# EMPLOYMENT TRIBUNALS

**Claimant:** Mr R Sohal

**Respondents:** DHU Healthcare CIC (1)

Logistical Support Limited (in Creditor's Voluntary Liquidation) (2)

**Heard at:** Leicester Employment Tribunal **On:** 28 to 30 November 2022

**Before:** Employment Judge K Welch
Mr K Libetta
Mrs J Morrish

**Representation**

Claimant: Mr A Rhodes, Counsel
First Respondent: Mr P Clarke, Consultant
Second Respondent: No attendance

# JUDGMENT

The unanimous decision of the Tribunal is that:

1) The claimant's claim for unfair dismissal against the second respondent is well founded and succeeds.
2) The claimant's claim for discrimination arising from disability against the first respondent fails and is dismissed.
3) The claimant's claim for discrimination arising from disability against the second respondent is well founded and succeeds.

4) The second respondent is ordered to pay the claimant the total gross sum of £27,274.96 made up as follows:
   a) An unfair dismissal award of £627.51 being:
      i) A basic award of £65.01;
      ii) A compensatory award of £562.50 for:
         (1) Loss of statutory rights in the sum of £450.00; and
         (2) an uplift of 25% for failure to follow the ACAS code of practice in the sum of £112.50; and
   b) Compensation for discrimination of £26,647.45 being:
      i) Injury to feelings of £11,000;
      ii) Loss of earnings of £7,810.20;
      iii) Interest at 8% in the sum of £2.507.76; and
      iv) Uplift for failing to follow the ACAS code of practice in the sum of £5,329.49.

# REASONS

1. Reasons were provided orally during the hearing, but following a request for written reasons by the claimant's representative during the hearing, these are produced.
2. The claimant brought claims against the first and second respondents by presenting a claim on 5 March 2021. The claims were rejected due to discrepancies with the ACAS Early Conciliation certificate, but following a reconsideration application were accepted with effect from 18 March 2021.
3. The claimant brought claims of unfair dismissal initially against both respondents, but following an Open Preliminary Hearing, his unfair dismissal claim against the first respondent was dismissed. The claimant also brought claims of discrimination arising from disability against both respondents under section 15 of the Equality Act 2010 (EqA 2010).
4. The claimant initially brought his claims against Logistical Support, which was not a legal entity, and which did not file a response. This was amended to Logistical Support Limited, a company which went into creditor's voluntary liquidation on 20 June 2019, some time before the events relied upon by the claimant. The claim was re-served upon the liquidator, who responded querying whether it was the correct respondent but also failed to file a response. In the hearing, we queried whether the second respondent was the

correct entity in light of the liquidator's response and due to it having gone into liquidation prior to the acts relied upon for the claims. The claimant confirmed that it knew that the second respondent was in liquidation. Following a break at the start of the hearing, the claimant further confirmed that it was the correct respondent referring to various documents within the bundle , and we proceeded on this basis. The Tribunal should have replied to the liquidator's email querying whether it was the correct respondent, however, we did not consider that reason enough not to continue with the hearing, being satisfied that the liquidator had not presented a response within the appropriate time limits, nor attended the hearing, of which it was aware.

5. There was therefore no attendance by anyone on behalf of the second respondent at the hearing.
6. The first respondent conceded that the Claimant was disabled at all material times by virtue of his anxiety, depression and asthma, although not that the first respondent had knowledge of this.
7. The hearing was an attended hearing held in person at Leicester Employment Tribunal. The hearing went ahead within the scheduled listing without any issues.
8. The parties had agreed a bundle of documents and references to page numbers in this Judgment relate to documents within that bundle. The claimant had sent in additional documents to be added to the bundle, and there being no objection from the first respondent, these were added to the agreed bundle.
9. The Tribunal heard evidence from:
    9.1. the Claimant; and
    9.2. Mr Malcolm King, Operations Manager of the first respondent.
10. Both parties provided a witness statement for a witness who was not attending Tribunal to give sworn evidence. The claimant provided an additional, unsigned witness statement for Ms B Bhogal, and the first respondent provided an additional signed witness statement for Ms H Stevens, who also did not attend Tribunal. It was agreed that we should attach

such weight that we considered appropriate to those statements in light of not hearing sworn evidence from them and the evidence not being tested under cross examination.

11. Both of the witnesses attending to give evidence had provided written statements which stood as their evidence in chief.
12. The Tribunal ensured that regular breaks were given, and asked the parties to request any additional breaks, if required.

**Issues**

13. The following list of issues were agreed by the parties following a discussion at the start of the hearing.
14. By an ET1 dated 5th March 2021, and deemed accepted by the tribunal on 18th March 2021, the claimant brings the following claims:
    14.1. unfair dismissal contrary to section 94 and 98 employment rights act 1996 (ERA) (against the second respondent only];
    14.2. discrimination arising from disability contrary to section 15 Equality Act 2010 (EqA).

Unfair dismissal

15. What was the reason for the claimant's dismissal? The second respondent has not advanced a reason for dismissal.
16. Does the reason for the claimant's dismissal constitute a potentially fair reason?
17. Did the second respondent act reasonably in treating this reason as a sufficient reason to dismiss the claimant bearing in mind all the circumstances, including the size and administrative resources of the second respondent; such question to be determined in accordance with equity and the substantial merits of the case?

Discrimination arising from disability

18. Did either respondent know, or could they reasonably be expected to know, that the claimant was a disabled person by reason of anxiety and depression and / or asthma? If so, when?
19. Was the claimant treated favourably or unfavourably by the following alleged conduct?

19.1. Helen Penn (an employee of the second respondent) humiliating the claimant in front of colleagues on 10 October 2020;

19.2. Heidi Stevens (an employee of the first respondent) terminating the claimant's engagement as a driver for the first respondent on 4 November 2020; and

19.3. Marc Wilson (of the second respondent) dismissing the claimant on 27 November 2020.

[The claimant's representative confirmed that the only alleged unfavourable treatment by the first respondent for the purposes of his section 15 complaint was set out at paragraph 19.2 above].

20. If so, was the alleged treatment because of something arising in consequence of the claimant's disability, namely him being exempt from wearing a mask during the COVID-19 pandemic?

21. if so, can either respondent show that the treatment was a proportionate means of achieving a legitimate aim? The first respondent maintains that the legitimate aim was protecting the health and safety of the claimant, staff members and service users within the care of the first respondent. The second respondent has not advanced a legitimate aim it relies upon.

Jurisdiction

22. With respect to each alleged discriminatory act or omission, have the claimant's discrimination claim(s) been brought within the three months' time limit (subject to any impact of early conciliation)? (s123(1)(a) EqA)?

23. If not, does any act or omission falling outside that form part of a course of conduct extending over a period for the purposes of s123(3)(a) EqA? If so, what was the end of that period?

24. If not, have the claims been brought within such other period as the Employment Tribunal thinks is just and equitable (s123(1)(b) EqA)?

Remedy

25. Should a declaration be made and if so on what terms?

26. What basic award should be made?
27. What compensation should be awarded for:
    27.1. financial losses? Or
    27.2. injury to feelings?
28. Should any reduction to compensation for financial losses be made on the basis of Polkey/ Chagger (i.e. was it possible that the claimant could have been dismissed fairly and/or for a non-discriminatory reason in any event)?
29. Has the claimant taken reasonable steps to mitigate his loss?
30. Did the second respondent unreasonably fail to comply with the ACAS code of practice on disciplinary and grievance procedures? If so, would it be just and equitable for the tribunal to increase the amount of damages, and if so, by what amount?
31. What interest should be awarded?

**Findings of fact**

32. An earlier hearing had found that the claimant was employed by the second respondent. His employment was as an agency driver and commenced on 18 December 2017 until his dismissal on 27 November 2020.
33. The second respondent (referred to as Logistical) was an agency providing support staff to its clients. Logistical provided drivers to the first respondent (referred to as DHU). We heard no evidence that Logistical provided any other agency workers to DHU.
34. The agency drivers were used by DHU on an 'as required' basis to transport clinicians, being nurses and doctors, for appointments with patients, mainly in those patients' own homes or in residential care homes. DHU covered the counties of Leicestershire and Rutland which had approximately 700,000 potential patients and 200 care homes within this area. The drivers would be expected to drive a clinician to and from these appointments (which were roughly one an hour) over the course of an 8 hour, or 12 hour, shift.

35. The drivers were required to transport the clinicians but also to provide support if required. This could mean that the drivers entered the homes of the individuals and/or care homes during these appointments.
36. DHU employed some drivers directly, but obtained other drivers through agencies, including that of Logistical.
37. When the claimant provided driving services to DHU through Logistical, he would attend Fosse House (DHU's site) to collect the vehicle he would use for that shift, and then drive one clinician around Leicestershire and Rutland to attend appointments during the shift, providing assistance in individuals' homes/ care homes, if required.
38. DHU had its own fleet of vehicles of approximately 27 vehicles for this purpose, although these were leased and not owned outright. DHU's employed drivers and agency drivers all used the vehicles when carrying out driving duties for DHU.
39. The claimant was disabled by virtue of his anxiety, depression and asthma at all relevant times, as conceded by the first respondent. The claimant's evidence, which we accept, was that, due to his disabilities, he was unable to wear a face mask.
40. In March 2020, due to the COVID-19 pandemic, a number of restrictions were introduced including a national lock down from towards the end of March. DHU continued to provide its services to patients throughout the lockdown period and drivers were therefore required to transport clinicians to the homes of individuals or care homes in order for the clinicians to have face to face consultations with patients.
41. DHU had issued various guidance documents during the pandemic, although not all of these were provided in the bundle. We heard evidence, that as a health care provider working within the NHS, Government guidance was continually changing and various updates were issued requiring DHU to amend its own guidance/ policies.
42. Mr King, on behalf of DHU, gave evidence that DHU considered various measures to try and ensure the safety of its staff, drivers and patients and to reduce the risk of transmission of the virus. This was initially done for DHU's own employees and latterly for its agency drivers.

43. The measures considered included the seating arrangements within vehicles in order to maximise the distance between the driver and the clinician, the use of screens in vehicles (both temporary and permanent) to reduce the risk of COVID-19 being spread, alternative methods of working (such as clinicians driving themselves), and windows being left open within vehicles. The first respondent had not covered this in its witness statements, nor had documentary evidence been provided, however, we are satisfied that these measures were considered.
44. DHU did not consider that the implementation of the measures set out above would have been successful, nor would they have provided an effective method to prevent the transmission of the virus in vehicles where drivers were exempt from wearing masks. This was for a number of reasons. Namely, the temporary screens were described as being 'similar to cling film', and which, when trialled, were prone to ripping and did not provide an adequate seal to sufficiently protect those within the vehicles. The permanent screens were expensive, although no evidence of costings nor documentary evidence of any trials were provided to the Tribunal. However, we also accept Mr King's evidence that, as the vehicles were leased, it was difficult to make these permanent, significant adaptations.
45. It was suggested by the claimant that permanent screens could have been made to one vehicle, so that it could be utilised by any driver(s) exempt from mask wearing, but Mr King's evidence was that this was not possible because of the geographical area covered by the service, as it would have been difficult to administer.
46. Whilst is was accepted by Mr King that it was sometimes possible for clinicians to drive themselves to appointments, this was not considered appropriate due to the length of the shifts, and the possibility of tiredness and concentration, especially as some of these shifts were during the night.
47. Finally, it was considered that changes to seating arrangements in vehicles, and windows being left open, were not acceptable and were not considered appropriate or sufficient to allay the increased risk of transmission of the virus where drivers could not wear masks.

48. It was clear to us that the claimant had not worn a face mask throughout the pandemic whilst driving for DHU. We take judicial notice of the fact that face masks were not initially compulsory during the pandemic, but that from 15 June 2020 it became compulsory to wear facemasks on public transport, and from 24 July 2020 in shops and supermarkets, unless an individual was exempt from wearing one. Also, in the NHS and health care settings, including care homes, the requirement for mask wearing had already been introduced.
49. The claimant's evidence was that he had informed both his employer and DHU of his disability prior to the incident on 10 October 2020. We accept that to be the case. It was clear that he had told 'Raj', DHU's supervisor on site at Fosse House, that he suffered with anxiety, depression and asthma and was therefore unable to wear a mask at some point prior to 10 October 2020.
50. Raj had printed out a badge for the claimant obtained from the internet [P154A] which said, "*My hidden disability makes me exempt from wearing a face covering*". The claimant kept this printout in his wallet. We are satisfied that Raj had printed this out prior to the claimant being challenged by Helen Penn about not wearing a mask on 10 October 2020. We also accept the claimant's evidence that he had informed Marc Wilson of Logistical of his disabilities and his inability to wear a face mask in light of these.
51. On 10 October 2020, the claimant was on DHU's site having carried out driving duties. His evidence, which we accept, is that he was challenged by Helen Penn about why he was not wearing a mask. The claimant's evidence was that Ms Penn probably would not have known about his exemption to wear a mask. The claimant showed Ms Penn the badge which Raj had previously printed out for him and said that he was exempt from wearing masks due to his disability. Ms Penn called him a liar, and the claimant's evidence in this regard is supported by Ms Bhogal's unsigned statement. This conversation/ challenge took place in front of other people.
52. From this date, the claimant was provided with no further shifts by Logistical to work for DHU.

53. At some point between 10 October and 4 November 2020, the claimant complained to Marc Wilson of Logistical, about the way he had been treated by Ms Penn. The claimant's evidence was that he was told to "F*** off" by him. This conversation was said to have taken place 2 to 3 weeks after the challenge on 10 October 2020 so we considered that this took place towards the end of October 2020.
54. The claimant contacted Dr Johri, the lead clinician of DHU. He initially contacted him just after the incident on 10 October, and followed this up with an email on 13 October 2020 [P107] asking Dr Johri to give him a call. It appeared that this related solely to the incident on 10 October and not any failure to provide him with work.
55. On 23 October 2020, Mr Wilson of Logistical sent an email to a number of individuals carrying out work for DHU, including the claimant [P108]. This email attached rules for wearing face coverings whilst on duty/ working for DHU. It referred to being "*in the eye of the storm*" of the second wave. It stated, "*should anyone not be able to comply to this, may I insist that you carefully read the memo and obtain a special decompensation (sic) from the person in the memo – until that has been issued, all are expected to be wearing a face covering/ shield at all times*."
56. We consider it likely, on the balance of probabilities, that the attachment to this email was the guidance dated 23 September 2020 [P110-111], particularly as this had been sent to Mr Wilson on 23 October 2020 [P109] and the email appeared to be forwarding this on to the drivers employed to cover DHU work. In the body of the email sent to the claimant and others on 23 October, it stated, "*Heidi [Stevens] also said to me that all drivers are expected to be wearing a covering whilst in the car! Sadly things are going to get worse before they get better, so by doing what we can as individuals, we slightly minimise the risk*."
57. Whilst the guidance was aimed at the wearing of face masks in buildings, we accept that the email made clear that drivers were expected to wear face masks when providing driving services for DHU.

58. The claimant sent a written grievance to Dr Johri although there was no date on the document [P152]. Unfortunately, the claimant was unable to assist in confirming the actual date it was sent. This grievance complained about the challenge made to him by Helen Penn on 10 October 2020 but also complained that he had not been provided with any work since that date.

59. Dr Johri met with the claimant on 28 October 2020 as confirmed by an email dated the next day [P112] where the claimant requested that Dr Johri confirm to Logistical that he did not have to wear a mask so that his work could resume.

60. Following the claimant's meeting with Dr Johri, and on the same day, there was a clinical meeting at which Dr Johri and managers of DHU (but not Mr King) discussed the position of drivers exempt from wearing masks. We consider that this was because of the claimant's situation which had been highlighted to Dr Johri by virtue of the claimant's grievance. We were not provided with any minutes of this meeting, but we accept that it took place. It appeared to us that the issue of agency drivers being exempt from wearing face masks had, up to this time, not been considered, although we accept Mr King's evidence that there had been some consideration of this for employed staff.

61. We accept Mr King's evidence that employed drivers who were exempt from wearing masks, were to be moved to non-patient facing areas, for example, audit work to reduce the risk to them and others.

62. It was agreed in the clinicians meeting on 28 October 2020, that agency drivers would be required to wear face masks when performing driving duties, and that drivers who were exempt from wearing masks, should not be provided by the agencies that DHU used.

63. This was confirmed in an email from Heidi Stevens to Marc Wilson on 4 November 2020 [P113]. The email stated, that,

"*I have heard back from [Dr Johri], and they have spoken about the issue with face coverings and staff being exempt, the following was agreed in the meeting.*

*The specific scenarios were:*

*(1) Agency driver who says that cannot wear a mask due to health reasons. What happens*

*next?*

*- Agreed view was that we do not use the agency driver as too high risk.*

*With this in mind we would request that you do not send us any Drivers that are exempt from wearing masks.*"

64. Mr Wilson sent this email on to the claimant on 4 November 2020 [P113] and asked the claimant to call him to discuss its contents. It appeared that nothing then happened between 4 November and 18 November 2020, when the claimant responded [P118] stating that this was evidence of discrimination and asking Ms Stevens to call him. This was forwarded on to Ms Stevens by Mr Wilson on the same day.

65. It was clear that there were some emails and attempts to speak between Ms Stevens and the claimant. On 19 November, Ms Stevens emailed the claimant [P122] to say that as he was "*high risk and [was] exempt then for your own safety we would not be able to work [with] you….It is for the sake of your own wellbeing and to ensure that anyone working for or with DHU are operating in the required manner in line with restrictions or additional requirements relating to COVID.*

*As an agency worker the issues you have raised need to be taken up with your Agency….*"

66. On the same day, the claimant replied to say that the matter had nothing to do with Mr Wilson of Logistical, and requested to speak with Ms Stevens directly.

67. Ms Stevens spoke to the claimant on 20 November 2020 [P124], and he asked her to confirm in writing what had been discussed. Ms Stevens emailed the claimant on 20 November 2020 [P124]. This email confirmed that, "*DHU requires all its drivers to wear a mask when in a vehicle with other people. This is a health and safety requirement and is for Covid-19 infection prevention and control purposes, and is for the protection of all people in the vehicle.*

*- As an agency worker, [the claimant] does not come under the scope of DHU's grievance procedure. He is therefore advised to raise any complaint directly with his agency and follow their processes*."

68. The email went on to say, "…*just to confirm we aren't saying that we won't use you again, we are saying that for your own safety and because you are unable to operate in the required DHU manner; and until such time comes where the requirement for masks isn't needed, you are not suitable for the home visiting service*."
69. Ms Stevens copied in Mr Wilson of Logistical so that this matter could be picked up by them.
70. The claimant had been overpaid by Logistical in the sum of £90. We believe this overpayment occurred around the end of September/ early October [P140]. Mr Wilson from Logistical chased up the repayment of the overpayment on 23 November 2020 [P126].
71. On 24 November 2020, the claimant was sent DHU's grievance procedure [P129] but was told that, as an agency worker, he was not within the procedure and was advised to request the appropriate procedure from the agency he worked for.
72. Marc Wilson again chased the £90 overpayment by email on 25 November 2020 [P140].
73. On 27 November 2020, Mr Wilson dismissed the claimant by email [P142]. This stated, "*Due to you ignoring my frequent requests about returning the £90 that was accidentally paid into your account, I have made the decision that you will be terminated from this contract and no longer offered any more shifts – this takes place with immediate effect….. I have informed DHU of this decision and the reasons why*."
74. We are satisfied that no procedure was followed in respect of this dismissal. The dismissal was simply effected by the email sent on this day.
75. The claimant challenged the reason for his dismissal by email dated 4 December 2020 [P142].
76. On 30 November 2020, the claimant contacted Ms Stevens of DHU asking for replies to his questions. Her reply of the same date [P143], stated that no further correspondence would be sent on the matter, and that, as she had been made aware that his employment with Logistical had terminated, he could no longer work for DHU via that agency.
77. The claimant returned the overpayment of £90 on 16 December 2020 [P148].

78. On 2 February 2021, the claimant sent a letter to Marc Wilson of Logistical. This complained about the lack of procedure concerning his dismissal and alleged breaches of employment law. Mr Wilson responded on 2 February 2021 although we were only provided with an extract of his response [P149].

**Submissions**

79. The parties addressed us orally on the case. The first respondent's representative put the case in context in terms of the pandemic, which was prevalent at the time. It had been determined that the claimant was not an employee of the first respondent, although it appeared that the claimant believed he was. There was a right to challenge individuals in the workplace. The decision for masks to be worn in vehicles was made between 10 October and 4 November 2020 was a reasonable one at that time. The first respondent's actions were objectively justified and a proportionate means of achieving a legitimate aim – namely the protection and health & safety of the claimant himself, clinicians, service users and vulnerable service users in the care of the first respondent.

80. The claimant stated that both respondents had knowledge of the claimant's disability prior to March 2020. The claimant had informed Raj, and clinicians of the First Respondent, and Marc Wilson of the second respondent well before the incident on 10 October 2020. The email from Heidi Stevens to Mr Wilson was clearly unfavourable treatment, and therefore the only issue between the claimant and the first respondent was whether this was a proportionate means of achieving a legitimate aim. On this, there were no documents within the bundle, and the evidence of any investigation of alternatives was very limited. It is for the respondent to show that it was a proportionate means of achieving a legitimate aim and they had failed to do so. There was no evidence of alternatives being investigated, this was not addressed in witness statements, and people who could have given relevant evidence were not here today.

81. The claimant further contended that there was clear evidence of unfavourable treatment by the second respondent; Helen Penn's challenge, and Marc Wilson's termination. The second respondent had not shown any objective justification for this. These claims should

therefore succeed. For the unfair dismissal claim, the second respondent has the burden of proving the reason for the dismissal, which it has failed to do, therefore the claim should succeed on this basis. However, the dismissal was unfair in any event as no procedure and the ACAS code of practice had not been followed, Even if the Tribunal were to find that the reason for the dismissal was the non-repayment of money, the claim should still succeed, as had a fair procedure been followed, it was likely that the claimant would not have been dismissed.

**LAW**

**Unfair dismissal**

82. The claimant claims unfair dismissal against the second respondent only.

83. The second respondent has to prove the reason for the dismissal and that it was one of the potentially fair reasons provided by section 98(1) and (2) Employment Rights Act 1996 ('ERA').

84. Once an employer has shown a potentially fair reason for dismissal, "*the determination of the question whether* the *dismissal is fair or unfair ... (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and (b) shall be determined in accordance with equity and the substantial merits of the case*."

85. We had regard to the guidance given by the EAT (approved repeatedly since) in BHS v Burchell [1980] ICR 203. Namely:

    a. Did the respondent genuinely believe that the claimant was guilty of misconduct?

    b. Did the respondent have reasonable grounds upon which to form that belief? and

c. Did the respondent carry out as much investigation as was reasonable in the circumstances?

86. The Tribunal must also consider whether the procedure followed by the respondent was reasonable, including whether it complied with the ACAS Code of Practice on Disciplinary and Grievance Procedures.

87. It is necessary for the Tribunal to be satisfied that dismissal was, in all the circumstances, within the range of reasonable responses of a reasonable employer and that a fair procedure had been followed by the employer (Iceland Frozen Foods Ltd v Jones [1983] ICR 17), as subsequently approved by the Court of Appeal in other cases. This is authority for the well-known proposition that a Tribunal must not substitute its own decision on the reasonableness of a dismissal for that of the employer; rather, the Tribunal must decide, objectively, whether the decision to dismiss was within the range of reasonable responses of a reasonable employer.

88. Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 provides that a compensatory award may also be increased by a maximum of 25% for failure to comply with the ACAS Code of Practice.

**Discrimination**

**Burden of Proof and discrimination claims**

89. The Tribunal had regard to the burden of proof in discrimination claims. This lies with the Claimant. However, if there are facts from which a Tribunal could decide in the absence of another explanation that the employer contravened the provisions of the EqA, the Tribunal must hold that the contravention occurred by virtue of section 136 (2) EqA.

**Discrimination arising from disability Section 15 EqA**

90. The Claimant complained that he had been treated unfavourably because of something arising as a consequence of his disability. The protection is laid out in Section 15 which states:

*"(1) a person (A) discriminates against a disabled person (B) if -*

*(a) A treats B unfavourably because of something arising in consequence of B's disability and,*

*(b) A cannot show the treatment is a proportionate means of achieving a legitimate aim.*

*(2) sub-section (1) does not apply if A shows that A did not know and could not reasonably have been expected to know that B had a disability*."

91. No comparator is required for this assessment. In order for this to apply, the employer must have treated the Claimant unfavourably. The EHRC employment code explains at paragraph 5.6 that it is sufficient to demonstrate that the unfavourable treatment is because of something arising in consequence of the disability. There must therefore be a link between the unfavourable treatment and the Claimant's disability.
92. The knowledge required for a discrimination arising from disability claim is of the disability only, and does not extend to a requirement of knowledge that the 'something' leading to the unfavourable treatment is a consequence of the disability.
93. The Employer may seek to rely upon an objective justification for the unfavourable treatment where it is a proportionate means of achieving a legitimate aim. To be proportionate, the unfavourable treatment has to be both an appropriate means of achieving the legitimate aim and a reasonably necessary means of doing so.
94. It is for the Tribunal to balance the reasonable needs of the business against the discriminatory effect of the employer's actions on the employee (Land Registry v Houghton and others UKEAT/0149/14). When determining whether or not a measure is proportionate, it is relevant for the Tribunal to consider whether or not a lesser measure could have achieved the employer's legitimate aim. The Tribunal should consider whether the measure taken was proportionate at the time the unfavourable treatment was applied.

**Conclusion**

95. Applying the relevant law to the evidence we have heard and the documentation considered, we have unanimously reached the following conclusions:

Unfair dismissal

96. It had been decided at an earlier Open Preliminary Hearing before Employment Judge Smith that the claimant was an employee of the second respondent, Logistical. The unfair dismissal claim therefore is only brought against that respondent.
97. We are satisfied that the claimant had sufficient service with the second respondent to claim unfair dismissal, having seen time sheets dating back to 1 January 2018, and in considering the claimant's evidence that he was employed from 18 December 2017.
98. The second respondent failed to present a response to the claim and did not attend the hearing, and therefore provided no evidence as to the reason for the claimant's dismissal. Whilst we have seen the email sent to the claimant on 27 November dismissing him [P142], we do not consider that the second respondent has satisfied the burden of proving that the reason for the dismissal was a potentially fair one and, therefore, the claim succeeds.
99. However, even if we were to find that there was a potentially fair reason for dismissal, namely conduct, either in not wearing face masks, or in failing to return an overpayment, we would still find the dismissal to be unfair since no procedure was followed; the ACAS code of practice was not adhered to and we consider that the second respondent did not act reasonably in all of the circumstances. Further, we do not consider that the decision to dismiss was within the range of reasonable responses open to the second respondent in this case. Therefore, we find the dismissal to be both procedurally and substantively unfair and the claimant's claim for unfair dismissal against the second respondent succeeds, with no reductions on Polkey or contributory conduct. Further, we consider that

compensation should be uplifted by the full 25% allowed in the legislation, as there cannot be a more flagrant breach of the ACAS code than this one.

Discrimination arising from disability

100. Firstly we have to consider whether the first and/or second respondents had the necessary knowledge of the claimant's disabilities at the relevant times. We are satisfied that both respondents knew of the claimant's disability on or before 10 October 2020. We accept that the claimant had told Mr Wilson of the second respondent and had informed Raj, supervisor of the first respondent, of his disabilities prior to this date.

101. Dealing with the claim against the first respondent, we do not consider that Ms Stevens email to Marc Wilson dated 4 November 2020 [P113] terminated the claimant's engagement, as set out in the agreed list of issues, since it was not sent to the claimant, but to Logistical, and did not specifically name the claimant. However, we accept that the email had the effect that the claimant was no longer able to be engaged to carry out driving duties on behalf of the first respondent, DHU. The decision that the claimant (and other drivers who were exempt from wearing masks) could not drive for the first respondent, was, in our view, unfavourable treatment, falling within section 15 EqA.

102. We further accept that this was something arising in consequence of the claimant's disability, namely his inability to wear face masks due to his medical conditions of anxiety, depression and asthma.

103. There was a clear causal link between the claimant's inability to wear masks and the decision not to use him for any driving duties on behalf of the first respondent. When the claimant discussed with Dr Johri his inability to wear face masks, a follow up meeting between Dr Johri and other DHU managers specifically discussed this issue. It was clear to us that this meeting was solely in connection with the claimant. We are therefore satisfied that the claimant has been subjected to unfavourable treatment for something arising in consequence of his disability.

104. We therefore have to consider whether the respondent has discharged the burden of proving it had a legitimate aim and that the unfavourable treatment was a proportionate means of achieving that aim.

105. We considered that the aim of protecting the health and safety of the claimant, staff members and service users within the care of the first respondent was a legitimate aim. This was a service provided by DHU to potentially vulnerable clients during the height of the COVID-19 pandemic; some of whom were in care homes, and could have been self isolating. We therefore accept this to be a legitimate aim.

106. We need to go on to consider whether the decision not to use drivers who were exempt from mask wearing was a proportionate means of achieving that legitimate aim.

107. Unfortunately, there was little documentary evidence provided to us by the first respondent to assist us in coming to a decision. We note that minutes of meetings and copies of emails which should have been provided, were not within the agreed bundle. Also, there was little within the first respondent's witness statements to assist us.

108. However, we considered the oral evidence of Mr King, and accepted, as per our findings of fact set out above, that consideration had been given as to whether it was possible for drivers to continue driving clinicians to and from appointments without wearing masks.

109. We have to consider whether there were less discriminatory ways of dealing with this. This has to be considered at the time when the unfavourable treatment occurred. We take judicial notice of the fact that in October/ November 2020, there were no vaccines available to the public, death rates from the virus were high and that face masks were compulsory for people attending shops, and using public transport, unless exempt. Also, within the NHS and healthcare services, the use of face masks was extensive.

110. With this background, we had to consider whether the refusal to allow drivers who were unable to wear masks was a proportionate way of achieving the aim of protecting individuals.

111. As set out in our findings of fact, we accept Mr King's evidence that the first respondent had considered and trialled various alternatives to mask wearing, but that the first respondent did not consider that any were practicable, effective or reasonable.

112. We accept that the temporary screens were not appropriate to be used as an alternative for mask wearing due to their flimsy nature, and ineffective seal. We further accept that the permanent screens were not able to be placed in leased vehicles, and that it would not have been possible to do this in one, or even a few, vehicles so that those who were unable to wear masks, could have utilised these vehicles. We accept that this would not have been feasible due to the nature of the first respondent's business, and its need to cover the relevant counties and schedule drivers to carry the clinicians.

113. Sitting the clinicians in different places within the vehicle, would not, in our view, have alleviated the need to wear face masks at that time. Whilst we accept that some clinicians may have been happy to continue to be driven by an individual who was unable to wear a mask due to disabilities, this did not affect the need to protect, so far as possible, those clinicians and the patients they were visiting inside their homes/ care homes. Additionally, the drivers may have been required to themselves go into the patients' homes/ care homes to provide support to the clinicians, and there would have been no alternative to wearing a mask in those circumstances. We do not consider that clinicians driving themselves to appointments was practicable or reasonable in all the circumstances, particularly when these appointments took place during long shifts and were sometimes at night.

114. We note that, had the claimant been able to provide alternative services, the first respondent would have still offered him work, but, unfortunately, he was engaged solely as a driver, mainly on the home visit service.

115. We are therefore satisfied that in the dire circumstances of the pandemic at that time (October/ November 2020) that the decision to not allow drivers, who were unable to wear masks due to disabilities, to drive clinicians to face to face appointments with patients in their homes/ care homes was a proportionate and reasonable means of protecting the

health and safety of the driver, the clinicians and the patients. We do not consider that there was a less discriminatory way that this aim could have been achieved at that time. Therefore, we dismiss the claim of discrimination arising from disability against the first respondent.

116. Turning to the claims for discrimination arising from disability against the second respondent, Logistical.

117. The first alleged unfavourable treatment was the challenge of the claimant on 10 October 2020 by Ms Penn. We are satisfied that this amounts to unfavourable treatment as the manner in which the claimant was challenged about his failure to wear a mask was not appropriate, being done in front of other work colleagues and in calling the claimant a liar about being exempt.

118. However this claim is out of time since it does not form part of a course of conduct extending over a period, and in light of the claimant contacting ACAS for early conciliation on 11 January 2021, any alleged discriminatory acts occurring before 12 October 2020 would be potentially out of time, unless we considered it just and equitable to extend time.

119. The claimant provided additional submissions, at the Tribunal's request, on whether the claim should be allowed to proceed when it had on the face of it been presented out of time. The claimant was suffering with depression and anxiety at the time and was exploring resolution with the second respondent. It appeared to us that the claimant did not have the benefit of legal representation at the time. We therefore exercised our discretion to extend time to allow the claim on the basis that the balance of prejudice weighed heavily in favour of allowing the claim to proceed on a just and equitable basis.

120. When Marc Wilson dismissed the claimant on 27 November 2020, this was clearly unfavourable treatment. This claim was also clearly brought in time. We considered that the burden of proof had been discharged and fell on the second respondent to prove that this was not a breach of section 15 EqA. In the absence of any response to the claim and

no evidence being put before the Tribunal by the second respondent, this claim also succeeds.

121. However, for completeness, we are satisfied, in any event, that the decision to dismiss was, at least in part, due to the claimant's inability to wear a face mask due to his disabilities. He had been provided with no work by the second respondent following 10 October 2020, when he was challenged by Ms Penn, one of the second respondent's other drivers. Therefore, we consider that his dismissal was due to this, together with the failure to repay the overpayment in a timely fashion. As a result, the decision to dismiss was in consequence of something arising from the claimant's disability.

122. The second respondent is unable to show that this was a proportionate means of achieving a legitimate aim, as we have no evidence of what legitimate aim they were relying upon, nor whether this was a proportionate way of achieving any such aim. He therefore succeeds in his claim for discrimination arising from disability against the second respondent in respect of his dismissal on 27 November 2020.

Remedy

123. Having given Judgment orally, the first respondent chose to leave the hearing, not being involved in remedy. We went on to hear further evidence from the claimant concerning his case.

124. The claimant confirmed in evidence that he was able to work with effect from April/ May 2021, and had made approximately 12 applications for different jobs since that time. Whilst he had registered with a few agencies, he had not obtained work from them, and could only recall that one of them was called Arc. He remained out of work at the date of the hearing.

125. We found that the claimant ought to have obtained employment within a year of his dismissal and therefore awarded compensation up until 27 November 2021, giving him some 7-8 months to have found employment once he felt well enough to do so. He has subsequently enrolled on a training course to obtain his personal training certificate, which he is currently half way through.

126. For unfair dismissal, the claimant's basic award was calculated in the sum of £65.01. We awarded £450 for loss of statutory rights. We did not award compensation for loss of earnings as part of the compensatory award, to avoid double recovery and awarded this instead within the compensation for discrimination. As previously stated, we uplifted the compensatory award by 25%, for the flagrant breaches of the ACAS code of practice, and therefore, the total compensatory award was £562.50. The total awarded for unfair dismissal was £627.51.

127. In relation to the award for discrimination, there was clear evidence of injury to feelings, as supported by the claimant's medical records and his oral evidence, but we considered that it was towards the lower end of the middle band of the Vento guidelines, since this amounted to two separate incidences of discriminatory conduct by the second respondent. We therefore decided to award £11,000 injury to feelings, together with loss of earnings since the 10 October 2020, when the incident with Ms Penn took place, and after which no further work was offered to the claimant.

128. His loss of earnings from 10 October 2020 until 27 November 2021 totalled £7,810.10, being 60 weeks at £130.17 a week.

129. We calculated interest on the injury to feelings from the date of the discriminatory conduct, being 112 weeks at 8%, which totalled £1,882.96. For the interest on the past, lost earnings, we used the mid-point between the date of the dismissal and 28 November 2021 (being the last day of the hearing), which was 1 year and 2 days' worth of interest. We calculated interest at 8% in the sum of £624.80.

130. We uplifted the compensation by 25% in light of the total and unreasonable failure by the second respondent to follow the ACAS code of practice. The uplift resulted in a further £5,329.49 being awarded to the claimant.

131. Therefore, the total sum awarded for disability discrimination was £26,647.45. The total gross sum awarded to the claimant for both unfair dismissal and discrimination was £27,247.96, payable by the second respondent.

Employment Judge Welch
Date: 5 December 2022

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