefit in keeping residents alive, but the tribunal is clear, not least from Mr O'Reilly's disdainful reaction to such suggestion, that the introduction of the policy was not driven by any financial analysis. The vaccine policy resulted in the dismissal of the claimants in circumstances where, in accordance with policy itself, they were neither vaccinated nor medically exempt. The reason for dismissal was genuine and substantial and one which could justify dismissal of care home workers as a potentially fair reason.

242. There are then, in the claims of unfair dismissal, two key questions to address. Firstly, whether dismissal was substantively fair, dismissal falling within a range of reasonable responses where a reasonable employer in the respondent's circumstances might have terminated employment. Save where the roles performed by the individual claimants differ to some extent, this involves common considerations in respect of all claimants. Secondly, the tribunal must determine whether there was a fair implementation of the policy in the case of each individual claimant including the procedure adopted prior to dismissal.

243. The tribunal recognises that the circumstances of the claimants' dismissals are unusual. Whilst "some other substantial reason" is a wide-ranging potential "catch all" category for a potentially fair dismissal, the mere assertion of such a reason is insufficient. On the other hand, classically cases falling within this category of a potentially fair reason involve changes to contracts of employment which are driven by a need to save money or increase efficiency by organisational change. In a sense, the reason the respondent dismissed these claimants was, in its genuine view, for a more substantial reason, where it believed its policy of (subject to medical exemption) only employing vaccinated care home staff would save lives. It is not for this tribunal to determine the question of reasonableness on its own view as to the requirement to implement a vaccine policy of this nature, just as it cannot override a commercial decision simply on the basis that it believes that an alternative approach might have been open to an employer. The tribunal has been clear from the outset that it is not its role to assess the dangers of Covid, nor the effectiveness or safety of any Covid vaccine.

244. In this case, however, the fairness of the policy which led to the claimants' dismissals must be evaluated against the interference it involved with the claimants' human rights. The tribunal appreciates that the respondent, as a private organisation, was not under direct obligations imposed by the Human Rights Act 1998. Instead, the tribunal is under a duty to read the right not to be unfairly dismissed so that its conclusion is not incompatible with the protection afforded to human rights.

245. The tribunal is then mindful that this case does engage a clash of rights. It is distinguishable from cases where a dress code implemented to achieve a particular corporate image disallowed the manifestation of a religious belief. Here, the respondent can legitimately, on the tribunal's findings as to the reason for dismissal, maintain that there was, at the very least, a tension between its aim to

protect life and the claimants' right, for instance, to enjoy a private life and freedom of thought and religion.

246. The right to life is often referred to as "an absolute right" which can never be interfered with by the state save in the exceptional cases allowed for within the 1998 Act (which clearly do not apply here). The rights potentially reliable upon by the claimants are, in contrast, "qualified rights" which may be interfered with in order to protect the rights of another or the wider interest.

247. It would be "overegging" the respondent's case, as Mx Davies put it, to assert that allowing the claimants to work when unvaccinated would have necessarily infringed the residents' right to life.

248. There were a number of stages involved for the claimants to put any of the care home residents' lives at risk, including the claimants' infection with Covid, it not being picked up in PCR and lateral flow tests, the claimants being asymptomatic (on the assumption that they would not have been at work if they exhibited symptoms), their transmitting the infection to a resident (despite all precautions having been taken) and a resident being sufficiently vulnerable, so as to become seriously ill or die. Nevertheless, the risk was reasonably viewed by the respondent as far from remote against evidence of care homes being particularly vulnerable to the spread of the coronavirus once it had entered any home.

249. The tribunal is surprised at the reliance placed in Mrs Dimitrova's case on the respondent's assessment of risk as being "rubbish" or "complete nonsense". The full tribunal did not hear or consider her evidence, but all of the claimants challenged the reasonableness of the respondent's assessment of risk to some extent. The deaths experienced in the respondent's care homes suggest an understatement of risk by Mrs Dimitrova and others. Testing, for example, did not ascertain care workers' Covid status over every shift they worked. The respondent did not base its assessment of the balance of risk on there being any inevitability of an infringement of a resident's right to life. The respondent was seeking to minimise the risk of death, putting genuine value on the saving of any resident's life. Any contrary attitude from a care home provider might have been regarded as disturbing.

250. In the **Peters** application for permission for a judicial review into the Regulations subsequently introduced by the Government to prevent the unvaccinated from working in care homes, Mrs Justice Whipple noted that the purpose of that legislation was *"to reduce the spread of COVID-19 in care homes, in order to protect care home residents who are vulnerable to COVID-19"*. With reference to the Regulations infringing Article 8, after recording that the whole point of the measure was to protect the lives of elderly care home residents, the measure itself was found to be intended to protect the Article 2 rights of those who are resident in care homes. That was described as *"a very weighty justification for any interference with Article 8 which might be established."*

251. The same considerations must apply to all the qualified rights relied upon by the claimants in this case. It is been said that the respondent's vaccine policy interfered with the Article 5 right to liberty and security of the person. However, the respondent of course never proposed, for instance, vaccination by force. It was at pains, throughout the introduction of the policy, to reaffirm that it recognised that vaccines could not be mandated, that vaccination was at the choice of the individual, that consent had to be given freely and consent to future vaccinations could be withdrawn at any stage. There was undoubtedly significant pressure weighing on the claimants' minds as their choice had significant consequences for them in that the decision not to be vaccinated would result in the loss of employment with (and income from) the respondent. In the **Peter's** case it was also argued that the effect of the Regulations was to mandate vaccination, but Mrs Justice Whipple rejected that argument, holding that the individual retained the autonomy to decide whether to be vaccinated or not with the Regulations rather imposing a consequence depending on the choice a person made. So did the respondent's policy.

252. The claimants variously rely on the Article 8 right to respect for private and family life. The tribunal accepts that the physical integrity of a person is covered by the concept of "private life" protected by Article 8, which would certainly cover compulsory medical intervention. On balance, the breadth of Article 8 is such that it is engaged in circumstances where an individual must consent to a vaccination in order to maintain their current income and way of life for themselves and their dependents. In the **Vavricka** case, not being admitted to pre-school because of a lack of vaccination involved an interference with Article 8 rights. Whilst that exclusion might have affected a child's development, the exclusion in this case might have affected the development of a whole family in terms of a removal of income, where it is an incomplete answer to say that the claimants could simply have obtained employment elsewhere - that is, rather, potentially a factor to be weighed in the balance when seeking to justify an interference. Mrs Justice Whipple certainly concluded, relying on the **Vavricka** case, that it must follow, by analogy, that there was ultimately no breach of Article 8 to legislate so that workers who were not vaccinated could be prevented from working in care homes.

253. Mrs Hussain and Mrs Motiejuniene rely on Article 9 ensuring the right to freedom of religion and belief. Again, this right is broadly framed so as to cover the manifestations of a religion or belief. This, however, is again a qualified right to be weighed against the respondent's aim of protecting the right to life of its residents.

254. Articles 10 ("freedom of expression"), Article 14 ("provision of discrimination") and Article 17 ("provision of abuse of rights") have been referred to on behalf of the claimants represented by Mx Davies, albeit without reference to any alternative or additional line of argument. These are also "qualified" rights.

255. In terms of the balancing exercise the tribunal must undertake, the claimants could not necessarily have simply, as Mr Glyn puts it, "walked into another care home role". Whilst the tribunal can take judicial notice that there was, at the time of the claimants' dismissals, a national shortage of care home workers, it has heard no evidence as to each claimant's individual circumstances in terms of, for instance, exactly where they lived and where there might be alternative work available for them. They would still have to have satisfied any new employer as to their suitability and this would have been in the context that, at the time of them applying for alternative jobs, any care home provider would be anticipating the Government Regulations likely to be shortly preventing the employment of care home workers if unvaccinated and therefore likely to be aware that there was every possibility that any employment of these claimants would have been short lived. The situation is distinguishable from the ECHR case relied upon by the respondent of **Cha'are Shalom Ve Tsedek (27417/95)**, where Orthodox Jews complained of a breach of Article 9 because the method of slaughter of animals, they considered to be required by their faith, was illegal in France. They, it was determined, could obtain meat easily from Belgium which satisfied their requirements such that there was no interference with their rights. Obtaining new employment for the claimants was not so straightforward.

256. Saying that, the claimants were not, by the respondent's actions, being excluded from a particular career or profession and did have a reasonable chance of obtaining future employment, including in other care homes. The respondent gains support from cases involving employees unable to work at particular times or days of the week due to their religious convictions (e.g. see ECHR **in Konttinen v Finland 24949/94** and **Stedman v UK 29107/95**) - in those cases it was held that the employee's dismissal did not interfere with the exercise of the rights of religious expression in circumstances where they were free to resign from their employment. The tribunal is nevertheless mindful that the claimants in this case certainly had not agreed to terms of employment requiring them to submit to any vaccination.

257. Ultimately, the weight given to the respondent's justification is enhanced by the position of care homes in the circumstances of a pandemic with an uncertain future impact and where the respondent's and the claimants' primary responsibility was to ensure the welfare of care home residents. The tribunal refers again to Mrs Justice Whipple's pronouncement on the weight to be given to an aim which was effectively the same aim as the respondent's aim in this case. Again, the respondent's vaccine policy did involve an assessment of competing rights, as in the **Ladele** and **McFarlane** cases. In **Ladele**, the claimant's religious objections had to be weighed against an employer relying on the Convention rights of protecting and promoting equality and diversity in the context of gay and lesbian couples' right to celebrate civil partnerships. There, the ECHR noted that it generally allowed *"a wide margin of appreciation when it comes to striking a balance between competing Convention rights."* In **McFarlane** (where an employee refused to counsel those who were gay because of his religion) for the Court "… *The most important factor to be taken into account is that the employer's action*

was intended to secure the implementation of its policy of providing a service without discrimination." The state authorities therefore benefited from a wide margin of appreciation in deciding where to strike the balance between Mr McFarlane's rights to manifest his religious belief and the employer's interest in securing the rights of others." The tribunal also has regard to the ECHR in **Wretland v Sweden 46210/99** where the right of the employer to dismiss a cleaner at a nuclear power plant was upheld, despite the cleaner's duties not being in themselves safety critical. The employer was found to have a strong interest in a drug-free work environment because of security,

258. Applying the structured approach advocated in **X v Y**, the circumstances of the dismissals here did engage Article 8 – the personal autonomy a person should enjoy in making decisions concerning their health (see **Pretty v United Kingdom (92002) 35 EHRR1** as applied by the Employment Tribunal in **Allette v Scarsdale Grange Nursing Home Ltd [2022] 1 WLUK**).

259. The tribunal must then, as a public authority, ensure that the rights of individuals are respected – in terms of a margin of appreciation, the issue of bodily autonomy and individual health go to a person's identity, physical integrity and an integral aspect of private life. Saying that, there is here a balance of competing rights between private individuals, rather than the state and a private individual.

260. In terms of justification, interference with article 8 and/or other convention rights was in accordance with the law. Vaccination was not at this point in time mandated by law, but vaccination was not physically forced upon any of the claimants. Whilst they would not have judged it as a free choice given the obvious implications of a loss of employment, it was a choice they had. The tribunal has addressed the legitimate aim of the respondent of minimising the risk of death and serious illness amongst residents and staff, more dramatically put in submissions as *"preventing death*". The interferences are then judged as being necessary in a democratic society - given the need to take steps to reduce the risk of death and serious illness in a care home environment, prone to be an environment where the coronavirus might readily spread and one populated by vulnerable residents. The tribunal also determines that the respondent was acting proportionately when weighed against the imperative of creating as safe an environment as possible and, not least, in circumstances where staff did not have to be vaccinated as a condition of employment if medically exempt. The tribunal concludes that any interference with human rights in the circumstances of this case was proportionate.

261. The tribunal focusses on the question of whether the respondent acted reasonably in its vaccine policy which resulted in the dismissal of the claimants, given their refusal to be vaccinated. The respondent determined to implement this policy on the basis of all of the considerations described by Mr O'Reilly.

262. It is said that the respondent relied on information which was one-sided and did not present to employees a balanced view of the risks of being vaccinated. Again, the tribunal reaffirms its acceptance of Mr O'Reilly's evidence regarding the situation within the respondent in terms of the evidence of Covid related deaths amongst residents and uncertainty regarding how the pandemic might develop, including in terms of new and possibly more deadly/transmissible variants. Its belief was reasonably held. Furthermore, it did not act unreasonably in being guided by government guidance, public health authorities and lead medical practitioners. The respondent was mindful that an alternative school of thought existed regarding the dangers of Covid and the safety of the Covid vaccine, as well as its nature as a new, fast-tracked vaccine where evidence was inevitably lacking of its long-term effects. It did not act unreasonably in not giving equal weight to the contrary view and indeed in strongly emphasising the official advice to become vaccinated and that the vaccine was safe, certainly significantly so relative to the dangers of catching Covid. Nor did the respondent withhold information regarding risks attached to the vaccine, providing to staff in weekly updates the link to the yellow card reporting. It was not unreasonable not to highlight the type and number of adverse reactions to the vaccine being reported. The purpose of the yellow card reporting system was to enable the MHRA to identify any patterns of concerns and it was not suggesting that the yellow card reporting illustrated any lack of safety or efficacy. The yellow card reporting system was an important tool in understanding the effects of the Covid vaccines, but the reports did not in themselves provide any evidence of a causal link.

263. Obviously, there was, in the case of the Covid vaccine, no data in terms of its long-term effects, but Mr O' Reilly reasonably concluded again that the respondent could and should rely on the MHRA endorsing the vaccine as safe. It is put that Mr O'Reilly ought not to have relied on the MHRA as the main source of information when there was a lot of other information such as the yellow card reporting. Mr O'Reilly reasonably believed however that their opinion was the most reliable in terms of vaccine safety, not least in circumstances where they advocated the use of vaccine with knowledge of the reported side effects. He agreed that it could not be said that there was no risk whatsoever in receiving the vaccine and accepted that the respondent's communication of 5 January 2021 referred to there being "no" risk. The tribunal is clear that he meant no substantial risk in the sense of substantial risk of harm and does not consider that any employee would understand that to mean that there could be no ill effects whatsoever. The negative views of employees who responded to the initial survey were published, but these were statements of individual opinion only. Mx Davies has reviewed a sample of survey responses calculating that 35 out of 217 were negative in some respect.

264. Mr O'Reilly's knowledge of the status of the licence under which the Covid vaccine was said to be approved or the length of the clinical trial phase was impugned. However, he reasonably relied upon the MHRA saying that the vaccine was safe to receive. It was not unreasonable for him not to seek to engage as a layperson with the complex technologies involved in the production of the various vaccines. Again, whatever technologies they used, the vaccines

had been approved by the MHRA and their use was being encouraged by leading public health professionals and the government generally.

265. Mx Davies has sought to impugn the way in which statistics were relied upon by the respondent. The tribunal does not conclude that they were deliberately misrepresented. The respondent did not act unreasonably in highlighting the heightened risk of death contributed to by Covid amongst its residents or the evidence of the vaccine reducing transmissibility. The claimants maintain that the arguments against the benefits and highlighting the risks of Covid ought to have been given greater weight. The balance of evidence from sources the respondent reasonably relied on was reasonably regarded as pointing the other way. Statistics inevitably showed what had happened in the past. At the time the respondent implemented the second stage of its vaccine policy, it reasonably concluded that the serious potential effects of the coronavirus were not necessarily behind it. Whilst the government may not have determined to implement legislation compelling a similar approach in all care homes, it had started consulting on such proposal before these claimants were dismissed.

266. Mx Davies has drawn the tribunal's attention to remarks the tribunal has indeed held to have been made by the respondent's chief executive, Mr Calveley. These remarks were made in December 2020, at an early stage prior to the launching of the vaccine policy. The tribunal does not know the evidence upon which Mr Calveley's trenchant views were based. However, the totality of the evidence is not indicative of the respondent blindly following through on a subjective opinion of their chief executive without full regard to all available information. The tribunal rejects the proposition that the respondent's policy was simply to dismiss those with a different philosophy from Mr Calveley. If the "writing was on the wall" for employees who would not become vaccinated, that was a product of a carefully thought out policy and not in itself unreasonable. Speaking generally, a breach of rules or policy in a wider context may make the termination of employment extremely likely. That does not render such rules or policies necessarily unreasonable. There was here scope for exploration of potential exemptions. In fact, during their dismissal processes, the claimants were asked what was their reason for refusing the vaccine in an open manner allowing them to provide whatever explanation they had, which in turn was considered by the respondent. The option of a referral to occupational health was given. Employees had a chance to show that they had a medical exemption and the respondent was not blind to exploring any indication of an underlying medical reason in circumstances where the respondent could not itself directly access individuals' medical records or other medical information.

267. Whilst, by the time the policy was implemented and the claimants dismissed, rates of death within the respondent's homes had reduced, the respondent still reasonably concluded that a risk of death remained, with then still uncertainty as to the future progression of new strains of the coronavirus.

268. Again, Mr O'Reilly's evidence regarding his own research and reasons for the introduction of the vaccine policy are accepted. The respondent clearly did not

wish to implement its policy in haste or all in one go leaving the position of existing employees until a second stage implementation of the policy following consultation and a proper risk assessment. The tribunal has found that the respondent strove to make a serious and genuine case in favour of vaccination and to present staff with a substantial amount of evidence from the experts upon whom it reasonably chose to rely. The tribunal rejects the proposition, from the webinar transcript, that Prof Stonehouse did not respect employee concerns about accepting the Covid vaccine. If she was strong in her rejection of the concerns, such view was based upon her own knowledge and the prevailing expert opinion at that time.

269. It is said that antibody tests showing that any claimant had already been infected by Covid (and therefore would now have a level of immunity) ought to have been considered and even satisfied the respondent. In fact, the only evidence amongst the claimants of a positive antibody test was in Mrs Hussain's case. Her own test results disclose that they did not mean she was immune from further infection, noting that she might get the virus again or spread it. No evidence has been pointed to which the respondent ought reasonably to have been aware of or taken into account that an antibody test gave as good protection as the Covid vaccine.

270. With the exception only of Mrs Hussain, all of the claimants were employed as frontline care workers delivering, of necessity, close personal care. Mrs Dimitrova was a deputy manager and nurse with greater responsibilities than Miss Maseiro, Mrs Motiejuniene and Miss Chadwick who were care assistants. Nevertheless, despite having additional managerial responsibilities, her day-to-day work involved close contact with the care home residents.

271. Whilst Mrs Hussain worked as a laundry assistant, the tribunal's findings are that she had to work within the care home itself, using the residents' lift when delivering clean laundry and that she went into residents' bedrooms. Her work as a housekeeper may have been infrequent, but as a laundry assistant she still interacted closely with residents (including engaging them in conversation – her English was sufficient to do so) and obviously handled laundry which was then used by every resident. She would clean the pods used for resident visits. She used common toilets and the home's staff room.

272. The respondent reasonably concluded that all of the claimants in their various positions posed a risk to residents and indeed other staff members if unvaccinated.

273. Mx Davies submits that the scope for employees being exempt was too narrow and unclear. The respondent was clearly, however, willing to consider any medical factors any of the claimant's might raise in justifying their refusal to accept the vaccine. It was not unreasonable for the respondent to seek evidence in the form of a GP letter. That would provide evidence from a medical professional. The respondent was reasonable in requiring this. It is put that a GP

did not have to be fair to any employee and could not be properly challenged. It was reasonable for the respondent to place reliance nevertheless on a GP opinion in circumstances where any individual could seek to obtain alternative evidence or raise concerns regarding the position taken by any GP. The respondent could not force any form of medical examination upon any of its staff. Fundamentally, in the case of these claimants, no one provided medical evidence to support there being any basis for a medical exemption. It is not the case of any claimant before the tribunal that they were medically exempt from the Covid vaccination.

274. Miss Chadwick suggested at her appeal that she had family conditions or had injections that would react with the vaccine, but no evidence was produced.

275. Mrs Hussain raised concerns regarding going into anaphylactic shock as an allergic reaction to medication taken 23 years previously, but produced to the respondent no medical evidence of an exemption. Nor has any been subsequently produced in these proceedings. There was no evidence before the respondent that her reaction to a tablet 23 years ago might be connected to the Covid vaccine or might make that vaccine unsafe for her. Despite telephoning a whistleblowing helpline on 30 March 2021 referring to a health issue when working in Italy, no reliance was placed on that more recent occurrence during the respondent's internal process leading to dismissal. In fact, Mrs Hussain said at her investigation meeting that she had had no further problems, since the occurrence in Poland 23 years previously. She produced the report from "gogodoc" which references that Mrs Hussain was advised to avoid penicillin-based antibiotics, but this was a report compiled without a medical examination or review of any medical records. It did not constitute evidence that Mrs Hussain would be adversely affected by the Covid vaccine. Whilst not relevant information before the respondent at the time of Mrs Hussain's dismissal, her medical records contained evidence of her taking medication for infections she suffered.

276. The claimants argue that dismissal was unfair without any individualised risk assessments having been conducted. The vaccine policy of course did provide for medical exemptions and the process adopted for each of the claimants included and indeed focused on the respondent seeking to gain an understanding as to whether there might be eligibility for any such exemption. That was effectively a form of risk assessment, but none of the claimants produced evidence which ought reasonably to have resulted in the respondent considering a variation from its general workplace risk assessment.

277. The tribunal accepts the argument, put on behalf of the claimants, that the policy was new and unanticipated and certainly not allowed for in any existing contract of employment. Nevertheless, fair dismissals for some other substantial reason often do involve contractual changes, with the necessary assessment by a tribunal of their substantive reasonableness and whether a fair procedure was adopted in introducing them. Certainly, dealing with the effects of the coronavirus or any other virus of that nature, was not something which one

would reasonably have expected to have been anticipated by an employer even in the healthcare sector.

278. The claimants suggest that the respondent's decision to give and allow employees to work their periods of notice undermined its reliance on its vaccine policy. However, it was not the respondent's position that the claimants had acted in breach of contract, unsurprisingly given that the respondent could not rely on any contractual provision whereby employees had consented to receiving any vaccination. They could not therefore be lawfully terminated without notice. The respondent did not consider that the claimants were effectively at fault for their dismissal or in breach of any disciplinary procedure for instance.

279. The respondent reasonably asserts that giving a period of notice also gave additional time for any of the claimants to consider the consequence of them losing their jobs (knowing now that the respondent was certainly not bluffing in the stance it took) and change their minds if they wanted to.

280. Perhaps the stronger argument on behalf of the claimants is that the respondent's reliance on the safety imperatives behind its vaccine policy was undermined by it being willing to continue to deploy each of the claimants for a further number of weeks despite them being unvaccinated. However, the tribunal notes that the respondent's risk assessment referred to the very real shortage of care home workers and the risks posed to home residents if there were staff shortages – part of the rationale for the policy was to reduce staff infection and therefore staff absences due to Covid which was undermining the respondent's ability to provide adequate care for its residents. Giving staff notice of termination and requiring them to work notice periods gave some breathing space to recruit replacement staff.

281. It could be argued that, having considered introducing a policy which would involve the barring of unvaccinated staff from care homes from January 2021, the respondent, if it was serious in terms of securing the safety of residents, ought to have moved more quickly than an introduction of a ban on unvaccinated staff from 23 April (and only then after a dismissal process). An alternative approach, however, would have resulted in, at the very least significantly truncated consultations on the policy and risk assessment. Effectively, the respondent acted reasonably in understanding the need to balance the risk to residents (and staff) with a need to seek to follow a fair procedure in implementing the vaccine policy in full.

282. It is been argued, on behalf of the claimants, that the respondent ought to have utilised the Coronavirus Job Retention Scheme for staff who refused to be vaccinated. The scheme, however, was designed to retain jobs which would otherwise have been lost and was due to end in September 2021, in circumstances where, by the time of the claimants' dismissals, the government was already consulting on its own Regulations which would have barred

unvaccinated staff from working in care homes. The claimants were not individuals who were clinically vulnerable – such employees would return to work and their positions would have been retained. There was no prospect, unlike with shielding staff, dependent upon the pandemic and effectiveness of vaccination, of the claimants returning to work at any foreseeable point in time, given the policy which was being implemented. Further, the respondent reasonably considered that its aim to persuade the majority of employees to accept the vaccine would have been undermined if employees had known that they could instead have remained away from work on furlough. The tribunal agrees that there would have been a likely impact on staff relations had it transpired that those who had reluctantly accepted vaccination, might instead have held out and enjoyed a period pay whilst remaining at home.

283. On behalf of the claimants, it is said that the respondent ought to have been satisfied with having reached a position where only around 5% of staff remained unvaccinated and to have considered that it had reduced the level of risk down to what was acceptable without and before terminating the employment of the claimants. The respondent reasonably did not set a minimum safe level in terms of the proportion of staff members vaccinated. It reasonably considered that for each person working in the care homes unvaccinated, there was an increase in risk. It wanted to maximise the proportion of staff vaccinated on the basis that the policy was worth pursuing if any risk to life was reduced. The respondent allowed staff to be exempt if there was a medical reason why they should not be vaccinated. In doing so, it evaluated that there was that level of risk it should reasonably tolerate (given the reason for unvaccinated status). There is, of course, no logic as to why it should be put to the respondent that a vaccination level among staff of 95% (rather than any other percentage number) was sufficient. The fact that enhanced protections could be used for those staff who were unvaccinated provided an incomplete answer. All unvaccinated staff did, on the respondent's reasonable belief, pose a higher risk of transmitting a Covid infection. Again, the respondent reasonably concluded that it would be contrary to principles of fairness and good staff relations to have simply exempted a rump of staff who had held out against vaccination (with no medical exemption), whereas others who had been similarly reluctant had accepted a responsibility to receive it. The respondent's approach was fair, reasonable and proportionate.

284. The possibility of redeployment has been floated at various stages by a number of the claimants, albeit without specific reference to any particular available positions which would avoid the risks the respondent had sought to counter by its vaccine policy. The claimants did not within their internal processes argue a positive case for redeployment.

285. There were centralised office-based roles in London and Inverness, but no roles have been identified as likely redeployment opportunities for any particular individual claimant. The tribunal has accepted the respondent's evidence that the central office roles involved individuals with specialist knowledge and experience and that some of the roles based centrally still involved the need to visit and enter care homes. It cannot be advanced on behalf of Mrs Hussain, given her

acceptance of her lack of fluency in English, that a central office based role would have been suitable for her regardless of the distant location of such roles when compared to her home location in Derby.

286. Miss Chadwick and Mrs Dimitrova worked at a care home at a location where other care homes and hospital facilities operated by the respondent were situated. The respondent had kitchen and laundry facilities at those sites. However, moving unvaccinated staff to this combined support function was reasonably regarded as creating a situation where in fact the risk of infection could be to a greater number of people, given that they would be performing a function, handling food and food containers/laundry which would serve four rather than simply one facility. Neither of those claimants, in any event, presented any arguments in favour of their relocation as an alternative to dismissal. Mrs Dimitrova of course worked as a deputy manager and was a qualified nurse, a role very different and of greater status than any role available in the central kitchen or laundry.

287. It is been raised that the claimants were not offered any indemnity for damage arising out of any of them accepting the Covid vaccination. The tribunal has heard evidence that the vaccine was already covered by the Vaccine Payment Scheme allowing for payments out of the public purse. Mr O'Reilly expressed the view that it was not for the respondent to give such an indemnity and it was fair in the circumstances not to do so in the context of a vaccine that was reasonably viewed as posing a very low risk, albeit where the respondent was not saying that there was no risk at all. The tribunal considers his position to be reasonable.

288. The dismissal of all of the claimants was substantively fair. It fell within a band of reasonable responses and the above factors have all been considered in the tribunal's deliberations as to justification in the context of an infringement of human rights.

289. The question is then whether any of the individual claimants were treated unreasonably in how the policy was implemented for them and in the process adopted.

290. Mx Davies criticises the nature of the consultation with the trade unions. The tribunal has inferred from the evidence that trade unions were recognised in around 35 of the respondent's approximate 240 care homes. Where they were recognised, however, they were involved in the introduction of the vaccination policy and given an opportunity to input into it and put forward any suggestions and/or contrary views. Mx Davies' submissions were made on the basis of disclosed email correspondence, but without any knowledge of the degree of discussion around/behind such communications. Few specific challenges were made of Mr O'Reilly. The unions agreed with the policy promoting vaccination, but, unsurprisingly, were not in favour of the dismissal of their own members. The respondent did not ultimately agree that it would have more or equal success in a policy of more subtle encouragement, but that does not mean that the unions' view was simply disregarded, nor that the respondent's position was

in itself unreasonable. The tribunal notes nevertheless and takes account of the inference that, in the respondent's opinion, some resisting the vaccination, including the unions, were "playing politics" as referred to in a letter to employees on 23 February 2021.

291. The tribunal considers that all of the claimants understood and were properly informed of the vaccination policy before it was implemented. They understood, when they were making a decision whether or not to be vaccinated, that they could face the sanction of dismissal. They understood that if they changed their mind and accepted the vaccine or could show a medical exemption, then they would not be dismissed. They understood then why they were being invited to investigation meetings. They had at all those meetings an opportunity to put forward the reasons for their refusal to accept a vaccine. They were again able to put that across at a subsequent formal meeting to determine whether their employment could be continued at which they had the right of accompaniment. They were all given a right of appeal, where, when exercised, another manager conducted a full and thorough further investigation of the reasons behind their unvaccinated status.

292. The claimants were not dismissed for a reason related to conduct, so that the ACAS Code on Disciplinary Procedures has no application. The claimants were not subjected to disciplinary action. However, for these dismissals to be fair, there was still a requirement of a fair process which did effectively mirror the type of process which ought reasonably to have been undertaken in the case of a conduct dismissal.

293. Whilst it is put forward, on behalf of the claimants, that dismissal was predetermined and there was nothing that the claimants could effectively say to avoid that sanction, this was an unusual, albeit by far from unique situation, where the existence of a policy determined the condition of continued employment. It was not unreasonable that, during the dismissal processes, the individual managers did not seek to re-evaluate the fundamental basis of the policy and the evidence underpinning it. There has been no suggestion of inconsistency in how the policy was then applied to individual employees who were unvaccinated, but without a medical exemption.

294. The case of Mrs Hussain raises specific individual concerns regarding the fairness of the process. Firstly, whilst the tribunal has made findings that her ability to communicate in English was better than she suggests and that she was able to understand and respond to the questions raised during the investigation meeting, there is no doubt that she would have been disadvantaged by her lack of fluency in English and would have benefited from the presence of an interpreter. Mrs Hussain asked for an interpreter and of course one was provided by the respondent at the formal meeting and subsequent appeal. Nevertheless, holding an investigation meeting without an interpreter, ran the risk of her not being able to fully understand her options and not being fully able to express herself. Ultimately, however, this is insufficient to render her dismissal unfair, given that the process needs to be

viewed in the round and where she did have 2 further opportunities for very full meetings at which an interpreter was present. The tribunal can confidently say that she had every opportunity to argue her case and understand that of the respondent.

295. Mrs Hussain also did not receive a significant pack of documentation until a day before her formal hearing. The evidence of one of the respondent's HR managers, Ms Turner, is that the hearing ought reasonably to have been stopped. Nevertheless, the documents sent to her were not new and included the policy, risk assessment and numerous updates which had been sent to staff in the preceding months. Mrs Hussain puts forward that she had not read those documents when they were sent to her, but she had been able to read other documents and her own research was conducted in English with the aid of Google translate. She did state at the meeting that she was willing to continue and she did so with the key knowledge of how the respondent's vaccine policy operated and what she would have to show for it not to apply to her, together with the consequences of her failing to show evidence of a medical exemption. Furthermore, Mrs Hussain subsequently appealed the dismissal decision and certainly, by the time of her very full appeal hearing, had had a full opportunity to consider the documentation sent to her.

296. Finally, Mrs Hussain complains that documentation she sent to Mr Calveley on 15 March 2021 and documentation she subsequently submitted to HR were not considered at any stage of the decision-making. The tribunal has considered such documentation. Whilst it ought reasonably to have been before the decision-makers, the tribunal cannot, on balance and looking at the case as a whole, consider that the failure to do so renders Mrs Hussain's dismissal unfair. The tribunal, in particular, has reviewed all of the additional documentation sent, which cannot have had any effect on the policy the respondent formulated or how it was being applied to her. The arguments she raised to Mr Calveley could and were repeated, in particular, at the appeal hearing. The reference to the attitude taken by the US authorities was not reasonably relevant to the respondent's considerations based on MHRA and UK government advice. Documents regarding consent were not at odds with the respondent's own position. The respondent was aware and had referred staff itself to yellow card reporting. The respondent did not doubt that the claimant was a Muslim. A document evidencing her mother's condition did not provide proof of it arising from the Covid vaccination and took her objections no further. If anything, her conditional acceptance of the vaccine, indicating that she would take it if the respondent acknowledged, amongst other things, uncertainty over the vaccine safety and gave her an indemnity, undermined her assertions that her religion and/or any belief were behind her refusal to be vaccinated.

297. There was, in theory, in the case of Miss Chadwick and Mrs Dimitrova, the availability of possible alternative employment close by in the kitchen and laundry facilities which acted as a central service for the Castle Park home where they worked and 3 other services. Ways of working had been changed so that the

laundry and kitchen assistants no longer entered the homes they served, but passed over laundry/food to care home staff without entering. However, whilst working at Castle Park, the risk was of infecting around 22 residents, in the central services they would have handled laundry and food containers which would be transported into and out of 2 additional care homes and a hospital, thus increasing the number of residents potentially affected. The respondent's policy required those working in the central laundry and kitchen to be vaccinated as a condition of employment for that reason. The evidence upon which the respondent reasonably relied was that Covid could still be spread by touch.

298. Both Miss Chadwick and Mrs Dimitrova were well aware of the purpose of the policy, the respondent's reasoning behind it and had been supplied with extensive communications, as had been sent to all employees. The residents at the care home at which they worked were significantly under the age of 65, but the respondent reasonably concluded that the residents were clinically vulnerable, unsurprisingly given the range of life limiting and debilitating conditions they suffered from. Miss Chadwick and Mrs Dimitrova knew that the purpose of the meetings they were called to attend was to understand their reason for refusing to accept a Covid vaccine in circumstances where the policy provided that they needed a medical exemption to remain in the respondent's employment.

299. There were letters sent to some claimants which used the word "disciplinary", where the respondent appreciated that there was never an issue of misconduct on their part. Mistakes in terminology do not in this case go to undermine the fairness of any individual process. Miss Chadwick's invitation of 28 April to the formal hearing included a bundle which could be categorised as incomplete in that some correspondence and updates were missing. Given the documents she was provided with and had been supplied in the preceding couple of months and her clear understanding of the policy, its purpose and effect, such failure cannot render dismissal in her case unfair. The respondent did not act unreasonably in failing to conduct any individualised risk assessment in circumstances where she disclosed at the appeal stage potential risk factors in her family medical history. The nature of Miss Chadwick's late disclosure was insufficient to make it unreasonable for the respondent not to undertake such steps.

300. Miss Dimitrova highlighted in some detail the nature of some of the research she had undertaken, presenting a contrary view to the respondent's belief that it could safely rely on government and MHRA guidance as well as the views it accepted from a variety of leaders in healthcare and academics. It was still nevertheless reasonable for the respondent to rely on the information it did. The tribunal has not heard any direct evidence on the first formal meeting carried out by Ms Findley, but clearly the tribunal considers there to have reasonably been a thorough discussion with Ms Bolger, as a further opportunity for Mrs Dimitrova's position to be understood. The tribunal does not consider there to be any evidence that any decision-making was affected by any view either Ms Findley or Ms Bolger took of the attitude displayed by her representative, Dr McCrae, at either meeting. The tribunal has made no finding of any adverse behaviour by Dr

McCrae. Clearly, he asked challenging questions, but it was not inappropriate for him to do so. Mrs Dimitrova may feel that there was insufficient engagement with these challenges, with some justification, but the procedural steps involved effectively an implementation of a policy already determined on the basis of sources of advice which the respondent, it has been found, reasonably accepted.

301. Similar considerations apply in the case of Miss Masiero. She understood the policy and knew the consequences of her not being vaccinated without a medical exemption.

302. Mrs Motiejuniene raises no specific procedural challenges. She did say (as an issue of complaint indeed) that she was constantly provided with information by the respondent about its vaccine policy.

303. There was no unfairness in the procedure adopted in the case of any of these claimants such as to render their dismissal unfair.

304. In conclusion, the complaints of unfair dismissal of all of the claimants must fail and are dismissed.

305. Mrs Motiejuniene and Mrs Hussain claim protection pursued to Section 10 of the Equality Act 2010 for a religious, but also a philosophical, belief. The respondent accepts that Mrs Motiejuniene is a Christian and Mrs Hussain a Muslim. Their complaints are of discrimination in relation to particular manifestations of their religion. Mrs Hussian maintains that as a Muslim she strongly opposes any vaccine which uses abortive foetal medical cells genetically modified by science. Mrs Motiejuniene's Christian belief encompasses a belief that God created the human body perfectly supported with an immune system necessary to survive.

306. Mrs Hussain holds a separate philosophical belief in bodily autonomy, at times described as "my body, my choice", but in essence a belief that there ought to be no medical intervention/treatment without the patient's consent. The respondent accepts that such belief constitutes a protected philosophical belief.

307. Mrs Motiejuniene maintains that she has a philosophical belief of "liberty and harmony". Essentially, she believes that if you live in harmony with your body and mind, your immune system is strong and you have peace of mind. Taking a vaccine might destroy this balance/"aura".

308. The tribunal must consider whether that belief is protected. Applying the various limbs of the **Grainger** test, the tribunal considers her beliefs to be genuinely held. She believes that her immune system, arising out of and, in particular, unpolluted by the way in which she leads her life gives her protection from infection and disease. If she were to travel to a developing country with a prevalence of infectious diseases, which are routinely vaccinated for, she told the tribunal

convincingly that she would avoid taking such vaccinations as she considers them to be unnecessary for her. Her belief has been, for her, borne out by her experiences of working during the coronavirus pandemic where she cared in particular for 3 residents who died after suffering from Covid and administered close personal care to them whilst they were in an infectious state. Despite this, she told the tribunal that she had not contracted Covid, which she put down to her belief in natural immunity.

309. It is suggested strongly by Mr Glyn that such belief ought to be rejected as based on a lie that she only received negative test results for Covid. She failed to disclose a test result which was classified as "unknown". It is said that she deliberately withheld this, in contrast to her disclosure of the results of 45 negative Covid tests. Mrs Motiejuniene has suggested that there was no room for her to insert an unknown test result on the sheets of test results she did provide to the respondent and which were included in the agreed bundle. This cannot be accepted by the tribunal, given that there was clearly space on one of the sheets. Mrs Motiejuniene has also said that the disclosure was simply accidentally overlooked. She has more convincingly told the tribunal that she did not consider the unknown test result to be relevant. It was not a positive test result. No conclusive result was provided by this particular test, so that she took another test shortly thereafter which was, as with all of the other test results, negative. The tribunal was drawn also to her witness statement evidence and further and better particulars previously provided of her religion and belief where she referred to taking a twice a week Covid test during a period of 13 months which was negative throughout. On balance, the presence of one "unknown" test, even in the circumstances of the, at times, unsatisfactory explanation by Mrs Motiejuniene, does not lead the tribunal to a conclusion that her belief amounted to a lie.

310. A distinction is to be drawn between a belief and a mere opinion *"based on some real or perceived logic or based on information or lack of information available"* (see **McClintock v Department of Constitutional Affairs [2008] IRLR 29**. Mrs Motiejeunine made reference to having done her own research in connection with the level of protection given by the vaccine, but her belief, that she was an individual who didn't need the vaccine as she protected herself naturally, was not based on such research. Again, she had studied certain resources and knew how the vaccine worked and that she didn't need to take it. She believed the vaccines were on trial. She learnt from her research that the vaccine provided time-limited protection and there was a chance that a vaccinated person could still spread Covid. That did not, however, undermine it being her deeper belief that her immune system was 100% guaranteed.

311. The tribunal must consider whether the belief possessed sufficient cogency, seriousness and importance. The authorities suggest that, in this regard, the bar must not be set too high - the belief must be coherent in the sense of being intelligible and capable of being understood. Furthermore, cogency and cohesion are more difficult to achieve where there is a substantial amount of evidence in the public domain. Some beliefs might be regarded to be proven as

nonsensical. This however was be contrasted with a belief in God, where there is little or no evidence. Mrs Motiejuniene's philosophical belief is very difficult to disentangle from her religious beliefs and is akin to them. There should, she believes, be no interference with her naturally created bodily state (one created, however, by God).

312. In terms of the final 2 limbs of the **Grainger** test, the respondent accepts that Mrs Motirjuniene's belief relates to a *"weighty and substantial aspect of human life*". There is also no dispute that the beliefs can be said to be worthy of respect in a democratic society. Again, the bar is not set particularly high in that regard. There is nothing offensive or which might denigrate others in Mrs Motiejuniene's belief.

313. In fact, the respondent's primary argument against any claims based on religion or philosophical belief are that neither Mrs Hussain's nor Mrs Motiejuniene's, religion and/or philosophical beliefs were behind their refusal to accept the Covid vaccination.

314. Looking firstly at the case of Mrs Hussain, her objection as a Muslim to the Covid vaccine was its use of foetal cells. It is accepted that such vaccines are grown in foetal tissue - it is produced in such cells, albeit it does not contain them. However, the tribunal does conclude that if her Muslim faith been a reason for her refusal of the vaccine, Mrs Hussain would have raised this at an earlier stage. She made no reference to it in her letter to Mr Calveley of 15 March 2021, nor when she called the whistleblowing helpline on 30 March 2021. She did not mention it at the investigation meeting on 13 April or at the formal meeting which led to the termination of employment on 6 May. Her first reference was in her grounds of appeal where she said that taking the vaccine would be contrary to her beliefs and that, as a Muslim, she strongly opposed any vaccine which used aborted foetal cells.

315. Mrs Hussain's evidence was at times problematical. Her assertion that she took no medication during the internal process was misleading. Her approach to taking medication in the past is not supportive of her concerns as a Muslim not to take anything which might contain or use foetal cells. She had received the hepatitis A vaccine in the past, her saying she was unaware of how it was produced. That was in circumstances where it is clear that she did not consider the need to undertake any research. Whilst appreciating that there may be distinguishing features, her willingness to take the morning after contraceptive pill was surprising when set against her religious objection to receiving the vaccine.

316. Most importantly, Mrs Hussain had signed a conditional acceptance effectively saying that she would accept the vaccine if there were various acknowledgements from the respondent as to the status and risk of the vaccine and an indemnity given to her against adverse effects. In the internal process she stated her objection to the vaccine was on the basis that it was experimental and still in the

process of clinical trials, where there was insufficient data available for her to make an informed choice. She also referred to her allergies as preventing her from accepting a vaccine. In evidence before the tribunal, she kept shifting her position maintaining at one point that she would receive the vaccine after it had undergone full trials and approval. Her position was not that she could still not consider it because of the use of foetal cells in its production. Clearly, Mrs Hussain had strong reservations against taking the vaccine arising out of her personal research, but not, the tribunal finds arising out of any religious belief.

317. In contrast, Mrs Hussian's belief in "my body, my choice" was a factor in her not receiving the vaccine. She did not consent to receive it because she believed she had (and had to have) a completely free choice as to what she put into her body.

318. Mrs Motiejuniene, was similarly slow to assert her refusal to accept the vaccine as being on the basis of any Christian or philosophical belief. She did not mention it during the investigation meeting on 30 April nor during the formal meeting on 7 May 2021 which led to her dismissal. Her first reference to her religious conviction was in her letter of appeal where she referred to God creating the immune system in a perfect way and her belief that her own immune system protected her to the fullest extent. At her appeal, there was an acceptance that the belief was hers and not necessarily a common belief amongst those who were members of her same church. Nevertheless, the tribunal is clear and accepts her evidence that, throughout the respondent's process and discussions regarding the implementation of its vaccine policy, she believed that she did not need it and this lack of need arose from her belief in bodily harmony which was inextricably linked to her belief in God. She may not have clearly expressed that, but it in fact lay behind her refusal to be vaccinated. Again, the tribunal does not accept that her case is fundamentally undermined by the lack of disclosure of a single "unknown" Covid test, nor that her undertaking an element of her own research is incompatible with a deep-seated and genuine belief in her immune system as a creation of God and her belief in the protection afforded to her by bodily harmony and how it affected the way she lived.

319. Turning to the complaint of indirect discrimination (in so far as it might still be pursued and, in the alternative, had it been accepted that Mrs Hussain's religion was a reason for her refusal to be vaccinated), this is primarily based on the PCP arising out of the respondent's policy that all care home staff had to be vaccinated in the absence of a medical exemption, as a condition of receiving a bonus and of continued employment. The respondent does not dispute that the respondent had such PCP. The PCP has been subdivided to include a practice of all relevant staff refusing to accept vaccine being subjected to investigation and disciplinary measures, being excluded from company email and IT networks, and all staff refusing to accept the vaccine having to submit to medical examination. These add nothing, save the tribunal would note that it has no evidence regarding any exclusion from any communication's network or being required to submit to medical examination.

320. Is there, however, a group disadvantage for those who shared Mrs Hussain's and Mrs Motiejuniene's religions and belief? This is for the claimants to show. The tribunal concludes that they have been unable to do so.

321. Clearly, those of the Christian and Muslim faith have accepted the Covid vaccine in huge numbers. The tribunal has been taken to evidence issued on 7 December 2020 by the British Islamic Medical Association recommending the Pfizer/BioNTtech vaccine for eligible at risk persons. It has been taken to an article appearing in the Guardian on 14 January 2021 with a headline that Imams across the UK were to reassure worshippers about Covid vaccines at Friday prayers that week. They were seeking to reassure worshippers about the safety and legitimacy of the Covid vaccinations and reminding them of the Islamic injunction to save lives. Mrs Motiejuniene accepted that there were those in her church who had decided to accept the vaccine.

322. As regards the philosophical beliefs, is there any evidence of anyone within the UK, who does not believe that medication should only be administered with their consent (in the absence of issues of capacity)? Clearly, many people who believe in "my body, my choice" have exercised a choice to be vaccinated.

323. Mrs Motiejuniene accepted that, whilst she has perfect immunity, there are others who believe in "liberty and harmony" with a weaker immunity who would, and indeed should, accept the vaccine, whereas others, such as Mrs Motiejuniene, would not. The need for vaccination, on her belief, would depend on the strength of the person's immunity and not on their religion or belief.

324. If the group disadvantage had been shown, the question would then arise as to whether there is any individual disadvantage. In circumstances where Mrs Hussain did not, the tribunal finds, refuse the vaccine because of any religious belief, she does not surmount that hurdle. On the tribunal's findings Mrs Motiejuniene might have shown individual disadvantage (as with Mrs Hussain in her belief in bodily autonomy), but an individual one only.

325. Even had Mrs Hussain and Mrs Motiejuniene been able to surmount all of the hurdles necessary in a complaint of indirect discrimination, it is open to the respondent to show that it has acted proportionately in pursuit of a legitimate aim as a defence to such a claim. The tribunal repeats the arguments in play in a justification of any infringement of a human right discussed with reference to the unfair dismissal complaints. The tribunal's findings are that the respondent had the legitimate aim of seeking to minimise the risk to life of its residents, staff and visitors. Given that this aim is supportive of the Article 2 right to life, it is again, as per Mrs Justice Whipple, a justification of some weight for the vaccine policy. Again, this case does not involve the respondent wishing to pursue a commercial objective but, squarely, a clash of rights.

326. The same considerations feed into arguments as to proportionality. The claimants' arguments are strongest on the point of dismissal. The disadvantage caused to

them was substantial, even if they might, with some effort, have secured employment elsewhere. Dismissal is the ultimate sanction open to an employer. The respondent was nevertheless not acting disproportionately in pursuing a policy aimed at encouraging the maximum number of people to accept the MHRA approved vaccine as, it saw, their professional duty and a means of reducing the risk to life, in circumstances where there was reasonably regarded to be no definable safe level of vaccination amongst any cohort of staff. The risk to life was far from remote. The respondent had seen the actual affect of Covid within its care homes. Allowing a proportion to remain unvaccinated was arbitrary and would not have achieved its aim as effectively – some staff, who did become vaccinated, would have refused the vaccine in the absence of consequences. An exemption was allowed for staff who had a medical reason for not accepting the vaccine. It was proportionate to seek to minimise a risk of Covid transmission and not to be satisfied by evidence of, for instance, previous infection or by taking additional precautions against Covid transmission, where unvaccinated staff were working. No alternative work has been identified which either Mrs Hussain or Mrs Motiejuniene could have undertaken. Their laundry assistant and care assistant duties could not have been adjusted to avoid the reasonably identified risk to life. Their dismissal did not entail them no longer being able to pursue their profession in the future.

327. The determination to exercise a discretion not to pay a bonus to staff who were unvaccinated for work carried out during a period where the vaccine had been available, was similarly not disproportionate. The decision to use the bonus as a further means of incentivising staff to accept the vaccine was rational and legitimate. Again, the imperative was to achieve the maximum possible levels of vaccination amongst care home staff. The evidence is that significant numbers of care home staff were, at the very least, reluctant to accept the vaccine and, whether by the way in which the policy was introduced and/or staff incentives, there was a successful persuasion by the respondent of staff to become vaccinated, significantly reducing the number of individuals who could or would not comply with the vaccine policy and who were, in the absence of medical exemption, at risk of dismissal.

328. The complaints of indirect discrimination fail and are dismissed.

329. Mrs Hussain and Mrs Motiejuniene complain, as acts of direct discrimination, of, certainly in Mrs Hussain's case, them being subjected to initial investigation and an investigative meeting, of them being asked why they declined the coronavirus vaccine at the investigation meeting, them been summoned to a dismissal hearing, false claims having been made about the vaccines (i.e. that they were not experimental) and the respondent exaggerating their effectiveness, making the vaccine mandatory, failing which there would be a dismissal of the claimants, the dismissal itself and failing to uphold an appeal following dismissal. Mrs Motiejuniene's claim is limited to non- payment of the bonus and her dismissal.

330. These complaints of Mrs Hussain and Mrs Motiejuniene are difficult to understand. Neither are asserting that they were dismissed because they are Muslim or

Christian or because they believe in “my body, my choice” or “bodily harmony”. It was certainly never put to any of the respondent’s witnesses, including decision makers in their dismissal or appeals, that their decisions were in any sense whatsoever tainted by the claimants’ religion or belief.

331. The claims were more correctly, albeit unsuccessfully, pursued as ones of indirect discrimination. The issue here is not the religion/belief, but the manifestation of the religion/belief which caused the individual to refuse to be vaccinated. Whilst it has been suggested that the treatment of the claimants ought to be compared with those of different religions or beliefs who were vaccinated, the correct comparison would be with those who did not share their religions or belief but, like the claimants refused the vaccine. It is not difficult for the tribunal to conclude that those individuals would also have been dismissed unless medically exempt. Certainly, no facts have been shown from which the tribunal could reasonably arrive at a conclusion to the contrary. There was no inherent discrimination in that there was nothing inherent in the religions of beliefs relied upon which led to them being unvaccinated. The evidence points the other way, for the majority of adherence certainly to the religions relied on and those who believe that medication should be administered only with consent. Here, there was a rule which was applied consistently to all care home staff regardless of their religion or belief.

332. Mrs Motiejuniene alone brings separate complaints of harassment related to religion/belief.

333. The tribunal has noted what was said by Ms Crowley to Mrs Motiejuniene. The comments are recorded in the notes of the appeal hearing and there is no dispute as to what was said. The tribunal considers that the natural flow of a conversation is being recorded. Mrs Motiejuniene did not react adversely to what was said to her at the time. Ms Crowley was essentially simply repeating back what she understood Mrs Motiejulienne was saying to her, in a genuine effort to ensure she was clear as to Mrs Motiejuniene’s reasons for not accepting the vaccine. Whilst a question whether Mrs Motiejuniene wanted to be reinstated, on the basis of God creating the human body perfectly, might have been asked sarcastically, it was not in this case. Again, Ms Crowley was ascertaining that she correctly understood what the Mrs Motiejuniene was saying. Mrs Motiejuniene believed that Ms Crowley was laughing “inside”, but she was there coming to an assumption which was not based on any expression that Ms Crowley actually made. There was a suggestion also in evidence that Ms Crowley had looked at the notetaker and smiled, but that is unlikely in the context of a zoom call with people in separate locations. Certainly, Mrs Motiejuniene was expressing in her appeal letter that God created an immune system in a perfect way and repeated this at the appeal meeting. The comment about God did not come from Ms Crowley first.

334. Ms Crowley asked whether the claimant believed that God would protect her. In so doing, in its full context, she was engaging with Mrs Motiejuniene’s argument that she did not require to be vaccinated. Again, the comment was not made sarcastically, but was an accurate restating of Mrs Motiejuniene’s expressed belief.

335. In context, therefore, there was no unwanted conduct related to religion or belief. If Mrs Motiejuniene was upset or made to feel stupid by what Ms Crowley said to her, it was not reasonable for the comments to have had that effect, again given the full context of the conversation.

336. Mrs Motiejuniene's complaint of unlawful harassment must fail.

Employment Judge Maidment

Date 21 November 2022