



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4111140/2021

Held in Edinburgh on 12, 13, 14 and 15 December 2022 and 9 January 2023 (and Member's meeting on 12 and 31 January 2023)

Employment Judge: M Sutherland  
Member: L Brown

Allan Paterson

Claimant  
In person

Edinburgh Napier University

Respondent  
Represented by:  
Mr B Nicol, Solicitor

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Tribunal is that the complaints of direct disability discrimination, discrimination arising from disability, indirect disability discrimination, failure to make reasonable adjustments, harassment related to disability, and victimisation do not succeed and are dismissed.

## REASONS

## Introduction

1. The Claimant presented complaints of direct disability discrimination, discrimination arising from disability, indirect disability discrimination, failure to make reasonable adjustments, harassment related to disability, and victimisation.
2. By prior judgment of 22 June 2022 it was determined that the Claimant was disabled by reason of the impairments of asthma and autism at the relevant time (from September 2020 to 31 August 2021). It was found that his asthma would have had a substantial and long-term adverse effect on his ability to carry out normal day to day activities but for his inhaler. It was found that, although the Claimant was at the milder end of the autistic spectrum, this had a substantial and long-term adverse effect on his normal day-to-day activities.
3. The Claimant appeared on his own behalf. The Respondent was represented by Mr B Nicol, Solicitor.
4. One of the two members selected to hear this case was unable to continue part way through the evidence. Both parties consented to the hearing continuing with the remaining member.
5. The Claimant gave evidence on his own behalf. The Respondent led evidence from Gail Crosbie (Engage Manager) and Dr Steven Logie (Director of Student Services).
6. The parties lodged a joint set of documents. Additional documents were also lodged.
7. The parties made oral closing submissions.
8. By way of abbreviation, the following initials are used to indicate the following individuals in this judgment -

| Initials | Name         | Job Title          |
|----------|--------------|--------------------|
| AT       | Anna Tippen  | HR Team Member     |
| EY       | Elaine Young | Facilities Manager |
| GC       | Gail Crosbie | Engage Manager     |

|    |                 |                              |
|----|-----------------|------------------------------|
| GH | Gerry Higgins   | Engage Supervisor            |
| LS | Laura Sneddon   | Engage Supervisor            |
| LF | Louisa Fraser   | HR Partner                   |
| SL | Dr Steven Logie | Director of Student Services |

#### List of Issues

9. The issues to be determined were as follows -

#### Disability (Section 6 Equality Act CEA') 2010)

1. The Respondent accepted that the Claimant was disabled by reason of the impairment of asthma and/or autism at the relevant time (from September 2020 to 31 August 2021).
2. Did the Respondent know that the Claimant was disabled by reason of asthma and/or autism at the relevant time?
3. Could the Respondent reasonably have been expected to know that?
  - a. Could GC, LS and/or GH have reasonably been expected to know by September 2020 that he was disabled by reason of asthma because they had seen him use an inhaler?
  - b. Did GC, LS and/or GH know because the Claimant had expressly told GH by phone that he had asthma and GH had told GC; and had expressly told them at each meeting he had with them from 2 November 2020 that he was disabled by reason of asthma?
  - c. Could GC, LS and/or GH have reasonably been expected to know by September 2020 that he was disabled by reason of autism because he said the feeling of the lanyard around his neck caused him stress and anxiety?
  - d. Did LF, HR know because the Claimant had expressly told HR online and AT by phone that he had a hidden disability of ASD and because his managers could therefore be reasonably expected to know?

#### Direct Discrimination (Section 13)

4. Did the Respondent treat the Claimant less favourably than it treats or would treat others because of his disability of asthma and/or autism by -

- a. On 9 September 2020 Bainfield staff repeatedly insisting that he wear a face shield despite being informed of the Claimant's medical exemption ? (para 1 of his claim)
- b. On 12 September 2020 GH asking exactly why he was exempt? (para 2)
- c. In November 2020 GC asking GH to discuss his exemption? (para 3)
- d. In November 2020 LS telling him to wear a lanyard containing a 'sunflower card' displaying 'hidden disabilities' ('that lanyard')? (para 4)
- e. In November 2020 GH asking him to complete a vulnerable groups risk assessment when he's not in a vulnerable group? (para 5)
- L On 28 April 2021 GC asking him to-
  - i. give details of his medical exemption? (para 6)
  - ii. prove/ confirm in writing -
    - 1. his medical exemption? (para 7)
    - 2. he is exempt from wearing a face mask and face shield? (para 8)
    - 3. his reason for not wearing that lanyard? (para 9)
    - 4. his medical exemption would not affect his ability to deliver the essential criteria of his role? (para 10)
  - iii. to provide the guidance stating that he does not have to wear that lanyard? (para 11)
- g. On 29 April 2021 GC and LS asking him to explain how other customers would feel if they saw him with no face covering and no lanyard; and the steps they should take if colleagues or customers complained about him? (para 12)
- h. On 13 May 2021 GC and LF asking him to justify and explain his reason for not wearing that lanyard? (para 13)
- i. On 13 May 2021 GC and LF threatening him with disciplinary action if he did not wear that lanyard? (para 14)
- j. From 28 April 2021 to 31 August 2021 not informing the Claimant that there is no issue with him not wearing that lanyard? (para 18)

Discrimination Arising from Disability (Section 15)

- 4. Did the Respondent treat the Claimant unfavourably because of something arising in consequence of his disability of asthma and/or autism by -

See a. to j. above (same acts of detriment relied upon for direct discrimination)

5. Did the Respondent know, or could they reasonably have been expected to know, that the Claimant was disabled by reason of asthma and/or autism?
6. Was the treatment a proportionate means of achieving a legitimate aim of protecting the safety of students, staffs and visitors ('others'), reassurance for the wearer of that lanyard and others that they were exempt, and/or compliance with internal policies and external guidance?

Indirect Discrimination (Section 19)

10. Did the Respondent apply to the Claimant a provision, criterion or practice (PCP) in September and November 2020 that members of staff are -
  - a. Required to wear a face covering (mask or shield) unless exempt and wear that lanyard if exempt (para 4);
  - b. Required to complete a vulnerable groups risk assessment (para 5);
  - c. Required to provide details of and prove/confirm in writing their exemption (para 6, 7 and 8) and that this would not affected their ability to deliver the essential criteria of their role (para 10);
  - d. Required to prove/ confirm in writing their reason for not wearing that lanyard? (para 9, 11 and 13)
  - e. Required to explain how other customers would feel if they saw them with no face covering and no lanyard; and the steps they should take if colleagues or customers complain about it? (para 12)
  - f. Threatened with disciplinary action if they do not wear that lanyard? (para 14)
  - g. Not informed that there is no issue with them not wearing that lanyard? (para 18)
11. Did the Respondent apply that PCP to persons who do are not disabled by reason for autism and/or asthma?
12. Did its application put persons who are disabled by reason of autism and/or asthma to a particular disadvantage in comparison with persons who are not disabled of -
  - a. suffering difficulty breathing and/or discomfort wear a face covering;
  - b. suffering the physical and/or psychological discomfort of wearing that lanyard;
  - c. the burden of providing additional information;

- d. an intrusion of privacy regarding their medical condition;
- e. the stress of threatened disciplinary action.

13. Did or would the application of the PCP put the Claimant to that disadvantage?

14. Was the application of the PCP a proportionate means of achieving a legitimate aim of protecting the safety of others, reassurance for the wearer of that lanyard and others that they were exempt, and/or compliance with internal policies and external guidance?

Failure to Make Reasonable Adjustments (section 20)

15. Did the Respondent apply to the Claimant a provision, criterion or practice (PCP) in September and November 2020 that members of staff are -

- a. Required to wear a face covering (mask or shield) unless exempt and wear that lanyard if exempt (para 1);
- b. Required to prove/ confirm in writing their reason for not wearing that lanyard? (para 13)
- c. Threatened with disciplinary action if they do not wear that lanyard? (para 14)
- d. Not informed that there is no issue with them not wearing that lanyard? (para 18)

16. Did the Respondent apply that PCP to persons who do are not disabled?

17. Did the application of the PCP put the Claimant to a substantial disadvantage in comparison with persons who are not disabled of -

- a. suffering difficulty breathing and/or discomfort wear a face covering;
- b. suffering the physical and/or psychological discomfort of wearing that lanyard;
- c. the burden of providing additional information;
- d. an intrusion of privacy regarding their medical condition;
- e. the stress of threatened disciplinary action.

18. Were reasonable steps not taken which ought to have been taken to avoid that disadvantage of -

- a. Provide an exemption from wearing of that lanyard?
- b. Not requiring staff to prove/ confirm in writing their reasons?
- c. Not threatening staff with disciplinary action?
- d. Reassuring staff that he is exempt from wearing the lanyard?

19. Did the Respondent know, or could they reasonably have been expected to know, that the Claimant had the disability and was likely to be put to that disadvantage?

Harassment (Section 26)

20. Did the Respondent engage in unwanted conduct by -

See a. to j. above (same acts relied upon for direct discrimination as for harassment)

k. On 18 June 2021 AT, at the behest of EY, trying to convince him to drop his grievance? (para 15)

21. Was that conduct related to his disability of autism and/or asthma?

22. Did that conduct have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant? When considering its effect: what was the Claimant's perception, what were the other circumstances of the case, and was it reasonable for that conduct to have that effect?

Victimisation (section 27)

23. Did the Claimant engage in a protected act -

- a. On 28 April 2021 by explaining to GC that requiring him to wear that lanyard amounted to discrimination under the EA 2010?
- b. On 13 May 2021 by explain to GC and LF that their treatment of him amounted to discrimination under EA 2010?
- c. On 2 June 2021 by submitting a grievance alleging discrimination under EA 2010?

24. Did the Respondent subject the Claimant to a detriment by -

- a. On 13 May 2021 GC and LF threatening him with disciplinary action if he did not wear that lanyard? (para 14)
- b. On 14 June 2021 GC or LS denied him the opportunity to return to work? (para 16)
- c. From 12 June 2021 to 31 August 2021 GC or LS failed to contact him whilst on furlough? (para 17)

25. Did the Respondent subject the Claimant to a detriment because the Claimant had done the protected act?

Time limits (Section 12-3)

27. Was each complaint brought within 3 months of the act or such other period as the tribunal thinks just and equitable?

Remedy (Section 124)

28. Is the Claimant entitled to a declaration, recommendation and/or compensation?

## Findings in fact

10. Since 8 April 2019 the Claimant has been employed by the Respondent as a Gym Instructor/ Assistant working in their Engage sports centre. His employment is continuing.
11. His role entails delivering fitness classes and 1-1 tuition, writing programmes and cleaning and tidying the gym. The Claimant is supervised by a Duty Supervisor, who reports to the Sports Centre Manager, GC, who reports to the Facilities Manager, EY. There are around 15 staff.

*Furlough - April 2020*

12. The Engage sports centre was closed as a result of the Covid pandemic from 18 March 2020. Engage staff including the Claimant were placed on full furlough from 24 April to 1 November 2020 and were paid in full. The Centre Manager was very supportive of her staff including the Claimant during their periods of furlough. She would communicate with them regularly and would cycle around town to visit staff including the Claimant to check on their welfare and to have an informal catch-up. She had members of staff who were anxious about Covid, the lockdown and the return work (the Centre Manager did shopping for one of her staff members because of their anxiety).
13. On 20 February 2020 Claimant self-declared on the online HR system that he had a hidden disability of ASD (autism spectrum disorder). HR asked the claimant whether he had informed his line manager of this and the claimant advised he had not (the Claimant did not want his managers to be advised of his autism).



*Voluntary work - September 2020*

14. In August 2020 the Scottish Government issued guidance on face coverings which was regularly updated. It stated that by law you must wear a face covering in most indoor public spaces unless you have a health condition which means you can't wear one; and that those exempt under the guidance and regulations do not have to prove their exemption. Wearing a face covering had been mandated because it was understood to reduce the risk of transmission of covid.
15. In around September 2020 the Claimant volunteered to work two shifts in the Student Accommodation at Bainfield to help support students who couldn't go home during the pandemic. When working those shifts he was asked by a member of staff to wear a face mask. The Claimant advised in response that he was exempt. He did not give any reason for his exemption. The staff member then asked him to wear a face shield because it was viewed as offering some protection. The Claimant declined stating that he was exempt. This was raised with his supervisor who in turn informed GC, Manager. GC asked GH, Supervisor, to establish the reason for his medical exemption.
16. On 12 September 2020 GH, Supervisor, telephoned the Claimant to ask the reason for his exemption. The Claimant advised that he did not have to give details about any exemption but said the exemption was due to his asthma.
17. GC, Centre Manager, had not previously been aware of the Claimant's asthma and was concerned whether he was safe to work. In late October 2020 she arranged for a vulnerable groups risk assessment to be provided to the Claimant for discussion with his GP's and for completion following his return to work.

*Return to work - November 2020*

18. Significant measures were taken by the Respondent with a view to mitigating the risk to the health and wellbeing of staff, students and visitors using the Respondent's facilities (including the Engage sports centre) during the pandemic. The senior leadership team held daily meetings to plan and prepare for return to work. Prior to partial reopening work areas were deep cleaned; detailed risk assessments were carried out; detailed guidance was issued; one-way systems and sanitisers were put in place; occupancy density was restricted and monitored;

working from home where possible was maintained; and support measures were put in place for staff who were anxious about returning to work,

19. The Respondent prepared Return to Work Health & Safety Guidance ('the Guidance'). The guidance addressed in a detailed and comprehensive manner various issues, including: travel to work; access/egress; physical distancing; face covering; hygiene practices; health & wellbeing; safety and security; first aid; fire evacuation; cleaning procedures; catering facilities; offices; libraries; sports facilities; ventilation; and signage, etc. The Guidance was regularly updated and disseminated to staff, students, visitors and contractors. Staff were advised of the requirement to follow that guidance. The Guidance stated that "Face coverings must be worn on campus, accommodation, communal areas and all other teaching areas unless medically exempt. Sunflower lanyards provide a physical display that someone can't wear a face covering due to a hidden disability and are available from campus iPoints." (The Sunflower lanyard is a national charitable scheme introduced prior to the Covid pandemic which bears a distinctive logo of yellow sunflowers on a green background and the words "hidden disability" in smaller partially obscured lettering. It was initially intended to indicate that the wearer may need additional support when traveling.)
20. On around 1 November 2020 the claimant returned to work.
21. On 2 November 2020 the Claimant was provided with an Employee Safe Return to Campus checklist seeking to confirm that he had completed the return to campus training, had read their COVID guidance, was aware of the protocols and one-way systems in place for accessing and using the building, and was aware of the protocols for limiting the spread of COVID (washing hands, avoiding face touching, maintaining social distancing space). This included the gym instructor Covid protocol which explained the effect of the gym closure and Covid procedures related to that role once the gym opened.
22. On 2 November 2020 GH in discussion with the Claimant completed a vulnerable group risk assessment in relation to his asthma. The risk assessment applied to higher-risk groups including those with chronic (long-term) respiratory diseases such as asthma. The Claimant advised that he has had asthma since he was a child; during furlough his asthma had worsened and he was prescribed a different inhaler; that he had informed his GP that he had tried to wear a mask but found it

restricted his breathing and caused him anxiety; that his GP had advised him he was exempt because he had an underlying medical condition; that his GP had confirmed he was otherwise fit and well and at no greater risk than anyone else in catching covid. GH accepted that the Claimant was exempt from wearing a face covering and asked him to wear a sunflower lanyard whilst on campus to which the Claimant agreed.

23. On 11 November 2020 GH, Supervisor, emailed GC, Centre Manager, to advise that the Claimant has had asthma since he was a child; that his asthma worsened whilst he was on furlough; that he is exempt from wearing a face covering; that his GP has advised that he is at no greater risk than anyone else in catching Covid; and that "AP is happy to wear the Sunflower lanyard whilst on campus".
24. In November 2020 LS provided the Claimant with a sunflower lanyard and asked him to wear it. The Claimant agreed to wear the lanyard and did so on a number of occasions.

*Furlough - December 2020*

25. From December 2020 to April 2021 the Engage sports centre was closed again as a result of the Covid pandemic and staff (including the Claimant) were placed on full furlough.

*Return to work meetings - April 2021*

26. In April 2021 the Scottish Government updated their Face Coverings Guidance to state that "the vast majority of people can wear a face covering, including most people with a lung condition such as asthma"; "It is not mandatory for those who are exempt to have to prove their exemption. However, the person can request a free face covering exemption card on 0800 121 6240 or through the exemption card website". "People do not have to prove that they are exempt, but they might have a Scottish Government face covering exemption card, or another type of card or product, such as the Sunflower lanyard, which signals that they are exempt". The government exemption card stated "I am exempt from wearing a face covering."
27. On 28 and 29 April 2021, immediately prior to the reopening of the Engage sports centre, the Respondent ran a series of induction sessions with Engage staff to

familiarise them with all the safety measures and guidance which had been put in place to address risks arising from Covid and GC had one-to-one meetings with staff.

28. The Claimant attended an induction session and a one-to-one meeting with GC, Manager on 28 April 2021. GC had a checklist of issues to discuss with staff in these meetings. She asked the Claimant if he was still exempt from wearing a face covering (mask or shield) and the Claimant said he was. She confirmed that his medical exemption would not affect his ability to deliver his role. She asked him to wear or carry a lanyard. She explained its purpose was to reassure others you are exempt. (GC understood that it was mandatory to wear a face covering if you weren't exempt and that it was standard practice to wear a lanyard if you were exempt.) He refused stating he doesn't have to prove his exemption. (GC was surprised by this because he had previously worn a lanyard and she was concerned others might be worry that the university wasn't taking its obligations seriously.) She asked him why he was no longer willing to wear or carry the lanyard. He was unwilling to say why, other than to state he was legally entitled not to do so and made reference to government guidance. She advised she would need to speak to HR. GC then asked the Claimant to confirm the key points of the meeting in writing (which was her standard practice when she'd had a meeting with a member of staff).
29. On 28 April 2021 the Claimant advised LS that he couldn't use the hand-sanitiser in the sports centre as it affected his skin. She reminded him of the need to identify a suitable one which the Respondent would then purchase for him.
30. On 28 April 2021 the Claimant confirmed in writing that he is exempt from wearing a face covering. He did not provide any further information. By reply the Claimant was asked to confirm in writing that he is exempt from wearing a face covering, that he is unwilling to wear a lanyard, that he is of the understanding that despite our request he is legally entitled not to do so, and that his exemption has no impact on his ability to delivery on the essential criteria of his role, which includes the teaching of exercise classes. He was also asked to provide the information he referred to regarding the law around the wearing of the lanyard.
31. The Claimant replied on 28 April advising this is the third occasion on which he's been quizzed about his exemptions (once after volunteering at Bainfield and the

other two when he returned to work in November 2020); that nothing has changed and he remains exempt, that he does not require to prove he is exempt and that the lanyard is a form of proof of exemption; that an issue is being made for no reason; that his exemption is covered by the Equality Act 2010; that he's now getting really stressed about the situation to the point that he's dreading coming into work. He provided a link to the government guidance on face-covering exemptions.

32. GC was very upset by his email and was confused about how she had upset him. She arranged to meet the Claimant to apologise for any misunderstanding and try to resolve matters.
33. On 29 April 2021 the Claimant met with GC, Centre Manager, and LS, Supervisor, to discuss his concerns. GC apologised repeatedly for any misunderstanding. She said she was sad and sorry to have upset him. She explained she was just trying to understand the up-to-date position with a view to supporting his return to work, in light of their recent covid planning and protocols. The Claimant advised that having stated he was exempt from wearing a face covering he doesn't need to explain the reasons for his exemption. He wasn't happy at being questioned further and he shouldn't be asked to put his position in writing which amounted to seeking proof. GC explained that she didn't consider it unreasonable to ask that he confirm matters in writing and that she wasn't seeking for him to prove his exemption. LS explained that one of their cancer rehab clients with a compromised immune system might feel uncomfortable or upset if faced with a staff member who was not wearing a face covering or lanyard, and they needed to consider together how to address this. They discussed with him that colleagues and customers might feel anxious if they saw him wearing no face covering and no lanyard, and what steps they should take if colleagues and customers complained. GC thanked him for attending the meeting and hoped they could move forward positively.

*Phased opening - May 2021*

34. From May 2021 there was a phased opening of Engage and a phased return to work for staff, who were placed on flexible furlough and paid in full regardless of whether they worked. The sports centre was only open to stakeholders (including

professional sports persons, academics) who would attend in a 'bubble'<sup>4</sup> with exclusive use of the facilities and minimal interaction with staff. The centre was also open to cancer rehabilitation attendees were considered a higher risk group due to compromised immune systems and co-morbidities. They required greater support and interaction with staff. Some staff (around half) were required to open and dose the building, maintain cleanliness or areas, set up equipment, and for reception and back-office duties. Like other staff, the Claimant was required some weeks but not others. The Claimant and other staff had regular contact with management during furlough but that reduced significantly once they were placed upon flexible furlough. There would be contact from a supervisor offering shifts as required.

35. On 5 May 2021 the Claimant completed an Employee Safe Return to Campus checklist confirming that he had completed the return to campus training, had read their COVID guidance, was aware of the protocols and one-way systems in place for accessing and using the building, was aware of the protocols for limiting the spread of COVID (washing hands, not touching face, maintaining social distancing space) including the gym instructor Covid protocol.

*Meeting with HR - May 2021*

36. GC contacted HR to discuss how to resolve the issue of the Claimant's refusal to wear the lanyard. On 13 May 2021 the Claimant was asked to attend an informal meeting with GC, Manager and LF, HR Partner, to discuss his refusal to wear the exemption lanyard and with a view to addressing his concerns and exploring alternative solutions.
37. At the meeting on 13 May 2022 GC explained that they were asking the Claimant to wear an exemption lanyard since he couldn't wear a face covering. She explained that other staff who were exempt either wore or carried lanyards and noted that he had previously done so. The purpose of the lanyard was to explain to others that he was not wearing a face covering because he was exempt. The Claimant was asked why he was no longer willing to wear the lanyard. The Claimant did not provide a reason other than stating he felt uncomfortable wearing it. He said that the lanyard was a type of proof which he didn't have to provide. It was explained to the Claimant that he was not being asked to prove his

exemption. It was explained to the Claimant that it was open to him to carry the lanyard in his pocket. The Claimant said he was unwilling to carry it. The Claimant was aggressive and intimidating in the meeting. He repeatedly said you can't make me wear or carry a lanyard and that he didn't require to explain. In the end LF, HR, said that they may need to consider disciplinary action.

38. On 13 May 2021 LS gave him an alternative milder hand sanitiser which did not cause him any issues.
39. On 13 May 2021 the Claimant emailed GC and LF to confirm their position that he is exempt from wearing a face covering, that they would prefer that he wears a lanyard but they are not insisting upon it, that he feels uncomfortable wearing a lanyard proving his exemption, that not wearing one may lead to the university to consider possible disciplinary action, that their insistence upon the lanyard was that staff and customers might feel uncomfortable and unsure as to why he was not wearing a face covering.
40. On 14 May 2021 the Claimant emailed LF to apologise if he came across as a little brash at yesterday's meeting, he explained he was not given any notice of the meeting, he felt on the back foot and defensive, he asked whether the university has a policy on face coverings and exemptions, whether the university adhered to government guidance, and the university's understanding of the law in these matters.
41. On 14 May 2021 LF, HR, emailed the Claimant apologising for the stress of the unexpected informal meeting; providing a link to the University policy on face coverings; stating that they accept that he is exempt; that he is not being asked to prove he is exempt (by way of medical evidence or otherwise); and advised that 'We are however asking you to wear an exemption lanyard so that customers, staff and other external visitors to the gym understand the reason you are not wearing a face covering is because you are exempt'; so that they are confident the university is following government guidance; that given his role is customer facing and that he previously wore a lanyard they believed this to be a reasonable request; explaining that the lanyard is not proof of exemption but signals to others that you are exempt; suggesting an OH referral; and suggesting a quick call to discuss matters together with his manager, GC.

42. After 14 May and before 20 May the Claimant took advice from his union on the request to wear an exemption lanyard.
43. On 17 May 2021 all Engage staff including the Claimant were asked if they wished to volunteer at Bainfield Student Accommodation which the Claimant declined.
44. On 20 May 2021 the Claimant emailed GO, Manager and LF, HR (which email was also sent to his union) advising that he has been quizzed on several occasions about his exemption and the wearing of the lanyard, noting that the university now accepts that his exemption is valid; that the reason for the exemption lanyard is to make staff, customers and visitors feel comfortable and confident that the university is following government guidelines; that they have failed to consider how this will affect him; that he does not like the feel of the lanyard meaning the sensory issue of wearing it causes him great stress; that he is disabled under the Equality Act 2010; that the showing of a card that is specifically designed to inform other people that he has a long term medical condition that affects his everyday life, which he finds degrading and humiliating, makes him feel uncomfortable and causes him a lot of stress and anxiety, affecting his sleep; that the university has a misunderstanding regarding proving an exemption and that he does not need to provide any written evidence or to show an exemption card; that the wearing of an exemption card is an issue of personal choice; that he is being asked to wear a lanyard is because he has a disability; that being asked to wear a lanyard and threatening disciplinary proceedings does not foster a supportive and inclusive work environment that is free from harassment and discrimination.
45. 26 May 2021 LF, HR emailed the Claimant to advise that she has discussed his email with his manager and suggested call to discuss matters; she was sorry that he felt stressed and anxious: she explained that the discussions were held in a supportive and calm manner with a view to understanding why he was unwilling to wear the exemption lanyard; given that he had worn the lanyard previously they needed to understand why this had changed; they were not advised prior to 20 May that there were sensory or psychological issues associated with the lanyard and: confirmed that they will not be proceeding with a disciplinary process on this basis; and that there should be a meeting to discuss a referral an OH referral



regarding reasonable adjustments, use of hand sanitiser in the gym, and his annual leave dates.

*Grievance - June 2021*

46. On 2 June 2021 the Claimant submitted formal grievances against GC, Manager, and LF, HR Partner, on the basis that he was directly discriminated against and harassed on account of his disability by continually bringing up and asking him to prove his medical exemption; by asking him to wear a lanyard displaying that he has a disability; by using the threat of disciplinary action to coerce him into to displaying that he has a disability: by victimising him for standing up for his rights. The Claimant stated view was that the issue should have been over the moment he told management that he was exempt. The Claimant referred to the recently updated Scottish guidance. He also referred to the UK Government guidance which stated that if you are exempt “you do not routinely need to show any written evidence of this; you do not need to show an exemption card. This means you do not need to seek advice or request a letter from a medical professional about your reason for not wearing a face covering. However, some people may feel more comfortable showing... an exemption card, badge or even a home-made sign. Carrying an exemption care or badge is a personal choice and is not required by law.” The Claimant stated that he had already made it clear that no reasonable adjustments need to be made for him. The Claimant did not want managers to be aware of his autism and any reference to it was redacted from this grievance.
47. In June 2021 the Claimant submitted an additional complaint that he had not had any shifts since he asserted his rights under the Equality Act 2010 at the meeting on 13 May 2021 and since he submitted his grievance, and that this amounted to victimisation.
48. The investigation manager held investigation meetings with the Claimant, GC, LF and GH. At his investigation meeting Claimant said: that being asked to confirm matters in writing following meetings was him being asked to prove his exemption to managers which he was not required to do; that being asked to wear the exemption lanyard was him being asked to prove his exemption to others which he was not required to do; that he was asked to explain why he wouldn't wear the lanyard which he was not required to do; that his made him feel stressed and

anxious; that he felt ambushed when he was called into the meeting on 13 May 2021 without prior notice. At her investigation meeting GC, Manager said: that the Claimant was aggressive and intimidating at that meeting; that he was unwilling to explain why he would not wear the lanyard or carry it in his pocket. At her investigation meeting LF, HR said: that they conducted the meeting in a calm and reasonable manner; that they believed that they were making a reasonable management request by asking him to wear the exemption lanyard; that the Claimant was unwilling to provide a reason why he would not wear the exemption lanyard; and that when he provided a reason after the meeting they accepted that.

49. On 18 June 2021 AT, at EY's behest, contacted the Claimant to ask him to consider if he wanted his grievance dealt with informally which he declined. The Respondent's Grievance Policy and Procedure provides that, where appropriate, concerns will be settled without recourse to a formal procedure. It provides that a manager should meet with the employee to explore in confidence how the matter could be resolved informally and that the informal approach must be fully exhausted before commencing the formal procedure.
50. On 25 August 2021 the Claimant was advised that his grievance had not been upheld. The grievance manager concluded: that GC and LF were following their duty of care by exploring with the Claimant why he no longer wanted to wear an exemption lanyard in his customer-facing role, but this could have been explored at an earlier stage involving fewer individuals and with prior notice of the meetings; that potential consideration of disciplinary action arose because the Claimant would not give any specific reasons for not wearing the exemption lanyard; that this was not the correct course of action because the wearing of an exemption lanyard is not mandatory, noting that the university guidance on this issue is unclear and the Covid guidelines have continually been evolving; that the university guidelines should be updated to make clear that exemption lanyards are not mandatory; that the purpose of the exemption lanyard is to signal to staff and visitors that the wearer is exempt and there should instead have been consideration of other alternative arrangements such as a move to other duties; when the Claimant provided a reason for not wearing the exemption lanyard it was confirmed that this was acceptable; that the Claimant was not singled out because of his disability and the complaint of discrimination was not upheld; that

there were no comments about his medical condition and the complaint of harassment was not upheld; that there was no work for the main Gym Instructor/Assistant and accordingly the complaint of victimisation was not upheld.

*Phased opening - June 2021*

51. From 14 June 2021 previous members were allowed back to the sports centre. The number of users was low for a variety of reasons (no changing/ shower facilities, no water, booked slots only, etc). They were unable to accommodate fitness classes, 1:1 tuition, and assistance in the gym. There was accordingly a reduced requirement for a gym instructor/ assistant. The weekend gym instructor/ assistant volunteered to cover the duties of the weekend gym attendant post, which was vacant.
52. Pending the outcome of the Claimant's grievance, EY, the Facilities Manager, was appointed as his line manager and point of contact. GC was told not to contact the Claimant pending the outcome of his grievance. On 24 June 2021 the Claimant was advised by EY, FS Manager that they needed cover for reception and other duties w/c 28 June because of accrual of holiday leave during furlough and that that he was welcome to volunteer to cover these duties. The Claimant was on holiday at that time. GC was told by EY that she had tried on a number of occasions to contact the Claimant without success.

*Grievance appeal - September 2021*

53. On 4 September 2021 the Claimant appealed the grievance outcome on the basis that it was inappropriate and based upon flawed information including: that according to the government guidelines you can't ask someone the reason for their exemption; that he did not agree to wear the lanyard, he was instructed to wear it; that he is not in a vulnerable group and should therefore not have been required to complete a risk assessment and that this amounted to harassment; being instructed to wear a lanyard that displays he has a hidden disability amounts to discrimination; that he told GC at the meetings in April and May 2021 that wearing the lanyard made him feel uncomfortable (physically and emotionally); that he does not require to prove he is exempt and he should not have been required to say the reason for the exemption by email; that the wearing of the

lanyard is an issue of personal choice which should be respected; that he should not have been asked to explain why he didn't want to wear the lanyard; that him stating it makes him feel uncomfortable was more information than he needed to give; that he was discriminated against by the threat of disciplinary action; that they were concerned with how others might feel about him not wearing a face covering or a lanyard and not how he would feel wearing the lanyard; that they did not consider making reasonable adjustments for him.

54. A grievance appeal hearing was held on 17 September 2021 by SL, Director with the Claimant and the Grievance Manager. At that meeting the Claimant stated that according to Government guidelines all you have to do is say that you are exempt from wearing a face covering and you cannot be required to give the reason for your exemption because this would entail disclosing medical information. The Claimant considered that being asked to give a reason amounted to a request for proof of exemption which was not required. He considered that repeatedly being asked to give a reason when it was not required amounted to harassment. That he was asked to complete a risk assessment and that this amounted to discrimination because no one else was asked to do so. That he was threatened with disciplinary and that this amounted to discrimination. The Claimant considered that the only reason the weekend Gym Instructor had been given shifts was because he wore a face covering and that this amounted to victimisation. SL, Grievance Appeal Manager had a follow up meeting the Grievance Manager.
55. On 29 September 2021 the Grievance Appeal Manager wrote to the Claimant providing the outcome of his grievance appeal which was partially upheld. He considered that there was no flaw in the procedure and the final outcome was appropriate based upon the information available. He noted that the Claimant did not want to reveal to management or colleagues that he had a hidden disability. He could appreciate why the Claimant felt that the repeated discussions and the suggestion of disciplinary action amounted to harassment. However, he could appreciate why the Grievance Manager considered that they were supportive. He noted that the Claimant had been contacted on several occasions regarding the availability of work and there was no evidence of victimisation. On balance he was satisfied that the grievance outcome was appropriate based on the evidence

available whilst acknowledging that others may have interpreted the evidence differently. He explained that his role was not to re-hear the original grievance and therefore he did not have access to all of the investigation evidence. He was broadly satisfied with the grievance outcome, although matters could have been resolved at an earlier stage without the need to signpost potential disciplinary action. Hence his appeal was partially upheld.

56. Flexible furlough ended in October 2021 and staff returned to their normal shift pattern.

#### Observations on the evidence

57. The standard of proof is on balance of probabilities, which means that if the Tribunal considers that, on the evidence, the occurrence of an event was more likely than not, then the Tribunal is satisfied that the event did occur. Facts may be proven by direct evidence (primary facts) or by reasonable inference drawn from primary facts (secondary facts).
58. The Respondents' witnesses came across as entirely credible and reliable in their testimony which was fair and measured, and consistent with the documentary evidence. The Claimant's testimony came across at times as somewhat self-serving for the reasons noted below.

#### *Government guidance*

59. Parties sought to rely upon versions of Scottish Government and UK Government guidance which was published after relevant time (the relevant time being from September 2020 to 31 August 2021). The versions published at the relevant time and available online from the National Records of Scotland (<https://webarchive.nrscotland.gov.uk/>) have been relied upon.

#### *Meetings of April and May 2021*

60. The Claimant asserted in evidence that at the meetings in April and May 2021 he had explained that wearing the lanyard made him feel uncomfortable physically and emotionally. GC asserted in evidence that he was unwilling to explain why he was no longer willing to wear the lanyard. It was accepted that he has said he felt uncomfortable wearing the lanyard and that he didn't have to prove to others he was exempt. It was apparent from the Claimant's emails of 13 May 2021, which

were sent immediately after the meeting, that the Claimant considered that the exemption lanyard amounted to proof of his exemption, that he was not required to prove his exemption, and therefore that he could not be required to wear a lanyard.

61. The Claimant did not raise having a sensory issue with the lanyard until his email of 20 May 2021 (“I did not like the feel of the lanyard, meaning the sensory issue of wearing a lanyard has and would cause me great stress”). He did not raise any emotional issue regarding the wearing of the lanyard until his email of 20 May 2021 (“The showing of a card that is specifically designed to inform other people that I have a long-term medical condition that affects my everyday life, not only makes me feel uncomfortable but causes me a lot of stress and anxiety”). The Claimant acknowledged in that email that he did not fully articulate his reasoning at the meeting on 13 May 2021.
62. In the management reply of 26 May it noted: that they were seeking to understand why he was unwilling to wear the exemption lanyard given that they had previously been advised that he was happy to wear the exemption lanyard and he had done so; that he had not previously advised his reasons for not wearing the exemption lanyard and he did not raise the sensory or psychological issues at that meeting.
63. It was apparent from the Claimant’s grievance appeal that his “position from the start” was that the wearing of the lanyard was “an issue of personal choice” which should be respected, that “I should not have been quizzed as to why I felt uncomfortable wearing a lanyard. And when I was quizzed and I said, it makes me feel uncomfortable, that was more information than I needed to give and should’ve been an end to it”, “I told Gail in 2 previous meetings [28 and 29 April 2021] and both Gail and Louisa at that meeting [13 May 2021], wearing the lanyard made me feel uncomfortable. This should have been enough...”
64. In the circumstances noted above, it is considered likely that at the meetings in April and May 2021 he had stated that he felt uncomfortable wearing it but that he refused to explain why beyond stating he did not have to prove his exemption.
65. The Claimant asserted that he was threatened with disciplinary action because he would not wear the lanyard. Having regard to all of the evidence: there was not a threat of disciplinary action but rather he was advised that they may need to

consider disciplinary action. He was not advised this following his refusal to wear the lanyard but rather he was advised of this following his refusal to explain why he would no longer wear the lanyard, which refusal he conveyed in an aggressive and intimidating manner. When he subsequently provided an explanation it was immediately confirmed to him that there was no need to consider the possibility of disciplinary action. It was not therefore accepted that he was threatened with disciplinary action because he would not wear the lanyard.

*Proof of exemption*

66. The Claimant believed that according to the Government guidance all he required to do was state he was exempt and he should not be required to give the medical reason for that exemption. The Claimant appeared to conflate three separate issues: simply stating you are exempt from wearing a face covering without given any reason; giving a reason for that exemption by stating a medical condition without providing medical evidence; and providing proof of that exemption by way of a medical report.
67. Notwithstanding the Claimant's interpretation of the status and meaning of the Scottish Government guidelines, we considered it would have been reasonable for an employer, in fulfilment of their duty of care to others, to seek proof where an employee was asserting exemption from wearing a mask whilst at work. Notwithstanding these observations the Respondent in this case did not seek proof of exemption. They merely sought for the employee to explain to their manager the reason for their exemption and for there to be a written record of this.

*Return to work*

68. The Claimant asserted that he had not been given shifts because he had raised a grievance. The shift rotas showed that after the phased opening of the gym in May 2021 staff, including the Claimant, were given shifts some weeks but not others. After the opening of the gym the Claimant was offered a shift in June 2021 (although he couldn't accept because he was on holiday). The Claimant was not afforded the opportunity to return full time because there was a reduced requirement for a gym instructor/ assistant role. The weekend gym/ instructor was

given the opportunity to return to work because he volunteered to cover the duties of the post of weekend gym attendant which was vacant.

### *Injury to feelings*

69. The Claimant asserts that the way he was treated resulted in injury to his feelings. The Claimant was not off sick during the relevant time (from September 2020 to 31 August 2021) or in the period immediately thereafter. There was no medical evidence of any psychiatric or psychological injury, and he did not assert this. He was not in receipt of any medication. However, we accept that he was upset and anxious by being asked to explain why he was exempt and to explain why he was unwilling to wear the sunflower lanyard. He was upset because he strongly believed that he should not have been asked to explain - in his view he merely required to state he was exempt.

### **The law**

#### *Direct Discrimination*

70. Section 13(1) EA 2010 provides: "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."
71. Direct discrimination requires consideration of whether the claimant was treated less favourably than others and whether the reason for that treatment was because of a protected characteristic.
72. The Tribunal may consider firstly whether the claimant received less favourable treatment than the appropriate comparator and then secondly whether the less favourable treatment was on discriminatory grounds. However, and especially where the appropriate comparator is disputed or hypothetical, the less favourable issue may be resolved by first considering the reason why issue. It will often be meaningless to ask who is the appropriate comparator, and how they would have been treated, without asking the reason why" (*Shamoon v The Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337)



*Less favourable treatment*

73. The claimant, must have been treated less favourably than a real or hypothetical comparator. If there is no less favourable treatment there is no requirement to consider the reason why.
74. Under Section 23 EA 2010 there must be no material differences between the relevant circumstances of the Claimant and their comparator. The comparison must be like with like (*Shamoon*).
75. The Tribunal may consider how an actual real person has been treated in the same circumstances or, if necessary, consider how a hypothetical person would have been treated in those circumstances. In determining how a hypothetical comparator would have been treated, it is legitimate to draw inferences from how an actual comparator in non-identical but not wholly dissimilar cases has been treated.

*The reason why*

76. The reason for the treatment need not be the main or sole reason but must have at least a significant (or more than trivial) influence on the treatment to amount to an effective cause of it. In "reason why" cases the matter is dispositive upon determination of the alleged discriminator's state of mind. In "criterion cases" there is no need to consider the alleged discriminator's state of mind when the treatment complained of is caused by the application of a criterion which is inherently or indissociably discriminatory (*R (E) v Governing Body of JFS* [2010] 2AC 728, SC).
77. Direct discrimination may be intentional or it may be subconscious (based upon stereotypical assumptions). The tribunal must consider the conscious or subconscious mental processes which caused the employer to act. This is not necessarily a question of motive or purpose and is not restricted to considering 'but for' the protected characteristic would the treatment have occurred (*Shamoon*).

*Burden of Proof*

78. Section 136(2) EA 2010 provides that “(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”.
79. The burden of proof provisions apply where the facts relevant to determining discrimination are in doubt. The burden of proof provisions are not relevant where the facts are not disputed or the tribunal is in a position to make positive findings on the evidence (*Hewage v Grampian Health Board [2012] UKSC 37, SC*).
80. The burden of proof is considered in two stages. If the claimant does not satisfy the burden of Stage 1 their claim will fail. If the respondent does not satisfy the burden of Stage 2, if required, the claim will succeed (*Igen v Wong [2005] ICR 935*)

*Stage 1 - prima facie case*

81. It is for the claimant to prove facts from which the tribunal *could* conclude, in the absence of an adequate explanation, that the respondent has treated the claimant less favourably because of a protected characteristic (‘Stage 1’ *prima facie* case).
82. Having a protected characteristic and there being a difference in treatment is not sufficient (*Madarassy v Nomura International Pic [2007] ICR 867*). The claimant must also prove a Stage 1 *prima facie* case regarding the reason for difference in treatment by way of “something more”.
83. It is unusual to have direct evidence as to the reason for the treatment (discrimination may not be intentional and may be the product of unconscious bias or discriminatory assumptions) (*Nagarajan v London Regional Transport [1999] 4 All ER 65*). Evidence of the reason for the treatment will ordinarily be by reasonable inference from primary facts.

84. At Stage 1 proof is of a prima facie case and requires relevant facts from which the tribunal could infer the reason. Relevant facts in appropriate cases may include evasive or equivocal replies to questions or requests for information; failure to comply with a relevant code of practice; the context in which the treatment has occurred including statistical data; the reason for the treatment (*Madarassy*). “In so far as this [information] was in the hands of the employer, the claimant could have identified the information required and requested that it be provided voluntarily or, if that was refused, by obtaining an order from the Tribunal” (*Efob/ v Roya/ Ma// Group* [2019] EWCA Civ 19, CA).
85. Assessment of Stage 1 is based upon all the evidence adduced by both the claimant and the respondent but excluding the absence of an adequate (i.e. non-discriminatory) explanation for the treatment (which is relevant only to Stage 2) (*Wadarassy*). All relevant facts should be considered but not the respondent’s explanation, or the absence of any such explanation (*Laing v Manchester City Council* [2006] ICR 1519, EAT and *Efobi*). (The respondent’s explanation for its conduct provides the reason why he has done what could be considered a discriminatory act.) “Most cases turn on the accumulation of multiple findings of primary fact, from which the court or tribunal is invited to draw an inference of a discriminatory explanation of those facts” (*Madarassy*). “In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts” (*Igen; Hewage*).

*Stage 2 - rebutting inference*

86. If the claimant satisfies Stage 1, it is then for the respondent to prove that the respondent has not treated the claimant less favourably because of a protected characteristic (Stage 2).
87. The employer must seek to rebut the inference of discrimination by explaining why he has acted as he has (*Laing*). The treatment must be “in no sense whatsoever” because of the protected characteristic (*Barton v Investec* 2003 IRC 1205 EAT). The explanation must be sufficiently adequate and cogent to

discharge the burden and this will depend on the strength of the Stage 1 *prima facie* case (*Network Rail Infrastructure Limited v Griffiths Henry* 2006 IRLR 865).

88. The Tribunal may elect to bypass Stage 1 and proceed straight to Stage 2, if they are satisfied that the reason for the less favourable treatment is fully adequate and cogent (*Laing*).

#### Discrimination arising from disability

89. Under Section 15 EA 2010 “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 that the treatment is a proportionate means of achieving a legitimate aim. (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.”

90. The tribunal must determine whether the Respondent treated the Claimant unfavourably because of something. This involves establishing the reason for any unfavourable treatment. The tribunal must then determine whether the something arose in consequence of the Claimant's disability (*Basildon & Thurrock NHS Foundation Trust v Weerasinghe* [2016] ICR 305, EAT).

#### *Unfavourable treatment*

91. Unfavourable treatment requires the Claimant to have been put to a disadvantage (a 'relatively low threshold'), but, unlike less favourable treatment, it requires no comparison with how a comparator was or would be treated (*Williams v Trustees of Swansea University Pension and Assurance Scheme* [2019] IRLR 306). This raises two questions of fact: what was the treatment and was it unfavourable to the Claimant?

#### *Reason for the treatment*

92. The approach to the question as to the reason for the treatment follows the approach taken to direct discrimination (*Pnaiser v NHS England* [2016] IRLR 170, EAT). It is for the Claimant to prove facts from which the tribunal could conclude,

in the absence of an adequate explanation, that the Respondent has treated the Claimant unfavourably because of the something arising ('Stage 1' *prima fade* case). If the Claimant satisfies Stage 1, it is then for the Respondent to prove that the Respondent has not treated the Claimant unfavourably because of the something arising (Stage 2) (or that the treatment was objectively justified).

*Something arising in consequence of disability*

93. The something must arise in consequence of the Claimant's disability. There must be a connection between the reason for the unfavourable treatment and the Claimant's disability. It does not encompass associative or perceptive discrimination.
94. The consequences of a disability include anything which is the result, effect or outcome of a person's disability (*Para 5.9 Equality and Human Rights Commission Code of Practice on Employment 2011('EHRC Code')*).
95. There may be multiple causal links between the disability and the something that causes unfavourable treatment.

*Respondent knowledge*

96. Discrimination does not arise if the Respondent did not know, and could not reasonably have been expected to know, that the Claimant had the disability. However the Respondent does not require to know that the something arises in consequence of disability.

*Objective justification*

97. The discrimination arising from disability is justified if the Respondent can show that the unfavourable treatment is a proportionate means of achieving a legitimate aim. The onus is upon the Respondent to establish justification.
98. Whilst there is a material overlap between objective justification of indirect discrimination under Section 19 and discrimination arising from disability under Section 15, the former involves consideration of group disadvantage whilst the

latter involves consideration of individual unfavourable treatment (*Stott v RailH Ltd UKEAT/0223/20*). Accordingly the PCP must be justified having regard to the quantitative and qualitative effective on the individual Claimant (rather than disadvantaged group).

Indirect discrimination

99. Indirect discrimination arises under Section 19 EA 2010 where: an employer applies a provision, criterion or practice ('PCP') to a worker; the employer applies or would apply that PCP to persons who do not share the worker's protected characteristic and persons who do; the application of the PCP did or would put persons who share the Claimant's protected characteristic to a particular disadvantage in comparison with persons who do not share it ('group disadvantage'); the application of the PCP did or would put the Claimant at that disadvantage ('individual disadvantage'); and the employer cannot show it to be a proportionate means of achieving a legitimate aim ('objective justification').
100. The burden of proof is on the Claimant to prove the PCP, group and individual disadvantage. If established, the burden of proof is on the Respondent to prove objective justification.
101. Direct discrimination is aimed at inequality of treatment; indirect discrimination is aimed at equality of treatment which has an inequality of results (*Essop v Home Office; Naeem v Secretary of State for Justice [2017] UKSC 27*). Direct and indirect discrimination are therefore mutually exclusive.

*Application of a provision, criterion or practice*

102. The PCP must have been applied or would have been applied to the worker and others. Indirect discrimination may therefore arise where a PCP has not yet been applied.
103. It is for the Claimant to identify the PCP relied upon in making the complaint. The words "provision, criterion or practice" are cumulative and do not require an absolute bar (*British Airways plc v Starmar [2005] IRLR 862, EAT*) but do not include every act that results in inequality (*Ishola v Transport for London [2020] EWCA Civ 112*).

104. The phrase PCP should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions (para 4.5 ECHR Code).
105. A one off decision may amount to a practice if that decision would be applied in similar situations in the future (*Ishola*).

*Group disadvantage*

106. Group disadvantage arises where the application of the PCP did or would put persons who share the Claimant's protected characteristic to a particular disadvantage in comparison with persons who do not share it.
107. The disadvantage does not require to be serious, obvious or significant and includes any type of disadvantage.
108. Direct discrimination requires a causal link between the less favourable treatment and the protected characteristic. Indirect discrimination does not. Instead it requires a causal link between the PCP and the particular disadvantage. However there is no requirement to show why it does by identifying the context factor (*Essop*).
109. The comparison is with persons whose relevant circumstances are the same, or not materially different from the claimant, apart from the protected characteristic (Section 23(1) EA 2010). However the pool must not be artificially restricted by reference to the characteristic itself (because "such an approach would drive a coach and horses through the indirect discrimination provisions") (*Spicer v Government of Spain [2004] EWCA Civ 1046, Court of Appeal*). The pool must suitably test the discrimination complained of and "the pool should not be so drawn as to incorporate the disputed condition" (*Naeem v Secretary of State for Justice [2017] UKSC 27*). Once the PCP has been identified "there is likely to be only one pool which serves to test its effect" as a matter of logic (*Allonby v Accrington and Rossendale College and others [2001] ICR 1189*).
110. All the workers to whom the PCP is applied should be included within the pool. In general the pool for comparison should consist of the group which the PCP affects (or would affect) either positively or negatively, while excluding workers who are not affected by it, either positively or negatively (4.18 EHRC Code) (*Essop*). The pool is all persons who would satisfy the relevant criteria apart from the PCP in question (*University of Manchester v Jones 1993 ICR 474, CA*). The pool may be

may be external where the PCP affects potential applicants for work, or it may be internal where the PCP only affects a section of an existing workforce, provided it is properly representative.

111. Looking at the pool, a comparison must be made between the impact of the PCP on those with the relevant protected characteristic and its impact on those without (4.19 EHRC Code).
112. Particular disadvantage may be established by quantitative and/or qualitative means e.g. by statistical evidence, personal testimony or expert evidence (*Homer v Chief Constable of West Yorkshire Police* [2012] UKSC 15). However, “sometimes, a PCP is intrinsically liable to disadvantage a group with a particular protected characteristic” (4.10 EHRC Code).

#### *Individual disadvantage*

113. The application of the PCP must put the Claimant to the same disadvantage as the group. There must be a causal link between the PCP and the disadvantage suffered by the individual (*Essop*).

#### *Objective justification*

114. A particular disadvantage may be objectively justified if it is a proportionate means of achieving a legitimate aim.
115. The onus is upon the Respondent to establish justification. The test is objective and is therefore not limited to what the Respondent considered at the time of its application. Although judged at the time of application the justification does not have to have been consciously and contemporaneously considered by the Respondent. Justification may be established by reasoned and rational judgement (*Chief Constable of West Yorkshire Police and anor v Homer* 2009 ICR 223, EAT).

#### *Legitimate aim*

116. A legitimate aim must be legal, should not be discriminatory in itself, and it must represent a real, objective consideration (4.28 EHRC Code). The health, welfare and safety of individuals may constitute a legitimate aim.



117. Reasonable business needs and economic efficiency may be legitimate aims but solely aiming to reduce costs does not (4.29 EHRC Code).

*Proportionate means*

118. In deciding whether the means adopted to achieve the legitimate aim are proportionate the tribunal must apply an objective test based upon a fair and detailed analysis of the working practices, business considerations and needs of the employer and the discriminatory effect of the means adopted (*Hardy and Hansons pic v Lax 2005 ICR 1565, Court of Appeal*).
119. The tribunal must conduct a balancing exercise between the discriminatory effects of PCP against the employer's legitimate aim taking into account all relevant facts (4.30 EHRC Code). An objective balance must be struck between the discriminatory effect and reasonable need (*Hampson v Department of Education and Science 1989 ICR 179, CA*) The PCP must be justified having regard to the quantitative and qualitative effective on the disadvantaged group (including the Claimant) rather than just the individual claimant (*University of Manchester v Jones 1993 ICR 474, CA, the Court of Appeal*).
120. A PCP is proportionate if it is an appropriate and necessary means of achieving a legitimate aim. (4.31 EHRC Code). "Necessary" means reasonably necessary - the employer does not have to demonstrate that no other means are possible (*Chief Constable of West Yorkshire Police v Homer [2012] UKSC 15, [2012] IRLR 590*) but there must not be a less discriminatory measure which would have achieved the legitimate aim. An exception may be made to accommodate a protected group but not if doing so would undermine the aim (*Blackburn and anor v Chief Constable of West Midlands Police 2009 IRLR 135, Court of Appeal*).
121. Cost can only be taken into account as part of the employer's justification if there are other good reasons for adopting the PCP (4.32 EHRC Code).
122. It is an objective test and after the event justification is permitted. Unlike the test for unfairness of dismissal, there is no range of reasonable responses (*Hardy*). The tribunal must make its own fair and detailed analysis of the working practices and business considerations in order to determine whether the PCP was reasonably necessary. As such a discriminatory dismissal may nevertheless be fair and a non-discriminatory dismissal may nevertheless be unfair.

Failure to make reasonable adjustments

123. Under Section 20 EA 2010 an employer has a duty, “where a provision, criterion or practice of A’s, puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage”. The duty also arises where the disadvantage is caused by a physical feature or the lack of an auxiliary aid.
124. Section 15 makes allowances for disability whilst Section 20 requires affirmative action (*Carranza v General Dynamics Information Technology Ltd [2015] IRLR 43, EAT*).
125. The tribunal must identify the provision, criterion or practice (‘PCP’) applied, the non-disabled comparators, the nature and extent of the disadvantage, and the reasonableness of the proposed adjustment. The burden of proof is upon the Claimant to establish the application of the PCP and the substantial disadvantage. PCP has the same meaning as for indirect discrimination. The burden of proof is then on the Respondent to show that the adjustment was not reasonable.
126. A substantial disadvantage is one that is more than minor or trivial. The purpose of the comparison with people who are not disabled is to establish whether the PCP or absence of an auxiliary aid puts the disabled person to a substantial disadvantage and not whether the disability causes it (*Sheikholeslami v University of Edinburgh 2018 IRLR 1090, EAT*). There is accordingly no requirement for a comparator group whose circumstances are the same.
127. What is a reasonable step is to be considered objectively having regard to all the circumstances of the case. Paragraph 4.5 of the EHRC Employment Code (2011) provides that “The following are some of the factors which might be taken into account when deciding what is a reasonable step for an employer to have to take: whether taking any particular steps would be effective in preventing the substantial disadvantage; the practicability of the step; the financial and other costs of making the adjustment and the extent of any disruption caused; the extent of the employer’s financial or other resources; the availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and the type and size of the employer.” There is no onus on the Claimant to suggest adjustments.

*Respondent knowledge*

128. Under Sch 8 Part 3 of EA 2020 the Respondent is not subject to a duty to make reasonable adjustments if it does not know, and could not reasonably be expected to know that an interested disabled person has a disability and is likely to be placed at the substantial disadvantage by the PCP, a physical feature or the absence of an auxiliary aid. The tribunal must determine whether the Respondent knew, or ought reasonably to have known, that the Claimant was disabled. If so, the tribunal must determine whether the Respondent knew, or ought reasonably to have known, that the Claimant was likely to be placed at a substantial disadvantage (*Wilcox v Birmingham CAB Services Ltd* [2011] All ER (D) 73 (Aug), Employment Appeal Tribunal) If the Respondent did not know, the tribunal must consider whether the Respondent ought reasonably to have known in the circumstances. The Respondent may be on sufficient notice as to the impairment, and its adverse effect, to merit further enquiries.

Harassment

129. Section 26(1) EA 2010 provides that “A person (A) harasses another (B) if - (a) A engages in unwanted conduct related to a relevant protected characteristic, and (b) the conduct has the purpose or effect of - (i) violating B’s dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B”.
130. The tribunal must determine whether the person engaged in the conduct; whether the conduct related to the protected characteristic and was unwanted; and whether that conduct had the purpose, or the effect, of violating the claimant's dignity, or creating the offensive, etc environment.
131. Conduct is related to a protected characteristic if it is connected with without being because of it.
132. In deciding whether the conduct has that purpose the tribunal must consider the person’s intentions. The burden of proof provisions apply as for direct discrimination. Where the conduct has a prohibited purpose it does not also require to have the prohibited effect.
133. In deciding whether the conduct has that effect the tribunal must take into account “the perception of B; the other circumstances of the case; and whether it is reasonable for the conduct to have that effect” (Section 26(4) EA 2010). This entails both a subjective question (what did B perceive?) and an objective

question (was it reasonable, etc?) (*Pemberton v Inwood [2018] EWCA Civ 564, CA*) Where the conduct has the prohibited effect the person does not have to have intended it. However it is relevant to consider whether it was reasonably apparent that the conduct was not intended to have that effect (*Richmond Pharmacology v Dhaliwal 2009 ICR 724, EAT*). An offensive environment means a state of affairs such that a one-off incident may amount to harassment if sufficiently serious to have a continuing effect

### Victimisation

134. Section 27 EA 2010 provides: "A person (A) victimises another person (B) if A subjects B to a detriment because - (a) B does a protected act, or A believes that B has done, or may do, a protected act."

### *Protected act*

135. Bringing proceedings, giving evidence or information, making an allegation or doing any other thing under the EA 2010, each amount to a protected act.

### *Detriment*

136. A detriment arises "where by reason of the act or acts complained of a reasonable worker would or might take the view that he had thereby been disadvantaged" (*Shamoon*). The Equality and Human Rights Commission Code of Practice provides that: "Generally, a detriment is anything which the individual concerned might reasonably consider changed their position for the worse or put them at a disadvantage. This could include being rejected for promotion, denied an opportunity to represent the organisation at external events, excluded from opportunities to train, or overlooked in the allocation of discretionary bonuses or performance-related awards".

137. The burden of proof provisions apply as for direct discrimination.

Time Limit

138. Under Section 123 a complaint of discrimination may not be made after the end of the period of three months starting with the date of the act to which the complaint relates or such period as the tribunal thinks just and equitable. The three-month time limit may be subject to an extension of time to facilitate ACAS Early Conciliation.

Remedy

139. Under Section 124 if the tribunal finds that there has been a contravention it may: make a declaration; order the payment of compensation; make an appropriate recommendation.

## Claimant's Submissions

140. The Claimant's submissions were in summary as follows -

*Knowledge of disability*

- a. The Centre Manager and his Supervisor were aware of his asthma and should have deduced from his use of an inhaler that he was disabled. They should have inferred that he was disabled by his reference to the Equality Act in April 2021. Having notified the HR online portal he presumed that all of HR would be aware of his autism. LF, HR should have checked HR connect. His disability by reason of autism could have been inferred from him stating he did not like the feel of the lanyard.

*Direct discrimination*

- b. He only had to advise that he was exempt - he did not have to give the reason for his medical exemption because this amounted to giving proof of his exemption. The government guidance made it unlawful for him to be asked for proof.
- c. He was not in a vulnerable group and therefore should not have had to complete a risk assessment. He was only asked to complete it because of his disability.
- d. He did not raise an issue with the sunflower lanyard in November 2020 because he thought he was required to wear it under the policy.

- e. But for his disability , he would not have worn a lanyard and accordingly he was threatened with disciplinary action in consequence of his disability. He did not behave in an aggressive or intimidatory way at that meeting. He did explain why he was unwilling to wear the lanyard.

*Discrimination arising from disability*

- f. His unfavourable treatment was connected to his disability.

*Indirect discrimination*

- g. His manager expected or required him to wear a lanyard which put him and would have put others who shared his disability at a substantial disadvantage.

*Reasonable adjustments*

- h. Management were aware that he did not feel comfortable wearing the lanyard and were therefore aware of the disadvantage of being expected to wear it.

*Harassment*

- i. The treatment of him arose because of his exemption which was related to his disability.
- j. It was the repeated and unnecessary discussions that rendered the conduct harassment after he had advised he was exempt and was unwilling to wear the lanyard.

*Victimisation*

- k. The work he had done before he raised the grievance was still available for him to do. EY failed to make contact with him.

*Time bar*

- l. The acts all relate to the same issue namely exemption from wearing a face covering and the lanyard and they are therefore all a continuing act.

*Remedy*

- m. He seeks an award of £27k having regard to the number of incidents over a prolonged duration. He no longer seeks a recommendation.

## Respondent's Submissions

141. The Respondent's submissions were in summary as follows -

- a. The Claimant was not a wholly credible witness because his evidence was inconsistent and in the event of a dispute the Respondent's witness evidence should be preferred.

*Knowledge of disability*

- b. The staff at Bainfield were not aware he had autism or asthma and accordingly did not discriminate against him when asking him to wear a face covering. The Centre Manager and Supervisors were aware of his asthma in September 2020 but were advised that it had no affect on his role and that he did not require any adjustments. The Centre Manager and Supervisors and LF was not aware of his autism.

*Direct discrimination*

- c. Anyone not wearing a face covering by reason of say a temporary condition and who was therefore not disabled would have been treated in the same way. Anyone who was in a vulnerable group but who was not disabled would have been treated in the same way. There was accordingly no direct discrimination.

*Discrimination arising from disability*

- d. He was told disciplinary action might need to be considered as a possibility because of the manner in which he refused to give a reason as to why he was no longer willing to wear a lanyard. His refusal to give a reason did not arise in consequence of his disability and accordingly there was no discrimination.
- e. The Claimant was not required to provide any proof of his exemption or any proof of his reason for not wearing the lanyard (which would have been reasonable). He was simply required to provide a reason.
- f. Any expectation that a face covering would be worn failing which an exemption lanyard was objectively justified. At the relevant time there was a global pandemic which in the UK resulted in around 24 million cases and around 200,000 deaths. Significant measures were taken to mitigate risk

including the closure of workplaces. The legitimate aim was the health and wellbeing of staff and visitors. Some of the staff were highly anxious about returning to work. Some of the visitors were in highly vulnerable groups. Not wearing a face covering represented an increased risk to staff and visitors of Covid transmission. The wearing of an exemption lanyard would reassure others that the user is exempt, rather than simply non-compliant, and that the Respondent was taking its obligation to mitigate risk seriously. The sunflower lanyard was the only exemption lanyard available at the time.

#### *Indirect discrimination*

- g. There was no requirement to wear a lanyard - it was simply a preference or expectation. His grievance resulted in a recommendation to clarify the policy. It was a one-off unique set of circumstances and therefore not a provision, criterion, or practice (*Nottingham City Transport v >4 Harvey UKEAT/0032/12/JOJ*).

#### *Reasonable adjustments*

- h. The Tribunal must identify clearly the nature and extent of the disadvantage (*Environment Agency v Rowan [2008] ICR 218*) and the Respondent's knowledge of that disadvantage (*Newham Sixth Form College v Sanders 2014 WL120001*). Management was not aware of any disadvantages until 20 May 2021. The Claimant had previously advised that he did not require any adjustments.
- i. In any event, reasonable adjustments were made for the Claimant because he was not required to wear the face covering and was permitted not to wear the lanyard.

#### *Harassment*

- j. It requires some knowledge of disability.
- k. Not all conduct which relates to a protected characteristic and causes offence or upset amounts to harassment. It must have the purpose or effect of violating dignity or creating the adverse environment. It is materially relevant to consider the purpose or intention of the conduct and whether the



Claimant ought reasonably to have appreciated that (*All v Heathrow Express* 2022 WL 01051687)

- i. The meetings were supportive and the Centre Manager apologised for any miscommunication. He was not threatened with disciplinary action for failure to wear the lanyard. The treatment of him related to his unreasonable refusal to provide an explanation. The context was trying to manage significant anxiety where mask wearing had been mandated. The Claimant understood this and accordingly his perception was unreasonable.

#### *Victimisation*

- m. The Claimant did not engage in a protected act on 28 April or 13 May. He did not explain that their treatment of him amounted to discrimination.
- n. The Claimant was not subjected to a detriment because he had raised a grievance. He was not threatened with disciplinary action; he was not denied the opportunity to return to work - there was no work to offer him; and his manager had been asked not to contact him pending the outcome of his grievance.

#### *Time bar*

- o. The initial acts relate to mask wearing, the later acts relate to lanyard wearing both involving different actors. There is no continuing act and accordingly the acts prior to 29 March 2021 are time barred.

#### *Remedy*

- p. This was an isolated minor incident and there was little if any injury to his feelings. Accordingly any award should be at the bottom of the *Vento* scale (£900) and not the top of the middle as sought.

### Discussion and decision

#### *Time bar*

142. Any acts of discrimination arising prior to 29 March 2021 would have been out with the statutory time limit subject to any just and equitable extension of time.
143. The Claimant asserts that the acts were not unconnected isolated acts but instead amounted to conduct extending over a period were accordingly in time. In the alternative he asserts that there should be a just and equitable extension of time.

Any acts which are not discriminatory cannot form part of the continuing act. Accordingly it is necessary to first consider which, if any, acts are discriminatory.

*Knowledge of disability*

144. The staff at Bainfield and the Engage staff (including the Centre Manager and supervisors) did not know and could not reasonably have been expected to know that the Claimant was disabled by reason of asthma until 28 April 2021 for the following reasons.
145. By September 2020 GC, Centre Manager, and GH, his supervisor, knew the Claimant had asthma and that it was a long-term condition. They were advised that he had no issues and that he did not require any adjustments. He also advised that he used an inhaler, but GC had never seen him have cause to use his inhaler. They did not know, and could not reasonably have been expected to know, that but for his inhaler his asthma would have a substantial adverse effect on his normal day-to-day activities. Having accepted that he was exempt from wearing a face covering by reason of his asthma, and that it did not affect his job, there was no requirement for them to make further enquiries. However on 28 April 2021 the Claimant advised that his exemption was covered under the Equality Act 2010 which indicated that he might qualify as disabled. His Managers were then under a duty to make further enquiries.
146. The staff at Bainfield, the Engage staff (including the Centre Manager and supervisors), and LF, HR, did not know and could not reasonably have been expected to know that the Claimant was disabled by reason of autism until 20 May 2021 for the following reasons.
147. Although the Claimant had updated his HR online portal to state that he had a hidden disability of ASD he did not advise his managers and he did not want them to know. Accordingly neither GC or GH knew that the Claimant had autism. On 28 April and again on 13 May 2021 the Claimant made clear that he does not require to wear the lanyard because proof of exemption is not required. There was no suggestion that his unwillingness to wear the lanyard arose from a medical condition or disability. However when he advised on 20 May 2021 he was unwilling to wear the lanyard because he had sensory issues they were then under a duty to make further enquiries.

148. We also considered whether the request to wear the sunflower lanyard which stated "hidden disability" indicated that that managers were aware that he had a hidden disability. The sunflower lanyard was the only exemption lanyard that was referred to in the Respondent's policy (the Government guidance did not refer to a government exemption card until April 2021). The sunflower lanyard was the only lanyard made available at reception and this was the only exemption lanyard known to the managers at the time. Staff who were medically exempt, whether or not they qualified as disabled, would be asked to use the sunflower lanyard. It cannot reasonably be inferred from the request to use that lanyard that the manager and supervisors knew that the Claimant was disabled.

*Direct Disability Discrimination*

149. Direct disability discrimination arises where a person treats another person less favourably than they treat or would treat others in the same circumstances because of a disability. This requires consideration of whether the claimant was treated less favourably than others in the same circumstances and whether the reason for that treatment was because of his disability.
150. On 9 September 2020 the staff at Bainfield asked him to wear a mask because it was mandatory to wear one. The staff at Bainfield then asked him to wear a face shield because he had said he was exempt from wearing a mask and it was viewed as offering some protection. A non-disabled person who was not wearing a mask or shield would have been treated the same way.
151. On 12 September 2020 GH asked why he was exempt because he wanted to know the reason for his exemption. A non-disabled person who was exempt would have been treated the same way.
152. In November 2020 CG asked GH to discuss his exemption because she wanted to understand the implications of it given the Covid pandemic and given his role as a gym instructor. LS asked him to wear an exemption lanyard because she understood that was good practice. A non-disabled person who was exempt would have been treated the same way.
153. In November 2020 GH asked him to complete a vulnerable group risk assessment because he was in a vulnerable group (the relevant form expressly referred to

having asthma). A non-disabled person who was in a vulnerable group would have been treated the same way.

154. On 28 April 2021 GH asked the Claimant to give details of his medical exemption because she was asking all staff a series of standard questions upon their return to work after lockdown. She did not ask him to prove his medical exemption by providing medical evidence or otherwise. She confirmed that he was exempt from wearing a face covering (mask or shield) and that his medical exemption would not affect his ability to deliver his role. She asked him to confirm this in writing because this was in line with her standard practice. She asked him to advise his reason for not wearing an exemption lanyard because he had previously worn one, with a view to addressing the issues arising. She asked him to provide the guidance stating that he does not have to wear an exemption lanyard because he had referred to it. A non-disabled person who was exempt and was no longer wearing an exemption lanyard would have been treated in the same way.
155. On 29 April 2021 GC and LS discussed with him that other colleagues and customers might feel anxious if they saw him not wearing face covering or lanyard and discussed what steps to take if colleagues and customers complained. They discussed this because they anticipated others (some of whom were highly vulnerable) would be anxious about him not wearing a face covering or lanyard. A non-disabled person who was exempt and no longer wearing an exemption lanyard would have been treated in the same way.
156. On 13 May 2021 GC and LF asked him to explain his reason for not wearing the exemption lanyard with a view to addressing the issues arising. He was not threatened with disciplinary action if he did not wear the lanyard. He was advised that they may need to consider disciplinary action. This was because he was refusing to discuss his reason for not wearing the lanyard. Once the Claimant provided that reason on 20 May 2020 he was advised that there was no issue with him not wearing that lanyard. A non-disabled person who was acting in the same manner would have been treated in the same way.
157. There were no facts from which it could reasonably be inferred that the Claimant was treated less favourably than others in the same circumstances because of his disability of asthma and/or autism and the complaints of direct discrimination are accordingly dismissed.

*Discrimination arising from disability*

158. Discrimination arising from disability occurs where a person treats another person unfavourably because of something arising in consequence of their disability and this treatment is not objectively justified. This requires consideration of the reason for the Claimant's treatment, whether that reason arose in consequence of his disability, whether the treatment was unfavourable, and whether the treatment was a proportionate means of achieving a legitimate aim.
159. The Claimant was asked to wear a mask and was then asked to wear a face shield because he was not wearing one. He was not wearing a mask because of his disability by reason of asthma/ autism and he was not wearing a face shield because of his disability by reason for autism. The Claimant was therefore asked because of something arising from his disability. The Claimant was not put to any disadvantage by these requests which he could and did refuse. In any event wearing a face covering unless exempt was mandatory and aimed to protect staff and customer health and safety. Asking him to wear a face covering was in reasonable pursuit of that legitimate aim and was proportionate.
160. The Claimant asked about the reason for his exemption and to confirm it in writing. The Claimant was exempt because of his disability. The Claimant was therefore asked because of something arising from his disability. These requests put him to the disadvantage of providing additional information and an intrusion of his privacy regarding his medical condition. Given the health and safety risks arising from not wearing a face covering it was important that exemptions were valid. The burden of providing additional information by stating the reason for his exemption and the intrusion of his privacy by disclosing his medical condition was limited (akin to the disclosures required for reasonable adjustments). The disadvantage to him was outweighed by the unnecessary risks arising from invalid exemptions. Asking him the reason for his exemption and documenting it was in pursuit of a legitimate aim and was proportionate.
161. The Claimant was asked to complete a risk assessment because he was in a vulnerable group. He was in a vulnerable group because of his disability. The Claimant was therefore asked because of something arising from his disability. This request did not put him to any disadvantage. In any event the vulnerable

group risk assessment aimed to identify and reduce risk any risk to him. It was a proportionate means of achieving that legitimate aim to ask him to complete it.

162. The Claimant was asked to confirm in writing that his medical exemption would not affect his ability to deliver the essential criteria of his role. The Claimant was exempt because of his disability. The Claimant was therefore asked because of something arising from his disability. This request did not put him to any disadvantage. In any event the purpose was to ensure that there was no additional risk arising from his role as a gym instructor who taught exercise classes and to have written record of it. Seeking that confirmation in writing was in pursuit of a legitimate aim and was proportionate.
163. The Claimant was asked to wear or carry an exemption lanyard because he was exempt. The Claimant was exempt because of his disability. The Claimant was therefore asked because of something arising from his disability. It is accepted that had there been a requirement to wear or display that lanyard it would have put him to psychological and physical discomfort. However it is not accepted that he was required to wear or carry that lanyard. The Claimant was not put to any disadvantage by a request which he could and did refuse.
164. The Claimant was asked to explain the reason for no longer wearing the lanyard. There was a discussion with the Claimant that colleagues and customers might feel anxious if they saw him not wearing a face covering or lanyard. He refused to wear the exemption lanyard because of his disability. The Claimant was therefore asked to explain because of something arising from his disability. These requests put him to the disadvantage of providing additional information and an intrusion of his privacy regarding his medical condition.
165. The Claimant was not threatened with disciplinary action if he did not wear the lanyard. He was advised that they may need to consider disciplinary action. This treatment occurred because of his unreasonable refusal to explain why he would no longer wear the lanyard. This put him to the disadvantage of being anxious that if he continued to behave in this manner that might result in a disciplinary process. The effective cause of his unreasonable behaviour was his belief that he was not legally required to do so. The Claimant did not assert that there was any link between his unreasonable behaviour and his autism. However we note the judgment on disability status found that he has difficulties communicating with

people and understanding the subtleties of language used by others and that this this causes him both anxiety and misunderstandings (although this was neither evident nor evidenced at the final hearing). We considered that he misinterpreted the guidance and the meetings, and that his autism may have been a factor in this misunderstanding.

166. In any event the treatment of him was a proportionate means of achieving legitimate aims. Wearing of an exemption lanyard aimed to reassure others who were anxious that the user was exempt, and that the Respondent was compliant with internal policies and external guidance. Having regard to the disadvantage to him, it was in reasonable pursuit of that legitimate aim to ask him to wear an exemption lanyard, to ask him to explain his reason for no longer wearing one with a view to addressing the issues, and to consider the possibility of disciplinary action because of his unreasonable refusal to explain (which behaviour he did not assert arose in consequence of his disability and which consideration ceased as soon as he explained his reason).
167. His complaints of discrimination arising from disability do not succeed and are dismissed.

#### *Indirect Disability Discrimination*

168. Indirect disability discrimination arises where an employer applies a provision, criterion or practice ('POP') to a disabled person and persons who share that disability and persons who do not; its application puts persons who share that disability to a particular disadvantage in comparison with persons who do not ('group disadvantage'); its application put the Claimant to that disadvantage ('individual disadvantage'); and the employer cannot show it to be a proportionate means of achieving a legitimate aim ('objective justification').
169. The requirement for staff to wear a face covering (mask or shield) unless exempt amounted to a PCP. That PCP was applied to all staff which included the Claimant and other persons who share his disability. The Claimant asserts that the application of that PCP put the Claimant and other persons who share his disability to the particular disadvantage of the discomfort of wearing a face covering. That particular disadvantage did not arise because of the availability of the exemption. In any event the PCP was objectively justified. Wearing a face

covering was mandatory unless exempt and aimed to protect staff and customer health and safety. Asking staff to wear a face covering was in reasonable pursuit of that legitimate aim and was proportionate.

170. Staff who were considered to be in a vulnerable group were required to complete a vulnerable group risk assessment which amounted to a PCP. It is likely that more disabled than non-disabled staff would be in a vulnerable group. The requirement to complete a vulnerable group risk assessment did not put them to a disadvantage, in any event the PCP was objectively justified. The vulnerable group risk assessment aimed to identify and reduce any risk to staff who were vulnerable. It was a proportionate means of achieving that legitimate aim to ask them to complete it.
171. The Respondent's written policy did not require staff to provide a reason for their exemption, it was the Centre Manager's practice to request a reason for their exemption and to confirm it in writing which amounted to a PCP. (There was no requirement for staff to prove their exemption by way of medical evidence or otherwise.) Those who were exempt would be put to the particular disadvantage of providing additional information and an intrusion of privacy regarding any medical condition. It is likely that more disabled than non-disabled staff would be exempt and therefore put to that disadvantage. In any event the PCP was objectively justified. Given the health and safety risks arising from not wearing a face covering it was important that exemptions were valid. The burden of providing additional information by stating the reason for exemption and the intrusion of privacy by disclosing the medical condition was limited and outweighed by the unnecessary risks arising from invalid exemptions. Asking the reason for exemption and documenting it was in pursuit of a legitimate aim and was proportionate.
172. The Respondent's written policy did not require staff to wear an exemption lanyard although the grievance manager accepted the policy was unclear. It was the Centre Manager's practice was to request those who were exempt to wear or carry an exemption lanyard. A refusal to do so would result in a request to provide an explanation. The request to either wear an exempt lanyard or to explain their refusal amounted to a PCP.



173. It is accepted that had there been a requirement to wear or display that lanyard it would put some staff (whether or not disabled) to a substantial disadvantage. Whilst some staff might wish to indicate to others that they are exempt and/or require additional support, others might suffer a psychological discomfort from wearing or displaying a lanyard that stated "hidden disability". It is also accepted that a requirement to wear (rather than carry) an exemption lanyard was more likely to have put staff disabled by reason of autism to a physical discomfort related to sensory issues. However it is not accepted that there was a requirement to wear or carry that lanyard.
174. Although exempt staff may have felt some sense of expectation from the centre manager to wear that lanyard it was open to staff to refuse to wear that or any exemption lanyard which is what the Claimant did. It was a matter of personal choice rather than a management instruction which would be enforced. There was no evidence that staff would be disciplined because of their failure to wear an exemption lanyard. Accordingly staff were not put to the psychological and/or physical discomfort of being required to wear that lanyard.
175. Exempt staff who refused to wear or carry an exemption lanyard would be asked to explain their reason for not doing so. This put them to the particular disadvantage of providing additional information and a possible intrusion of their privacy if that reason related to a medical condition. It is likely that more disabled than non-disabled staff would be exempt and therefore put to that disadvantage.
176. It is considered likely that there would be a discussion with any exempt staff who refused to wear or carry an exemption card that other staff and customers might feel anxious and the steps to be taken if they complained and this amounted to a PCP. However there was no assertion or evidence that this discussion would put them to a disadvantage.
177. It is considered likely that the possibility of disciplinary action would be considered if staff unreasonably refused to explain the reason for their refusal and this amounted to a PCP. This did not put disabled staff at any disadvantage compared with non-disabled staff who unreasonably refused to explain. It is not considered likely that more disabled than non-disabled staff would unreasonably refuse to explain their exemption.

178. In any event the PCP was objectively justified. Wearing of an exemption lanyard aimed to reassure others who were anxious that the user was exempt and that the Respondent was compliant with internal policies and external guidance. Balancing that aim against the disadvantage of having to provide additional information and the intrusion of privacy regarding a medical condition, it was in reasonable pursuit of that legitimate aim to ask exempt staff to wear an exemption lanyard or to ask them to explain their reason for not doing so a view to addressing the issues, and to consider the possibility of disciplinary action because of any unreasonable refusal to explain.
179. His complaints of indirect disability discrimination do not succeed and are dismissed.

*Failure to make reasonable adjustments*

180. Failure to make reasonable adjustments arises where a provision, criterion or practice ('PCP') puts a disabled person at a substantial disadvantage in comparison with persons who are not disabled and there were reasonable steps to have taken to avoid the disadvantage.
181. The requirement for staff to wear a face covering (mask or shield) unless exempt amounted to a PCP. This did not give rise to difficulty breathing and/or discomfort because an adjustment by way of the exemption had already been provided.
182. The practice of requesting a reason for their exemption and confirming it in writing amounted to a PCP. (There was no requirement for staff to prove their exemption by way of medical evidence or otherwise.) The Claimant was put to the substantial (i.e. more than minor or trivial) disadvantage of providing additional information and an intrusion of privacy regarding his medical condition by disclosing it to his managers. However that was akin to the information that would require to be disclosed for there to be an adjustment (the nature of the disability and the substantial disadvantage suffered). In any event, given the health and safety risks arising from not wearing a face covering it was important that exemptions were valid and it would not have been a reasonable step to waive that request.
183. The practice of requesting those who were exempt to wear or carry an exemption lanyard or to explain their refusal to do so amounted to a PCP. (There was no requirement to wear that lanyard if exempt and accordingly there was no need to

consider the provision of an exemption from that requirement). By having to explain his refusal the Claimant was put to the substantial (i.e. more than minor or trivial) disadvantage of providing additional information and an intrusion of privacy regarding his medical condition by disclosing it to his managers. However that was akin to the information that would require to be disclosed for there to be an adjustment (the nature of the disability and the substantial disadvantage suffered). In any event, given the anxiety that would be caused to others (including customers who were highly vulnerable) by a staff member not wearing a face covering or lanyard it was reasonable to have an informed discussion with him about how to address the issues arising and waiving that would not have been a reasonable step.

184. The practice of considering the possibility of disciplinary action where staff unreasonably refused to explain the reason for their refusal amounted to a PCP. (There was no practice of threatening staff with disciplinary action if they refused to wear that lanyard.) The Claimant as a disabled person was not put to a substantial disadvantage in comparison with persons who are not disabled. Any staff member who behaved in this was put to the disadvantage of suffering stress and anxiety. The Claimant did not assert that there was any link between his unreasonable behaviour and his autism and there was no evidence to this effect. In any event at that time his managers and HR did not know and could not reasonably have been expected to know that the Claimant was disabled by reason of autism or that he was likely to be placed at any substantial disadvantage by the PCP. Furthermore simply discounting unreasonable behaviour without further consideration would not have been a reasonable step.

185. The complaints of failure to make reasonable adjustments do not succeed and are dismissed.

#### *Harassment*

186. The Claimant was asked by student accommodation staff to wear a mask because he was not wearing one when it was mandatory to do so unless exempt. The Claimant was then asked by them to wear a face shield because he was exempt from wearing a face mask and a face shield was seen as an alternative. He was not asked to wear a mask and then a shield for the purpose of violating

his dignity. This was a minor incident and being asked to wear a mask then face shield in these circumstances could not reasonably have the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for him. It should have been reasonably apparent to him that the conduct was not intended to have that effect.

187. The Claimant was asked in Autumn 2020 why he was exempt because his managers wanted to know the reason for his exemption with a view to understanding the implications of it given the Covid pandemic and given his role as a gym instructor. By the time the centre opened again in April 2021 the government guidance had been updated and he was asked to confirm if he was still exempt in response to a checklist. The Claimant believed that all he had to do was state he was exempt and he was irritated and stressed because he felt he had been unnecessarily quizzed on several occasions. He was not asked to confirm he was exempt for the purpose of violating his dignity and being asked to confirm he was still exempt in the circumstances could not reasonably have the effect of creating an offensive, etc environment for him. It should have been reasonably apparent to him that the conduct was not intended to have that effect.
188. The Claimant was asked to wear or carry an exemption lanyard because this was considered good practice. The Claimant initially wore the lanyard and did not object. When he refused to wear the lanyard he advised that it was because it was a form of proof of exemption which was not required. He did not advise of any physical or psychological issues arising from wearing the lanyard (which related to his disability) until 20 May 2021. He was not asked to wear a lanyard for the purpose of violating his dignity and being asked to do so in these circumstances could not reasonably have the effect of creating an offensive, etc environment for him. It should have been reasonably apparent to him that the conduct was not intended to have that effect.
189. The Claimant was asked to complete a vulnerable group risk assessment because he was in a vulnerable group. The Claimant believed he was not in a vulnerable group and should not therefore have been asked. He was not asked for the purpose of violating his dignity and being asked to complete a risk assessment in the circumstances could not reasonably have the effect of creating

an offensive, etc environment, for him. It should have been reasonably apparent to him that the conduct was not intended to have that effect.

190. The Claimant was asked why he was not willing to wear an exemption lanyard because he had worn one previously and they wanted to know his reason with a view to addressing the issues arising. The Claimant believed that the lanyard was a form of proof of exemption which was not required and he was annoyed about being unnecessarily quizzed on several occasions. He was not asked for the purpose of violating his dignity and being asked why he was no longer willing to wear the lanyard in the circumstances could not reasonably have the effect of creating an offensive, etc environment for him. The reason for seeking a discussion about the lanyard was explained to the Claimant and it should have been reasonably apparent to him that the conduct was not intended to have that effect.
191. There was discussion with the Claimant that others (including highly vulnerable customers) might feel anxious if they saw him not wearing a face covering or lanyard and what steps to take if they complained. The purpose of this discussion was not to violate his dignity and this discussion could not reasonably have created an offensive, etc environment for him. It should have been reasonably apparent to him that the conduct was not intended to have that effect.
192. On 18 June 2021 AT, at the behest of EY, asked him to consider if he wanted his grievance dealt with informally. (She did not try to convince him to drop his grievance.) The purpose of this discussion was not to violate his dignity but to explore resolving matters informally before progressing matters formally. This discussion, which was in fulfilment a reasonable grievance policy objective, could not reasonably have created an offensive, etc environment for him. It should have been reasonably apparent to him that the conduct was not intended to have that effect.
193. It should have been reasonably apparent to the Claimant in each case that the conduct was not intended to violate his dignity or intended to create an offensive, etc environment for him. However we note the judgment on disability status found that he has difficulties communicating with people and understanding the subtleties of language used by others and that this causes him both anxiety and misunderstandings. Although those difficulties were not evident or evidenced

at the final hearing we considered that he may have misinterpreted the conduct such that he genuinely perceived it had the prohibited purpose or effect. However his managers did not know and could not reasonably have been expected to know of any risk of misunderstanding on his part and they could not be expected to adjust their conduct accordingly.

194. His complaints of harassment do not succeed and are accordingly dismissed.

*Victimisation*

195. A person victimises another person if they subject them to a detriment because they have, or believe they have, done a protected act.

196. Bringing proceedings, giving evidence or information, making an allegation or doing any other thing under the EA 2010, each amount to a protected act.

197. On 28 April 2021 the Claimant did not state either verbally or in writing that requiring him to wear a lanyard amounted to discrimination. The Claimant did however state that that his exemption from wearing a face covering is covered by the Equality Act 2010 and we considered this constituted doing any other thing in connection with the Act.

198. On 13 May 2021 the Claimant did not state either verbally or in writing that their treatment of him amounted to discrimination of him under the Act or words to that effect. There was no basis upon which it could be inferred that he had done a protected act.

199. On 2 June 2021 the Claimant submitted a grievance alleging discrimination under the Act which amounted to a protected act.

200. As regards the detriments alleged, the Claimant was not threatened with disciplinary action on 13 May 2021. The Claimant was advised that they may need to consider disciplinary action. He was advised this because he was unreasonably refusing to discuss his reason for not wearing the lanyard. There was no reasonable basis upon which it could be inferred that he was advised this because he had done or may do a protected act.

201. On 14 June 2021 the Claimant was not denied the opportunity to return to work because he had done or may do a protected act. The Claimant was not afforded the opportunity to return because there was a reduced requirement for a gym instructor/ assistant role. The weekend gym/ instructor was given the opportunity

to return to work because he volunteered to cover the duties of the post of weekend gym attendant which was vacant.

202. From 12 June to 31 August GC and IS did not fail to contact him whilst on furlough because he had done or may do a protected act. EY had been appointed as his line manager during his grievance and she contacted him instead.

203. There were no facts from which it could reasonably be inferred that the Claimant was subjected to a detriment because he did a protected act and his complaints of victimisation are accordingly dismissed.

**Employment Judge: M Sutherland**  
**Date of Judgment: 01 February 2023**  
**Entered in register: 03 February 2023**  
**and copied to parties**