RESERVED JUDGMENT

EMPLOYMENT TRIBUNALS

Claimants: Ms L Akester and the 126 further claimants set out in Schedule 1

Respondents: (1) Burlington Care (Yorkshire) Limited and others
(2) Secretary of State for Health and Social Care
(3) Department of Health and Social Care
(4) Care Quality Commission
(5) Mr Ian Trenholm

Heard at: Leeds (in public by Teams) **On:** 5 and 6 December 2022

Before: Employment Judge Deeley

Appearances
For the claimants: Mr P Hyland, Solicitor
For the respondents: (2) - (5) Mr T Brown, Counsel
(1) See list of hearing attendees for the First Respondents at Schedule 2

PUBLIC PRELIMINARY HEARING – RESERVED JUDGMENT

1. The claimants' claims against the Second, Third, Fourth and Fifth Respondents are struck out as having no reasonable prospects of success.

2. The claimants' applications to strike out or (in the alternative) to make deposit orders in relation to the responses of the Second, Third, Fourth and Fifth Respondents are rejected.

3. For the avoidance of doubt, the claimants' claims against the First Respondents shall continue.

REASONS

Background

1. These claims were submitted against the backdrop of legislation introduced during the Covid-19 pandemic in 2021. The legislation placed a duty on the registered

managers of care home to restrict access to care homes by care home workers (and certain other individuals). In summary, the legislation stated a registered manager must not permit a care home worker to enter the care home unless:

1.1. they were vaccinated; or
1.2. the care home worker produced evidence (to the registered manager's satisfaction) that there were clinical reasons why the worker could not be vaccinated.

2. The claimants have brought claims against the First Respondents, who consist of each individual claimant's former employer. All claimants have brought claims of ordinary unfair dismissal under s98 of the Employment Rights Act 1996. The claimants also allege that their dismissals amounted to acts of indirect discrimination on the grounds of each claimant's individual protected characteristic or characteristics (e.g. religion or belief) under s19 of the Equality Act 2010.

3. The claimants have also brought claims against the Second, Third, Fourth and Fifth Respondents (i.e. the Secretary of State, the Department for Health and Social Care, the Care Quality Commission (the "**CQC**") and Mr Ian Trenholm (Chief Executive of the CQC)). I will refer to them collectively as the "**Government and CQC Respondents**".

4. The basis on which the claimants seek to pursue their claims against the Government and CQC Respondents is that all four of those respondents:

4.1. instructed, caused or induced the First Respondents to indirectly discriminate against the claimants under s111 of the Equality Act 2010; or

4.2. aided the First Respondents to indirectly discriminate against the claimants under s112 of the Equality Act 2010.

However, there are difficulties with the way in which the claims have been pleaded against the Government and the CQC Respondents which are discussed later in this Judgment.

5. The Second and Third Respondents (i.e. the Secretary of State and the Department of Health and Social Care) have been identified as separate respondents by the parties. I am not aware of any legal distinction between these two respondents. However, for the purposes of this judgment I have continued to identify them separately.

6. The purpose of this hearing was to decide the applications relating to the Secretary of State, the Department for Health and Social Care, the CQC and Mr Trenholm. The parties' applications did not relate to the claimants' former employers. The claimants' claims against their former employers will proceed and orders will be issued at a further case management hearing.

7. The applications consisted of:

7.1. the applications of the Secretary of State, the Department for Health and Social Care, the Care Quality Commission and Mr Ian Trenholm that the Tribunal should either:

7.1.1. strike out all of the claimants' claims against all respondents (except for the claimants' employers or former employers) on the basis that they had no reasonable prospects of success under Rule 37 of the Employment Tribunal Rules; or

7.1.2. make an order that all of the claimants' claims against all respondents (except the claimants' employers or former employers) should only be permitted to proceed against them if they paid a deposit under Rule 39 of the Employment Tribunal Rules;

7.2. the applications of all of the claimants that the Tribunal should either:

7.2.1. strike out all of the defences of the Secretary of State for Health and Social Care, the Department for Health and Social Care, the Care Quality Commission and Mr Ian Trenholm on the basis that they had no reasonable prospects of success under Rule 37 of the Employment Tribunal Rules; or

7.2.2. make an order that the defences of Secretary of State for Health and Social Care, the Department for Health and Social Care, the Care Quality Commission and Mr Ian Trenholm should only be permitted to proceed against them if they paid a deposit under Rule 39 of the Employment Tribunal Rules.

Key terms and abbreviations

8. The abbreviations used in this Judgment are set out in the table below:

Key term or abbreviation	**Full name or legislation title**
Parties	
First Respondents	the employers (or former employers) of each of the individual claimants
DHSC	The Department for Health and Social Care (the Second Respondent)
Secretary of State	The Secretary of State (the Third Respondent)
CQC	The Care Quality Commission (the Fourth Respondent)
Mr Trenholm	Mr Ian Trenholm, Chief Executive of the CQC (the Fifth Respondent)
Government and CQC Respondents	The Secretary of State, the DHSC, the CQC and Mr Trenholm
Legislation and guidance	

Key term or abbreviation	Full name or legislation title
1984 Act	Public Health (Control of Disease) Act 1984
2008 Act	Health and Social Care Act 2008
Code of Practice	The Code of Practice on Infection Control dated 2015
2014 Regulations	Health and Social Care Act (Regulated Activities) Regulations 2014, as amended by the 2021 Regulations (the "**2014 Regulations**")
2021 Regulations	Health and Social Care Act 2008 (Regulated Activities) (Amendment) (Coronavirus) Regulations 2021
Regulation 12(3)(b) Requirement	the provisions of Regulation 12(3)(b) of the 2014 Regulations (as amended by the 2021 Regulations)
the Equality Act or EQA	Equality Act 2010
European Convention	European Convention on Human Rights
Operational Guidance	a document with the tile "*Operational guidance"* and the sub-title *"Covid-19 vaccination of people working or deployed in care homes"* issued by the DHSC two versions of the Operational Guidance were issued: a) a first version dated 4 August 2021; and b) a second version updated on 19 October 2021.
Medical Exemption Guidance	a document with the title *"Guidance"* and the sub-title *"Covid-19 medical exemptions: proving you are unable to get vaccinated"* and the further sub-title *"How to apply for official proof that, for medical reasons you're unable to be vaccinated or unable to be vaccinated and tested for Covid-19"* published by the DHSC on 1 October 2021
Caselaw	
Bailey	the Employment Tribunal decision in the case of *Ms Allison Bailey v (1) Stonewall Equality Ltd, (2) Garden Court Chambers Ltd and (3) others* (Case number 2202172/2020)

Key term or abbreviation	Full name or legislation title
Chandok	the Employment Appeal Tribunal decision in the case of *Chandok & Anor v Tirkey* 2015 ICR 527
Fairburn	a) the High Court decision of Whipple J in *R. (on the application of Peters) v Secretary of State for Health and Social Care; R. (on the application of Fairburn) v Secretary of State for Health and Social Care* [2021] EWHC 3182; and b) the refusal of permission to appeal by Bean LJ against Whipple J's decision dated 13 December 2021 (Ref CA-2021-001976)
Imperial Society	the Employment Appeal Tribunal decision in the case of *Commission for Racial Equality v Imperial Society of Teachers of Dancing* [1983] ICR 473
Vavricka	the European Court of Human Rights' decision in the case of *Vavricka and Others v The Czech Republic* ECHR 116 [2021]
Other	
EAT	the Employment Appeal Tribunal
ECHR	European Court of Human Rights
VCOD	Vaccination as a Condition Of Deployment

Tribunal proceedings

9. The claims that form part of this multiple have been joined together by a Case Management Order of the President of the Employment Tribunals (England and Wales) dated 15 March 2022 (revised on 12 October 2022). There are currently around 127 claims that form part of this multiple (including the lead claimant, Louise Akester). However, there is a dispute between the parties as to whether all of the 127 claims should continue as part of this multiple (for example, in relation to claims where the employer was not a Care Home but was a different body (e.g. the CQC)). This is a matter that will be dealt with at the next case management hearing of these claims.

10. Employment Judge Maidment held a case management preliminary hearing on 11 August 2022 to consider the issues raised by these claims. He arranged for further hearings to consider these claims including:

    10.1. this preliminary hearing to determine the R2-R5 and the claimants' respective applications for strike out and/or a deposit order against each other (details of which are set out below);

    10.2. a further case management preliminary hearing to 'take stock' of the conclusion reached at this preliminary hearing, to refine the remaining issues and to give directions to progress the sample cases to a final hearing; and

    10.3. arrangements for the final hearing of up to six sample cases.

11. The parties provided the documents set out below for consideration during the hearing. In total, there were over 3500 pages of documents provided for the Tribunal's reference during this hearing. I have only read the specific pages in the files of documents and authorities that Mr Brown and Mr Hyland took me to during the hearing. I did not read all of the documents because it would have taken far more than the two days arranged for this hearing to read every single page and to listen to Mr Brown's and Mr Hyland's oral submissions.

12. The documents consisted of:

    12.1. Mr Brown's and Mr Hyland's skeleton arguments (which were provided to the Tribunal in accordance with Employment Judge Maidment's orders). Mr Hyland provided an updated skeleton argument during the hearing because he had accidentally referred to a claimant by their full name in the original version of his skeleton argument. Mr Hyland also stated during this hearing that one of the claimants had noted that he had made an error when he had set out the position in relation to the authorisation of the Pfizer vaccine. I granted Mr Hyland permission to amend that part of his skeleton argument only. Mr Hyland sent what he stated to be an amended skeleton argument to the Tribunal at 7 December 2022 at 3.04pm. However, when I compared that document to his redacted skeleton argument, they were in fact identical. Mr Hyland did not respond to the Tribunal's order asking him to provide a version of his amended skeleton argument with track changes highlighting any amendments;

    12.2. Mr Hyland's document headed *"Claimant's reply to R2 to R5's Skeleton Argument and Submissions on Law and fact"* (which was emailed to the Tribunal on the afternoon of 2 December 2022);

    12.3. Mr Hyland's document headed "References to law" (which was emailed to the Tribunal after the end of the first day of this hearing);

    12.4. Mr Hyland's document headed *"Factual References List to Issues"* (which was emailed to the Tribunal late morning on the second day of this hearing);

    12.5. R2-R5's suggested pre-reading list. The claimants did not provide a suggested pre-reading list;

    12.6. R2-R5's authorities (provided to the Tribunal on 2 December 2022);

12.7. the claimants' authorities (provided to the Tribunal on the afternoon of the first day of this hearing);

12.8. two additional cases referred to during this hearing (paragraphs 17 and 18 of *Chandok* and the Employment Tribunal's first instance decision in the case of *Bailey*; and

12.9. the Explanatory Notes to s111 and s112 of the Equality Act 2010 and the decision in *Commission for Racial Equality v Imperial Society of Teachers of Dancing* [1983] ICR 473 (which was emailed by Mr Hyland to the Tribunal on 7 December 2022).

13. I also listened to detailed oral submissions from Mr Brown and Mr Hyland during the two day hearing, which together lasted for around one and a half days of this preliminary hearing.

14. Some of the representatives of the First Respondents and other observers of this hearing requested copies of the skeleton arguments, written submissions and authorities referred to during this hearing. Mr Hyland and Mr Brown agreed to this request and copies were sent to those who provided their email addresses in the Teams chat room function for the purposes of this hearing only, subject to the condition that they would not be circulated.

Hearing arrangements and claimants' application for a restricted reporting order

15. I arranged for this hearing to be conducted by Teams because of the limit on the possible number of attendees on the Tribunal's CVP videolink system.

16. There were over 60 attendees at this hearing, the vast majority of whom were either claimants or representatives for various First Respondents. However, it became apparent during the hearing that there were other attendees who were not parties to this hearing of whom the Tribunal was not aware. Mr Hyland stated that he had sent the link to the Tribunal hearing to individuals who were not parties to the hearing.

17. I reminded everyone present that the normal process was for individuals who are not parties or witnesses to request a videolink from the Tribunal directly if they wished to attend a public hearing. Any videolinks provided by the Tribunal should not be forwarded to such individuals without the Tribunal's permission.

18. Mr Hyland also applied for a restricted reporting order on behalf of the claimants by email. However, he withdrew this application when I noted that this hearing would not need to hear evidence regarding any individual claimants' health or other sensitive information in order to deal with the applications that R2-R5 and the claimants had made.

19. I told the parties that Mr Hyland could make a further application at any point during this hearing if he wished to do so. In addition, both representatives agreed to refer to any individual claimants using their initials, rather than their full names.

Claimants' application for publication of their skeleton argument and submissions document on Mr Hyland's website

20. Mr Hyland also applied for permission to publish his skeleton argument and submissions on his website. I reserved my decision on that application.

21. I have granted permission for Mr Hyland to publish his skeleton argument and submissions if he wishes to do so. For the avoidance of doubt, no permission is granted to publish:

    21.1. any Tribunal correspondence or documents (for example relating to case management hearings); and

    21.2. any correspondence or documents provided by the respondent.

Applications from the Government and the CQC Respondents and from the claimants

22. Employment Judge Maidment arranged this preliminary hearing to determine:

    22.1. (on the application of the Government and the CQC Respondents) whether the claimants' claim that, in introducing the Guidance and using the Guidance as the basis for CQC enforcement, R2-5 induced, caused, instructed and/or aided the first respondents' indirect discrimination of the claimants pursuant to Sections 111 and 112 of the Equality Act 2010, has no or little reasonable prospect of success; and

    22.2. (on the claimants' application), whether the responses of the Government and the CQC Respondents have no or little reasonable prospects of success.

Issues (or questions) considered at this preliminary hearing

23. Employment Judge Maidment set out the issues to be considered at this preliminary hearing at paragraph 5 of his case management orders with the qualification that:

    "If the claimants prove the facts necessary for the claims under the Equality Act 2010 against their employers (including their status as employees, the protected characteristics on which they rely and particular group and individual disadvantage by reference to a protected characteristic)".

24. This means that for the purposes of the applications at this preliminary hearing only, the Tribunal considered the seven issues set out by Employment Judge Maidment on the assumption that at any future final hearing the individual claimants were able to prove facts to show both that:

    24.1. they had the protected characteristics that form part of their complaint (e.g. disability, religion or belief); and

24.2. they had been indirectly discriminated against on the basis of that protected characteristic.

25. The reason why the Tribunal made this assumption is that when dealing with applications for strike out it is necessary to take the claim (or response) at its highest.

26. Employment Judge Maidment stated that this hearing would consider seven issues:

26.1. "There is no pleaded claim as to why and how the 4th and 5th respondents might be liable for any act of indirect discrimination by the care home respondents.

26.2. Is the effect of paragraph 1 of Schedule 22 of the Equality Act 2010 to exempt the treatment complained about in relation to the protected characteristics of age, sex, disability and belief, on the grounds that the employers were doing anything they must do pursuant to the requirement of an enactment, namely Regulation 12 of the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014/2936 as amended by the Health and Social Care Act 2008 (Regulated Activities) (Amendment) (Coronavirus) Regulations 2021?

26.3. Was the effect of Regulation 12(3)(b)(ii) of the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014/2936 (as amended) that the mere fact of a lack of consent to vaccination constituted "clinical reasons [a person] should not be vaccinated with any authorised vaccine [against the coronavirus]"?

26.4. Was the relationship between the employers and the Department of Health and Social Care ("DHSC") and/or Secretary of State such that they were in a position to commit a basic contravention in relation to the employer for the purposes of 111(7) of the Equality Act?

26.5. Do the claimants prove facts from which the tribunal could conclude that, in publishing operational Guidance on the coronavirus vaccination of people working or deployed in care homes, the DHSC and/or the Secretary of State induced, caused, instructed and/or knowingly aided the indirect discrimination of the claimants in relation to any applicable protected characteristic?

26.6. Was the CQC directed by the DHSC and/or Secretary of State to assess compliance by reference to the Guidance rather than the Regulations?

26.7. If so, how did this constitute inducing, causing, instructing and/or the knowing aiding of indirect discrimination of the claimants?"

27. The Tribunal sent a copy of Employment Judge Maidment's case management orders (dated 12 August 2022) to the parties' representatives on 2 September 2022. Mr Hyland and the respondents' representatives did not question the issues set out by Judge Maidment or any other aspect of his case management orders.

RELEVANT LAW AND AUTHORITIES

28. The relevant law, authorities and guidance documents are summarised in this Judgment.

29. I have considered the helpful skeleton arguments, written submissions and oral submissions provided by Mr Brown and by Mr Hyland. However, I have not reproduced these in this Judgment in full in the interests of brevity. I note that Mr Hyland's skeleton argument and written submissions consisted of in excess of 100 pages and that Mr Brown's skeleton argument consisted of 15 pages. In addition, both Mr Brown and Mr Hyland provided detailed oral submissions lasting around one and a half days together during this hearing.

Fairburn and Vavricka

30. I note that under the legal principle of "stare decisis", lower courts are required to take account of and follow the decisions made by the higher courts where the material facts are the same. This means that the decisions of higher courts (including the High Court, the Employment Appeal Tribunal, the Court of Appeal and the Supreme Court) are binding on the Employment Tribunal.

31. In *Fairburn*, the claimants sought judicial review of Regulation 5(3)(b) of the 2021 Regulations (which inserted the Regulation 12(3)(b) Requirement into the 2014 Regulations). Whipple J (sitting in the High Court) refused permission for the claimants to apply for judicial review.

32. Whipple J summarised the effect of the disputed regulation at paragraph 2 of her judgment: *"The effect of that regulation is to preclude a worker from working in a care home unless they have been vaccinated or they are exempt on clinical grounds".*

33. Whipple J considered the claimants' argument that the introduction of the 2021 Regulations were in breach of s45E of the 1984 Act which states that:

"45E Medical treatment

(1) Regulations under …s45C may not include provision requiring a person to undergo medical treatment.

(2) "Medical treatment" includes vaccination…".

34. s45C of the 1984 Act states that:

"(1) The appropriate Minister may by regulations make provision for the purpose of preventing, protecting against, controlling or providing a public health response to the incidence or spread of infection or contamination in England and Wales…

(3) Regulations under subsection (1) may in particular include provision –

…(c) imposing or enabling the imposition of restrictions or requirements on or in relation to persons, things or premises in the event of, or in response to, a threat to public health."

35. Whipple J held at paragraph 9 of her judgment that:

> *"The claimants say that the effect of the 2021 Regulations is to mandate vaccination and that mandate is precluded by s. 45E. They say that this is a real world understanding and analysis of what occurs or will occur in light of the 2021 Regulations, because care workers will be forced to undergo vaccination to keep their jobs, and that is contrary to the statutory prohibition. They argue that s. 45E has primacy over the 2021 Regulations, on the basis that primary statute prevails over secondary legislation.*
>
> *I am unable to accept that submission. I do not consider it to be arguable. On its face, s.45E says that no person can be compelled to undergo medical treatment, but that is not, on a proper understanding, the effect of the 2021 Regulations, which do not mandate vaccination. The way they work is that the individual retains the autonomy to decide whether to be vaccinated or not; the 2021 Regulations impose a consequence, depending on the choice a person makes, and preclude someone who has chosen not to be vaccinated from taking up work in a care home unless they come within an exempted category, which neither of these claimants does. I conclude that this is not a situation where s.45E is even arguably engaged."*

36. I note, by way of contrast, the ECHR case of *Solomakhin v Ukraine* 24429/0 involved a case where a patient was vaccinated against his wishes and without his consent. The ECHR concluded that the forced vaccination in this case was an interference with the right under Article 8 of the European Convention to respect for a person's private life, which included a person's physical integrity.

37. The claimants in *Fairburn* also raised human rights arguments under Article 8 of the European Convention (Right to respect for private and family life) . Whipple J stated:

> *"26. As to ground 3, that is an Article 8 ground, suggesting that the Regulation gives rise to a breach of Article 8. This is answered in large part by the recent case of Vavřička v. Czech Republic: if children can be barred from school because they are not vaccinated, as was the circumstance of that case, it must follow, by analogy, that there is no breach of Article 8 to legislate so that workers, who are not vaccinated, can be prevented from working in care homes. I see no merit in this ground.*
>
> *There are other aspects to the Article 8 argument. As the defendant says, the whole point of this measure is to protect lives, namely, the lives of elderly residents in care homes. So the measure itself is intended to protect the Article 2 rights of those who are residents in these care homes. That is a very weighty justification for any interference with Article 8 which might be established."*

38. Whipple J was clear that the circumstances in *Vavricka* were analogous to those in *Fairburn*. I accept that they were not identical to the circumstances in issue in *Fairburn* – for example, the vaccine involved in *Vavricka* had been in use for longer than the Covid vaccines at the time of the acts in contention. However, I have concluded that Whipple J's reasoning can be read across to the application of any qualified human right in potential conflict with the Article 2 of the European Convention (the right to life).

39. Whipple J in *Fairburn* considered the claimants' arguments regarding other ECHR rights, namely Article 14 (protection against discrimination). She concluded that the government had a wide margin of discretion when implementing measures to protect care home residents in the context of the Covid-19 pandemic:

"30 Ground 4 alleges Article 8 breach in conjunction with Article 14 on the basis that the Regulation indirectly discriminates on grounds of sex and race, noting the higher proportions of women and BAME people who work in the social care sector. Article 14 adds little to the debate. I have already concluded that there is nothing in the Article 8 point. Any discrimination which could be shown to exist, and that in and of itself is a doubtful proposition, would surely be justified in the context of a pandemic and in the context of an urgent need to protect care home residents from COVID-19. Again, the breadth of the discretion afforded to Government in these circumstances is confirmed in many cases decided by the domestic and Strasbourg courts."

40. Dr Fairburn (but not the other claimants) sought leave to appeal to the Court of Appeal. Bean LJ refused that permission, stating:

"1. I agree with Eady J and Whipple J that it is not arguable that Regulation 5(3)(b) contravenes Section 45E of the 1984 Act. It does not require anyone to undergo medical treatment. It is true that an employee who is not vaccinated and not medically exempt may be at risk of losing their job, but that is not the same thing as requiring them to undergo medical treatment.

2. I also agree with the judges below that it is not arguable that Regulation 5(3)(b) is ultra vires the powers conferred on the Secretary of State by s 20 of the 2008 Act.

*3. It is not reasonably arguable that Regulation 5(3)(b) can be challenged by reference to ECHR Article 8(1), particularly in the light of (a) the decision of the Strasbourg court in the case of Vavricka v Czech Republic. In so far as care workers' Article 8(1) rights are interfered with, that is plainly necessary in a democratic society *see Article 8(2)) for the protection of health, and/or of the Article 2 rights of care home residents.*

4. Care home providers complying with Regulation 5(3)(b) have not "invented" a regulatory requirement as to mandatory vaccination; nor, in excluding unvaccinated and non-exempt staff or visitors from the premises, are they acting "without the authority of law"; on the contrary, they are complying with the law.

5. I do not consider it reasonably arguable that Regulation 5(3)(b) of the 2021 Regulations is somehow rendered ultra vires by a possible indirectly discriminatory effect.

6. I agree with Whipple J that Regulation 5(3)(b) cannot arguably be described as irrational. The decision to make the Regulation is plainly a matter of political judgment within the terms set out by the Court of Appeal in the Dolan case…"

DISCUSSION OF THE ISSUES

Issue (1) - Pleaded claims relating to R4 (the Care Quality Commission (CQC)) and R5 (Mr Ian Trenholm CQC Chief Executive)

41. Mr Hyland's firm was named as the claimants' representative at the time that each of the claimants' claim forms were submitted to the Tribunal from around December 2021 onwards. He has represented all of the claimants since that time. I note that sample claim forms provided as part of the file for this hearing included documents entitled "Rider to ET1" setting out the claimants' grounds of complaint, some of which were prepared on Mr Hyland's behalf by a barrister (Mr C Milsom) (the "**Riders**").

42. The format in which the six sample claim forms were submitted was not consistent, despite the fact that Mr Hyland's firm has represented all of the claimants since the submission of these claims. I note that from the sample claims provided as part of the documents for this hearing:

    42.1. The sample claimants have named different respondents. For example:

        42.1.1. JS, RS and SK named all five respondents in their ET1s. However, they only named their former employer, the Secretary of State and the DHSC in the Riders that set out the details of their claim;

        42.1.2. the Riders for ADG, DS, DH, FH and RH name their former employer, the Secretary of State and then a third respondent named as the "Department of Health and Social Care/Ian Trenholm", despite the fact that Mr Trenholm did not work for the DHSC. They did not name the CQC as a respondent to their claims in the Riders;

        42.1.3. LW had only named her former employer as a respondent to her claim in her ET1. She named her former employer, the Secretary of State and the DHSC in the Rider that set out the details of her claim. In addition, LW noted that her former employer was not a care home;

        42.1.4. HW was employed by the CQC and rightly named them as the first respondent to her claim. She also named the Secretary of State and the DHSC as respondents to her claim in her Rider. She did not name Mr Trenholm.

    42.2. the sample claim forms and their Riders contained a number of anomalies. For example:

        42.2.1. the CQC was mentioned in passing at two paragraphs in most of the Riders, but the Riders did not explain the grounds on which complaints were being pursued against the CQC; and

        42.2.2. Mr Trenholm was not referred to at all in the Riders, even for those claimants who named him as a respondent in their claim forms;

        42.2.3. other examples of the anomalies included the types of discrimination pleaded by various claimants:

Sample claimant	Part 8.1 of claim form – boxes ticked for discrimination complaints	Rider to claim form – types of discrimination complained of
JS	Disability, sex, religion or belief	Philosophical belief only
LW	Disability and sex	Disability, sex and age
VS	Sex	Age, sex and pregnancy
SK	Religion or belief	Philosophical belief, disability and age
ADG	Religion or belief	Sex and/or age and/or belief
DS	Religion or belief	Sex and/or age and/or belief
DH	Religion or belief	Sex, belief, disability and/or age
FH	Religion or belief	Sex, belief and/or age
RH	Age, sex, religion or belief	Sex, belief and/or age
HW	Religion or belief	Philosophical belief

43. Mr Brown also noted that there were other difficulties with the sample claimants' pleadings, including:

43.1. most of the sample claimants (with the exception of LW referred to above) name the CQC and Mr Trenholm as respondents to their ET1s. However, they do not name either the CQC or Mr Trenholm in the heading to the Rider documents which set out the Particulars of their Claim. For example, JS's Rider to her ET1 is headed:

"[JS]

Claimant

- and -

(1) [R1]

(2) Secretary of State for Health and Social Care

(3) Department of Health and Social Care

1st to 3rd Respondents"

43.2. the ET1s and the Rider documents do not provide any details of the legal complaints against the CQC or Mr Trenholm. By way of contrast, the document contains a heading:

*"**The Liability of the Second and Third Respondents**"*

and pleads expressly that the SoS and the DHSC are liable under s111 and s112 EQA;

43.3. Mr Trenholm is not named or referred to at all in the details of claim set out in the Rider documents;

43.4. some of the sample claimants are seeking to bring complaints on the basis of combined protected characteristics (e.g. sex and age). This is not possible under the EQA because the provisions of s14 EQA which provide for combined discrimination on the basis of dual characteristics have never been brought into force;

43.5. DH is a man and is claiming sex discrimination. It is unclear how the claimants are seeking to allege particular disadvantage both to women and to men as part of their indirect discrimination complaints.

44. Mr Hyland appeared to be confused as to which claimants had claimed against which respondents. For example, he stated in relation to RH's claim that RH had claimed against her employer, the CQC and Mr Trenholm because there was not enough room to include all of the respondents. However, when we considered RH's claim form, it was clear that the Secretary of State and the DHSC were named as respondents on the additional pages at the end of the claim form.

45. Mr Hyland said that in relation to LW, there were technical issues when submitting her claim form which meant that he had only included her former employer. I noted that this was a matter which should be considered at the next case management hearing (if applicable).

46. I asked Mr Hyland whether he intended to make an application to amend the claimants' claims to include complaints against the CQC and/or Mr Trenholm. Mr Hyland said that he did not need to make an application to amend because in his view the claims included complaints against the CQC and/or Mr Trenholm. Mr Hyland stated that:

46.1. the claimants had obtained ACAS early conciliation certificates relating to the CQC and/or Mr Trenholm;

46.2. all (except one (LW)) of the claimants had named the CQC and/or Mr Trenholm as respondents on their ET1s. (Mr Hyland stated that he had experienced technical problems with the submission of LW's ET1, which meant that he was only able to fill in the details for the first respondent);

46.3. Mr Hyland accepted that the headings of many of the Rider documents to the claimants' claim forms did not refer to the CQC or Mr Trenholm as respondents to the claims. However, he stated that the Further and Better Particulars that he submitted on behalf of various claimants from October 2021 onwards sought to 'enlarge' the existing complaints against the CQC and Mr Trenholm. Mr Hyland stated that he did not think that any amendment application was necessary and confirmed that he was not making any such application.

47. I also asked Mr Hyland why the claimants sought to pursue their claims against Mr Trenholm personally. Mr Hyland stated that Mr Trenholm, as Chief Executive of the CQC, should take *"overall responsibility*" for the CQC's actions. Mr Hyland was unable to identify what specific actions or omissions Mr Trenholm should or should not have taken in relation to the matters relevant to these claims. Instead he stated that Mr Trenholm failed to stop the CQC from adopting the Operational Guidance.

48. I noted that the EAT gave the following guidance in the case of *Chandok* at paragraphs 17 and 18 (with my emphasis underlined):

17. I readily accept that Tribunals should provide straightforward, accessible and readily understandable fora in which disputes can be resolved speedily, effectively and with a minimum of complication. They were not at the outset designed to be populated by lawyers, and the fact that law now features so prominently before Employment Tribunals does not mean that those origins should be dismissed as of little value. Care must be taken to avoid such undue formalism as prevents a Tribunal getting to grips with those issues which really divide the parties. However, all that said, the starting point is that the parties must set out the essence of their respective cases on paper in respectively the ET1 and the answer to it. If it were not so, then there would be no obvious principle by which reference to any further document (witness statement, or the like) could be restricted. Such restriction is needed to keep litigation within sensible bounds, and to ensure that a degree of informality does not become unbridled licence….

18. In summary, a system of justice involves more than allowing parties at any time to raise the case which best seems to suit the moment from their perspective. It requires each party to know in essence what the other is saying, so they can properly meet it; so that they can tell if a Tribunal may have lost jurisdiction on time grounds; so that the costs incurred can be kept to those which are proportionate; so that the time needed for a case, and the expenditure which goes hand in hand with it, can be provided for both by the parties and by the Tribunal itself, and enable care to be taken that any one case does not deprive others of their fair share of the resources of the system. It should provide for focus on the central issues. That is why there is a system of claim and response, and why an Employment Tribunal should take very great care not to be diverted into thinking that the essential case is to be found elsewhere than in the pleadings.

Conclusions on issue (1)

49. I concluded that the sample claimants' claim forms (provided in the hearing file for claimants JS, LW, JS, SK, ADG, DS, DH, FH and RH and additionally for HW) failed to *"set out the essence of their cases"* against the CQC and against Mr Trenholm, as required by the EAT in *Chandok*. The key reasons for my conclusion include:

49.1. ACAS early conciliation certificates do not form part of a party's pleadings. They are a pre-condition to submitting a claim, not part of their 'case';

49.2. most of the claimants (with the exception of LW referred to above) name the CQC and Mr Trenholm as respondents to their ET1s. However, the ET1s and the Rider documents do not provide any details of the legal complaints against the CQC or Mr Trenholm. By way of contrast, the Riders contain express pleadings that the SoS and the DHSC are liable under s111 and s112 EQA.

49.3. Mr Trenholm is not named or referred to at all in the majority of the Rider documents. Mr Hyland stated in this hearing that Mr Trenholm was personally liable under the EQA for the claimants' claims because he had

"*overall responsibility*" for the CQC. However, this is patently incorrect. Otherwise any Chief Executive of any organisation would be personally liable for all actions or omissions of their organisation under the EQA, regardless of whether they personally involved or not and the degree of any such involvement;

49.4. the claimants have had the benefit of legal advice from both Mr Hyland and Mr Milsom (Counsel) from the start of these proceedings. The generic grounds of resistance submitted on behalf of the CQC and Mr Trenholm stated that:

"3. Although the Care Quality Commission and Mr Trenholm have been named as respondents to this claim:

a. The Riders to the ET1s do not list them as respondents to the claim;

b. No details of complaint as against them are included in the Riders;

c. The only references to the CQC do not plead any complaint against the CQC;

d. There is no reference in the Riders to Mr Trenholm;

e. Neither respondent employed any of the claimants, and, therefore, neither can be liable for unfair dismissal."

49.5. the Further and Better Particulars were not submitted until around ten months after the claimants' ET1s, i.e. outside the primary three month time limit for EQA complaints. Employment Judge Maidment had ordered provision of Further and Better Particulars in relation to the claimants' individual indirect discrimination complaints (including details of their protected characteristics for the purposes of the EQA) at the preliminary hearing on 11 August 2022. However, the Judge had not granted permission for additional legal complaints to be raised in the Further and Better Particulars; and

49.6. Mr Hyland confirmed that he was not making an application to amend the claims. He failed to explain why there had been a significant delay in submitting the particulars of the claimants' complaints against the CQC and Mr Trenholm and/or why it would be just and equitable to extend the time limits under the EQA to submit these further complaints at this stage in the proceedings.

50. I have therefore concluded that the claimants' claims against the CQC and against Mr Trenholm failed to set out the essence of their cases and have no reasonable prospects of success. The claims against the CQC and Mr Trenholm are therefore struck out.

Issue (2) - Paragraph 1 of Schedule 22 to the Equality Act 2010

51. Paragraph 1 of Schedule 22 EQA states:

"(1) A person (P) does not contravene a provision specified in the first column of the table, so far as relating to the protected characteristic specified in the second column in respect of that provision, if P does anything P must do pursuant to a requirement specified in the third column."

52. The columns referred to in paragraph 1 are as set out below. Part 5 of the EQA is the part that governs matters relating to employment, including indirect discrimination (as defined by s19 EQA) by employers against employees under s39 EQA.

Specified provision	Protected characteristic	Requirement
Parts 3 to 7	Age	A requirement of an enactment
Parts 3 to 7 and 12	Disability	A requirement of an enactment A relevant requirement or condition imposed by virtue of an enactment
Parts 3 to 7	Religion or belief	A requirement of an enactment A relevant requirement or condition imposed by virtue of an enactment
Section 29(6) and Parts 6 and 7	Sex	A requirement of an enactment
Parts 3, 4, 6 and 7	Sexual orientation	A requirement of an enactment A relevant requirement or condition imposed by virtue of an enactment

53. Sub-paragraph 4 states:

> *"(4) In the table, a relevant requirement or condition is a requirement or condition imposed (whether before or after the passing of this Act) by—*
> *(a) a Minister of the Crown;…"*

54. An "enactment" is defined at s212 EQA as:

> *""enactment" means an enactment contained in –*
> *(a) an Act of Parliament,*
> *…*
> *(d) subordinate legislation."*

55. Mr Brown noted the legislative background to the 2021 Regulations (which amended the 2014 Regulations):

55.1. s20 of the HSCA places a duty on the Secretary of State to issue regulations that are necessary to secure that the services provided in the carrying on of regulated activities do not risk 'avoidable harm' to service users (e.g. care home residents);

55.2. the 2021 Regulations were approved by resolution of both Houses of Parliament, as per s162 of the HSCA;

55.3. Regulation 21 of the 2014 Regulations provides that registered persons must have regard to guidance issued under the HSCA. However, this did not include the Operational Guidance. It only included the Code of Practice;

55.4. Regulation 22 of the 2014 Regulations provided that a registered person could be liable for a criminal offence if they failed to comply with Regulation 12 and such failure resulted in either:

55.4.1. avoidable harm to the service user; or
55.4.2. if the service user was exposed to a significant risk of such avoidable harm had occurred;

55.5. at the time that the 2021 Regulations were introduced in July 2021, Delta was the dominant Covid-19 variant. By way of contrast, at the time that the Regulations were revoked, the less severe Omicron variant was the dominant variant.

56. Mr Brown submitted that the First Respondents were not liable for anything that they had done which might otherwise amount to indirect discrimination on the basis of disability, religion or belief. (Mr Brown noted that indirect sex discrimination in employment is not covered by these provisions).

56.1. a requirement of the 2014 Regulations; or
56.2. a relevant requirement or condition imposed by virtue of the 2014 Regulations on the First Respondents;

because of the provisions of Paragraph 1 of Schedule 22.

57. On the face of it, Paragraph 1 of Schedule 22 exempts the First Respondents from any liability in relation to indirect discrimination on the basis of age, disability, religion or belief in relation to anything that they did pursuant to either:

57.1. an enactment; or
57.2. a relevant requirement or condition imposed by an enactment.

58. If that is the case, then R2-R5 could not be liable for 'instructing, causing or inducing' and/or 'knowingly helping' the First Respondents to commit any discrimination on the basis of disability, religion or belief (under s111 and/or s112 EQA). This is because the things that R2-R5 either instructed, caused or induced or knowingly helped the First Respondents to do under Regulation 12 of the 2014 Regulations were exempt from being discrimination under the EQA.

59. Mr Hyland did not seek to disagree expressly with Mr Brown's submission. However, he stated that any indirect discrimination took place because of the First Respondents' reliance on the Operational Guidance, rather than the 2014 Regulations. Mr Hyland said that the Operational Guidance narrowed the meaning of 'clinical reasons' under Regulation 12 of the 2014 Regulations. He stated that the

Operational Guidance was not part of the 2014 Regulations (or part of any requirement or condition imposed by virtue of the 2014 Regulations).

Conclusions on issue (2)

60. I concluded that paragraph 1 of Schedule 22 exempts the First Respondents from any liability in relation to the protected characteristics of Disability, Religion or belief in respect of any actions or omissions that the First Respondents took or made pursuant to:

    60.1. the Regulation 12(3)(b) Requirement (which was introduced by the 2021 Regulations into the 2014 Regulations) which amounted to an enactment for the purposes of Schedule 22; or

    60.2. any requirement or condition imposed by the Regulation 12(3)(b) Requirement.

61. In relation to the protected characteristic of sex, paragraph 1 of Schedule 22 exempts the First Respondents from any liability in respect of any actions or omissions that the First Respondents took or made pursuant to the Regulation 12(3)(b) Requirement. It does not extend to any requirement or condition imposed by the Regulation 12(3)(b) Requirement because of the difference in wording in the provisions (as set out at paragraph 52 of this Judgment above).

62. I have concluded that R2-R5 cannot be liable under s111 or s112 of the Equality Act if the First Respondents were exempt from liability under paragraph 1 of Schedule 22 of the Equality Act.

63. However, this does not conclude the matter because:

    63.1. some of the claimants are bringing complaints of indirect sex discrimination. The wording of Schedule 22 in relation to sex discrimination does not cover Part 5 of the EQA (i.e. discrimination in employment); and

    63.2. Mr Hyland also raised arguments on behalf of all claimants to the effect that the Operational Guidance was not a requirement or condition imposed by the 2014 Regulations or by the 2021 Regulations.

64. I will therefore move on to consider the provisions of the Regulation 12 of the 2014 Regulations, the Operational Guidance and the Medical Exemption Guidance below.

Issue (3) Regulation 12(3)(b)(ii) of the 2014 Regulations (as amended) and the Operational Guidance

65. Regulation 12(3)(b) of the 2014 Regulations was introduced by the 2021 Regulations. I have referred to this as the "**Regulation 12(3)(b) Requirement**" in the definitions table at the start of this Judgment.

66. Both parties accept that Regulation 12(3)(b) did not define "clinical reasons". I therefore have to consider the meaning of those words, taking into account the principles of statutory interpretation.

67. The object in construing the words used in an enactment is to ascertain Parliament's intention, by reference to the words used and the context in which they are used. The Explanatory Memorandum to the 2021 Regulations (which amended the 2014 Regulations) stated:

> ***"2. Purpose of the instrument***
>
> *2.1 The purpose of this instrument is to reduce the spread of COVID-19 in care homes, in order to protect care home residents, who are vulnerable to COVID-19.*
>
> *2.2 This is achieved by amending the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 ("the 2014 Regulations"), to provide that the registered person for nursing and personal care in care homes must secure that – subject to certain exceptions— a person does not enter the care home premises unless they provide evidence that they have been vaccinated with a complete course of an authorised vaccine against COVID-19.*
>
> *…*
>
> ***6. Legislative context***
>
> ***…***
>
> *6.3 This instrument seeks to amend regulation 12 (safe care and treatment) of the 2014 Regulations. For the purposes of preventing, detecting and controlling the spread of infections, and specifically in response to the effects of the coronavirus pandemic, this instrument provides that a registered person of the regulated activity of providing accommodation for persons who require nursing or personal care (see paragraph 2 of Schedule 1 of the 2014 Regulations) in a care home, must not permit a person to enter the premises of that care home, unless that person meets one of the specific requirements listed in 7.4.*
>
> *6.4 Where providers do not comply with the requirements set out in this instrument, the CQC could consider taking regulatory action, for example through the issuing of a warning notice.*
>
> *6.5 Regulation 7 sets out the requirement for the Secretary of State to carry out an annual review of these regulations, taking into account clinical advice and the accessibility and availability of authorised vaccines, and publish a report setting out the conclusions of this review*.
>
> ***7. Policy background***
> ***What is being done and why?***
>
> *7.1 The independent Scientific Advisory Group for Emergencies (SAGE) Social Care Working Group has highlighted that people living in care homes have been significantly impacted by the COVID-19 pandemic due to a combination of a heightened risk of severe outcomes following COVID-19 infection and the risk of outbreaks in these closed settings. They have advised that a vaccination uptake*

rate of 80% in staff and 90% in residents in each individual care home setting would be needed to provide a minimum level of protection against outbreaks of COVID-19, recognising that current or emergent variants may require even higher levels of coverage and/or new vaccines to sustain levels of protection and that higher coverage and both doses would result in more protection. Only 65% of care homes in England are currently meeting this dual threshold, and the proportion is only 44% of care homes in London.

…

7.4 There remains a strong case for introducing a new requirement to make high-risk environments as safe as possible from the effects of COVID-19. Consequently, regulations will be amended to require all CQC-registered care homes, in England, providing accommodation for persons who require nursing or personal care, to only allow persons to enter a care home if they meet one of the following requirements:
• the person is a service user of the regulated activity in the premises used by the registered person;
• the person has provided the registered person with evidence that satisfies the registered person they have been vaccinated with the complete course of an authorised vaccine;
• the person has provided the registered person with evidence that satisfies the registered person that for clinical reasons they should not be vaccinated;

…

7.5 The registered person must secure that the requirement is complied with and we will issue guidance setting out how they should do this.

…

7.10 Despite the already existing non-regulatory options listed above, vaccine uptake amongst care home workers is not consistently at the level we know from SAGE advice is needed to minimise the risk of outbreak. It is imperative that together we now take every step necessary to reduce the risk of spreading the virus to those most at risk from COVID-19 and those who care for them.

…

11. Guidance

11.1 The Government has published operational guidance for these regulations which can be accessed at: https://www.gov.uk/government/publications/vaccination-of-peopleworking-or-deployed-in-care-homes-operational-guidance/coronavirus-covid-19- vaccination-of-people-working-or-deployed-in-care-homes-operational-guidance"

68. The relevant part of Regulation 12(3) for the purposes of this Judgment is as follows (with my emphasis underlined):

[(3) For the purposes of paragraph (2)(h), a registered person ("A") in respect of a regulated activity specified in paragraph 2 of Schedule 1 (accommodation for persons who require nursing or personal care) in a care home must secure that a person ("B") does not enter the premises used by A unless—

(a) B is a service user residing in the premises used by A;

(b) B has provided A with evidence that satisfies A that either—

(i) B has been vaccinated with the complete course of doses of an authorised vaccine; or

(ii) that for clinical reasons B should not be vaccinated with any authorised vaccine;…]

69. A 'registered person' for these purposes is a nominated individual who was accountable for regulatory matters (e.g. a Care Home Manager). Regulation 2 of the 2014 Regulations defines a "registered person" and related terms as follows:

"registered person" means, in respect of a regulated activity, a person who is the service provider or registered manager in respect of that activity;

"registered manager" means, in respect of a regulated activity, a person registered with [the CQC] *under Chapter 2 of Part 1 of* [the 2008 Act] *as a manager in respect of that activity;*

"service provider" means, in respect of a regulated activity, a person registered with [the CQC] *under Chapter 2 of Part 1 of* [the 2008 Act] *as a service provider in respect of that activity"*

70. The Operational Guidance was issued by the DHSC on 4 August 2021 and updated on 19 October 2021. The relevant parts of the updated Operational Guidance are as follows (with my emphasis underlined as part of the black text below (the blue underlined text was the original text which contained hyperlinks to other documents, some of which are no longer available on the government website)):

"General guidance on medical exemptions

For a small number of people, vaccination is not appropriate due to clinical reasons. These people will be able to seek a clinically approved exemption from this requirement. Individuals should apply formally for a medical exemption – see further information on medical exemptions and how to apply for one.

A temporary self-certification process was introduced in September 2021. The original timeframe permitted self-certification to be used until 24 December 2021, but this was subsequently extended until 31 March 2022. Guidance is available on temporary medical exemptions for COVID-19 vaccination of people working or deployed in care homes.

After 31 March 2022, exemptions will need to be evidenced by the formal process. Those who wish to apply for a medical exemption should do so at the earliest opportunity as they will not be able to work in care homes beyond 31 March 2022 without proof of vaccination or a formal exemption, even if they have previously submitted evidence via self-certification.

…

Groups that can get a medical exemption

There are a range of circumstances in which an exemption may be granted, which will reflect the green book on immunisation against infectious disease, chapter 14a, and clinical advice from the Joint Committee of Vaccination and Immunisation.

…

Guidance for registered persons

Overview

Since 11 November 2021, registered persons (the person registered with the CQC as a manager or service provider) must ensure that they do not allow anyone to enter the inside of a care home, unless they have had a complete course of doses of an authorised vaccine or fall into one of the exempt groups.

…

This section aims to give advice to registered persons on the implementation of the regulations. When deciding how to implement the regulations, the registered person must also refer to the code of practice on the prevention and control of infections, which we are currently updating and will publish as soon as possible.

Checking vaccination or exemption status

Registered persons (or those acting on behalf of the registered person) will have to check that all persons wishing to enter the care home have received a full course of vaccinations, unless they are exempt. This includes checking, for example, care home staff, health care professionals, CQC inspectors, tradespeople, hairdressers and beauticians.

The requirement only applies in respect of persons entering the inside of the care home premises and it will be up to the registered person (or those acting on behalf of the registered person) to identify the most appropriate procedures to check vaccination status.

…

It will be up to you, the registered person (or those acting on your behalf), to identify the most appropriate procedures to check the vaccination and exemption status of

individuals. You may want to consider the UKHSA's advice under the previous section 'Other temporary methods of medical exemption' when doing so.

…"

Guidance for staff

…

Exemptions

Vaccination may not be appropriate for you due to clinical reasons. In this case, you should apply formally for a medical exemption – see further guidance on medical exemptions and how to apply for one.

A temporary self-certification process was introduced in September 2021. The original timeframe permitted self-certification to be used until 24 December 2021, but this was subsequently extended until 31 March 2022. Guidance is available on temporary medical exemptions for COVID-19 vaccination of people working or deployed in care homes.

After 31 March 2022, exemptions will need to be evidenced by the formal process.

Those who wish to apply for a medical exemption should do so at the earliest opportunity as they will not be able to work in care homes beyond 31 March 2022 without proof of vaccination or a formal exemption, even if they have previously submitted evidence via self-certification.

Managers should do a risk assessment for those who are exempt from vaccination. This means they will evaluate the potential risk to the spread of COVID-19 caused by unvaccinated (but exempt) members of staff entering the care home. They may put in place measures to help reduce this risk – for example, by asking exempt members of staff to wear more or different PPE, or by suggesting a change to their duties.

…

Redeployment

If you are unable to provide proof of vaccination or exemption, then your manager should explore all options available to you. This could include moving you to an alternative role for which vaccination is not required. You should speak to your manager about your options as soon as you can. You should not assume that it will be possible for you to be redeployed.

Dismissal

If you are unable to provide proof of vaccination or exemption, then your manager should explore all options available to you. However, you should note that the regulations may provide a fair reason for dismissal if you are not vaccinated or medically exempt.

…"

71. The Medical Exemption Guidance (referred to in the updated Operational Guidance) stated:

> *"…**If you're unable to get vaccinated against COVID-19 for medical reasons***
>
> *Some individuals are unable to be vaccinated and also, in some cases, tested for medical reasons. You can apply for proof that you have a medical reason why you should not be vaccinated or why you should not be vaccinated and tested.*
>
> *If you get this proof of medical exemption you'll be able to use the NHS COVID Pass wherever you need to prove your COVID-19 status within England.*
>
> *Until 24 December 2021, you can self-certify that you're medically exempt if you work or volunteer in a care home (https://www.gov.uk/government/publications/temporary-medical-exemptions-for-covid-19-vaccination-of-people-working-or-deployed-in-care-homes).*
>
> *…*
>
> *From 25 December, if you're unable to get vaccinated, you'll have to use the NHS COVID Pass in the same way that people who are fully vaccinated use it.*
>
> *…*
>
> *The possible reasons for exemptions are limited. Examples that might be reasons for a medical exemption are:*
>
> - *people receiving end of life care where vaccination is not in the person's best interests*
> - *people with learning disabilities or autistic individuals, or people with a combination of impairments where vaccination cannot be provided through reasonable adjustments*
> - *a person with severe allergies to all currently available vaccines*
> - *those who have had an adverse reaction to the first dose (for example, myocarditis)*
>
> *Other medical conditions could also allow you to get a medical exemption.*
>
> *Short-term exemptions will also be available for those with short-term medical conditions and as an option that some pregnant women may choose to take.*
>
> *…*
>
> ***The NHS COVID Pass for people who are medically exempt from vaccinations***

All exemptions will be confirmed by your doctor, specialist clinician or midwife. If approved, your NHS COVID Pass can then be used to prove your status.

The domestic NHS COVID Pass will look and work the same for people with medical exemptions as it will for people who are fully vaccinated. The pass will not show that you have a medical exemption.

…"

Claimants' submissions on issue (3)

72. Mr Hyland's key submissions included that:

72.1. S45E of the Public Health (Control of Disease) Act 1984 provides that no person can be compelled to undergo medical treatment;

72.2. if an individual refuses to be vaccinated, then that is in itself a clinical reason for such non-vaccination. Mr Hyland submitted that 'clinical reasons' could therefore include matters such as a refusal to be vaccinated because of a belief in bodily autonomy or religious beliefs;

72.3. any interpretation of 'clinical reasons' must take into account the Code of Practice, rather than the Operational Guidance;

72.4. the wording of the Operational Guidance sought to narrow the definition of 'clinical reasons' under Regulation 12(3)(b), for example by referring to 'medical exemptions' rather than 'clinical reasons';

72.5. the Operational Guidance did not treat either disability or non-consent as a 'clinical reason'. In addition, it did not provide a specific exemption for women who were trying to conceive (although an exemption was provided for pregnant women)'

72.6. in any event, the 2014 Regulations should be interpreted such that 'clinical reasons' includes a refusal to be vaccinated under common law principles and under the European Convention. Mr Hyland sought to distinguish *Fairburn* and rely on *Vavricka* in support of his argument. He stated that:

72.6.1. the claimants accepted the decision in *Fairburn* that the 2021 Regulations were lawful. However, Mr Hyland stated it was not canvassed during the High Court hearing whether clinical reasons might involve considerations of an individual's religion or beliefs;

72.6.2. Mr Hyland viewed the amendment introduced into the 2014 Regulations by the 2021 Regulations as a *"record keeping and process requirement in which no value judgment should be applied".* He stated that the Secretary of State and the DHSC should not have 'got involved' in any 'value judgments' and that their role was limited to reviewing the Code of Practice;

72.6.3. the Secretary of State and the DHSC's interpretation of 'clinical reasons' in the Operational Guidance and Medical Exemption Guidance 'arbitrarily' interfered with the claimants' human rights (including Articles 8, 9, 12 and 14). Mr Hyland relied on care home residents as 'comparators' for the claimants (see for example paragraphs 243 - 245 of his skeleton argument and paragraphs 168-181 of his written submissions);

72.6.4. in *Vavricka*, the context was that the Czech Republic had introduced a legislative scheme of mandatory vaccinations and exemptions. Mr Hyland stated that the legislative scheme included rights of appeal and indemnity arrangements (see for example paragraphs 61 and 186 of his skeleton argument). Whereas, in this case, Mr Hyland stated that the DHSC was performing what he described as 'extra-constitutional activities outside of the architecture of the [2014] Regulations";

72.7. the 2014 Regulations exerted an 'undue influence' on individuals' decisions whether or not to be vaccinated. Mr Hyland stated that many of the claimants' colleagues decided to be vaccinated (and did not seek to submit evidence that they had 'clinical reasons' for not being vaccinated) because they were concerned about the risk of losing their job.

Respondents' submissions on issue (3)

73. Mr Brown's key submissions included that:

73.1. Mr Hyland's argument was circular – a lack of consent to a clinical procedure, such as vaccination, was not in and of itself a 'clinical reason' for not having that procedure. Mr Brown stated that people who have not been vaccinated in reality will not have 'refused their consent' to be vaccinated. Instead, they will simply not have taken steps to be vaccinated;

73.2. Mr Brown referred to Whipple J's judgment in *Fairburn* where she dismissed the arguments regarding s45E of 1984 Act as 'unarguable' stating:

"On its face, s.45E says that no person can be compelled to undergo medical treatment, but that is not, on a proper understanding, the effect of the 2021 Regulations, which do not mandate vaccination.

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

73.3. the starting point for construing the meaning of 'clinical reasons' was the intention of the words used by the Secretary of State (and approved by each House of Parliament when the 2021 Regulations were laid before them).

The Secretary of State and the Houses of Parliament were well aware of the vaccination requirements;

73.4. the Explanatory Memorandum to the 2021 Regulations stated that the purpose of the 2021 Regulations was to reduce the spread of Covid-19 amongst Care Home residents, who were classed as particularly vulnerable if infected;

73.5. the 2021 Regulations were intended to encourage individuals to be vaccinated. If 'clinical reasons' reflected the status quo – i.e. that those who had not been vaccinated by 11 November 2021 because of their own individual concerns regarding the vaccine and/or their beliefs - then the 2021 Regulations would not serve their purpose;

73.6. there was no provision in Regulation 12 stating that individuals were exempt from vaccination because they did not consent to it;

73.7. the logical assumption was that the Secretary of State's intention regarding the words 'clinical reasons' in Regulation 12 was the same as that set out in the Operational Guidance, given the close proximity in time in which the Regulations were enacted and the Operational Guidance was produced;

73.8. the claimants' arguments regarding the ECHR must fail, given the approach taken by Whipple J to the Article 8 and Article 14 arguments in *Fairburn.* This was confirmed by Bean LJ who stated at paragraph 3 of his decision refusing permission to appeal:

*"It is not reasonably arguable that Regulation 5(3)(b) can be challenged by reference to ECHR Article 8(1), particularly in the light of (a) the decision of the Strasbourg court in the case of Vavricka v Czech Republic. In so far as care workers' Article 8(1) rights are interfered with, that is plainly necessary in a democratic society *see Article 8(2)) for the protection of health, and/or of the Article 2 rights of care home residents."*

Discussion on issue (3)

74. I concluded that:

74.1. the Regulation 12(3)(b) Requirement did not impose a requirement on any individual to be vaccinated. I agreed with the analysis in *Fairburn* that individuals were able to decide whether or not to be vaccinated following the introduction of the Regulation 12(3)(b) Requirement. The Regulation 12(3)(b) Requirement imposed consequences that flowed from each individual's decision, i.e. if an individual decided not to be vaccinated:

74.1.1. that individual could choose to provide a registered person with evidence that they had 'clinical reasons' not to be vaccinated;

74.1.2. however, if that individual did not do so, the registered person was required to prevent that individual from entering the Care Home for which that registered person was responsible;

I accept that those consequences were serious – i.e. that an individual faced the risk of losing their job if their employer was unable to redeploy them;

74.2. the evidence provided had to be 'satisfactory' for the registered person's purposes. Each registered person had to take their own decisions regarding:

74.2.1. the process of checking that should be followed for their Care Home;

74.2.2. the evidence that they would deem satisfactory; and

74.2.3. the information that they would need to provide to the CQC for monitoring purposes.

The Operational Guidance (and later the Medical Exemption Guidance) was issued to assist registered persons in making these decisions;

74.3. the Secretary of State's purpose in amending the 2014 Regulations was clear from the Explanatory Memorandum – i.e. to reduce the spread of Covid-19 in care homes in order to protect vulnerable care home residents.

74.4. the word 'clinical' in ordinary language is used as a synonym for 'medical' matters. The ordinary meaning of 'clinical reasons' is therefore a medical reason. This is reflected in the wording of the statement made by the Minister of State for Care (Helen Whately) to the House of Commons on 17 June 2021 when introducing the 2021 Regulations to Parliament: (Statement UIN HCWS98 with my emphasis underlined):

"On 14 April, we informed the House of our intention to consult on a proposal to amend regulations to require care home providers, with at least one resident over the age of 65, to deploy only those workers who have received both doses of their COVID-19 vaccination (or have a legitimate medical exemption from vaccination).

…

- *The initial proposals set out that individuals would be exempt from the requirement if they have an allergy or condition that the Green Book lists (Chapter 14a, page 16) as a reason not to administer a vaccine. We will additionally provide exemptions for those under the age of 18; those who are clinical trial participants; and, in exceptional circumstances, where a person has a medical reason not to be vaccinated. Guidance will give more detail about exemptions, which will reflect the Green Book on Immunisation against infectious disease (COVID-19: the green book, chapter 14a) and clinical advice from the Joint Committee of Vaccination and Immunisation (JCVI).*

The Government's intention is to bring an amendment to the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 legislation to the House, at the earliest opportunity. If approved by Parliament, there will be a 16-week grace period from when the regulations are made to when they come into force, to enable staff who have not been vaccinated to take up the vaccine."

74.5. I note that the Explanatory Memorandum states that the Operational Guidance was issued to assist registered persons with considering the process to be followed;

74.6. the second version of the Operational Guidance contained a link to the Medical Exemption Guidance. The relevant wording in the Operational Guidance was as set out below (the blue underlined text contained links to the Medical Exemption Guidance):

"Exemptions

Vaccination may not be appropriate for you due to clinical reasons. In this case, you should apply formally for a medical exemption – see further guidance on medical exemptions and how to apply for one.

A temporary self-certification process was introduced in September 2021. The original timeframe permitted self-certification to be used until 24 December 2021, but this was subsequently extended until 31 March 2022. Guidance is available on temporary medical exemptions for COVID-19 vaccination of people working or deployed in care homes.

After 31 March 2022, exemptions will need to be evidenced by the formal process.

Those who wish to apply for a medical exemption should do so at the earliest opportunity as they will not be able to work in care homes beyond 31 March 2022 without proof of vaccination or a formal exemption, even if they have previously submitted evidence via self-certification.

Managers should do a risk assessment for those who are exempt from vaccination. This means they will evaluate the potential risk to the spread of COVID-19 caused by unvaccinated (but exempt) members of staff entering the care home. They may put in place measures to help reduce this risk – for example, by asking exempt members of staff to wear more or different PPE, or by suggesting a change to their duties."

74.7. the Medical Exemption Guidance explained that an individual may need to demonstrate their vaccination status if they wished to work or volunteer in a care home regulated by the CQC from 11 November 2021. It explained what to do if an individual was unable to be vaccinated for "medical reasons", which may entitle an individual to a 'medical exemption'. The Medical Exemption Guidance stated that:

"The possible reasons for exemptions are limited. Examples that might be reasons for a medical exemption are:

- *people receiving end of life care where vaccination is not in the person's best interests*

- *people with learning disabilities or autistic individuals, or people with a combination of impairments where vaccination cannot be provided through reasonable adjustments*
- *a person with severe allergies to all currently available vaccines*
- *those who have had an adverse reaction to the first dose (for example, myocarditis)*

Other medical conditions could also allow you to get a medical exemption.

Short-term exemptions will also be available for those with short-term medical conditions and as an option that some pregnant women may choose to take."

74.8. the Medical Exemption Guidance also set out a number of ways in which an individual could obtain proof of 'medical exemption'. It stated that individuals could self-certify until 24 December 2021, but that afterwards they would need to obtain an NHS Covid Pass or use a MAT B1 certificate (for pregnancy). It also stated in relation to the NHS Covid Pass:

"All exemptions will be confirmed by your doctor, specialist clinician or midwife. If approved, your NHS COVID Pass can then be used to prove your status."

74.9. I do not accept Mr Hyland's submission that the Operational Guidance and/or the Medical Exemption Guidance is 'not in accordance with the law' as set out in his skeleton argument (including (but not limited to) at paragraphs 28-46) and his written submissions. Neither of these two sets of guidance were covered by the requirements of Regulation 21 of the 2014 Regulations. Regulation 21 (i.e. the guidance to which a registered person must have regard) states:

"21. Guidance and Code

For the purposes of compliance with the requirements set out in these Regulations, the registered person must have regard to—

(a) guidance issued by the Commission [defined by reference to s(1) of the 2008 Act as the CQC] *under section 23 of the Act in relation to the requirements set out in Part 3 (with the exception of regulation 12 in so far as it applies to health care associated infections); and*

(b) in relation to regulation 12, in so far as it applies to health care associated infections, any code of practice issued by the Secretary of State under section 21 of the Act in relation to the prevention or control of health care associated infections."

The Operational Guidance and the Medical Guidance were not issued by the CQC and therefore do not fall within Regulation 21(a). In addition, the Operational Guidance and the Medical Guidance do not fall within Regulation 21(b) because they do not relate to "health care associated infections". "Health care associated infections" are dealt with under

Regulation 12(h) of the 2014 Regulations. This is a separate provision to the Regulation 12(3)(b) Requirement that is in dispute between the parties.

There is nothing Regulation 21 which prevents the government from issuing non-binding guidance to registered persons, where such guidance falls outside of the scope of Regulation 21. Mr Hyland did not refer to any other basis on which he submitted that the issuing of government guidance was 'not in accordance with the law';

74.10. I also do not accept Mr Hyland's submission that the Operational Guidance and/or the Medical Exemption Guidance breaches the claimants' human rights under the European Convention. Mr Hyland's submissions on this point were somewhat confused. I concluded that:

74.10.1. Whipple J was fully aware of the impact of the 2021 Regulations. She noted that:

"2. …The effect of that provision is to preclude a worker from working in a care home unless they have been vaccinated or they are exempt on clinical grounds.

2. *The impact of this provision is substantial…It is part of the claimants' submissions to me that the Regulation will result in significant job losses and could even result in closure of care homes for lack of staff. My job here today is not to comment in any way on the practicability or the desirability of this provision. I am just looking at whether the provision is lawful. I have no regard to its political, social or healthcare merits."*

74.10.2. Whipple J had considered arguments regarding Articles 8 and 14 in *Fairburn* and had dismissed these arguments. She noted that:

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

74.10.3. care home residents are in a very different position to those care home workers. Ultimately, a Care Home is a resident's home, rather than their place of work. In any event, any proportionality exercise would have to involve consideration of the rights of the care home residents. This would include

the care home residents' right to life under Article 2 of the ECHR. As Whipple J noted (with my emphasis underlined):

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

74.10.4. Whipple J also noted:

"28. …the Government would have a wide margin of discretion in implementing any measure in order to protect care home residents, again bearing in mind the essentially political and social decision at issue, which is based on complex scientific and social evidence.

74.10.5. In relation to Article 14, Whipple J concluded:

"Ground 4 alleges Article 8 breach in conjunction with Article 14 on the basis that the Regulation indirectly discriminates on grounds of sex and race, noting the higher proportions of women and BAME people who work in the social care sector. Article 14 adds little to the debate. I have already concluded that there is nothing in the Article 8 point. Any discrimination which could be shown to exist, and that in and of itself is a doubtful proposition, would surely be justified in the context of a pandemic and in the context of an urgent need to protect care home residents from COVID-19. Again, the breadth of the discretion afforded to Government in these circumstances is confirmed in many cases decided by the domestic and Strasbourg courts."

Whipple J referred specifically to indirect discrimination relating to the protected characteristics of sex and race. However, this argument would apply equally to the protected characteristics of religion or belief.

Conclusions on issue (3)

75. I have therefore concluded in relation to issue (3) that:

75.1. the words "clinical reasons" in the Regulation 12(3)(b) Requirement meant medical reasons for not being vaccinated. For example, the Medical Guidance states that this would cover an individual who could not be vaccinated due to severe allergies, at particular times around pregnancy or where an individual had an adverse reaction to the first dose (for example, myocarditis). "Clinical

reasons" did not include a situation where an individual refused their consent to be vaccinated, for example on the basis of their personal concerns regarding the safety or efficacy of the vaccine, a religious belief or a belief in bodily autonomy;

75.2. the Operational Guidance and the Medical Guidance were not a "relevant requirement or condition" imposed by the 2014 Regulations – they were not issued under Regulation 21 of the 2014 Regulations. Instead, they consisted of non-binding guidance for the registered persons to assist them to comply with the Regulation 12(3(b) Requirement;

75.3. in any event, the Operational Guidance and the Medical Guidance did not expand the meaning of "clinical reasons" beyond that which was set out in the Regulation 12(3)(b) Requirement. The Explanatory Memorandum and the statement of the Minister of State for Care provide evidence regarding Parliament's intention when referring to "clinical reasons" that are broadly consistent with the Operational Guidance and the Medical Guidance;

75.4. as a result, the First Respondents are exempt from any indirect discrimination that may otherwise have taken place against the claimants on the basis of disability or religion or belief under paragraph 1 of Schedule 22. Therefore, the Government and the CQC Respondents cannot be liable under s111 or s112 of the Equality Act in relation to such allegations of discrimination;

75.5. the human rights arguments raised by the claimants are analogous to those raised by the claimants in *Fairburn* which were rejected for the reasons set out above. Ultimately, the care homes residents' Article 2 right to life would outweigh the interference with the claimants' rights under Article 8, 9, 12 and 14 in the circumstances of these claims;

75.6. the claimants' complaints that the Government and the CQC Respondents are liable under s111 and/or s112 of the Equality Act in relation to allegations of indirect discrimination relating to disability, religion or belief have no reasonable prospects of success and are struck out.

Issues (4) and (5) s111 and s112 of the Equality Act 2010 – claims against the Second Respondent and the Third Respondent (i.e. the Secretary of State and the DHSC)

76. However, Schedule 22 EQA does not exempt any respondents from liability for indirect sex discrimination relating to any claimant's employment. This is because the wording of Schedule 22 in relation to sex discrimination does not cover Part 5 of the EQA (i.e. discrimination in employment) as stated earlier in this Judgment.

77. In addition, if my conclusions on the status of the Operational Guidance and/or the Medical Guidance under issue (3) are incorrect, the conclusions set out below will also apply to any claimants bringing claims against R2-R5 under s111 and s112 of the EQA relating to their claims against the First Respondents for indirect discrimination on the basis of disability, religion or belief.

78. I will therefore go on to consider whether s111(7) prevents the claimants from bringing complaints that the Second Respondent or the Third Respondent either:

78.1. s111 EQA - *"instructed, caused or induced"* the First Respondents to do anything amounting to indirect discrimination; and/or

78.2. s112 EQA - "*knowingly helped"* the First Respondents to do anything amounting to indirect discrimination.

79. I note that the burden of proof is on the claimants and subject to the EQA provisions on the burden of proof (s136 EQA).

s111 - Instructing, causing or inducing contraventions

80. Section 111 EQA states (with my emphasis underlined):

(1) A person (A) must not instruct another (B) to do in relation to a third person (C) anything which contravenes Part 3, 4, 5, 6 or 7 or section 108(1) or (2) or 112(1) (a basic contravention).

(2) A person (A) must not cause another (B) to do in relation to a third person (C) anything which is a basic contravention.

(3) A person (A) must not induce another (B) to do in relation to a third person (C) anything which is a basic contravention.

(4) For the purposes of subsection (3), inducement may be direct or indirect.

(5) Proceedings for a contravention of this section may be brought—

(a) by B, if B is subjected to a detriment as a result of A's conduct;

(b) by C, if C is subjected to a detriment as a result of A's conduct;

…

(6) For the purposes of subsection (5), it does not matter whether—

(a) the basic contravention occurs;

…

(7) This section does not apply unless the relationship between A and B is such that A is in a position to commit a basic contravention in relation to B.

(8) A reference in this section to causing or inducing a person to do something includes a reference to attempting to cause or induce the person to do it.

…"

81. In *NHS Development Authority v Saiger and others* (2018) ICR 297, the EAT held that there must be evidence of actual instruction, causation, inducement, or attempt to cause or induce for the purposes of s111 EQA. It was not sufficient to show that:

81.1. persons had 'played a material part in the decision'; and/or
81.2. persons were in a position to do those things.

82. The EAT concluded at paragraph 118 that:

"…there must be evidence of instruction or causation or inducement for there to be a breach of section 111. That Mr Blythin was in a position to instruct cause or induce "a basic contravention" is not enough to establish liability. The evidence must show that he behaved in that way, not that he had the potential to do so. Likewise, concluding that "he did participate in the decision" or that he was "a party to a discussion" or that he "played a material part in the decision" is in my judgment not, without more, to be equated with an instruction, causation or inducement. Nor do any of these findings amount to giving help knowingly."

83. Section 111(1) of the EQA defines a 'basic contravention' as being anything which contravenes Parts 3-7 and other specified provisions of the EQA. I note that Part 5 of the EQA relates to discrimination in employment.

84. Section 111(7) of the EQA clearly states that the legal person who is said to have instructed, caused or induced the discrimination, must be in a position to commit that discrimination against the 'go between' whom they are instructing, causing or inducing to discriminate against the 'victim'. In these claims, this means that the Secretary of State and/or the DHSC must be in a position to commit some form of discrimination under Parts 3-7 or other specified provisions of the EQA against the employers (or former employers) of the individual claimants.

85. I asked Mr Hyland more than once during his submissions to identify the section of the EQA which he states was a 'basic contravention' under the EQA that the DHSC and/or the Secretary State were in a position to commit against the First Respondents. He was unable to do so. Mr Hyland stated that: *"The basic contravention was issuing discriminatory guidance".*

86. I asked Mr Hyland how that could amount to a basic contravention under the EQA by the Secretary of State or the DHSC against the First Respondents. Mr Hyland stated that the Operational Guidance itself led to the discrimination and said that 'the law as interpreted covers this situation'. He also said that the Operational Guidance failed to include disability as a 'clinical reason' for choosing not to be vaccinated. I noted that individuals with a disability may or may not have a clinical reason for not being vaccinated; this would depend on the nature of the disability. For example, an individual with mobility difficulties may still be able to be vaccinated, depending on their medical condition.

87. Mr Hyland also said that the First Respondents found themselves in a position where they were applying the Operational Guidance that led to indirect discrimination against the claimants. He said that R2-R5 *"cannot exclude themselves from liability by denying that relationship".*

88. I noted that Mr Hyland also asserted that the Tribunal could 'interpret' the EQA to give effect to the claimants' complaints against the DHSC and/or the Secretary of State. Mr Hyland said that the Operational Guidance had 'unduly influenced' the

employers (or former employers) of the individual claimants to commit indirect discrimination against each claimant. He referred to paragraphs in the Grounds of Resistance of some of the First Respondents in support of this proposition.

89. The wording of s111(7) EQA is clear – i.e. that the Secretary of State and/or the DHSC have to be in a position to discriminate against the First Respondents in order to be liable under s111 EQA. I asked Mr Hyland what words he was asking the Tribunal to strike through and/or insert into the EQA to give effect to the claimants' interpretation of the EQA. Mr Hyland stated that he was not asking the Tribunal to amend the wording of the EQA, but simply submitting that a different interpretation of the EQA should be preferred. Mr Hyland stated that the claimants' interpretation of the EQA would give effect to their common law rights and human rights.

90. Mr Brown submitted that:

90.1. the Secretary of State is required by s20(2) of the 2008 Act to issue regulations to ensure that no avoidable harm was caused to care home residents and/or that their health, safety and welfare of residents was secured during the Covid-19 pandemic:

"(1) The Secretary of State must by regulations impose requirements that the Secretary of State considers necessary to secure that services provided in the carrying on of regulated activities cause no avoidable harm to the persons for whom the services are provided.

(2) The Secretary of State may by regulations impose any other requirements in relation to regulated activities that the Secretary of State thinks fit for the purposes of this Chapter, including in particular provision with a view to -

…(b) securing the health, safety and welfare of persons for whom any such service is provided.

(3) Regulations under this section may in particular -

...(b) make provision as to the manner in which a regulated activity is carried on;

(c) make provision as to the persons who are fit to work for the purpose of the carrying on of a regulated activity;"

90.2. there could be no 'basic contravention' by the Secretary of State and/or the DHSC as required by s111(7) EQA because of the statutory exemptions in both Schedule 3 and Schedule 22 of the EQA (see the paragraphs of this Judgment on Issue (2) above);

90.3. the provisions of Schedule 3 EQA exempt the Secretary of State and/or the DHSC from any liability relating to the exercise of a public function under s29 EQA for all types of discrimination (including indirect sex, disability and religion or belief discrimination):

> *"29(6) A person must not, in the exercise of a public function that is not the provision of a service to the public or a section of the public, do anything that constitutes discrimination, harassment or victimisation.*
>
> *…*
>
> *Schedule 3*
>
> *…*
>
> *(3) Section 29 does not apply to preparing, making, confirming, approving or considering an instrument which is made under an enactment by—*
>
> *(a) a Minister of the Crown;…"*

90.4. the Secretary of State is answerable to Parliament when making legislation. The claimants are able to challenge legislation via the judicial review process in the Administrative Courts (for example, as sought by the claimants in *Fairburn*), rather than via the Employment Tribunal;

90.5. by way of contrast, in the case of *Bailey,* the Employment Tribunal considered that it may be possible to identify the required relationship under s111 EQA between Stonewall and Garden Court Chambers under which Stonewall could commit a basic contravention against Garden Court Chambers, although they did not consider the provisions of s111(7) EQA. (The Employment Tribunal did not uphold Ms Bailey's complaint against Stonewall – see paragraph 390 of the Tribunal's judgment).

Conclusions on issues (4) and (5) – s111 EQA claims against the Second and Third Respondents

91. The human rights arguments that Mr Hyland raised have already been considered and rejected by Whipple J in *Fairburn* (as discussed under issue (3) above – see paragraph 74.10). Mr Hyland did not identify any 'common law rights' on which the claimants relied. In any event, Mr Hyland was unable to explain how any claimants' 'common law rights' would override the clear and unambiguous wording of the EQA.

92. In any event, I concluded that it was not possible for the Tribunal to amend the words of s111(7) EQA which would remove the requirement under s111(7) of the EQA for the DHSC and/or the Secretary of State to be in a position to commit a basic contravention against the First Respondents. To do so, would be to go against the clear and unambiguous wording of the EQA. Mr Hyland was unable to identify what basic contravention the claimants were alleging that the DHSC and/or the Secretary of State were in a position to commit against the First Respondents.

93. In the absence of any such basic contravention, the claimants' complaints under s111 EQA against the Second and Third Respondents have no reasonable prospects of success and are struck out.

s112 – Aiding contraventions

94. Section 112 EQA states:

"(1) A person (A) must not knowingly help another (B) to do anything which contravenes Part 3, 4, 5, 6 or 7 or section 108(1) or (2) or 111 (a basic contravention).

…

(4) A person guilty of an offence under subsection (3) is liable on summary conviction to a fine not exceeding level 5 on the standard scale."

95. The Equality and Human Rights Commission's Employment Statutory Code of Practice provides some guidance on the meaning of 'knowingly help'. The EHRC Code is not binding, however the Tribunal must take into account any part of the EHRC Code that appears to be relevant to any questions arising in Tribunal proceedings.

96. Paragraph 9.27 of the EHRC Code states:

What does it mean to help someone commit an unlawful act?

9.27

'Help' should be given its ordinary meaning. It does not have the same meaning as to procure, induce or cause an unlawful act. The help given to someone to discriminate, harass or victimise a person will be unlawful even if it is not substantial or productive, so long as it is not negligible.

Example:

A company manager wants to ensure that a job goes to a female candidate because he likes to be surrounded by women in the office. However the company's Human Resources (HR) department, in accordance with their equal opportunities policy, has ensured that the application forms contain no evidence of candidates' sex. The manager asks a clerical worker to look in the HR files and let him know the sex of each candidate, explaining that he wants to filter out the male candidates. It may be unlawful for the clerical worker to give the manager this help, even if the manager is unsuccessful in excluding the male candidates."

97. Mr Brown submitted that the definition of 'knowingly help' under s112 EQA must not include any matters dealt with under s111 EQA (i.e. it must not include instructing, causing or inducing). His key submissions for distinguishing the two provisions included:

97.1. the definition of 'help' should be its ordinary meaning;
97.2. different conditions applied to s112 EQA compared to s111 EQA (e.g. there was no equivalent requirement to the relationship under s111(7) EQA);
97.3. there were different methods of enforcement for each provision – some s111 EQA contraventions can only be enforced collectively; and
97.4. the potential consequences under both sections were different – criminal liability can be imposed under s112(4) EQA, whereas only civil penalties are available under s111 EQA.

98. Mr Brown also stated that the statutory exemptions from liability under Schedule 22 and Schedule 3 of the EQA set out above also apply to s112 EQA complaints.

99. Mr Hyland's submissions on s112 EQA mirrored those that he had made on s111 EQA (see above). After the hearing had concluded, he emailed the Explanatory Notes to s111 and s112 of the EQA and the case of *Imperial Society.* Mr Hyland did not explain how the Explanatory Notes nor how the *Imperial Society* case supported the claimants' position.

100. I note that the *Imperial Society* case related to a secretary at the Imperial Society who told the Head of Careers at a local school that the Society wanted to employ a filing clerk but did not wish the school to send anyone of a particular colour for the vacancy. I also note that the Explanatory Notes to s112 of the EQA provide an example of the nature of the acts that the section is intended to cover:

"On finding out that a new tenant is gay, a landlord discriminates against him by refusing him access to certain facilities, claiming that they are not part of the tenancy agreement. Another tenant knows this to be false but joins in with the landlord in refusing the new tenant access to the facilities in question. The new tenant can bring a discrimination claim against both the landlord and the tenant who helped him."

101. I note that the Court of Appeal had also considered a claim under s112 EQA in the case of *Arvunescu*, which was decided the day after this hearing concluded. The Court of Appeal upheld the EAT's judgment in *Arvunescu* and concluded that a UK company was in a position to 'knowingly help' its German subsidiary to victimise Mr Arvunescu because he had previously brought a complaint of race discrimination against the UK company. However, the Court of Appeal agreed with the EAT that any such claim was settled under the claimant's COT3 agreement.

Conclusions on issues (4) and (5) – s112 EQA claims against the Second and Third Respondents

102. I concluded that the claimants had not provided evidence from which the Tribunal could conclude that the DHSC and/or the Secretary of State had 'knowingly helped' the First Respondents to indirectly discriminate against the claimants:

102.1. the Secretary of State and the DHSC were acting on behalf of the government in producing the 2021 Regulations, which introduced the Regulation 12(3)(b) Requirement into the 2014 Regulations. Any acts or omissions by the First Respondents as a result of Regulation 12(3)(b) are exempt from the discrimination provisions in the EQA because of Schedules 3 and 22 of the EQA. Any actions or omissions of the First Respondents which fell outside of the requirements of Regulation 12(3) were the responsibility of the registered persons working for the First Respondents, rather than the other respondents to this claim;

102.2. the word 'help' should be given its ordinary meaning, as set out in the EHRC Code. The provisions of s112 are separate to those of s111, for the reasons submitted by Mr Brown. The definition of 'knowingly help' should not

encompass instructing, causing or inducing contraventions of the EQA as these are matters covered by s111 of the EQA;

102.3. the examples set out above in relation to 'knowingly help' involve individuals who provided direct assistance to the persons carrying out the discrimination. The definition of 'knowingly help' cannot be extended to encompass the issuing of non-binding guidance, the intention of which was to assist the registered persons with their statutory duties. The Operational Guidance reflects this by stating:

"This section aims to give advice to registered persons on the implementation of the regulations. When deciding how to implement the regulations, the registered person must also refer to the code of practice on the prevention and control of infections, which we are currently updating and will publish as soon as possible.

Checking vaccination or exemption status

…

It will be up to you, the registered person (or those acting on your behalf), to identify the most appropriate procedures to check the vaccination and exemption status of individuals. You may want to consider the UKHSA's advice under the previous section 'Other temporary methods of medical exemption' when doing so.

…"

103. The claimants' complaints under s112 EQA against the Second and Third Respondents have no reasonable prospects of success and are struck out.

Issues (6) and (7) s111 and s112 of the Equality Act 2010 – claims against the Fourth Respondent (the CQC) and the Fifth Respondent (Mr Ian Trenholm)

104. The claimants have also brought claims against the CQC and Mr Trenholm under s111 and s112 EQA. I have already concluded that the claims against the CQC and against Mr Trenholm should be struck out for the reasons set out under Issue (1) (see paragraphs 41 to 50 above). However, in case my conclusions on those points were incorrect, I will consider the position of those two respondents in relation to the claims brought under s111 and s112 of the EQA.

105. The CQC is the independent regulator of health and social care in England. Its role includes registering care providers and monitoring, inspecting and rating the services provided. The objectives of the CQC are set out at s3 of the 2008 Act, which states:

"(1) The main objective of the Commission in performing its functions is to protect and promote the health, safety and welfare of people who use health and social care services.

(2) The Commission is to perform its functions for the general purpose of encouraging—

(a) the improvement of health and social care services,

(b) the provision of health and social care services in a way that focuses on the needs and experiences of people who use those services, and

(c) the efficient and effective use of resources in the provision of health and social care services."

106. The statutory basis for the CQC's functions is also set out in the 2008 Act and includes:

106.1. S11-19 – dealing with the registration, suspension of registration and cancellation of registration of service providers and registered managers;
106.2. s20 and s23 – issuing guidance about compliance with the requirements of the regulated activities set out in Regulation 20 (see paragraph 90.1 above); and
106.3. s20A - monitoring the processing of information by registered persons;
106.4. s28 to s37 – dealing with warning notices and offences;
106.5. s38 - providing copies of registers.

107. As part of its role, the CQC was required to monitor care homes' compliance with Regulation 12 of the 2014 Regulations. The updated Operational Guidance states as follows:

"The role of the CQC

The requirement forms part of the fundamental standards and will be monitored and enforced in appropriate cases by the CQC. The CQC has published a statement outlining their approach to:

- *registration*
- *ongoing monitoring*
- *enforcement*

A summary of the statement is included below.

…

Ongoing monitoring

The monitoring of the requirement is the responsibility of the CQC.

The CQC propose to add the following question to the provider information return (PIR) once the regulations are in force:

'How are you assured that those you employ and deploy within your service have satisfied the vaccination requirements?'

The CQC will also build a similar question into their monitoring approach once this duty is in place. Further information will be provided in due course.

Inspection

On inspection, the CQC will look for evidence to confirm systems and processes are in place to comply with the requirement.

Registered persons will not be required to show a record of the evidence itself, but will need to provide assurance that systems and processes are in place to ensure that individuals who enter the premises are fully vaccinated or exempt. Registered persons may choose to make a record of the evidence they have seen for their own internal staff employment record-keeping.

If the evidence is collected and recorded, all personal data must be handled in accordance with UK GDPR. This includes providing individuals with privacy information at the stage their data is being collected. Please refer to the guidance from the Information Commissioner's Office to ensure you have appropriate lawful basis, technical and security measures in place to protect personal data.

Enforcement

Any enforcement activity that is generated as a result of non-compliance with the amended regulations will be undertaken on a proportionate basis and, based on the CQC's assessment of the impact on quality of care and people's safety, in line with the CQC's existing enforcement policy. The CQC will decide what action to take based on proportionality and in line with their normal approach to enforcement.

…"

108. Mr Hyland's key submissions in relation to the CQC included that:

108.1. the 2014 Regulations required registered persons to undertake a 'record-keeping' role only and the CQC's role should have been limited to monitoring compliance with that requirement only. Mr Hyland referred to s20A of the HSCA 2008;

108.2. the CQC directed all registered persons to ensure that they complied with what Mr Hyland submitted were the wider requirements in the Operational Guidance relating to 'clinical reasons', rather than the 2014 Regulations. Mr Hyland cited the 1 July 2021 meeting minutes of the VCOD guidance working group as evidence of this; and

108.3. Mr Trenholm had overall responsibility for the decision that the CQC would direct registered persons to follow the Operational Guidance because he was the Chief Executive of the CQC.

109. Mr Brown's key submissions in relation to the CQC included:

109.1. the 2014 Regulations were not limited to a 'record-keeping' exercise – they required the registered persons to satisfy themselves as to the vaccination status of care workers and certain other individuals entering the Care Home as set out in Regulation 12;

109.2. the monitoring undertaken by the CQC would include monitoring of compliance by registered persons with the entry requirement under Regulation 12;

109.3. s20A of the HSCA 2008 sets out specific obligations relating to the processing of information by registered persons – it does not set out all of the monitoring requirements that the CQC undertakes; and

109.4. the claimants had failed to provide any evidence as to why Mr Trenholm should be personally liable for any discrimination. Mr Trenholm's position as chief executive of the CQC did not mean that he should be automatically personally liable for actions or omissions of the CQC.

Conclusions on Issues (6) and (7)

110. I concluded that the claimants' claims against the CQC under s111 and s112 EQA have no reasonable prospects of success for the following key reasons:

110.1. Regulation 12 of the 2014 Regulations was not limited (as Mr Hyland sought to argue) to record-keeping. It is abundantly clear from the wording of Regulation 12 that registered persons are required to prevent care workers and certain individuals from entering a care home unless they have supplied evidence (to the registered person's satisfaction) that either:

110.1.1. they have been vaccinated by a complete course of doses of an authorised vaccine against Covid-19; or

110.1.2. that for clinical reasons, they should not be vaccinated with any authorised vaccine against Covid-19;

110.2. the CQC's role involved monitoring compliance with the 2014 Regulations, including Regulation 12(3)(b) (as set out in the 2008 Act);

110.3. the CQC had regard to the Operational Guidance in carrying out such monitoring. The fact that the Operational Guidance was not legally binding on registered persons did not mean that it was irrelevant to the CQC's monitoring of care homes. The Operational Guidance noted that:

110.3.1. the CQC proposed to add an additional question to its provider information return:

> *"How are you assured that those you employ and deploy within your service have satisfied the vaccination requirements?"*

110.3.2. the CQC would consider evidence of a care home's systems and processes during an inspection:

> *"On inspection, the CQC will look for evidence to confirm systems and processes are in place to comply with the requirement."*

110.4. the CQC had a statutory exemption under Schedule 22 of the EQA in relation to complaints of indirect discrimination relating to age, disability, religion or belief because it was carrying out its duties under an enactment (i.e. the 2008 Act and the 2014 Regulations);

110.5. in relation to indirect sex discrimination (and in relation to age, disability, religion or belief if my conclusions on Schedule 22 of the EQA are incorrect), the CQC:

110.5.1. did not instruct, cause or induce discrimination under s111 of the EQA because the claimants have failed to explain what basic contravention they say the CQC was in a position to commit against the First Respondents under s111(7) of the EQA; and

110.5.2. the claimants have failed to explain why the CQC's monitoring and inspection duties would amount to 'knowing help' under s112 of the EQA, given my conclusions set out above.

111. I also concluded that the claimants' claims against Mr Trenholm under s111 and s112 EQA have no reasonable prospects of success for the following key reasons:

111.1. as set out earlier in this Judgment, the claimants have not provided details of their complaints against Mr Trenholm and no application to amend the claims has been made;

111.2. even if such claims had been made, the claimants' claims against Mr Trenholm under s111 and s112 of the EQA would fail for the same reasons that they would fail against the CQC; and

111.3. in addition, the claimants have failed to provide any evidence as to Mr Trenholm's personal involvement in the matters that they allege against the CQC. Instead, Mr Hyland stated that Mr Trenholm should be personally liable because as chief executive of the CQC he had 'overall responsibility' for the CQC's actions. That is not sufficient to satisfy the burden of proof under the EQA.

CLAIMANTS' APPLICATIONS FOR STRIKE OUT OR DEPOSIT ORDERS AGAINST THE GOVERNMENT AND CQC RESPONDENTS

112. The claimants applied for orders to either:

112.1. strike out the Government and CQC Respondents' responses; and/or

112.2. an award of a deposit as a condition of permitting the Government and CQC Respondents' responses to continue.

113. The grounds for the claimants' applications was identical to the grounds on which they sought to resist the Second, Third, Fourth and Fifth Respondents' applications for a strike out and/or deposit order of the claimants' claims. As I have concluded that the claimants' claims against those respondents have no reasonable prospects of success, there is no basis on which to strike out or make a deposit order in respect of the responses of those respondents.

RESERVED JUDGMENT

CONCLUSIONS

114. The claimants' claims against the Second, Third, Fourth and Fifth Respondents are struck out as having no reasonable prospects of success.

115. The claimants' applications to strike out or (in the alternative) to make deposit orders in relation to the responses of the Second, Third, Fourth and Fifth Respondents are rejected.

116. For the avoidance of doubt, the claimants' claims against the First Respondents (i.e. their former employers) shall proceed and further case management orders shall be issued for the management of those claims.

Employment Judge Deeley

10 January 2023

Schedule 1 – list of claimants

Adams, Jason
Akester, Louise
Almond, Edith
Anderson, Gillian
Argyrou, Michael
Arter, Catherine
Ballard, Sarah
Banka, Damian
Bartlett, Linda
Barnes, Teresa
Bassitt, Abigail
Batty, Kim
Baylis, Marilou
Berry, Rosie
Bennett, Angela
Bowen, Jayne
Bradeanu, Alexandru
Brindle, Darrel

Burrows, Hayley
Caplin, Jay
Chant, Teresa
Charles, Elaine
Chester, Loretta
Chirculescu, Carmen
Chitty, Elaine
Corkery, Kristina
Coleman, Sarah
Coutain, Leon
Dalgliesh, Louise
Dean, Carollease
De Gale, Alicia
Diaz, Alison
Duncan, Christian
Elcock, Emma
Entwistle, Zoe
Friligkos, Sofoklis

Garcia, Dora
Ghiulea, Salomeea Sanda
Giannitti, Lexie
Goldsmith, Lisa
Hartland, Rachel Elizabeth
Harrald, Jemma
Harrold, Richard
Hicks, Bev
Hind, Fiona
Holloran Darren
Hudson, Sandra
Jewson, Robert
Johal, Parminder
Jones, Alisha
Jones, Sian
Kalkantera, Evphi
Kancleryte Ruta
Kerridge, Chris
Khatun, Zubaida
Kidd, Jacqueline
Kilborn, Debra
Killen, Amy
King, Lorna
King, Samantha
Kisakye, Jennifer
Kong, Sou
Kukulska, Ewa
Lemon, Laura
Lewis, Mark
Light, Rebecca
Littleboy, Daniel
Lue Quee, Sylwia
Lund, Linda Ann
Machado, Tiago
Martyna, Jolanta
Maszkowska, Ewelina
McClarron, Anna
McHattan Farr, Rhonda
Miles, Joanne
Mitinov, Zdravko
Mooney, Emma
Morawa, Aneta Agnieszka
Morgan, Leanne
Nijjar, Gurpreet
Dmyszewicz-Nascimento, Melania
Norton, Miranda
Noonan, Cathy
O'dwyer, Hayley
Oliver, Sharon
Pawlowska, Zaneta
Peters, Simon
Perkins, Jessica
Pereira, Donna
Phillips-Tong, Holly
Pozlotka, Agneieszka
Preece, Joanne
Razau, Abra
Richards, Christine
Richardson, Carl
Robinson, Karen
Roa, Julie
Rowe, Naomi
Rutter, Sarah
Saville, Kayleigh
Smith, Donna
Stephenson, Julia
Szelei, Veronika
Szilagyi, Adrienn
Szydlowska, Sylwia
Taylor, Colin
Thompson, Melonie
Thomas, Jodie
Thomas, Kiera

Tomanova-Hodbodova, Iveta	Wetherley, Maria
Toogood, Barbara	Wiecek, Rafal
Toomey, Beatrice	Wietrzykowski, Pawel
Veze, Tamara	Woods, Tammy
Waite, Louise	Woodford, Joanne
Walker, Helena	Woolridge, Joanne
Ward, Sandra	Young, Marie

Schedule 2 – list of hearing attendees

Name of Representative	Company
Phillip Hyland	PJH Law Solicitors
Ysabelle Buckle	Government Legal Department
Zohya Latif	Government Legal Department
Abbi Copson	Irwin Mitchell
Brian Hendley	Croner Group LTD
Duncan Carson	DCL Business Services LTD
Leo Hodgson	DAS Law
Eleanor Gow	RRadar
Jackie Morris	Anthony Collins Solicitors LLP
Jake Wilkie	Trower & Howlings LLP
Jessica Blackburn	Capsticks LLP
Katie Hindmarch	Nicholsons CA-BA
Jolene Charalambous	Peninsula UK
Laura Auld	WorkNest
Mark Clayton	Watershed Law
Sejal Raja	Radcliffes Le Brasseur LLP
Sue Clarehugh	Dovehaven

RESERVED JUDGMENT

Kirsten Currer	**Ashfords LLP**
Sarah Calderwood/Albert Mould	**Slater Heelis**
William Lane	**ESP Law Limited**