EMPLOYMENT TRIBUNALS

Claimant:	**Mrs H Adams**
Respondent:	**Alliance healthcare Management services Ltd**
Heard at:	Tribunals Hearing Centre, 50 Carrington Street, Nottingham, NG1 7FG
On:	12, 13, 14 December 2022 9 February 2023 (deliberations in private, parties did not attend)
Before:	Employment Judge Adkinson sitting with Mr C Tansley Mr J Akhtar
Appearances	
For the claimant:	Mr Adams, husband (for most of hearing) in person (for latter part)
For the respondent:	Mr A Leonhardt, Counsel

JUDGMENT

After hearing from the parties, and for the reason set out below, IT IS ORDERED that

1. The respondent unfairly dismissed the claimant. However,
   - 1.1. If the respondent had followed a fair procedure, then the claimant would only have been employed for a further 3 weeks (being her notice period) and so any compensatory award is limited to those 3 weeks,
   - 1.2. the conduct of the claimant before dismissal caused or contributed to her dismissal, and therefore it is just and equitable to reduce both any basic and compensatory award by 75%, and
   - 1.3. there has been no breach of any relevant ACAS code of practice.
2. All other claims fail and are dismissed,
3. Remedy will be determined at a further hearing. Details of that will follow separately.

REASONS

4. The claimant (Mrs Adams) brings claims for standard unfair dismissal, discrimination arising from a disability, indirect disability discrimination and harassment related to disability. The respondent (Alliance) denies the claims. It revolves around her inability to wear a cloth face mask to work, Alliance's insistence therefore that she work from home from January 2021 during the Covid-19 pandemic, her refusal to do so and her subsequent dismissal for gross misconduct.

Hearing

5. The claim was an attended hearing.

6. Mrs Adams was represented by her husband, Mr Adams, for most of the hearing. However he became unwell towards the end of the third day and during the fourth day. After discussing matters with her husband, she decided to represent herself for those remaining parts of the hearing. Mr A Leonhardt, Counsel, represented Alliance. We are grateful to all three for their help that they have given to the Tribunal.

7. The parties presented the following evidence to us:

    7.1. Oral evidence (on which each was cross-examined and asked questions by the Tribunal) from

        7.1.1. Mrs H Adams, the claimant.

        7.1.2. Mr M Benham, Service Centre Manager with Alliance,

        7.1.3. Mrs F Houghton (née Gray), at the relevant time Alliance's Acting Service Centre Manager at their Nottingham site,

        7.1.4. Mr M Taylor, Warehouse Operations Support Manager at Alliance's Nottingham site at the relevant time,

        7.1.5. Mr T Wasteney, Loss Prevention Solutions Manager with Alliance.

    7.2. The pages to which the parties took us in the hearing bundle;

8. The claimant presented written closing submissions and the respondent made oral closing submissions.

9. We have taken into account the evidence and submissions in our decision.

10. The claimant had raised in writing an issue before the hearing about the late service of a signed witness statement (she had been served already with an unsigned copy). That was not pursued at the hearing. We say no more about it therefore.

11. We took regular breaks during the hearing. Mr Adams became unwell at the end of the third day because of a particular condition he has. The details do not matter, but he was unable to be in the Tribunal room because it caused him to feel anxiety. This was repeated on the fourth day. When it

happened, we stopped. Eventually Mr and Mrs Adams agreed between themselves that Mrs Adams would represent herself for the remainder of the fourth day.

12. Mrs Adams did seek on a few occasions to argue points that were not part of her claim. The issues were clarified and identified by Employment Judge Brewer in his case management order made at a hearing on 9 July 2021. Both parties attended that hearing. Neither party suggested Employment Judge Brewer's order was wrong in correspondence afterwards, despite him making it clear that parties must let him know of any error within 14 days of the order being sent to them on 20 July 2021. There was and had been no application to amend. The list of issues reflected the pleaded cases. Therefore we restricted the parties to the issues identified.

13. No party has suggested the hearing was unfair. We are satisfied it was a fair hearing.

14. The hearing concluded without us having sufficient time to consider our decision. We met on the earliest opportunity after the hearing (9 February 2023) and made our decision. This is our decision. It is unanimous.

Issues

15. The issues were identified by Employment Judge Brewer in his case management order of 9 July 2021.

16. The respondent conceded it knew or ought to have known of Mrs Adam's disability of Ménière's disease. The respondent also did not argue that Mrs Adam's inability to wear a cloth facemask arose from her Ménière's disease. We therefore proceed on the assumption the inability of her to wear a cloth face mask arose from her disability.

17. The claimant does not seek reinstatement or re-engagement.

18. It was agreed that remedy be considered separately.

19. The issues therefore are as follows:

Unfair dismissal (Employment Rights Act 1996 Part X)

20. What was the reason or principal reason for dismissal: the respondent relies on gross misconduct?

21. Was it a potentially fair reason?

22. Did the respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the claimant, including following a fair procedure?

23. If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant?

24. If the dismissal was unfair,

    24.1. What is the basic award?

    24.2. What is the compensatory award?

24.3. should the compensation be reduced to reflect the chance the claimant would have been fairly dismissed by the respondent in any event?

24.4. If so by how much?

25. Did the claimant cause or contribute to dismissal by blameworthy conduct such that it is just and equitable to reduce their basic and/or compensatory award?

25.1.

26. Has there been any breach of the ACAS code of conduct?

Discrimination arising from disability (Equality Act 2010 section 15)

27. It is not disputed for the purposes of this hearing that

27.1. the respondent treated the claimant unfavourably by dismissing her;

27.2. the claimant's inability to wear a mask arose from her Ménière's disease;

27.3. the respondent knew or ought to have known of her disability.

28. Did the respondent dismiss her because she was unable to wear a face mask?

29. Was the treatment a proportionate means of achieving a legitimate aim? The respondent says that its aims were:

29.1. To prevent the spread of Covid-19 in the workplace and thereby to promote the health and safety of those working there.

Indirect discrimination (Equality Act 2010 section 19)

30. There is no dispute for the purposes of this hearing that

30.1. the respondent had a provision, criterion or practice (PCP) that people in the respondent's workplace must wear face masks from January 2021.

30.2. the respondent applied the PCP to the claimant;

30.3. Did the respondent apply the PCP to all staff regardless of disability or would have done so?

31. Did the PCP put people with the claimant's disability at a particular disadvantage when compared with those who do not have the claimant's disability in that the latter can wear face masks and so attend the workplace?

32. Did the PCP put the claimant at that disadvantage?

33. Was the PCP a proportionate means of achieving a legitimate aim? The respondent says that its aims were:

33.1. To prevent the spread of Covid-19 in the workplace and thereby to promote the health and safety of those working there.

Harassment related to disability (Equality Act 2010 section 26)

34. Did the respondent do the following things:

    34.1. On 4, 5 and 6 January 2021 tell the claimant that if she did not work from home she would not be paid?

35. If so, was that unwanted conduct?

36. Did it relate to disability?

37. Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

38. If not, did it reasonably have that effect, taking into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

Findings of fact

39. We first consider the witnesses.

    39.1. On the whole we found the respondent's witnesses to be straightforward and credible. Generally they were clear, focused on the questions and issues and did not attempt to provide answers when they did not know the answer.

    39.2. There was one issue that concerned the Tribunal – the possibility of Mrs Adams being placed on furlough. The Tribunal did ask the respondent's witnesses why they did not consider furlough for Mrs Adams. The general answers were vague. Essentially it came across as though Alliance had developed a policy on who would be furloughed early on and was intransigent about revisiting it – very much, once written it was immutable. There was no flexibility. The witnesses could not however convincingly explain why it could not be revisited. While concerning at the time, we do not think it affects their credibility when considering the case as a whole. The reality is that furlough would never be a solution because Mrs Adams did not want to be at home. In addition the witnesses did not attempt to mislead us on the issue of furlough as a possibility. Finally they were credible about everything else.

40. We are sceptical however of Mrs Adams's evidence. Our reasons are as follows:

    40.1. Mrs Adams has very fixed views and appeared unwilling or incapable of accepting she may be wrong:

        40.1.1. She repeatedly insisted that she could only legally work in accordance with her contract and did not accept the possibility that parties can agree to vary it or circumstances may override it;

        40.1.2. She insisted she could not drive work equipment home because it would invalidate her car insurance and, for reasons that we could not fathom, her car's

MOT certificate. We highly doubt that having one's employer's laptop in a car invalidates the insurance. We reject out of hand it invalidates the MOT certificate. When pressed about the basis for her belief, she asserted she used to work for the police. That may be so, but is not authority for what seems to be a remarkable proposition.

40.1.3. She insisted she would require additional insurance for her home to work from there.

40.1.4. None of the documents produced by Mrs Adams in relation to insurance show that she was right about her assertion that she would be uninsured if she had the respondent's equipment in her car or at home. When asked about the enquiries she had actually made on the issues, she was at best evasive.

40.2. She told us that her husband had a particular condition. The details of it do not matter. She saw going to work as respite from being with him. We accept this is the real reason based on our own observations of what happened in the hearing and on the fact that her tone was far less antagonistic and confrontational when she disclosed this to us. Significantly however is the fact that Mrs Adams never told Alliance the true reason she could not or did not want to work from home. Instead she put obstacles in the way such as insurance, contribution to increased expenses at home, contractual terms and the like. In short, she misled them. In addition we are not satisfied she truly believed they were reasons not to work from home.

40.3. Mr Adams wrote a derogatory post on Facebook about Alliance. While the "information" that informed his post must have come from Mrs Adams, we do not think that in itself is something for which she can be blamed. However she did post a message that in effect endorsed it. However she was either unwilling or unable to see any obvious problem about doing that. Again, this reflects on her very fixed views and unwillingness to consider alternatives.

40.4. Mrs Adams came across to us as being of the view that she was right and anyone who disagreed with her must by definition be wrong. This was apparent in the manner she gave evidence. She came across as fixed, inflexible was strident in the way she gave evidence.

About the claimant

41. Alliance employed Mrs Adams from 22 May 2017 until 24 February 2021 as a customer service advisor. She worked at the respondent's South Normanton site. Her role required her to work at a desk alongside other advisors. She had a computer, latterly a laptop, and phone with headset. Customers (in this case, pharmacists) would telephone Alliance to place orders. She answered those calls and placed the orders. She was good at

her job. She had no disciplinary findings against her. She had not been the subject of any other process, such as a capability process.

42. Mrs Adams has Ménière's disease. She cannot wear cloth or medical face masks. Instead she wore a face shield. This is in essence a piece of clear plastic that hangs down from a band worn across the forehead and ears. It covers the face but is open at the bottom.

43. For the purposes of this hearing it was accepted that the inability to wear a face mask arose from her Ménière's disease.

44. At the material times, she worked for the respondent 3 days per week, Wednesday, Thursday and Friday.

About the respondent

45. Alliance is a large wholesale retailer to pharmacies of medical supplies. The respondent has not provided in evidence details of their size or administrative resources. However we have been given no reason to believe that either of those features adversely affects their ability to carry out a fair procedure like one could reasonably expect from a large, well-resourced employer. Indeed the evidence suggests they are a large, national company with offices across the United Kingdom. This is evidenced by the fact that Alliance sends out over 11,000 different medicines, and it can make 1.2 million units at this site per day.

46. Alliance's South Normanton site had a number of buildings at it. It was owned and let to Alliance by Alloga – a sister company within the same group as Alliance. There were other buildings that were in whole or part let to other companies.

Contract of employment and policies

47. The contract of employment, signed on 22 May 2017, provides as follows (so far as relevant):

"Your normal place of work will be our South Normanton customer services premises. You may, however be required to:

"● work at any location at which the company carries out business from time to time within reasonable travelling distance. Should this need occur, additional travel expenses will be reimbursed.

"● Transfer to another place of work within the UK upon reasonable prior notice by the company."

Subsequent variations did not alter this term.

Clause 19 said that copies of the disciplinary and grievance procedure were available on request and were also available on the intranet.

48. Alliance had in addition a disciplinary policy. It provided (so far as relevant) for an investigation, disciplinary hearing if the investigation suggested it were warranted provided the employee were informed of the allegations and possible sanction, and opportunity for the employee to appeal against any sanction. It aligned with the ACAS Code of practice on disciplinary procedures.

49. It also said:

"If you are dismissed for an act of gross misconduct and the dismissal will take immediate effect and you will not be entitled to work your notice or to pay in lieu of your notice. A non-exhaustive list of examples of gross misconduct is provided for below…

"Below is a list of examples of misconduct which are considered sufficiently serious to warrant dismissal without notice. Other conduct which is not listed but which is sufficiently serious may also result in dismissal with or without notice. This list is provided as a guidance so that employees are aware of the consequences of unacceptable conduct – it is by no means exhaustive….

"● refusal to carry out a reasonable instruction, or gross insubordination...

"● making or publishing untrue statements which directly or indirectly damage or may damage the business and or reputation of the company."

50. Alliance had a policy on working from home. It said those who are home-based would have that fact explicitly set out in their contract of employment, and that for everyone else it had to be agreed with their line manager, whether it were a regular occurrence or a one-off. Mrs Adams was not home-based. While the respondent's witnesses seemed unable to help on the point, we find as a fact that the clause in her contract was the one used for employees who were expected to attend a place of work provided by the respondent (i.e. home-based employees would have had a different term in their contract of employment). This is because it does not expressly refer to working from home (which Alliance's policy would suggest would ordinarily be the case) and because the nature of her work was of the type to be done from a workplace provided by Alliance, and in fact Alliance provided such a workplace.

51. Alliance had a social media policy. It is dated 29 January 2020. It made it clear in

51.1. Paragraph 5.1.V that employees must be fair and courteous to other employees and officers. Employees should avoid using statements that that reasonably could be viewed as malicious, obscene, threatening or intimidating;

51.2. Paragraph 5.1.VI that employees must not defame Alliance, and in paragraph 5.1.VII; and

51.3. Paragraph 5.3 that employees are accountable personally for what they publish.

52. These policies were available on the Alliance intranet. We are satisfied that Mrs Adams had access to that intranet before the incidents in the start of January 2021 (to which we shall come) and as such had plenty of opportunity to familiarise herself with the policies. She never asked for copies to be provided to her. Besides, we do not believe it requires a written policy to tell an employee they cannot go about making derogatory remarks about their employer which can be viewed in a public forum.

Covid 19

53. In late 2019 to early 2020, the Covid-19 virus arrived in the United Kingdom. The virus became a pandemic. Its effects could range from symptoms of a cold or 'flu to requiring hospitalisation. It was a novel virus that was easily spread from person to person.

54. The government introduced numerous regulations and schemes. From about late March 2020, the general public in England was required to stay at home and work from home where possible (what was called "lockdown"). In indoor spaces, people were required to wear face coverings to prevent transmission.

55. Essential workers were allowed to continue to attend work. Alliance was an essential business because it supplied pharmaceuticals. Mrs Adams was an essential worker because she took orders for the medicines that pharmacies needed.

56. During this time Mrs Adams wore a face shield. Both were acceptable to Alliance in the workplace.

Company equipment letter

At some point after the commencement of lockdown, Alliance offered Mrs Adams the chance to work from home. They presented her with a letter to complete. It said she had been issued with a laptop and laptop bag. She was required to sign a clause that provided:

"The company may deduct the costs of equipment from my salary in the event that equipment is:

"1. Lost

"2. Stolen

"3. Defaced or mistreated"

57. Mrs Adams declined to sign the form and did not take a laptop or bag.

Mr Adams' Facebook video of 26 March 2020

58. On 26 March 2020 Mr Adams posted a video to Facebook. So far as relevant he said as follows

"I'm after the help of people who are in Facebook land to try and get this out into the public and possibly even onto the TV because em, well, well I'm a bit disgusted in where my wife works Alliance Healthcare. She went to work yesterday and everyone is preaching on about this coronavirus and all this, that and the other and social distancing. When she arrived at work yesterday she was put at her desk and she can virtually touch the person next to her with her elbows – it doesn't take a lot to work out this isn't 2 metres apart….

"Well I can tell you now AH that if anything happens to me my blood is on your hands because you don't care about your workers, and what was the comment that the floor manager said to you yesterday Helen? Oh I'm glad you brought it to our attention….

"But don't bully my wife don't victimise my wife and don't abuse my wife like you allow your supervisors to have done in the past is getting really and apparently well it's not apparently it is definite the hygiene in your place is despicable...

"The bullying and everything else, sorry if I've got to word it right, the verbal abuse, not bullying, verbal abuse…"

59. Mrs Adams posted a comment below the video as follows:

"Please share this... Andy was at a delivery when he put this on, he is now driving so unable to comment etc.... stay safe everyone"

60. We accept it was Mr Adams alone who decided to make the video. However Mrs Adams clearly adopted it as her own view when she posted the comment below, asking it to be shared. If it were the case she did not want to associate with it, she could very easily have remained silent.

61. We have been shown photos of the workplace, apparently taken in March 2020. We do not consider it assists us to determine whether there were breaches or not. The real complaint about the video is the tenor of it, and making public things that could be dealt with in private.

Facemask policy change on 13 January 2021

62. In late 2020 or early 2021 there emerged a more contagious version of Covid-19.

63. In January 2021, Alliance issued a face covering policy. It was formally printed out as a notice and communicated to employees. We do not know when it was sent, but infer it was in early January 2021, before the office had to close because of an outbreak of Covid-19 there because it was revised afterwards. So far as relevant it read as follows (so far as relevant):

"Following on from the recent risk assessment by the EHS team it has been confirmed that all colleagues will be required to adhere to the company mandatory PPE requirement. Masks or face coverings must be worn by all colleagues whilst at work, this extends to both on company premises and conducting company duties away from company premises. The only time a face covering is not required would be when colleagues or sat at that desk, sat in a meeting or eating."

Conversations on 4, 5 January 2021

64. Monday 4 January 2021 was a non-working day for Mrs Adams. However Alliance was open and trading.

65. That day there was an outbreak of Covid-19 at the office. Alliance decided to close the office for a deep-clean.

66. Mrs Adams's line manager was Ms E Dyson. Ms Dyson phoned Mrs Adams that day. Mrs Adams prepared a note of the call about 3 or 4 days later. We have no reason to doubt its accuracy, albeit it is not verbatim.

67. Miss Dyson said that because the office was closed Mrs Adams, would not be able to work in the office on Wednesday Thursday or Friday. Mrs Adams declined to take the days as holiday. Ms Dyson asked Mrs Adams if she

could work from home. Mrs Adams declined and recorded her own reply as:

"I advised her I am not insured to work at home also that I had refused to sign the letter asking me to take the laptop home I am not insured to transport businesses equipment in my car nor use or store [it] at our home."

68. Ms Dyson also told Ms Adams that Alliance's face covering policy had changed that day and she would send a copy over. The change in policy provided that people in the office must wear face masks: face shields were no longer acceptable.

69. On 5 January 2021, Ms Dyson called Mrs Adams. She informed Mrs Adams that Alliance would pay her normal pay for Wednesday and Thursday (her two normal working days), but on Friday she either worked from home or would not be paid.

70. Mrs Adams again reiterated the alleged problem with insurance. However she now also added in that her home had not had a workplace health and safety assessment for things such as trips, slips and other hazards.

71. Mrs Adams saw this as bullying. Mr Adams was with her and she handed the call over to him. Mr Adams then told Ms Dyson that he was offering to rent space in their home to Alliance for £50 per week with utility and services at an additional £10 per day.

5 January 2021, Mr Adams posted another comment on Facebook.

72. Mr Adams then posted on Facebook on 5 January 2021 details of the call, albeit from his perspective. He set out the points about the contract and place of work, repeated his suggestion Alliance should pay rent and service charge. He called Alliance "Rob dogs", and ended

"[Mrs Adams] is doing what you all should be doing because Alliance Healthcare are robbing you and breaking the law and your contractual rights... WAKE UP AND SMELL THE COFFEE PEOPLE!!!"

However there is no suggestion that Mrs Adams encouraged him to do this or adopted the words as her own like she did previously with a post encouraging sharing. The claimant gave no evidence that she disagreed with her husband's sentiments.

Conversation of 6 January 2021

73. Mrs Adams and Ms Dyson spoke again on 6 January 2021. Ms Dyson reiterated that Mrs Adams either had to work from home or she would not be paid.

74. According to the note which we accept is accurate, Mrs Adams told Ms Dyson that

I re-emphasised that at no time had I refused to work throughout these discussions I have advised I'm unable to work from home."

Emails of 6 January 2021

75. Mrs Adams made a subject access request. It disclosed the precis of some emails. Two from 6 January 2021 are relevant.

75.1. 15:02: “If Helen doesn't come and collect her kit and agree to work from home for what will be one day, then we will put her down as unpaid leave although we will change it to holiday of she chooses.”

75.2. 15:31: “Either Helen adheres or she don't and won't get paid.”

76. We do not know the sender or recipient of the emails or the original text of the emails. However taken with the other evidence, they show that Alliance told Mrs Adams she either worked from home or did not get paid.

Ability to work from home

77. The latter comment was explored in evidence, though it arises later in the history of this case. It is appropriate to deal with it now.

78. Mrs Adams asserted she was unable to work from home. We are not clear how saying one is unable to work from home is different to refusing to work from home, but consider it does not matter.

79. We accept she was unable to work from home. We have alluded already to the real reason which was disclosed to us by Mrs Adams in cross-examination. She went specifically to work away from home as respite from her husband and his condition. If she had to work from home she would not have that respite, and we are satisfied that in reality she would therefore be unable to work from home because of “tensions” – for want of a better word – in the household. However she never told Alliance this.

80. Instead she advanced a number of reasons:

80.1. When asked about various locations at home, her opinion depended not on whether the location could accommodate her but how she designated that space. For example she told us the dining room table was not available because it was not a workplace, but a place to eat. Similarly the kitchen was not a workplace. These are not true obstacles to working from home.

80.2. She clarified to the Tribunal that she saw her home as home – i.e. somewhere separate from work and wanted it to remain that way. This is entirely understandable desire. However it is not a reason one is unable to work from home.

80.3. We do not accept her complaints about insurances. There is no evidence to show her concerns to be true. While she has adduced key fact documents for insurance, there is no evidence about what enquiries were made to see if working from home in the pandemic affected things.

80.4. Mrs Adams also raised issues about council tax. However we consider this was clutching at straws. The government had mandated working from home. There was no evidence or suggestion any local authority, yet alone the claimant’s, had considered that working from home in accordance with lockdown regulations warranted a consideration of business rates. There is no evidence of any enquiry with her local authority to discover if this is true.

80.5. Mrs Adams was unpersuadable that she could work from home under her contract of employment because of clause 4. She suggested that if she did, she would be breaking the law. Setting aside that breach of contract is not a criminal offence, she refused to contemplate the idea that the parties were capable of agreeing something between them or that situation might dictate some other solution.

81. Each obstacle could have been resolved by proper enquiry. While she raised the points repeatedly, she did not make the most basic enquiry to check the specifics of her situation. In our opinion this shows that these were being used as defences to a suggestion she work from home – put another way, simply as attempts to deflect the respondent's demand. The only enquiry related to car insurance, but it did not appear the insurance broker was ever furnished with the true facts, but was asked to respond to the most general of enquiries. We say that because the reply does not engage with what Alliance proposed.

82. We go further and find as a fact the claimant did not truly believe these were obstacles to her working from home. This is because of what was actually the real reason, her refusal to take steps to see if her concerns could be alleviated, her steadfast refusal to depart from what she understood her contract to say even in light of the pandemic and change in circumstances, and moreover by the fact that she let her husband propose she could work from home in return for rent and service charge – something she herself repeated in later meetings. We think this latter point particularly significant: if she was unable to work from home, why was she offering to work from home on payment of a rent and service charge.

Review of face covering policy

83. After the outbreak, Alliance reviewed the face covering policy. This was not typed up into a formal document, and it appears not to have been communicated properly to staff, because the only version we have seen is it quoted in a later email to Mrs Adams.

84. The Government guidance issued on 13 January 2021 suggested that face visors were unlikely to be effective against smaller droplets, unlike face masks. It encouraged employers to carry out their own risk assessments.

85. However we are satisfied that it was taken after careful consideration of the risks. Alliance has produced copious logs of work that the health and safety team were doing and undertaking in response to Covid-19.

86. We are satisfied the concerns they identified and how they dealt with them was reasonable. We could detect no malice in what Alliance decided. We saw nothing to suggest the policy was based on anything but relevant considerations.

87. Whatever government guidance may or may not have said, it is for each employer to determine what was safe or unsafe for its workplace, balancing risk and practicality at all stages. We are not in a position to evaluate Alliance's policy's merits as such, not least because we are acting as an appeal against a decision that an employer has taken in the course of its business, and we do not have the expertise.

88. What we do know is that this employer had just had an outbreak of Covid-19 that resulted in closure of the office for a while. We also know that face shields like those worn by the claimant provided open between the mouth and nose and the open air without the filtering effect of a cloth or medical mask. When a wearer breathes out, their breath cannot penetrate the shield and so would have to go to the outside of the shield. When Mrs Adams inhaled, the air would come from outside the shield. Either way, her breath would not be filtered through material like it would be were Mrs Adams wearing a face mask. We think it is reasonable therefore to change the policy as Alliance did. There is no one answer of course. Alliance could have made other decisions that may also have been equally valid.

Grievance of 7 January 2021

89. On 7 January 2021, at Ms Dyson's suggestion, Mrs Adams emailed Mr Kirkham. She raised the issue of the change from face shield being acceptable to being unacceptable. She asked for copy of the policy.

90. Mr Kirkham offered to discuss the matter when she came in next. Instead Mrs Adams replied that the government website said she only had to wear a face covering, and her shield was a covering. She reiterated she could not work from home because she would not be covered by home or car insurance. She also asked who would pay for the internet or carry out the health and safety assessments.

91. Mr Kirkham again said he would discuss it with her the next week when the office reopened.

92. Mrs Adams lodged a grievance. She alleged she had been threatened and bullied by management and that Alliance had not followed correct procedures about requesting her to work from home.

Change of policy notified to claimant on 13 January 2021

93. The change of policy that said employees must wear face masks and that face visors was unacceptable was made before 13 January 2021. There is some confusion about when this may have come to the attention of employees. We cannot resolve that one way or another. What we do know is that Ms V Martin emailed the policy to Mrs Adams. It said

> "The outcome of the risk assessment for non-mask wearers in the businesses that it would compromise on their and others safety and increase the risk of a covert outbreak at all locations.
>
> (The risk assessment is available to all employees to review.)
>
> "The business edition is that to protect the safety of all employees all non-mask wearers will be taken through a questionnaire with their line manager regarding the options available to non-mask wearers moving forward, this should be completed by all managers by Friday 15th of January, an occupational health assessment would be offered to all affected employees whilst this assessment is being arranged hold affects the employees will be asked not to attend the office as per the risk assessment and work from home where they can work from home as per government guidance... as we have previously discussed face advisors are no longer seen as adequate face covering by the Government link below [link to gov.uk]…

"USDAW [the workplace union] has agreed all of the above steps"

Occupational health report on 19 January 2021

94. Mrs Adams underwent an occupational health assessment with a report being produced on 19 January 2021. It recorded the change in face mask policy took place on 15 January 2021. It noted that Mrs Adams had explained why she could not work from home, but does not record what she said. It recommends only that Alliance and Mrs Adams discuss a way forward. No specific adjustments were mentioned.

Grievance meeting of 27 January 2021

95. Mrs Adams met with Mr Taylor at a grievance meeting on 27 January 2021. Mrs Adams raised the following points in the meeting:

    95.1. She could not work from home because her insurance did not cover business equipment,

    95.2. Her mortgage company "and council tax" said she could not run a business from her home,

    95.3. Mrs Adams said she was not refusing to work, but only refusing to work from home,

    95.4. When asked why working from home was not acceptable, the following exchange took place:

    "HA: Because it's my home, I need to consider my husband as it's his home too and he is at home currently ill.

    "MT: Why will it affect him?

    "HA: Because he lives there, it's not just my decision, my contract has a location which states it's not my home

    "…

    "MA: I have nowhere to do it other than my dining room or bedroom"

96. Though she alluded to her husband's illness she did not explain why it stopped her working from home. When asked she provided no explanation about why she could not work from home because of council tax, mortgage company or insurances. She did not allude to the fact that coming to work provided respite.

Investigation meeting 28 January 2021

97. On 28 January 2021, Mrs Adams attended an investigatory meeting conducted by a Ms L Moore. The allegations under investigation were that she had refused to carry out a reasonable instruction by not working from home and published untrue statements that impacted adversely on Alliance. The invitation made Mrs Adams aware of the subject matter of the investigation.

98. During the investigation, Mrs Adams told Ms L Moore that she was not going to comment on the alleged refusal to work at home because it was

part of her grievance. She also denied all knowledge of Alliance's social media policy.

99. The Tribunal can see no reason for Mrs Adams to refuse to answer questions at this meeting. She was well able to put forward her position to the investigator, that may have helped to narrow the issues or resulted even in the matter being dropped. There was no reason not to co-operate. There was no conflict between answering the questions in the investigation and pursuing her grievance. We conclude that Mrs Adams was being obstructive.

Grievance dismissed on 29 January 2021 and appeal on 4 February 2021

100. Mr Taylor dismissed Mrs Adams's grievance on 29 January 2021. Mrs Adams appealed that outcome on 4 February 2021.

Second investigation meeting on 5 February 2021

101. The investigation meeting resumed on 5 February 2021, again with Ms L Moore chairing it again. Again Mrs Adams said that she was unwilling to answer any questions about the allegations because she was appealing her grievance. We echo what we said about her refusal to engage with the first investigation with this one too.

Grievance appeal meeting on 11 February 2021 and outcome 12 February 2021

102. Ms F Houghton conducted the appeal hearing. In the course of the meeting Mrs Adams again did not raise the real reason she did not want to work from home. She suggested that she could work from another office. However Mrs Houghton answered that she was unable to work in another office because of health and safety concerns and, besides, Mrs Adams would still have to wear a face mask moving about Alliance's premises.

103. Ms Houghton rejected Mrs Adam's appeal the next day.

Claimant suspended on 15 February 2021

104. On 15 February 2021 the respondent suspended the claimant from work because she could not work in the office and would not work from home,

105. The disciplinary process continued to a disciplinary hearing.

Disciplinary hearing on 18 February 2021

106. Mrs Adams attended a disciplinary hearing on 18 February 2021. The invite made it clear to her that the allegations were one of gross misconduct for refusing to follow the instruction to work from home and of breach of Alliance's social media policy. She was told she could be accompanied to the meeting by a colleague or trade union representative.

107. The meeting was presided over by Mr T Wasteney. Mrs Adams was accompanied by a colleague. In the meeting Mrs Adams:

    107.1. Reiterated her belief that she was not insured to have work equipment at home;

    107.2. Suggested she work in a separate office block called AP7.

107.3. She also suggested that she might work in a meeting room or other room to herself.

107.4. She was unaware of any social media policy. Besides her husband could write on it if he wanted to. She just would not, going forward. However it was confirmed to her that she could have accessed it on the intranet and she confirmed she had access to that.

107.5. She said she could wear a motorcycle helmet that covered her face.

108. Having considered the exchanges, the Tribunal is satisfied that she had a fair opportunity to put her side of the argument.

109. Before the outcome of the meeting, Mrs Adams disclosed a page from her home insurance policy schedule that said

"Items held or used for **business** purposes except those listed as **business equipment** in the definitions"

Mrs Adams never provided the terms of the policy that defined the words in bold, and did not provide to Alliance any evidence of any enquiries that she had made to see if this covered working from home for her employer.

Disciplinary outcome on 23 February 2021

110. Mr Wateney wrote to Mrs Adams on 23 February 2021. He decided that Mrs Adams had committed gross misconduct for her refusal to work from home and he also relied on the social media comments. The letter is detailed and thorough. In evidence Mr Wateney explained that in his mind the social media comments did not alone justify a finding of gross misconduct or justify dismissal. He told us the main problem was that Mrs Adams refused to work from home and had provided no good reason for doing so. We accept that was the real reason for his summary dismissal of Mrs Adams. The letter concentrates on that aspect in our view. Besides the social media comments were quite old. The obvious main problem is that Mrs Adams was not able to work in the office, and was refusing to work from home. They wanted her back to work but she was refusing to do so. This was the main source of all the problems. We therefore accept it was what weighed most heavily on his mind.

Appeal against dismissal

111. Mrs Adams appealed against her dismissal. She was invited to an appeal meeting. She was reminded of her right to be accompanied. Mr M Benham heard the appeal. At the hearing on 8 March 2021, Mrs Adams was accompanied by a colleague. Notably, Mrs Adams told Mr Benham that she had said only ever said to Alliance that she did not want to work from home, as opposed to saying she could not work from home. The Tribunal notes this is in complete contrast to the number of objections she had earlier raised (insurance, council tax etc.) to show she could not work from home. Having considered the exchanges in the appeal hearing, the Tribunal is satisfied that she had a fair opportunity to put her side of the argument.

112. On 19 March 2021, Mr Benham dismissed the substantive appeal. He concluded that working from home was itself a reasonable adjustment, that because she could not wear a face mask she could not work from an alternative location in the office, and that there was no reason provided why she could not work from home in any event. There was some suggestion that Alliance had offered the claimant a chance to work elsewhere. This does not appear to tally with the evidence we heard. However it does not matter since Mrs Adams's inability to wear a mask meant she could not work in an office anyway.

Alternative office

113. It can be seen that Mrs Adams suggested in evidence that she could work from either another building (building AP7 was identified) or a separate office or meeting room given over to her.

114. As for AP7, it is not clear to us if such a space was available, since the buildings are owned by a separate company, albeit one that belongs to the same corporate group as Alliance. The respondent's witnesses seemed unclear but believed it was not. However whatever the reality of such availability, we find as a fact that such a suggestion is unreasonable:

114.1. It is not reasonable to expect a whole floor or building or part thereof to be provided for the exclusive use of the claimant. It is disproportionate, and the claimant is isolated from other staff and management;

114.2. There was on the basis of the evidence available at the time a viable alternative of the claimant working from home.

115. As for the use of a separate office or meeting room, we do not accept this was reasonable either. She would have to wear a mask to get to and from the office or meeting room, which she could not do. In addition we accept the respondent's evidence that, because the office was open plan, the meeting rooms were needed to provide a private space for meetings between staff. Again though, on the evidence at the time, there was the alternative that she could work from home.

Law

Unfair dismissal

116. The **Employment Rights Act 1996 section 111** entitles a person who has been employed for a sufficient period to bring a claim for unfair dismissal

117. **Employment Rights Act 1996 section 98** provides (so far as relevant):

"(1) In determining … whether the dismissal of an employee is fair or unfair, it is for the employer to show—

"(a) the reason (or, if more than one, the principal reason) for the dismissal, and

"(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

"(2) A reason falls within this subsection if it—

"…

"(b) relates to the conduct of the employee,

"…

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

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

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

"…"

118. The employer bears the burden of proving on the balance of probabilities that the claimant was dismissed for misconduct. If the employer fails to persuade the tribunal that had a genuine belief in the employee's misconduct, then the dismissal is unfair.

119. When it comes to reasonableness the burden of proof is neutral. The tribunal should consider all the circumstances including the employer's size and administrative resources.

120. The tribunal has had regard to **British Home Stores Ltd v Burchell [1980] ICR 303 EAT; Iceland Frozen Foods Ltd v Jones [1993] ICR 17 EAT; Foley v Post Office [2000] IRLR 82 CA** and **Sainsbury's Supermarkets Limited v Hitt [2003] IRLR 23 CA**.

121. The tribunal understands of the effect of these cases is as follows:

121.1. Was there a reasonable basis for the respondent's belief?

121.2. Was that based upon a reasonable investigation?

121.3. Was the procedure that the employer followed within the "range of reasonable responses" open to the employer?

121.4. Was the decision to dismiss summarily within the "range of reasonable responses" open to the employer?

122. The range of reasonable responses is not infinitely wide. Long standing practice is relevant, and there is no special rule because health and safety is involved: **Newbound v Thames Water Utilities [2015] IRLR 734 CA**.

123. The Tribunal is entitled to consider and measure the employer's conduct and decision against the employer's own disciplinary or conduct codes.

124. The **ACAS Code of Practice on Disciplinary and Grievance Procedures** sets out the basic requirements for fairness applicable in most conduct cases. The **Trade Union and Labour Relations (Consolidation) Act 1992 section 207A** requires a Tribunal to have regard to the code.

125. The code identifies the following key steps in any disciplinary procedure:

125.1. carry out an investigation to establish the facts of each case;

125.2. inform the employee of the problem;

125.3. hold a meeting with the employee to discuss the problem;

125.4. allow the employee to be accompanied at the meeting;

125.5. decide on appropriate action; and

125.6. provide employees with an opportunity to appeal.

126. The code points out each case must be looked at in the context of its particular circumstances, which may include health or domestic problems, provocation, justifiable ignorance of the rule or standard involved, or inconsistent treatment in the past.

127. The employee's length of service is relevant when deciding the appropriate sanction: **Strouthos v London Underground Ltd [2004] IRLR 636, CA; Newbound**.

128. Despite the code of practice and guidelines in the cases, ultimately each case must turn on its own facts and be broadly assessed in accordance with the equity and substantial merits: **Jefferson (Commercial) LLP v Westgate UKEAT/0128/12 EAT; Bailey v BP Oil Kent Refinery [1980] ICR 642 CA**.

129. When a person is dismissed for gross misconduct, but the only claim is one of unfair dismissal, then the Tribunal does not have to determine if there is gross misconduct to decide if the dismissal is fair or unfair. The factual enquiry is in relation to the matters dictated by the **Employment Rights Act 1996 s.98**, not what happened which is dictated by the contractual enquiry: see **West v Percy Community Centre [2016] ELR 223 EAT**

Discrimination arising from a disability

130. The **Equality Act 2010 section 15** provides (so far as relevant)

"Discrimination arising from disability

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

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

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

131. The approach to cases under **section 15** was explained in **Pnaiser v NHS England aor [2016] IRLR 170** (after referring to the previous authorities):

131.1. the Tribunal had to identify whether there was unfavourable treatment and by whom;

131.2. it had to determine what caused the treatment. The focus was on the reason in the mind of the alleged discriminator, and an examination of the conscious or unconscious thought processes of that person might be required;

131.3. the motive of the alleged discriminator in acting as he did was irrelevant;

131.4. the Tribunal had to determine whether the reason was "something arising in consequence of [the claimant's] disability", which could describe a range of causal links;

131.5. that stage of the causation test involved an objective question and did not depend on the thought processes of the alleged discriminator;

131.6. the knowledge required was of the disability; it did not extend to a requirement of knowledge that the "something" leading to the unfavourable treatment was a consequence of the disability.

132. In **Williams v Trustees of Swansea University Pension and Assurance Scheme aor [2019] ICR 230 UKSC** the Supreme Court suggested at [27]

"I agree […] that in most cases (including the present) little is likely to be gained by seeking to draw narrow distinctions between the word "unfavourably" in section 15 and analogous concepts such as "disadvantage" or "detriment" found in other provisions, nor between an objective and a "subjective/objective" approach. While the passages in the Code of Practice to which [Counsel] draws attention cannot replace the statutory words, they do in my view provide helpful advice as to the relatively low threshold of disadvantage which is sufficient to trigger the requirement to justify under this section."

133. The parts of the code referred to are that the claimant must have been put to a disadvantage (The code **[5.7]**) and that it is enough the claimant can reasonably say they would have preferred to be treated differently (The Code **[4.9]**). This corresponds in substance with the test in **Shamoon v RUC Chief Constable [2003] IRLR 285 UKHL**.

134. As for detriments, we understand detriment to mean that "detriment" requires us to establish if the claimant believes she has been subjected to a disadvantage and that belief is reasonable: **West Yorkshire police v Khan 2001 ICR 1065 UKHL**; **Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 ICR 33 UKHL; Derbyshire aors v St Helens MBC 2007 ICR 841 UKHL: Barclays Bank plc v Kapur [1995] IRLR 87 CA; Employment code [9.8]-[9.9]**

Harassment

135. The **Equality Act 2010 section 26** provides (so far as relevant):

"(1) A person (A) harasses another (B) if—

"(a) A engages in unwanted conduct related to a relevant protected characteristic, and

"(b) the conduct has the purpose or effect of—

"(i) violating B's dignity, or

"(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

"…

"(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

"(a) the perception of B;

"(b) the other circumstances of the case;

"(c) whether it is reasonable for the conduct to have that effect."

136. The Tribunal should:

136.1. consider the 3 elements separately even though they overlap,

136.2. have regard to the context to assess if it was reasonably apparent what was the purpose or effect,

136.3. be sensitive to hurt that result from offensive comments or conduct but seek not to encourage a culture of hypersensitivity (see **Richmond Pharmacology v Dhaliwal [2009] IRLR 336 EAT**).

137. The Tribunal's approach was explained in **Pemberton v Inwood [2018] ICR 1291 CA** by Underhill LJ and is as follows. A Tribunal must

137.1. consider **both**:

137.1.1. whether the claimant perceives themselves to have suffered the effect in question (subjective); **and**

137.1.2. whether it was reasonable for the conduct to be regarded as having that effect (objective).

137.2. It must also take into account all the other circumstances.

138. The conduct must be related to the protected characteristic. Unacceptable general anti-social behaviour not related to a protected characteristic is not enough: **Brumfitt v Ministry of Defence [2005] IRLR 4 EAT; UNITE v Nailyard [2018] IRLR 730 CA**.

139. The Tribunal has reminded itself that it does not follow that because someone has put up with "banter" for years or joined in even, does not mean it is unwanted. It is important to look at all the circumstances: **Munchkins Restaurant Ltd aors v Karmazyn UKEAT/0359/09**; but that if a claimant makes it clear through words or conduct they take no objection, that may suggest the conduct is not unwanted (e.g., **English v Thomas Sanderson Blinds Ltd [2009] ICR 543 CA**; and acceptable conduct can cross the line and become unwanted: **English**. We have also considered the Code **[7.8]** which says

"7.8 The word 'unwanted' means essentially the same as 'unwelcome' or 'uninvited'. 'Unwanted' does not mean that express objection must be made to the conduct before it is deemed to be unwanted. A serious one-off incident can also amount to harassment."

140. We have also had regard to the list of examples of unwanted conduct in the Code at **[2.8]**.

Indirect discrimination

141. In light of the common ground, we need only comment on one aspect of indirect discrimination.

142. In indirect discrimination claims, one cannot justify discrimination based purely on the basis of costs alone: **Cross and ors v British Airways plc [2005] IRLR 423 EAT; HM Land Registry v Benson and ors [2012] ICR 627 EAT**. Recent cases considering this principle have not departed from it.

143. In **Heskett v Secretary of State for Justice [2021] ICR 110 CA**, the Court said

> "the essential question is whether the employer's aim in acting in the way that gives rise to the discriminatory impact can fairly be described as no more than a wish to save costs. If so, the defence of justification cannot succeed. But, if not, it will be necessary to arrive at a fair characterisation of the employer's aim taken as a whole and decide whether that aim is legitimate. The distinction involved may sometimes be subtle… but it is real".

144. However financial budgetary control can be a legitimate aim: **Benson** and dealing with financial pressures can be the need to deal with real-world financial pressures: **Heskett**.

Burden of proof: Equality Act 2010

145. The **Equality Act 2010 section 136** sets out the way that the burden of proof operates in claims under the legislation, and was explained in **Igen Ltd aors v Wong aors [2005] IRLR 258 CA; Efobi v Royal Mail Group Ltd [2019] 2 All ER 917 CA; [2021] 1 WLR 3863 UKSC; Hewage v Grampian Health Board [2012] ICR 1054 UKSC** and **Madarassy v Nomura International plc [2007] ICR 867 CA**.

146. At the first stage, the Tribunal must consider whether the claimant has proved facts on the balance of probabilities from which the Tribunal could properly conclude that the respondent has committed an unlawful act of discrimination or harassment. The Tribunal presumes there is an absence of an adequate explanation for the respondent at this stage but it can take into account the respondent's evidence is assessing if the claimant has discharged the burden of proof. At this stage it is irrelevant that the respondent has not adduced an explantion.

147. It is not enough for a claimant to prove bare facts of a difference in status and a difference in treatment. They only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that the respondent had committed an unlawful act of discrimination or harassment: **Madarassy at 56; Efobi UKSC at 46**. There must instead be some evidential basis on which the Tribunal could properly infer that the protected characteristic either consciously or subconsciously was the course of the treatment.

148. The Tribunal may look at the circumstances and, in appropriate cases, draw inferences from breaches of, for example, codes of practice or policies.

149. If the claimant succeeds in showing that there is, on the face of it, unlawful discrimination or harassment, then the Tribunal must uphold the claim unless the respondent proves that it did not commit or was not to be treated as having committed the alleged act. The standard of proof is the balance of probabilities. It does not matter if the conduct was unreasonable or not sensible: The question is if the conduct was discriminatory.

150. In **Efobi UKSC** and **Hewage** the Court said it is important not to make too much of the role of the burden of proof provisions. As Lord Hope said at para 32:

"They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other"

151. Where there is a question about whether something is a proportionate means of achieving a legitimate aim, the burden rests on the respondent.

Conclusions

Unfair dismissal (Employment Rights Act 1996 Part X)

What was the reason or principal reason for dismissal: the respondent relies on gross misconduct? Was it a potentially fair reason?

152. We conclude that the respondent's reason for dismissal was its honest belief Mrs Adams had committed an act of gross misconduct.

153. The reasons are as follows:

153.1. As set out in the findings of fact, this was an emergency situation. Alliance had reasonably decided those in the office must wear face masks. Mrs Adams could not do that. Alliance believed it was a reasonable instruction. Therefore Alliance had issued an instruction for the claimant to work from home. She had, in effect, refused but provided no good reasons why. Alliance's own published examples of gross misconduct identified gross insubordination and refusal to carry out a reasonable instruction as gross misconduct. As we found, Alliance genuinely believed the instruction was one it could give to Mrs Adams. In the circumstances it is perfectly believable Alliance honestly believed she had refused to carry out a reasonable instruction and so was guilty of gross misconduct.

153.2. "Gross misconduct" includes "misconduct". That is a potentially fair reason.

Did the respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the claimant, including following a fair procedure?

154. We are satisfied there was as much investigation as was reasonable. Establishing her refusal to work from home required little investigation. The respondent provided Mrs Adams on many occasions opportunity to explain the rationale for her objection.

155. The respondent followed a fair procedure in our view. There was a fair and reasonable investigation, disciplinary hearing and appeal hearing. She knew what she was accused of at all stages. She was entitled to representation at all stages. It complied with the substance of Alliance's procedure and with the ACAS Code of Practice Number 1.

156. The definition of gross misconduct was clear from the staff handbook. We are satisfied that she had had plenty of opportunity to familiarise herself with it and had had reasonable access to it.

157. We have looked at the question of whether it was reasonable in itself to request that she work from home. If it were not, then the reason for dismissal would be fundamentally flawed. Our analysis is as follows:

157.1. Clause 4.1 does not of itself entitle Alliance to direct Mrs Adams to work from home for the following reasons

157.1.1. We have approached working out its meaning by seeking to establish what the words mean to the reasonable person aware of the reality when the parties entered into the contract.

157.1.2. At that time it was a fact that

157.1.2.1. Anyone who wanted to work from home had to apply and have specific managerial approval;

157.1.2.2. Anyone who did work from home (e.g. sales) had different terms in their contract;

157.1.2.3. Alliance provided offices from which staff at Mrs Adam's level and in her position were expected to work. All the equipment was there and kept there for her to use.

157.1.3. The first bullet point of clause 4.1 cannot properly refer to working from home. In the circumstances no reasonable person could consider the words "location at which the company carries out business from time to time within reasonable travelling distance" could cover home. It does not fit with the factual matrix. Alliance never contemplated doing business from anyone's home. The next sentence that confirms travel expenses would be paid "if this need occurs" clearly conveys to the reasonable reader that the first part refers to having to travel to a different office.

157.1.4. The second bullet point of clause 4.1 does not in our view reasonably include an employee's home. Firstly the words "transfer" suggest to us a move from a base to another base. Working from home still kept the employee linked with their particular office to which they were assigned. Therefore if an employee at Nottingham then worked from home, it would be too far a stretch of the language to say they had

"transferred". In any case "another place of work within the UK…" cannot in the circumstances when the contract was executed and taking into account that an employee is "transferred" there, be reasonably read as meaning a home could fall be seen as what "another place of work" is meant to cover.

157.1.5. The clause is we think premised on the basis that Alliance has at least some standing or control over the particular place of work at which the employee is working. It has no control over anyone's home. If it were as broad as Alliance suggested

157.1.5.1. They could in theory designate anywhere "another place of work" such as a library, coffee shop or even a park bench;

157.1.5.2. There would be no reason for such a strict work from home policy or vetting of requests;

157.1.5.3. There would be no need for a special version of the clause for those who were employed to and it was contemplated would work from home;

157.1.5.4. There is no obvious reason to impose the restriction of the United Kingdom since if an employee were to work from home, there is no obvious reason why they could not do that outside the United Kingdom. The imposition of territorial limit and "transfers" strongly suggests the territorial limit is intended to restrict the width of the geographical area of permanent relocation to another office or workplace provided by Alliance.

157.2. However this was an urgent situation like that contemplated in the case law we referred to above. There was a pandemic of an airborne, communicable disease. The respondent assessed face masks were a minimum requirement. Mrs Adams could not wear one. She could therefore attend work. She was otherwise able to work and provide service and Alliance could provide her with work. It was an exceptional situation in which it was permissible legally in our view to work from home so that her employment could continue. As a matter of law, we conclude the facts were such they could order to take this exceptional step and there was presented to them no reason why she could not do it.

157.3. Therefore the request she work from home was reasonable.

158. It follows she did in fact fail to comply with a proper instruction and do what they were entitled to request her to do. Therefore its belief it was gross

insubordination and refusal to carry out a reasonable instruction amounted to gross misconduct was a reasonable belief.

159. We have however considered Alliance's response to this. We appreciate the usual sanction for gross misconduct is summary dismissal. However it is not automatically so. Here we believe Alliance acted unreasonably. Our reasons are as follows:

159.1. Alliance's disciplinary policy directs that gross misconduct must result in dismissal without notice. The clear wording "the dismissal will take immediate effect" and "will not be entitled to [notice or pay in lieu of notice]" clearly do not afford the decision-maker any discretion in relation to gross misconduct. The reasonable employer would not fetter the decision-maker's discretion that way because it does not afford opportunity to consider exceptions. Even if the decision-maker realised they had a discretion about whether to summarily dismiss or not, the policy as worded most clearly directs the decision maker to the idea there is only one acceptable outcome so far as Alliance is concerned. The effect that it means that in practice Alliance will accept only one outcome once gross misconduct is established.

159.2. A reasonable employer would have appreciated the fact it was asking an employee to work from home when the contract did not entitle them to do that. They therefore would have been less headstrong about it and appreciated the wider circumstances.

159.3. The reasonable employer would have appreciated the fact Mrs Adams was ready and willing to work, albeit not at home. This militates somewhat the severity of her gross misconduct

159.4. The reasonable employer would have recognised she had given good service and performed satisfactorily.

159.5. The reasonable employer would have recognised that the reality here was not one of gross insubordination or refusal to carry out a reasonable instruction, but in fact a clash of expectations: they wanted her to work albeit from home, whereas she wanted to work albeit from the office. Neither party's stance is overtly unreasonable. In reality the working relationship had hit an impasse. It was in effect some other substantial reason the relationship could not continue.

159.6. The reasonable employer would have reflected on this. In our view a reasonable employer would still have dismissed fairly, but only on notice, because that is in short equivalent to terminating the employment in any event because of the impasse.

160. Therefore the dismissal was unfair.

Should the compensation be reduced to reflect the chance the claimant would have been fairly dismissed by the respondent in any event? If so by how much?

161. In our opinion the reality was that the relationship had come to an impasse. There was no way forward given Alliance's reasonable insistence she work from home, and Mrs Adam's insistence that she work from the office. She

would have therefore been dismissed at the end of a period of notice. She could have been dismissed fairly for some other substantial reason and, had Alliance acted fairly, we are satisfied they would have dismissed her with 3 months' notice. The situation meant that dismissal was inevitable.

162. Therefore compensation has to be reduced to no more than notice pay, which is 3 weeks' pay because Mrs Adams had 3 whole years of continuous employment.

Did the claimant cause or contribute to dismissal by blameworthy conduct such that it is just and equitable to reduce their basic and/or compensatory award?

163. We have concluded it was. Our reasons are as follows:

163.1. Mrs Adams was obstinate and obstructive throughout the process. She threw up unreasonable objections unbacked by evidence. She indicated some willingness to work from home when in fact it was not the case. Moreover, she never told them the true reason. Had she done so, it may have avoided a disciplinary hearing or risk of dismissal for gross misconduct.

163.2. Second are the issues with the posts on social media. We appreciate Mr Adams wrote them. We assume he did so of his own volition and not under order from Mrs Adams. The respondent accepts they were not enough to warrant dismissal and were not part of the reason for her dismissal. They are vitriolic, emotional and highly provocative. If she had not associated herself with them, we would have said no more about it. However she did. It therefore undermined the relationship with her employer. It at least warranted consideration in the disciplinary process.

164. We do not think that Mrs Adams was wholly to blame. None of it stopped Alliance from taking a reasoned decision. However it does mean she is mostly to blame. She was combative and not co-operative. She brought most of the problems on herself from her attitude.

165. A reduction of 75% of any award does justice in this case. We have considered whether the reduction should be different for the basic and compensatory award. We can see no good reason for differential reduction. Her conduct affected the totality of what happened. Therefore the reduction should be the same.

Has there been any breach of the ACAS code of conduct?

166. Based on our findings of fact, there has not.

Discrimination arising from disability (Equality Act 2010 section 15)

167. We remind ourselves that it is not disputed that

167.1. the respondent treated the claimant unfavourably by dismissing her;

167.2. the claimant's inability to wear a mask arose from her Ménière's disease;

167.3. the respondent knew or ought to have known of her disability.

Did the respondent dismiss her because she was unable to wear a face mask?

168. The answer is yes. The reason for the dismissal was because she would not work from home. But the only reason she had to work from home was because she could not wear a face mask at work, as the respondent required. That is at the heart of it. The chain of causation is made out.

Was the treatment a proportionate means of achieving a legitimate aim? The respondent says that its aims were to prevent the spread of Covid-19 in the workplace and thereby to promote the health and safety of those working there.

169. We are satisfied that it was a legitimate aim. We are satisfied it was proportionate.

170. Covid-19 could be a serious illness. It is easily spread. It was highly prevalent in the community. It can therefore easily impact on a workforce if there were an outbreak. We therefore have no difficulty concluding it is a legitimate aim. Health and safety is promoted by reduction of the risk of Covid-19 (or any other easily transmissible illness which is prevalent in the community). In addition maintaining a healthy workforce is beneficial obviously to the employees but also the employer, because the fewer absences through sickness, the better.

171. We consider now proportionality. The respondent had access to a lot of guidance. We are satisfied they considered the matter carefully. We are not in a position to decide whether a face shield (like that the claimant wore) and a face mask provide equivalent or near-equivalent protection. We can see from a lay person's perspective arguments both ways. However we are satisfied it is legitimate to decide that a face mask is preferable to a face shield and therefore to forbid those at work. We note that the respondent did not stop Mrs Adams from working – but only from attending the office.

172. We do not consider there was any other realistic option. Only 3 were explored and neither answers the point.

    172.1. Furlough would not address the fundamental problem that Mrs Adams did not want to be at home in the day.

    172.2. If we presume another office building were available, then working from another office was disproportionate. There would still be a need for protection to prevent the spread of germs and their transmission in that office building. She would still need to wear some sort of protection when moving about that office. Even if she had it to herself (as she appeared to suggest), it would still need cleaning, servicing etc. exposing staff to risk, and so she would still need to wear a face mask. We do not in any case consider it realistic she have a building or significant part to herself. It would be expensive, she would lack supervision or ability to access support or social contact, she would in effect be isolated.

    172.3. She should have a meeting room to herself. These rooms were required for meetings with others. It was not realistic to give over one resource to her with its consequent impact on facilities

available for other staff. Besides it does not address the difficulty of having to wear a mask to get to and from that room.

Conclusion

173. This claim fails.

Indirect discrimination (Equality Act 2010 section 19)

174. There is no dispute that

174.1. the respondent had a PCP that people in the respondent's workplace must wear face masks from January 2021.

174.2. the respondent applied the PCP to the claimant;

174.3. the respondent applied the PCP to all staff regardless of disability or would have done so; and

174.4. the PCP put people with the claimant's disability at a particular disadvantage when compared with those who do not have the claimant's disability in that the latter can wear face masks and so attend the workplace.

175. It cannot sensibly be said the PCP did not put the claimant at that disadvantage. Therefore the case turns on the proportionality and legitimacy.

Was the PCP a proportionate means of achieving a legitimate aim? The respondent says that its aims were: To prevent the spread of Covid-19 in the workplace and thereby to promote the health and safety of those working there.

176. The answer is yes. We repeat everything that we set out in paragraph 169 above.

Harassment related to disability (Equality Act 2010 section 26)

Did the respondent do the following things: On 4, 5 and 6 January 2021 tell the claimant that if she did not work from home she would not be paid?

177. The answer to that is yes.

If so, was that unwanted conduct?

178. The answer to that is yes. No employee would want to be told that, and it is readily acceptable Mrs Adams did not want to be told it either.

Did it relate to disability?

179. The answer in our opinion is no. It relates to her refusal to work from home. It is correct that she was being asked to work from because she could not wear a mask as a consequence of her disability. However her disability had nothing to do with why she could not work from home or her refusal to do so. We do not consider the relationship between the two to be more than co-incidence. Assume she were not disabled but did not want to work from home when asked to do so, she would be told exactly the same thing. We see it as co-incidence rather than there being a relationship, in those circumstances.

Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

180. We conclude it did not. The purpose was to tell her the factual reality.

If not, did it reasonably have that effect, taking into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect?

181. While Mrs Adams may have perceived it that way, her reaction was not reasonable in the circumstances. She had been requested to work from home. She refused to do so. Alliance was doing no more than telling her the factual reality that if she did not, then she would not be paid. It is not reasonable to be upset at being informed of the consequences of refusing to do a certain thing.

182. We have considered the surrounding circumstances. We accept that the situation may have been tense. We acknowledge that in theory, it is not what is said but the way that it is said may take an otherwise reasonable statement into the realm of harassment. We do not believe the facts here amount to doing that. Things may have been tense on both sides. But we are not convinced it made unacceptable that which was otherwise acceptable.

Conclusion

183. This claim fails too.

Employment Judge Adkinson

Date: 28 February 2023

Notes

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Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.