EMPLOYMENT TRIBUNALS

Claimant		Respondent
Mrs M Acheampong	**v**	**ISS Mediclean Limited t/a ISS Facilities Services Healthcare**

Heard at: Central London Employment Tribunal

On: 27, 28 February, 1 - 3 & 6, 7 March 2023

Before: Employment Judge Brown

Members: Ms M Keyms
Mr D Shaw

Appearances:

For the Claimant: Mr K Amankwa, lay representative
For the Respondents: Mr J Hitchens, Counsel

Interpreter in the Twi Language: Mr Edward Agyeman

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. **The Claimant was not a disabled person at the relevant times. Her disability discrimination claims fail;**

2. **The Respondent did not make unlawful deductions from the Claimant's wages.**

REASONS

Preliminary

1. By a claim form presented on 9 March 2022 the Claimant brought complaints of discrimination arising from disability, failure to make reasonable adjustments and unlawful deductions from wages against the Respondent, her employer. Other complaints in her claim have since been dismissed on withdrawal.

2. The Claimant relies on her asthma condition in saying that she was a disabled person at the relevant times. The Respondent did not concede that the Claimant was a disabled person.

3. The Tribunal discussed the issues in the case with the parties at the start of the Final Hearing. The other issues were then finalised as follows:

1. ***Discrimination arising from disability (Equality Act 2010 section 15)***

1.1 *Did the following things arise in consequence of the claimant's disability:*

1.1.1 *The claimant not wearing/not being able to wear a face mask?*

1.1.2 *The claimant being absent from work?*

1.1.3 *The claimant being unable to undertake a face mask fit test?*

Mask

1.2 *Because she did not wear a mask, did the respondent treat the claimant unfavorably by:*

1.2.1 *Ms. Leim shouting at her on 7 April 2020?*

1.2.2 *Discharging her home on 7 April 2020?*

1.2.3 *Forcing her to decide between wearing a mask or resigning on 24 July 2020?*

Absence

1.3 *Because of her absence, did the respondent treat the claimant unfavorably by:*

1.3.1 *Withholding her wages?*

1.3.2 *Failing to observe the requirement to maintain regular contact?*

1.3.3 *Threaten to discipline her?*

1.3.4 *Label her as Absence Without Leave?*

1.3.5 *Force her to see her GP to get a COVID exemption letter?*

Mask fit test

1.4 *Because she was unable to undertake a face mask fit test, did the respondent treat the claimant unfavorably by:*

1.4.1 *Ms Leim shouting, harassing and bullying her on 20 March 2020, 06, 07 April 2020, 28 January and 31 January 2022?*

1.4.2 *Ms Leim and Juhi Mehta making detrimental statements in emails of 28 January and 31 January 2022?*

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

1.5.1 *Complying with legal or recommended requirements for staff in hospitals to wear PPE.*

1.5.2 *Seeking to protect the health and safety of staff and patients.*

1.5.3 *Responding to and managing staff and patients as best as possible in the face of a global pandemic, staff shortages, and rapidly changing circumstances and guidance.*

1.5.4 *Paying staff in accordance with their statutory and / or contractual entitlement.*

1.5.5 *Seeking to ensure that staff comply with sickness absence reporting (and evidence) requirements.*

1.5.6 *Managing staff absence fairly and consistently and / or in accordance with absence and / or disciplinary procedures Communicating internally and / or with the Claimant with a view to facilitating the Claimant's return to work.*

1.6 *The Tribunal will decide in particular:*

1.6.1 *was the treatment an appropriate and reasonably necessary way to achieve those aims;*

1.6.2 *could something less discriminatory have been done instead;*

1.6.3 *how should the needs of the claimant and the respondent be balanced?*

1.7 *Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?*

2. ***Reasonable Adjustments (Equality Act 2010 sections 20 & 21)***

2.1 *Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?*

2.2 *A "PCP" is a provision, criterion or practice. Did the respondent have the following PCPs:*

2.2.1 *Requiring the claimant to wear a face mask at work?*

2.3 *Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability. The Claimant relies on the following alleged substantial disadvantages:*

2.3.1. Struggling to breath whilst not wearing a mask.
2.3.2. In consequence of struggling to breath, being unable to work
2.3.3. In consequence of being unable to work, being sent home.

2.4 *Did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?*

2.5 *What steps could have been taken to avoid the disadvantage? The claimant suggests:*

2.5.1 *In April 2020:*
- *a. Allocating the Claimant to a non-Covid area.*
- *b. Providing the Claimant with a 'mask exempt' lanyard.*
- *c. Providing the Claimant with a different type of mask.*
- *d. Having weekly meetings to review the Claimant's progress.*
- *e. Allow the Claimant to wear only a visor*

2.5.2 *In July 2021:*
- *a. All of the reasonable adjustments mentioned above in respect April 2020.*
- *b. Providing Twice weekly lateral flow tests.*
- *c. Encouraging the Claimant to be vaccinated.*

2.6 *Is this head of claim, or any allegation relied upon under it out of time?*

2.7 *Was it reasonable for the respondent to have to take those steps and when?*

2.8 *Did the respondent fail to take those steps?*

<u>Wages</u>

3.1. Was the Claimant absent without leave from 07 April 2020?

3.2. The Claimant maintains fit, willing and able to work between 07 April 2020 and July 2022. Is this assertion correct?

3.3. Was the Respondent contractually entitled to be paid for 37.5 hours per week during her absence from work between 07 April 2020 and 17 July 2022?

4. This hearing was to consider liability only. A provisional remedy hearing date was set.

5. The Tribunal heard evidence from the Claimant. For the Respondent, the Tribunal heard evidence from: Kwame Boahen, Operations/Catering Manager at the relevant times and the Claimant's colleague; Ewerton Soares Operations Manager, who managed the housekeeping department at the relevant times; Mariana Leim, Domestic

Service Manager at the relevant times and one of the Claimant's supervisors; Kawsu Manjang, Service Manager at the relevant times, and one of the Claimant's supervisors.

6. There was a bundle of documents.

7. The Claimant sought disclosure of attachments to emails and, in addition, all emails between specified employees of the Respondent. The Respondent agreed to provide an original copy of one email it had already disclosed at Bundle p302. Having heard submissions, the Tribunal did not make an order for further disclosure. It was satisfied that the Respondent had properly complied with its disclosure obligations to search for and disclose all relevant and necessary documents in its possession. The Claimant did not identify any specific documents which existed, but which had not been disclosed.

8. The Claimant sought a witness order for employee of the Respondent to attend, in order for the Claimant to cross examine them. The Tribunal explained that that witness would be the Claimant's witness and she would not be able to cross examine the witness. The Tribunal therefore did not make the witness order.

9. The parties made written and oral submissions.

10. The Tribunal had the assistance of an interpreter in the Twi language. Before the Claimant was sworn in and adopted her witness statement, the interpreter the Tribunal asked what he needed to do in terms of the oath and her statement. The Tribunal had not heard anything from the Claimant at all at that point. When she had been asked to come the witness table, she had not moved and was prompted to do so by her lay representative. The Employment Judge therefore told the interpreter that the Claimant was behaving in a way which indicated she did not understand English at all, so he should translate the whole of the oath and all questions about her name and address. The interpreter did so.

Relevant Facts

11. The Claimant first started to work for the Respondent at Chelsea and Westminster Hospital (the Hospital), in 2018, as a casual worker. Her casual worker agreement provided that, " The Company is not obliged to offer you work, at any time or in any capacity. Similarly, should a work assignment be offered to you by us, you are not obliged to accept such work and may decline to do so." P103.

12. The Claimant attended a 3-day training course at the 'ISS Academy' on 10-12 October 2018, p111-113. This included topics such as infection control, such as the use of masks, personal protective equipment ("PPE"), colouring coding of mops and cloths for different areas of the hospital and the appropriate level of dilution for chemicals.

Contractual and Policy Provisions

13. By letter dated 4 March 2019, the Respondent offered the Claimant a permanent position of Housekeeper (private patients), p117-118. The role of a Housekeeper involves cleaning wards, side rooms and common areas.

14. The letter offer said, "… please report to Kawsu Manjang. Your hours of work for this position will be 37.5 hours per week and your rate of pay will be £8.54 per hour. You will be paid fortnightly in arrears directly into your bank or building society account. Further details of other terms and conditions of employment can be found in your Contract of Employment and Employee Handbook."

15. The Claimant signed a Statement of Main Terms and Conditions of Employment on 4 March 2019, p119 - 120.

16. The Statement of Terms and Conditions provided, "Your contracted hours of work are 37.5 per week (please refer to the handbook for further details) Normal working days and hours will be advised to you according to the roster in force." P119.

17. It also provided, "I acknowledge that I have read understood and accept the terms contained within his statement and the accompanying handbook. .. " p119.

18. The handbook stated,

    "Your rate of pay, is shown in the statement, which appears earlier in this booklet. Your hourly rate is payable for hours worked whilst working your contracted working week…" p126.

    "Your contracted working week is as shown in the statement, which appears earlier in this booklet and is exclusive of meal breaks.

    Hours of work are as directed by your manager, and may be subject to change from time to time. Where such changes may be necessary the Company will consult you beforehand. …

    During those hours designated by your manager as your working hours, then excepting for statutory and/or other permitted breaks in your work, you are required to be at your workplace and performing your duties." P126.

19. Under the section, "Sickness and Absence Policy" the handbook said,

    "Regular attendance at work is essential to meeting the Company's business objectives.

    The company recognise that from time to time employees may be genuinely incapable of attending work.

    Whether the sickness is for one day or for a longer term, each case will be managed to ensure minimal impact upon the service delivery to the Company's Clients.

    Any absence, which is not authorised or notified in accordance with the rules of the Sickness and Absence Policy, will be regarded as a breach of the contract of employment and will be treated in accordance with the Company's Disciplinary Procedure.

    It is the policy of the Company for managers to conduct a return to work interviews following a period of sickness/absence." P133

20. Under the Section, Reporting of Sickness/Absence, the handbook provided,

    "On the first day of sickness absence, subject to local requirements, employees must phone in as soon as possible before the start of their shift, and no later than 1 hour after the start of the shift.

    Afternoon and evening shift employees must phone in as soon as possible before the start of shift so cover can be arranged.

    If sickness absence continues beyond three days, on the fourth day, you must contact your manager to update them of your situation.

    If sickness absence continues beyond seven days, on the eighth day, you must submit a Doctor's medical certificate.

    When you are fit to return to work you must contact your manager in advance of the commencement of your shift. Failure to do so may result in you being sent home without pay.

    As a condition of service the Company reserves the right, at any time, to require an employee to produce a medical certificate stating the reasons for absence, which is signed by a registered medical practitioner at the time of absence." P133.

21. Under the heading "Sick Pay" the handbook provided, p134 "Subject to your compliance with the foregoing rules, and your cooperation with any local rules relating to sickness absence reporting and associated instructions from the Company's management, your entitlement to sick pay allowance shall be in accordance with statutory sick pay regulations. You are asked to note that where questions arise as to eligibility to receive sick pay allowance, it is for you to demonstrate entitlement to the Company's satisfaction, by following the required sickness reporting procedures and any associated management instructions. In the event that you fail to comply with any of the above, the Company reserves the right not to pay you sick pay.

22. The Respondent's August 2017 Absence Policy provided, in relation to, "Absence for eight calendar days or more", It is the employee's responsibility to ensure they keep the Line Manager updated on a regular basis however if they fail to do so, or if it is required for any reason, the Manager will make regular contact with the employee." P355.

23. The 2017 Absence Policy also provided, "AWOL (Absent without leave) If the employee fails to attend work and doesn't notify their Line Manager within the timescales stipulated in the absence procedure, this is classed as absence without leave. If the employee makes no contact, pay will be suspended and the necessary procedures will be followed dependent upon the circumstances." P360.

24. These provisions of the 2017 Absence Policy were repeated in the January 2021 Absence Policy at p362 and 367.

    The Claimant's Asthma

25. The Claimant has asthma. She told the Tribunal she had had this condition since childhood, when she recalled it was mostly manageable. In her disability impact

statement, she said that her asthma had been worse in adulthood. However, she said that, even in childhood, she had been limited in her ability to participate in classroom activities such as singing due to too much dust.

26. She was challenged on this. The Claimant then agreed in oral evidence that she is a professional singer who has released 7 albums. She agreed that she undertakes live performances during which she both sings and dances. She said that she takes asthma medication before doing so and that sometimes the performances are short in duration.

27. In her disability impact statement, the Claimant also said that the severity of her asthma is influenced by outside factors such certain chemicals, smells, exposure to allergens like dusty surfaces, fumes, toxins in the immediate environment. She said, "The difference between a clean dust-free area and one that is not can be quite substantial, in that I am unable to function such as hold a reasonable conversation continuously without searching for air that is fresh for sometimes for as long as 10-20 minutes."

28. However, during her oral evidence to the Tribunal, she was asked an open question about what would trigger her asthma, such as dust, chemicals, or temperature. In oral evidence, the Claimant denied that dust or cleaning products would trigger her asthma. She said she avoided using very strong chemicals. In oral evidence, she did not say that her asthma would be triggered by anything.

29. Her oral evidence therefore appeared to contradict her disability impact statement about her asthma being influenced by outside factors.

30. In her disability impact statement, the Claimant said that her husband assisted with the cleaning and cooking when she sensed that an asthma attack could happen. However, she did not say in her witness statement for the Tribunal that, before covid, her asthma interfered with her cleaning job for the Respondent.

31. Also in her disability impact statement, the Claimant said that she had suffered a severe episode of asthma in Italy in 2000 when she was prescribed Dexamethasone, an anti-inflammatory medication. She further said that, once in 2019, she suffered an asthma attack and fainted and was taken to the Accident and Emergency department of the Chelsea and Westminster Hospital for treatment. There was no medical evidence to corroborate these assertions. The Claimant did not disclose her medical records to the Tribunal.

32. The Claimant's GP provided Fit Notes and a letter for the Claimant. Fit Notes dated 7 April 2020 and 24 April 2020 said that the Claimant had asthma and said, "not tolerating work-provided face mask." P322, 323.

33. On 3 December 2021 the Claimant's GP wrote a letter to the Respondent saying, "She was unable to tolerate wearing the face masks supplied at work at last year due to her history of asthma. It was recommended that she was allowed to use other forms of personal protection (example face shield}) If appropriate or be redeployed to a less risky area of work. Medical certificates were issued for this, covering the period of April to August 2020 but the recommendation still hold still now." P324.

34. The Claimant's GP also wrote a letter about the Claimant on 10 June 2022, "She was diagnosed with asthma in childhood and the symptoms have continued since then including cough, wheezing and difficulty breathing. She manages the asthma with regular inhalers and intermittently needs steroids for significant flare ups. Due to the effect of asthma on her pulmonary function she finds it difficult to tolerate face masks as she feels her breathing further restricted when wearing then, especially the type provided for her by work during the height of the covid pandemic in 2020. This condition has been present since her childhood and hence does qualify as a disability under the Equality Act 2010." P444.

35. The Claimant was referred to Occupational Health during her employment. Agnes Osei, Occupational Health Adviser, said of the Claimant's condition, Mary has an underlying respiratory medical condition which seems to be exacerbated wearing face mask… Mary's Underlying condition is likely to be covered by the equality act 2010." Pp287 – 288.

36. A number of forms were completed in order for the Claimant to start work at the Respondent.

37. The Claimant was interviewed by Kwame Boahen before she was appointed as a casual worker. It was not in dispute that Mr Boahen completed many of the standard parts of the forms, including the Claimant's name and the role for which she was applying.

38. An ISS Work Health Assessment form was completed in respect of the Claimant. A box on that form was ticked, saying of her, " I am not aware that I have a health condition or disability that might impair my ability to effectively undertake the duties of the position that I have been offered." p102.

39. The Claimant told the Tribunal that she could not remember this form, she said that she could not read and write.

40. Mr Boahen was asked in evidence about the Health Assessment form. He said that the question about whether an applicant had a health condition or disability was a "key question" which a recruiting manager had to ask. He said believed, therefore, that he did ask the Claimant this question. He said, however, that even if he had made a mistake and not asked the question, OH would have asked the Claimant whether she had a health condition or disability. He said that the Claimant was seen by OH after he had interviewed her.

41. The Tribunal noted that the form at p102 stipulated, at the bottom, that it was required to be sent to Occupational Health. That corroborated Mr Boahen's evidence that the Claimant was seen by OH, in any event, after he interviewed her. The Tribunal accepted Mr Boahen's evidence and found that it was likely that he did ask the Claimant, at the start of her employment, whether she had a condition or disability which would affect her ability to carry out her cleaning job at the Respondent and she had confirmed that she did not.

42. An Occupational Health Screen was completed in respect of the Claimant on 15 November 2018, which indicated that the Claimant was "Fit for Post." P114

43. The Tribunal was satisfied on the balance of probabilities therefore that both Mr Boahen and Occupational Health asked the Claimant, at the start of her employment, whether she had a health condition or disability that might impair her ability to undertake her cleaning job. She declared that she did not.

44. The Claimant produced a prescription in respect of her asthma dated 2023. It showed she was prescribed 2 inhalers, Clenil Modulite and Salamol.

45. In the absence of her GP records, the ET was unable to establish when and with what frequency those inhalers had been prescribed for her in the past. It noted her GP's letter, dated June 2022, saying that the Claimant manages her asthma with inhalers and steroids for flare-ups. That letter was dated June 2022, after the events in question in this case. While the Tribunal accepted that the Claimant was taking that medication at that time, it was troubled by the lack of GP records to corroborate the history of the Claimant's asthma or medication use.

46. The Claimant was not provided with an "extremely clinically vulnerable" letter during the covid pandemic.

47. The Claimant told the Tribunal that wearing a standard fluid-resistant surgical face mask made her feel short of breath, sweaty and dizzy.

48. The Claimant was not generally required, under her contract of employment, to wear a mask at work before 2020. However, in evidence she agreed that she was required to wear a standard fluid-resistant surgical mask when cleaning 'side rooms' -which were rooms designated for infected patients. There was a sign at the entrance to such rooms indicating that a mask had to be worn.

49. Mr Manjang, the Claimant's supervisor, told the Tribunal that a side room would take 30 – 45 minutes to clean and that the Claimant would clean such a side room once or twice a day, during which she would wear a mask and other PPE, like gloves. Mr Manjang saw the Claimant every day in work. He told the Tribunal that the Claimant never had any problems wearing a mask before the covid pandemic in 2020.

50. Mr Boahen also told the Tribunal that he had seen the Claimant wearing a surgical mask for her cleaning duties before the covid pandemic.

51. The Claimant was extremely evasive and unclear in her evidence about cleaning side rooms. She refused to give any estimate of how long it would take her to clean the isolation rooms. Despite numerus invitations to do so, she would not even venture an estimate of the time this would take.

52. The Tribunal preferred the Respondent's evidence on the Claimant's cleaning of side rooms. It found that, on a daily basis, for at least a year before the covid pandemic, the Claimant cleaned side rooms for infected patients. She wore a fluid-resistant surgical mask and PPE when she did. She would wear such a mask for periods up to 1.5 hours. She did not raise any issues with this.

53. The Claimant asserted that the Respondent's alleged discriminatory treatment of her exacerbated her asthma. In the absence of any medical evidence as to this, the Tribunal did not find the Respondent's actions caused any exacerbation of her asthma.

54. On all the evidence, the Tribunal found that the Claimant has had asthma since childhood.

55. However, it did not accept the Claimant's evidence about the effects that her asthma had had on her ability to carry out normal day to day activities. It did not accept that the asthma interfered with her ability to sing – she is able to sing and dance at the same time and in live performances. The Tribunal did not accept that, due to her asthma, wearing a surgical mask made her short of breath, sweaty and dizzy. She had worn a mask for at least a year before the covid pandemic and had undertaken cleaning activities for up to 1.5 hours daily while wearing a mask, without any problems. The Tribunal therefore did not find that wearing a mask had a more than minor effect on the Claimant's ability to carry out cleaning work. It observed that wearing a mask for very long periods of time, while undertaking physical work, in the Tribunal's experience, would make anyone feel somewhat restricted in terms of their breathing.

56. The Tribunal did not accept that the Claimant was unable to undertake normal household tasks from time to time because of her asthma. She undertook a cleaning job for the Respondent on a full time basis for a year without any restriction on her activities. In addition, at the start of her employment, she told the Respondent that she did not have a condition or disability which might impact on her ability to carry out her cleaning tasks.

57. The Claimant contradicted her own evidence in her disability impact statement about triggers for her asthma. The Tribunal did not find that she was a reliable witness with regard to her asthma symptoms. Her lack of reliability, compounded by the absence of her GP records, meant that the Tribunal did not accept that she had taken asthma medication with any particular frequency before and during her employment with the Respondent. The lack of medical records also meant that the Tribunal did not accept that the Claimant's alleged fainting in 2019 was caused by asthma, or that any treatment in Italy in 2020 was necessitated by asthma. An isolated fainting event could be caused by any number of conditions. Further, one episode of inflammation of lungs could be caused by a transient or isolated respiratory illness.

58. Furthermore, the Claimant's own GP was not an independent medical expert. The GP said that the Claimant did not tolerate a face mask because of her asthma, when there was ample evidence before the Tribunal that she had, in fact, tolerated well a face mask before the dispute in this case. The Tribunal was therefore unable to accept the GP's account of the Claimant's asthma and symptoms.

59. The Tribunal noted that the Occupational Health adviser said that the Claimant was likely to be covered by the Equality Act 2010. However, the Occupational Health adviser appeared to have made this assessment entirely on the basis of the Claimant's own account of her asthma condition. It was therefore not an independent opinion.

60. In the absence of GP records, the Tribunal did not find that the Claimant had been prescribed asthma medication on any regular basis before 2023.

The Claimant's English Language Skills

61. There was a dispute of fact about the Claimant's ability to understand both spoken and written English. It is a requirement of the Respondent that, in order to be employed as a Housekeeper, the applicant completes a test of their English language skills, a "Written Communication Assessment" p95. This written test includes simple questions such as, "What country did you last visit outside the UK?" "What number comes after the number 12?" It also includes picture questions, such as a picture of an apple, with the questions "What is this" and "What do you do with it?" The candidate must answer in written English.

62. The written assessment had been completed fully and correctly in respect of the Claimant's employment. The Claimant was asked about it in oral evidence. On the first day of her evidence, she said that a person had accompanied her to the test and had completed the test for her. She was asked who the person was and she answered that the person was no longer in the UK. On the second day of her evidence, the Claimant changed her evidence - and said that Kwame Boahen had completed the English test for her.

63. She had earlier said that Mr Boahen had completed all her application forms for her.

64. Mr Boahen denied that he had completed the English Assessment, although he agreed that he had filled out the Claimant's name and prospective role at the top of the assessment. He denied that the handwriting on the rest of the English Assessment was his. Mr Boahen said that he had spoken to the Claimant in English during her interview process and that he considered that her English was excellent.

65. The Claimant agreed in evidence that the 3 day induction course at the start of her employment was delivered entirely in the English language. She told the Tribunal that other Ghanian people had attended the 3 induction course at the same time as the Claimant and that they had explained the induction to her.

66. Mr Soares told the Tribunal that the trainers on the induction course assess trainees during the whole course on whether they have interacted and demonstrated what they have learnt. Trainees are not allowed to help each other to do this. Trainees need to learn chemical dilution and colour coding for mops and cloths. Each session trains 15 employees and 1 or 2 employees fail every session. Mr Soares insisted that trainers would fail a trainee if they could not understand English.

67. Mr Amankwa contended that Mr Boahen had known the Claimant before she was appointed. He suggested that this would explain why Mr Boahen had assisted her in the English Assessment. He relied on Mr Boahen's statement in saying this. However, the Tribunal noted that Mr Boahen's statement said, "I first met Mary Frimpomaa Acheampong in 2018 when a security colleague introduced her to me saying she needed a job. I helped explain the recruitment process to Mary." His statement simply stated that the Claimant had been introduced to him as a prospective job candidate and that he had spoken to her about applying for a job. It did not suggest any friendship between them.

68. Mr Soares told the Tribunal that, in his experience, the Claimant had no problem in following infection control guidelines, including instructions on dilution of cleaning chemicals.

69. At the outset of her evidence, the Claimant gave the impression to the Tribunal that she did not understand any English because she did not react to spoken English at all, including being asked to come to a table to give evidence. However, on all the evidence, the Tribunal preferred the Respondent's evidence on the Claimant's proficiency in the English language. She demonstrated her English language communication skills to independent assessors during her 3 day induction course, which she therefore passed. She communicated in English with Mr Boahen and Mr Soares without difficulty during her employment and was able to read written instructions. The Tribunal decided that the Claimant has good functional English for the purposes of spoken and written communication in English in the workplace.

70. The Tribunal found that the Claimant did complete the English language Assessment at the start of her employment. The Tribunal noted that she completely changed her evidence about who completed the test for her. Her first explanation, that an unknown person, who had now left the country, had completed the test for her, was utterly implausible. Her second assertion, that Mr Boahen had completed it for her, was far-fetched and potentially damaging to Mr Boahen, in that she was saying he had cheated to enable her to obtain a job for which she was not competent. The Tribunal found that Mr Boahen, who did not know the Claimant before she sought a job, had no possible motivation for wrongly assisting her in this way. It accepted Mr Boahen's denial that he had done so. He was a straightforward and honest witness.

71. The Tribunal found that the Claimant lied twice and at length during her evidence about not having completed the English language assessment at the start of her employment. This had implications for her credibility, particularly in relation to her evidence about her ability to communicate with the Respondent when she was not at work during 2020 – 2021.

The Start of the Covid19 Pandemic

72. In March 2020 a Covid19 pandemic was declared and Public Health England issued guidance under which all healthcare staff were required to wear masks.

73. On 2 April 2020 the Chelsea and Westminster Hospital NHS Foundation Trust introduced similar guidance, which required masks to be worn in all areas except the 'blue' area, which comprised public spaces such as corridors, offices and restaurants, p393. The blue areas was also known as the 'clean' area. A fluid-resistant surgical mask was required to be worn in 'green' areas.

74. All clinical areas, which included wards, were on the green pathway.

75. Employees wearing fluid-resistant surgical masks were able to go to rest rooms on a regular basis to have a drink of water, or a snack, and to take off their masks when doing so.

76. A 'filtering face piece' - a class 3, FFP3 mask – was required to be worn in 'red' and 'critical care red' (aerosol-generating procedure) areas, p393. The FFP3 masks were tighter and more uncomfortable than fluid-resistance surgical masks and needed an individual fitting test to ensure a perfect fit. All the Respondent's staff needed to have an FFP3 mask fit test.

77. In about early April 2020 the Claimant had a mask fit test for the FFP3-type mask which she failed.

78. The Claimant told the Tribunal that Chelsea & Westminster Hospital PPE Team advised her that, because she had asthma, she would have difficulties wearing the FFP3 facemask.

79. Kawsu Manjang, the Claimant's supervisor, was in Gambia in March 2020 and was unable to return to the UK because of the pandemic. Mariana Leim undertook some his supervisory duties in relation to the Claimant, instead.

80. The Claimant told the Tribunal that, when she reported to Ms Leim that the PPE Team had advised her that she would have difficulties wearing the FFP3 mask, Ms Leim did not appear to be pleased. The Claimant gave evidence that, thereafter, "She started to be critical of me without cause. She will without proper discussion just abruptly ask me to go and work in another area even when I hadn't completed the job I was doing. One day during work, I was working with a trolley. Without saying anything to me and appearing angry just grabbed the trolley and went away. I had nothing to work with. I was disturbed by the experience."

81. The Claimant did not give dates or times for these events. In her witness statement, she referred to her grievance hearing, wherein an account was given of Ms Leim taking a trolley, as corroboration for her evidence. In fact, the grievance hearing notes simply said of Ms Leim, "She took the trolley and went." There was no mention, then, of Ms Leim being angry, or grabbing the trolley.

82. None of these allegations were put to Ms Leim in cross examination.

83. The Tribunal did not accept the Claimant's evidence in many respects about Ms Leim's other conduct towards her in March and April 2020. The Tribunal refers to its findings below.

84. On the balance of probabilities, the Tribunal did not accept the Claimant's evidence about Ms Leim being abrupt with her, or critical of her, or about Ms Leim grabbing a trolley from her.

85. The Claimant normally worked on a ward called David Evans ward. It was a post-surgical ward and was designated on the green pathway, which required a fluid resistant surgical mask.

86. On about 6 or 7 April 2020, the Claimant was told to work in another ward.

87. There was a dispute about whether David Evans ward was closed that day.

88. The Claimant told the Tribunal that, on that day, 6 or 7 April 2020, the Claimant was working on David Evans ward and experienced headaches and felt sweaty, faint and distressed while wearing an ordinary surgical face mask. She went to a corridor and took the mask off her nose and mouth to catch some fresh air. At that point, she said that Ms Leim shouted at her that someone had reported seeing her taking her mask off completely. The Claimant told the Tribunal that she explained to Ms Leim that she had asthma and was trying to get some air because she had been wearing the mask

for too long. The Claimant told the Tribunal that Ms Leim sent her home that day. There was no written communication from Ms Leim to the Claimant about this.

89. The Claimant also told the Tribunal that, on the following day, 7 April 2020, she attended work and first spoke to Mr Boahen, Operations Manager, and then to Ms Leim, Ewerton Soares and another supervisor in a corridor. Mr Soares told the Claimant to obtain a certificate of exemption from her General Practitioner (GP) and to get a Fit Note before being allowed back to work.

90. A timeline prepared by the Respondents at p310 included the following entry, " Date 07/04/2020 - 24/04/2020 Sent home by Mariana due to COVID and not wearing a face mask, sick note received asthma…".

91. On 8 April 2020 Simon Ferrier, Facilities Manager, sent an email to other managers saying that red and green zones had been established in all areas and that there were 101 patients who had tested positive for covid in the hospital. He said, "we have confirmed or suspected Covid in almost every ward onsite. If the ward is not a cohort ward then the patients will be in low numbers / in side rooms, p389. He also listed "closed wards" which included David Evans ward.

92. Ms Leim agreed that she had told the Claimant to wear her fluid-resistant surgical face mask properly on about 7 April 2020 because she had received a complaint through the help desk that a cleaner was not wearing a mask properly. She found the Claimant and informed her that a complaint had been made and that she needed to wear a mask properly.

93. Ms Leim further told the Tribunal that, on 7 April 2020, David Evans ward was closed and Ms Leim had allocated the Claimant to a ward which may have had covid patients on it. That ward was also in the green area, which required a surgical fluid-resistant face mask.

94. Ms Leim gave evidence that the Claimant had asked not to work there, saying, "Please Madam, I have small kids". When Ms Leim had explained to her that many employees had young children, including Ms Leim, the Claimant had also said that she had asthma.

95. Ms Leim told the Tribunal, "I said that, if that was the case, she needed a note from her doctor. If Mary couldn't work and had to go home because she was unable to wear a mask, we would need a note from her doctor, or she would be regarded as absent from work without leave." When the Claimant had continued to ask to be deployed to another area, Ms Leim had told her, "'There are two options. Either you go and cover that ward, or you go home'. Ms Leim denied shouting. Ms Leim also told the Tribunal that Bamba Kongo had also said to the Claimant, " If you don't want to work, go home."

96. Mr Soares told the Tribunal that, early on 7 April 2020 Bamba Kogo, General Manager, and he had seen the Claimant and Mariana Leim as they were passing by. The Claimant had her head down on her arm over a trolley and Ms Leim told them that the Claimant did not want to work near suspected Covid-19 patients as she did not want to put her family at risk, and that she had complained about wearing a mask. Mr Kogo said the safest option for the Claimant was to go home.

97. Mr Soares did not recall Ms Leim shouting at the Claimant.

98. The Claimant went home that day.

99. The Tribunal preferred the Respondent's evidence. On about 6 - 7 April 2020 David Evans Ward was closed – as confirmed by Mr Ferrier's email, p389-390. The Tribunal rejected the Claimant's assertion that David Evans ward was still open. Ms Leim allocated the Claimant to another ward in the green area. This had possible covid patients, either in a cohort, or in side rooms, as did almost all wards in the hospital by that point, p389. It was not, however, in the red zone which required FFP3 mask.

100. The Tribunal found that Ms Leim did not shout at the Claimant; she instructed her to wear a fluid-resistant surgical mask properly and allocated her to a different ward because David Evans was closed.

101. The Claimant, who had been wearing a fluid-resistant surgical mask on David Evans ward, objected to being moved to the new ward. The Tribunal found that she did so because she was worried about being exposed to Covid and said to Ms Leim, "Please Madam I have small children." She had previously worn a fluid-resistant surgical mask, so the significant change, which led to her not wishing to continue to work, was her being informed of possible covid patients in the ward to which she had been allocated.

102. The Tribunal comments, from its workplace experience, that her fear of exposure to covid was entirely understandable – the covid pandemic was raging, in its early stages, with many deaths reported, and there were no vaccines available. Most people in the country were working from home to avoid exposure to the virus.

103. The Claimant then told Mr Leim she had asthma. Ms Leim gave her a choice whether to work or to go home. The Claimant went home. When she returned to work the next day, Mr Soares and Mr Kogo confirmed that she could either work on a ward or go home and get a note from her doctor. Again, the Claimant chose to go home.

104. The Claimant's GP provided her with a Fit Note dated 7 April 2020, for the period 7 – 14 April 2020, p322. It said that the Claimant had the following condition, "asthma, not tolerating work-provided face mask." The note said that the Claimant may be fit to work taking account of amended duties and workplace adaptations. The GP commented, "consideration of other duties / masks." P322.

105. The note also said, "You could go back to work with the support of your employer. Sometimes your employer cannot give you the support you need and if this happens your employer will treat this form as though you are 'not fit for work'."

106. Ms Leim confirmed that the Respondent had received the Fit Note a few days later.

107. On 11 May 2020 the Claimant sent Mr Kwame Boahen a further Fit Note, dated 11 May 2020 by her GP and covering the period 24 April – 25 May 2020, p323. Again, the Fit Note said that the Claimant had the condition, "asthma, not tolerating work-provided face mask" and said that the Claimant may be fit for work with adjustments

of amended duties and workplace adjustments. The GP commented, “consideration for other duties”. Mr Boahen sent the Fit Note to Ewerton Soares.

108. The Claimant continued not to attend work. The Respondent stopped paying her on 24 April 2020.

109. The Claimant did not provide another Fit Note after the one which expired on 25 May 2020. The Tribunal accepted Ms Leim’s evidence that she telephoned the Claimant in May 2020, but the Claimant did not answer the telephone, p160. The Claimant disputed that the Respondent’s witnesses had telephoned her or sent her messages during 2020, but the Tribunal noted that a WhatsApp message sent to her in November 2020 was delivered and read.

110. Kawsu Manjang, the Claimant’s supervisor, told the Tribunal that he recalled receiving an unexpected telephone call from the Claimant between March and July 2020, who told him that she was asthmatic that she had been sent home because she refused to wear a mask at work. Mr Manjang told the Tribunal that he had informed the Claimant that he was on holiday, and that she needed to speak to the management on site.

111. The Claimant told the Tribunal that, on 24 July 2020, Mr Manjang telephoned the Claimant and told her to decide whether to come back to work and use the same face masks, or resign.

112. In oral evidence, Mr Manjang agreed that he had probably spoken to the Claimant on 24 July 2020, but he denied that had told the Claimant that she would need to choose between coming back to work and resigning. He said, “It was a discussion about checking on her welfare or any update on her coming back.”

113. The Claimant’s evidence was most unsatisfactory regarding this telephone call. She was cross examined about how she knew what Mr Manjang had said if, as she asserted, she could not understand spoken English. She then told the Tribunal that she had put the conversation on speaker and that her husband had listened to the call and told her what Mr Manjang said. She had not mentioned her husband listening to the call in her witness statement. Her husband did not given evidence to the Tribunal.

114. In evidence, Mr Manjang presented as a mild-mannered and sympathetic manager. The Tribunal accepted that he did not give the Claimant an ultimatum about resigning or coming back to work when he spoke to her in July 2020, but enquired about her and whether she was coming back to work.

Claimant’s 27 July 2020 letter

115. The Claimant’s union representative, Mr Kwame Amankwa, wrote on her behalf to Mr Soares on 27 July 2020. He said that the Claimant had been sent home without a proper explanation, or letter, on about 6 April 2020, after she had said that she felt she was suffocating in her mask. He said, “She was not referred to the company's Occupational Health Department as stipulated In your policy document.” The letter said that the Claimant had provided a GP Fit note on 7 April, recommending amendment of the Claimant’s duties and other adaptations. It said that the recommendations were never considered and that the Claimant remained, “off duty

imposed by her manager." P136. The letter said that there had been no correspondence from the Respondent saying the Claimant had been "laid off".

116. Mr Soares told the Tribunal that, when he received Mr Amankwa's letter, he called Ms Leim, who confirmed she had not recently been able to get in touch with the Claimant and had not heard from her. Mr Soares told the Tribunal that he then called Mr Amankwa on the mobile number provided on the letter and told him that the Claimant had been absent without leave, to which Mr Amankwa responded that the Claimant had not been paid sick pay. On 30 July 2020 Mr Soares forwarded the Claimant's sick notes to Giulia Gensini who then processed them p420-421, so that on 13 August 2020 the Claimant received SSP for the period of 7 April to 25 May 2020, covered by the two sick notes p343.

117. The Tribunal accepted Mr Soares' evidence that he telephoned Mr Amankwa in late July 2020. It was notable that Mr Soares did rectify the Claimant's sick pay in July 2020, which corroborated his account.

118. Mr Soares told the Tribunal that, when the 2020 lockdown commenced and covid19 patients were at their highest in April – May 2020, the Respondent had a severe shortage of cleaners because cleaners were absent from work, sick, self-isolating, or worried about working in the hospital. Hospital office staff were working at home or, if they were clinically trained, had returned to the wards. As a result, the hospital agreed that cleaning was not needed in offices, so that all available cleaners could be allocated to cleaning wards and other hospital areas. Ms Leim corroborated that evidence.

119. They said, therefore, that there was no cleaning work to be done, other than in the hospital itself.

120. Ms Soares told the Tribunal, however, that, by July 2020, the numbers of covid patients had dropped and offices were being cleaned again. However, to avoid being within 2 metres of other people, so that she did not need to wear a mask, the Claimant would have needed to clean in the evening, after working hours.

121. Mr Soares told the Tribunal that he informed Mr Amankwa that, if an employee declares a medical condition, the Respondent needs medical evidence from their doctor. The Respondent follows their doctor's recommendation and if that cannot be accommodated, then the employee is referred to OH for a second opinion. Mr Soares said that he told Mr Amankwa that the Respondent could possibly redeploy the Claimant in the office areas, but she would have to work later in the evening. Mr Soares said that he emphasised that the Respondent did want the Claimant back; it was still short of staff, but that Mr Amankwa did not know whether working in the evening would suit the Claimant and said he would get back to Mr Soares the following day. Mr Soares gave evidence that Mr Amankwa did not get back to Mr Soares.

122. Mr Soares told the Tribunal that he did not respond to Mr Amankwa's letter in writing because he had spoken with Mr Amankwa and was waiting for his reply. Further, he said that, with all the pressures of the pandemic he had many pressing matters and emergencies to deal with.

123. Mr Amankwa did not give evidence to the Tribunal. The Claimant confirmed, in evidence, that Mr Amankwa had told her he had spoken to Mr Soares. She did not recall whether Mr Amankwa had mentioned the possibility of her working in the evening.

124. The Tribunal accepted Mr Soares' evidence that he spoke to the Claimant's union representative in July 2020 and explained that the only possibility for her coming back to work without wearing a mask was to work in the evening, cleaning offices. He asked whether the Claimant would agree to this, but never received a response.

125. The Claimant continued to be absent from work.

October – December 2020

126. In October 2020 Ms Leim called the Claimant on her mobile number to discuss the situation. The Claimant did not answer the phone.

127. On 4 November 2020 Mr Soares called the Claimant on her mobile telephone. She answered, but said she could not understand him speaking in English.

128. . On 4 November 2020 Mr Soares sent the Claimant a WhatsApp saying, "I have tried to make contact with you again today and your answer to me over the phone was that you don't speak English well and that you do not understand me. Kawsu and Mariana, your direct supervisors have spoken to you before (May and July) to ask for an update. If are off work because according to you and the doctors note you provide, you are not able to wear mask. If I don't hear an update from you by the end of today with regards to your current situation and what is stopping you from returning to work, I will follow the unauthorised absence process." P187.

129. The Respondent produced 2 letters dated 19 November 2020, p139, and 1 December 2020, p140 from Mr Soares to the Claimant. The Claimant said that she did not remember receiving these.

130. Mr Soares' 19 November letter said that the Claimant had not attended work since 26 May 2020, following the expiry of her doctor's medical certificate. In the letter, Mr Soares said, "… you have not made any contact to notify ISS of your absence or the reason for it after your medical certificate ended." He also stated that he had telephoned and texted the Claimant on 4 November, but she had said that she did not understand him, "when I clearly asked you for an update as to whether you are either coming back to work, changing your shift for low risk areas or if you had any further medical certificates." Mr Soares said that the Claimant had not replied since and was absent from work without authorisation. He asked the Claimant to contact hm by 23 November 2020 with an explanation for her absence. He said, "Should you fall to do so your unauthorised absence and your failure to comply with a reasonable management instruction will be dealt with via the Company's disciplinary procedure as serious misconduct."

131. The 1 December 2020 letter invited the Claimant to a formal investigation meeting on 3 December 2020, to consider, "your unauthorised absence from work since 4th November 2020, your failure to comply with absence reporting procedures

and your failure to comply with a reasonable management Instruction, namely contacting Ewerton Soares as requested In his letter dated 19th November 2020."

132. There was a dispute of fact about whether the Claimant received the letters. She said that she did not remember doing so. Mr Soares told the Tribunal that the hospital has a post room in the basement. When a manager is posting a letter they go to the post room and ask for 2 letters to be sent – one recorded delivery and one first class. The post room puts a recorded delivery sticker on the front of the envelope and hand peel another part of the sticker to stick on the letter, to prove they have sent it recorded delivery. If the recipient does not sign for the recorded delivery letter, then the first class letter will be posted through the door in any event, so there are 2 ways of receiving the letter. If the recorded delivery letter is not signed for, it will be returned to the post room. Mr Soares said that the letters were never returned undelivered.

133. Mr Soares pointed out that the recorded delivery stickers were on the front of the 2 letters in the Tribunal bundle.

134. The Claimant's representative produced a proof of posting for Special Delivery and said that the Respondent had not produced the same proof that these letters were delivered. The Tribunal noted that this was a different method of delivery so it was not relevant to the letters in dispute.

135. The Tribunal found that the 2 letters were delivered to the Claimant. They were both posted in 2 different ways and were not returned undelivered. It was beyond the bounds of credibility that all 4 letters had gone astray.

136. The Respondent therefore wrote to the Claimant on 19 November 2020 and 1 December 2020 saying that the Claimant was absent in breach of absence reporting procedures and asking her to contact the Respondent.

137. The Claimant did not respond to the letters. Instead, on 7 December 2020 she emailed the Respondent a letter of resignation, p141-144. In it, she said that she had resigned for a number of reasons, some of which had been set out in a letter to Mr Soares on 15 June 2020 from her trade union representative, to which she had received no response. She said she was resigning because of "1. The refusal to pay me my due salary since May 2020. 2. Unfounded allegations of poor performance 3. Failure to make reasonable adjustments for a disability 4. Unfair or unreasonable treatment 5. Working or being forced to work in breach of health and safety laws." P141.

138. Ms Leim received the resignation letter and forwarded it to Manjit Garlick, Mr Soares and Mr Bamba, saying the allegations were not true, p143 - 144. Manjit Garlick emailed Mr Soares asking whether the Claimant's grievance had been heard in June 2020 and what had been the outcome, p143. Mr Soares replied, on 8 December 2020, "She did not come on site as the original issue was that according to her, she could not wear any mask at all so I discussed all the details with her union rep at the time." P142.

139. Nothing further appeared to have been done on either side following the Claimant's purported resignation letter until Ms Leim emailed a Juhi Mehta on 25 September 2021, attaching the letters sent to the Claimant in 2020 and asking to discuss her absence, p149. Ms Leim confirmed that the Claimant was still absent from work. Ms Mehta replied saying that she was baffled as to why the Absent without Leave ("AWOL") process had stopped in December 2020. She advised that letters pursuing an AWOL process, up to and including a dismissal letter, be sent in sequence to the Claimant, p146.

140. On 28 September 2021 Ms Leim wrote to the Claimant, saying that the Claimant was AWOL and asking her to contact Ms Leim by 1 October 2021, giving an explanation for her absence, p153.

141. The Claimant's husband spoke to Ms Leim on 1 October 2021 and explained that the Claimant was in hospital, p146.

142. On 8 October 2021 Ms Leim invited the Claimant to a formal investigation meeting to be held on 12 October 2021, "to consider your unauthorised absence from work since 26th May 2020, your failure to comply with absence reporting procedures and your failure to comply with a reasonable management instruction, namely contacting me as requested in my letter dated 27th September 2021."

143. The Claimant then informed Mr Manjang and Mr Boahen that she was self-isolating.

144. On 12 October 2021 Ms Leim wrote again to the Claimant, saying the Claimant had not provided evidence of her self-isolation and that Ms Leim did not accept that she was. She invited the Claimant to a disciplinary hearing on 19 October 2021 to consider the Claimant's alleged absence without authorisation and failure to follow reasonable management instructions, p155. She said that these were matters of gross misconduct and that the Claimant could be dismissed.

145. Ms Leim therefore sent 3 letters to the Claimant, in sequence, relating to her absence, asking her for an explanation, and warning her about the consequences.

Events Leading Up to the Claimant's Return to Work – Withdrawal of Resignation

146. On 13 October 2021, Mr Amankwa, the Claimant's union representative, wrote to Ms Leim on the Claimant's behalf. He said that he had been dealing with matters on behalf of the Claimant and had written to Mr Soares on a couple of occasions, most recently on 20 December 2020, p159. He referred to Ms Leim's recent letters to the Claimant and said, "That is unfortunate because in all the letters of concern written on behalf of Mary, the question as to when management will get her assessed by your occupational health with the view to getting her back to work has been raised. I am afraid the management response on each occasion has been poor or nil." He said that the Respondent had failed to pay the Claimant her wages and sick pay and that Mr Amankwa had tried to contact Ms Leim unsuccessfully.

147. Mr Soares set out his version of events in an email on 17 November 2021 at 16.58 p170 – 171. He said, "Mary's ward was mainly closed around the time of this incident and when we told her that she would be redeployed to a different area, she

started to mention that she could not go to a different area because of the mask but she had no issue wearing a mask before when her ward was half empty and there was no known covid patients. She refused to wear a mask and during that time, the guidance from the Trust was that all staff had to wear a mask unless they had a medical reason but if they had a medical reason, they would not be able to work in a ward … I also discussed with the union rep that I was happy for Mary to return to work and be redeployed to a low risk areas such as pub(l)ic areas or offices and then we can wait for the medical report, to which he said that he would speak to her and get back to me. I did not get a call back but instead, they have provide a resignation letter She also claimed to have a medical condition but has never sent a letter confirming she is at risk and should have been put on furlough."

148. On 30 November 2021 the Claimant attended an investigation meeting, p179. In the meeting, Mark Leith, the Investigating Officer, told the Claimant, "…there are no areas within the hospital where you do not need to wear a mask. There were public areas or offices, where it is not as serious as in the wards, but you would need to wear the mask." He also said, "… our experience is that employees need to provide GP fit notes and GP medical report and then we visit this and then look into the recommendations from the GP and if this is something that we cannot do for whatever reason, we refer to OH for a second opinion. This is how ISS policies work and naturally will be different to NHS and how they work." The Claimant confirmed in the meeting that she was going to receive her second vaccination on 10 December 2021.

149. On 7 December 2021 Mr Leith sent the Claimant an investigation outcome letter, p176. He said that it was mandatory to wear a mask in all hospital settings. He also said that the Claimant had withdrawn her resignation and wanted to return to work. He invited the Claimant to provide further sick notes and said that the Respondent would consider providing backdated pay in respect of such notes. He said that it had been agreed that the Claimant would return to work.

150. The Claimant provided a further Fit Note, dated 7 December 2021, for the period 25 May 2020 to 14 August 2020, p325. The Respondent then paid her sick pay for the period 25 May to 14 August 2020.

Adjustments

151. On 20 December 2021 the Claimant attended a mask fitting, p223.

152. On 4 January 2022 the Claimant's union representative emailed Juhi Mehta and Mr Boahen saying, amongst other things,"… the GP has indicated that there will be no more Fit notes issued for the reasons that GP's do not issue covid face masks exemption letters or certificates. You would recall from my letters to your managers previously that if they were in doubt about the employee's suitability for the wearing of faces mask to refer to your occupational health department and seek the appropriate advice. Regrettably it has taken over a year during which my member was made to sit at home for this important action to be undertaken." P233.

153. Juhi Mehta replied, challenging the union representative's assertion that the GP had said there would be no more fit notes.

154. The Tribunal noted that the GP's December 2021 letter did not say this.

155. The Claimant was referred to Occupational Health to assess whether she could return to work wearing a visor only, p287.

156. On 13 January 2022 the Claimant was seen in Occupational Health. A report was produced on 14 January 2022, p287 – 288, which advised, in relation to the Claimant, "Mary's underlying medical condition and other factors meets the higher risk category on the COVID risk matrix… she understands that the level of protection with the use of face mask is much higher than the face visor only. She informed me that she felt comfortable using one of the masks she tried at the mask fitting on 20 December 2021. She agreed to have another trial later to ensure it is suitable for her. I would advise you arrange this and if found suitable, and acceptable for use by infection control at Chelsea and Westminster Hospital, it can be a step towards getting Mary back to work. …

• Mary has long-term underlying respiratory condition.

• With appropriate safety measures in place, good managerial support in accommodating Occupational Health recommendations, Mary might be able to attempt a return to work in the next few weeks possibly from the beginning of February 2022, first two weeks to be a trial period.

• I suggest the following work adjustments for management to consider:

o Mary to avoid working in high risk known COVID area

o If a suitable mask is found for Mary and other appropriate safety measures are put in place, [a phased return to work], working only in an area deemed COVID safe by the Trust, preferably an open area where Mary would be able to observe reasonably safe distance away from patients.

o To be allowed to take short frequent breaks (10-15 minutes) every hour to take off her mask and have fresh air.

o A meeting with Mary at the end of each week to discuss her progress and ensure her condition is not impacted negatively by the work environment before she moves on to the following week.

…

• Redeployment to a suitable area known to be COVID safe may be considered if none of the above recommendations is feasible.

…

• I would not recommend the use of only the face visor at this stage."

157. On 25 January 2022 Juhi Mehta emailed the Claimant saying, "We had arranged for another face mask test based on the occupational health report obtained, as you stated you were comfortable with one of the masks. We tried to arrange this for you last week, however you mentioned to Kwame Boahen that you are not well. Since then, he has tried to contact you x2 via phone but there was no answer. Please can you advise us when you would like us to arrange this and how you are feeling?"

158. On 28 January 2022 p243 Biago Difiore, PPE Fit Test Coordinator & Tester at the Chelsea and Westminster hospital emailed Ms Leim saying, "… unfortunately, we are unable to perform the fit test on Frimpomaa Acheam Pong Mary. Me and the other fit tester Dionne tried to fit test her but both of us was not successful in performing the test because she is not cooperating with us. She is declaring that she has medical reason why she cannot perform the test." p243.

159. Ms Leim forwarded that email to Juhi Mehta and Kwame Boahen saying, "Please see below the negative feedback from Trust PPE fit testers regarding Mary. She just came to the office to let us know she is going home, when we asked her how it went, she refused to speak, with Mark and me. But she was happy to speak with Anisa (helpdesk)." P243.

160. On 31 January 2022 Juhi Mehta asked the Claimant to provide details of the mask she was comfortable with. She said, "Following the attempts that have been made to organise for a face mask fitting, I now request for you to provide me the details of what type of mask you were comfortable with as you have mentioned this to the consultant and is documented in your occupational health report, we will require you to go again to the team for a face mask fitting test, and cooperate with the team there." p251.

161. On 4 February 2022 the Claimant replied, saying she did not know the name or type of mask and would have to ask OH who gave it to her at the time. P251. On 8 February 2022, Ms Mehta replied further to the Claimant, saying that the mask fitting team could not remember which mask suited the Claimant as they fit masks for more than 50 people a day. She asked the Claimant for her availability for the following week to book another mask fitting test, p250.

162. Also on 8 February 2022, Jane Callway, Lead Nurse Infection Prevention and Control, emailed to Kwame Boahen saying, "You haven't said whether your colleague can wear a fluid resistant surgical mask. However, I do agree with OH that working in clinical areas, wearing a visor alone will not provide adequate protection." P245

163. On 23 February 2022 the Claimant raised a grievance, p261

164. On 1 March 2022 the Claimant had a further mask fitting, p265.

165. On 9 March 2022 the Claimant presented her claim, p1.

166. On 8 April 2022 Ms Boahen emailed Cathy Hill, Director of Nursing at Chelsea and Westminster Hospital, saying that he had a member of staff (the Claimant) who was asthmatic and had failed all mask fitting. He said that the Claimant could be allocated to a low risk area and asked what the Hospital's view was if she was not to wear a mask but only a visor.

167. Ms Hill replied the same day saying, " I would take the following actions.

Allocate to a non COVID area.

Wear a visor.

Ask the member of staff to obtain a mask exempt lanyard (these are available to the public).

Encourage staff member to be fully vaccinated including booster
- establishing because of asthma are they clinically vulnerable and therefore eligible for 4th dose

Follow recommendations by OH

Ensure regular risk assessments completed.

Twice weekly lateral flows." p269.

168. On 18 May 2022 the Claimant attended a grievance hearing, p273. On 26 May 2022, she received a grievance outcome p279 – 280. On 18 July 2022 the Claimant returned to work and Mr Boahen conducted a risk assessment.

Relevant Law

Discrimination

169. By *s39(2)(c)&(d) Equality Act 2010*, an employer must not discriminate against an employee by dismissing him or subjecting him to a detriment.

Disability

170. By *s6 Equality Act 2010*, a person (P) has a disability if – P has a physical or mental impairment, and The impairment has a substantial and long term adverse effect on P's ability to carry out normal day to day activities.

171. The burden of proof is on the Claimant to show that he or she satisfies this definition.

172. *Sch 1 para 12 EqA 2010* provides that, in determining whether a person has a disability, an adjudicating body (which includes an Employment Tribunal) must take into account such Guidance as it thinks is relevant. The relevant Guidance to be taken into account in this case is Guidance on Matters to be taken into Account in Determining Questions Relating to the Definition of Disability (2011), brought into effect on 1 May 2011.

173. Whether there is an impairment which has a substantial effect on normal day to day activities is to be assessed at the date of the alleged discriminatory act, *Cruickshanks v VAW Motorcrest Limited* [2002] ICR 729, EAT.

174. *Goodwin v Post Office* [1999] ICR 302 established that the words of the *s1 DDA 1995,* which reflect the words of *s6 EqA,* require the ET to look at the evidence regarding disability by reference to 4 different conditions:

a. Did the Claimant have a mental or physical impairment (the impairment condition)?

b. Did the impairment affect the Claimant's ability to carry out normal day to day activities? (the adverse effect condition)

c. Was the adverse effect substantial? (the substantial condition)

d. Was the adverse effect long term? (the long term condition).

Adverse Effect on Normal Day to Day Activities

175. Section D of the *2011 Guidance* gives guidance on adverse effects on normal day to day activities.

176. D3 states that day-to-day activities are things people do on a regular basis, examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food.., travelling by various forms of transport.

177. Normal day to day activities encompass activities both at home and activities relevant to participation in work, *Chacon Navas v Eurest Colectividades SA* [2006] IRLR 706; *Paterson v Metropolitan Police Commissioner* [2007] IRLR 763.

178. D4, D8 and D9 provide that 'normal day-to-day activities' is not intended to include activities which are normal only for a particular person, or a small group of people. In deciding whether an activity is a normal day-to-day activity, account should be taken of how far it is carried out by people on a daily or frequent basis. In this context, 'normal' should be given its ordinary, everyday meaning.

179. D22 states that an impairment may not directly **prevent** someone from carrying out one or more normal day to day activities, but it may still have a substantial adverse long term effect on how he carries out those activities, for example because of the pain or fatigue suffered.

180. The Tribunal should focus on what an individual *cannot do, or can only do with difficulty*, rather than on the things that he or she is able to do – Guidance para B9. *Goodwin v Patent Office* 1999 ICR 302, EAT stated that, even though the Claimant may be able to perform many activities, the impairment may still have a substantial adverse effect on other activities, so that the Claimant is properly to be regarded as a disabled person.

181. If an impairment would be likely to have a substantial adverse effect but for the fact that measures are being taken to treat or correct it, it is to be treated as having that effect - *para 5(1), Sch 1 EqA.* This is so even where the measures taken result in the effects of the impairment being completely under control or not at all apparent - para B13 Guidance.

Substantial

182. A substantial effect is one which is more than minor or trivial*, s 212(1) EqA 2010*. Section B of the Guidance addresses "substantial" adverse effect.

183. Account should be taken of how far a person can reasonably be expected to modify their behaviour, for example by use of a coping or avoidance strategy, to reduce

the effects of the impairment on normal day to day activities. Such a strategy might alter the effects of the impairment so that the person does not meet the definition of disability, Guidance para B7.

184. However, it would not be reasonable to expect a disabled person to give up normal day to day activities which exacerbate their symptoms, *Guidance B8.*

Long Term

185. The effect of an impairment is long term if, inter alia, it has lasted for at least 12 months, or at the relevant time, is likely to last for at least 12 months.

186. Where an impairment ceases to have an effect but that effect is likely to recur, it is to be treated as continuing, *Sch 1 para 2, EqA 2010.* "Likely" again means, "could well happen".

Burden of Proof

187. The shifting burden of proof applies to claims under the *Equality Act 2010, s136 EqA 2010.*

Discrimination Arising from Disability

188. *s 15 EqA 2010* provides:

"(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.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability".

189. Simler P in *Pnaiser v NHS England* [2016] IRLR 170*, EAT*, at [31], gave the following guidance as to the correct approach to a claim under *EqA 2010 s 15:*

'(a) 'A tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.

(b) The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a s.15 case. The "something" that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see *Nagarajan v London Regional Transport* [1999] IRLR 572. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises..

(d) The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability'. That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of s.15 of the Act (described comprehensively by Elisabeth Laing J in *Hall*), the statutory purpose which appears from the wording of s.15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

(e) For example, in *Land Registry v Houghton* UKEAT/0149/14, [2015] All ER (D) 284 (Feb) a bonus payment was refused by A because B had a warning. The warning was given for absence by a different manager. The absence arose from disability. The tribunal and HHJ Clark in the EAT had no difficulty in concluding that the statutory test was met. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.

(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

(g) There is a difference between the two stages – the “because of” stage involving A's explanation for the treatment (and conscious or unconscious reasons for it) and the “something arising in consequence” stage involving consideration of whether (as a matter of fact rather than belief) the “something” was a consequence of the disability.

(h) Moreover, the statutory language of s.15(2) makes clear (as Miss Jeram accepts) that the knowledge required is of the disability only, and does not extend to a requirement of knowledge that the “something” leading to the unfavourable treatment is a consequence of the disability. Had this been required the statute would have said so. Moreover, the effect of s.15 would be substantially restricted on Miss Jeram's construction, and there would be little or no difference between a direct disability discrimination claim under s.13 and a discrimination arising from disability claim under s.15.

(i) As Langstaff P held in *Weerasinghe*, it does not matter precisely in which order these questions are addressed. Depending on the facts, a tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of “something arising in consequence of the claimant's disability”. Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to “something” that caused the unfavourable treatment.''

190. When assessing whether the treatment in question was a proportionate means of achieving a legitimate aim, the principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the needs of the undertaking. The more serious the disparate adverse impact, the more cogent must be the justification for it: *Hardys & Hansons plc v Lax* [2005] IRLR 726 per Pill LJ at paragraphs [19]–[34], Thomas LJ at [54]–[55] and Gage LJ at [60]. It is for the employment tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own objective assessment of whether the former outweigh the latter. There is no 'range of reasonable response' test in this context: *Hardys & Hansons plc v Lax* [2005] IRLR 726, CA.

191. A PCP will not be proportionate unless it is necessary for the achievement of the objective and this will not usually be the case if there are less disadvantageous means available, *Homer* [2012] ICR 704.

Reasonable Adjustments

192. By *s39(5) EqA 2010* a duty to make adjustments applies to an employer. By *s21 EqA* a person who fails to comply with a duty on him to make adjustments in respect of a disabled person discriminates against the disabled person.

193. *s20(3) EqA 2010* provides that there is a requirement on an employer, where a provision, criterion or practice of the employer puts a disabled person at a substantial disadvantage in relation to a relevant matter, in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

194. *Para 20, Sch 8 EqA 2010* provides that an employer is not under a duty to make adjustments if the employer does not know and could not reasonably be expected to know that a disabled person has a disability and is likely to be placed at the substantial disadvantage

Wages

195. By *s13(3) ERA 1996*, ”Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion … the amount of the deficiency shall be treated … as a deduction made by the employer..”.

196. “Wages” are defined in *s27 ERA 1996* as “sum payable to the worker in connection with his employment including – (a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise. (*b*) statutory sick pay under Part XI of the Social Security Contributions and Benefits Act 1992…”.

197. In *Taylor Gordon & Co Ltd v Timmons* [2004] IRLR 180 the EAT held that an employment tribunal does not have jurisdiction to determine whether an employee is entitled to statutory sick pay. That question is to be exclusively resolved under the provisions which relate generally to statutory sick pay entitlement in the social security context. An analysis of the statutes and regulations relating to statutory sick pay shows that the appropriate authorities for the determination of disputes as to entitlement are

the officers of the Board of the Inland Revenue and, on appeal, the Commissioners. Their jurisdiction is exclusive or exhaustive. It would lead to potential inconsistency in decision-making if first instance decisions on entitlement to statutory sick pay were also to be made by employment tribunals and it is highly unlikely that the legislature envisaged that there would be two parallel schemes under which disputes as to entitlement to statutory sick pay would be resolved.

198. Accordingly, the employment tribunal's only jurisdiction in relation to SSP is in a case where the employer has admitted entitlement but is withholding all or part of it, or where the statutory authorities had determined that the statutory payment was payable. This is the case even though s27(1)(b) Employment Rights Act defines "wages" as including SSP.

Discussion and Decision

199. The Tribunal took into account all its findings of fact and the relevant law before coming to its decision.

200. It addressed, first, whether the Claimant was a disabled person at the relevant times.

201. The Claimant had a physical impairment, asthma, at all relevant times.

202. However, the Tribunal was not satisfied that the Claimant's asthma had a more than minor adverse effect on her ability to carry out normal day to day activities, at any time. The Tribunal refers to its findings of fact in paragraphs [54] – [60], above.

203. The Tribunal did not accept the Claimant's evidence regarding the effects of her asthma on her day to day activities, including singing and housework – her evidence was contradictory and unreliable. The limited medical evidence from the Claimant's GP and from OH was not of assistance. It be appeared to be based wholly on the Claimant's account of her symptoms and not on any independent assessment.

204. In the absence of contemporaneous medical evidence, the Tribunal was unable to find that the Claimant had used medication at any particular time, or on any regular basis, before June 2022. It therefore did not accept that the Claimant used medication before June 2022, or that her asthma would have been more severe if she had not.

205. The Tribunal did not accept that the Claimant had had acute exacerbations of her asthma at any time, or that these were likely to recur. There was no medical evidence to justify such a conclusion.

206. The only adverse effect of the Claimant's asthma, for which there was reliable evidence, was that she could not wear an FFP3 mask. However, the Tribunal decided that wearing an FFP3 mask was not a normal day to day activity. It was a specialist activity within the context of a high infection risk environment, in a hospital. The Tribunal referred to the Guidance paragraphs D4, D8 and D9.

207. Even in a hospital setting, and even in the circumstances of covid, where mask wearing did become a normal day to day activity, the normal requirement for mask wearing was for a fluid-resistant surgical mask to be worn at work.

208. The Tribunal did not accept that the Claimant's asthma had a more than minor adverse effect on her ability to wear such a fluid-resistant surgical mask at work. In reality, the Claimant was able to carry out physical cleaning tasks for 30-45 minutes at a time, while wearing a fluid-resistant surgical mask. She had done this daily, for up to 1.5 hours at a time. An inability to do physical work for more than 1.5 hours while wearing a mask was not a substantial adverse effect on normal day to day activities. Most people would find working for more than 1.5 hours in a mask to be uncomfortable and would feel they needed a break. The uncontested evidence of the Respondent was that employees were able to take regular breaks in rest rooms and remove masks to have a drink of water or something to eat. Insofar as the Claimant felt uncomfortable wearing a mask for a very long period of time, she could reasonably be expected to take a regular break from mask wearing, in a rest room.

209. On all the evidence, therefore, the Tribunal concluded that the Claimant was not a disabled person by reason of her asthma.

210. As a result, her disability discrimination claims failed.

211. The Claimant's disability claims failed because she was not a disabled person. The Tribunal had, however, made findings of fact relevant to the whole of the Claimant's claims, because it made its decision on disability after having heard all the evidence. The Tribunal therefore made findings on that evidence where it was appropriate to do so, in the event that its decision on the issue of disability was wrong

Discrimination arising from disability (Equality Act 2010 section 15)

212. *Did the following things arise in consequence of the claimant's disability:*

213. *The claimant not wearing/not being able to wear a face mask?*

214. The Tribunal found that the Claimant could and did wear a fluid- resistant surgical face mask at all times until 7 April 2020. She was able to wear such a mask, including when she was working, cleaning infection side rooms. The Tribunal did not accept the GP's Fit Notes and letters were accurate in their assertions regarding the Claimant's inability to tolerate a fluid resistant surgical face mask. They were apparently written without knowledge of the Claimant's previous ability to wear such masks.

215. In fact, the Tribunal found that the Claimant objected to working, not because she could not wear a mask, but because she did not wish to work on wards where there might be covid patients.

216. The Claimant not wearing a mask did not arise from the Claimant's asthma.

The claimant being absent from work?

217. The Tribunal found that the Claimant did not want to continue working on 7 April 2020 because she was understandably fearful about working in an environment where there was covid infection. At that point, she said she was unable to wear a mask. Her unwillingness to work and to wear a mask were entirely due to her fear of covid and did not arise from her asthma.

The claimant being unable to undertake a face mask fit test?

218. The Claimant did undertake an FFP3 mask test in March 2020. She failed it because of her asthma. She never passed an FFP3 mask test. That arose from her asthma.

219. A tester in January 2022 considered that the Claimant was not cooperating with a mask test. The Claimant said that she had a medical condition. It was not clear what masks were being tested that day. On the balance of probabilities, on the wording of the email from the tester, the Tribunal found that the Claimant was not cooperating with the test, rather than she was unable to undertake the test because of asthma.

Mask

220. *Because she did not wear a mask, did the respondent treat the claimant unfavorably by*

a. Ms. Leim shouting at her on 7 April 2020?

221. On the facts, Ms Leim did not shout at the Claimant on 7 April 2020. She told her that there had been a complaint about the Claimant not wearing a mask properly.

a. Discharging her home on 7 April 2020?

222. The Claimant went home because she would not work on the ward to which she had been allocated and would not wear a mask. Her unwillingness to work and to wear a mask were entirely due to her fear of covid and did not arise from her asthma

223. *Forcing her to decide between wearing a mask or resigning on 24 July 2020?*

224. The Tribunal found that Mr Manjang did not give the Claimant an ultimatum about resigning or coming back to work when he spoke to her in July 2020. He merely enquired about her and whether she was coming back to work.

Absence

225. *Because of her absence, did the respondent treat the claimant unfavorably by:*

a. Withholding her wages?

b. Failing to observe the requirement to maintain regular contact?

c. Threaten to discipline her?

d. Label her as Absence Without Leave?

e. Force her to see her GP to get a COVID exemption letter?

226. All these allegations fall away because the Claimant's absence did not arise from her asthma.

Mask fit test

227. *Because she was unable to undertake a face mask fit test, did the respondent treat the claimant unfavorably by:*

228. *Ms Leim shouting, harassing and bullying her on 20 March 2020, 06, 07 April 2020, 28 January and 31 January 2022?*

229. On the Tribunal's findings of facts, Ms Leim did not shout at the Claimant or harass or bully the Claimant on any of those dates. She did not shout at her on 6 or 7 April 2020.

230. On the facts, Ms Leim did not shout at bully or harass the Claimant on 28 or 31 January 2022. The only thing Ms Leim did on 28 January 2022 was forward an email from a third party, Mr Difiore, p243, in which Mr DiFiore said that the Claimant had not cooperated with the mask testers. Ms Leim accurately described this as negative feedback about the Claimant. Ms Leim's accurate words could not amount to unfavourable treatment.

231. *Ms Leim and Juhi Mehta making detrimental statements in emails of 28 January and 31 January 2022?*

232. Only Juhi Mehta made any comment about the Claimant on 31 January. Juhi Mehta asked the Claimant to provide details of the mask she was comfortable with "as you have mentioned this to the consultant and is documented in your occupational health report, we will require you to go again to the team for a face mask fitting test, and cooperate with the team there."

233. The Claimant complained that Juhi Mehta's email of 31 January 2022 was "too authoritative and unreasonable and not in anybody's interest" p249.

234. The Tribunal decided that this email was not unfavourable to the Claimant. The purpose of the email was to identify a mask that was more comfortable for the Claimant to wear, and to ensure that she cooperated with the testers, to enable her to return to work. The email was not "unreasonable" or "too authoritative", but reflected the report by a third party, unconnected with the Respondent, that the Claimant had not cooperated with a previous test. Again, Juhi Mehta did no more than reflect the view of the third party.

Reasonable Adjustments (Equality Act 2010 sections 20 &

235. *Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?*

236. Ms Leim knew the Claimant had asthma from late March 2020. The Respondent had knowledge of her asthma from this time.

237. *A "PCP" is a provision, criterion or practice. Did the respondent have the following PCPs:*

238. *Requiring the claimant to wear a face mask at work?*

239. The Claimant was required to wear a fluid-resistant surgical mask at work.

240. *Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability. The Claimant relies on the following alleged substantial disadvantages:*

2.3.1. Struggling to breath whilst not wearing a mask.

2.3.2. In consequence of struggling to breath, being unable to work

2.3.3. In consequence of being unable to work, being sent home.

241. *The Tribunal decided that the duty to make adjustments did not arise because the Claimant did not struggle to breathe while wearing an ordinary fluid-resistant surgical face mask. Nor was she unable to work while wearing such a mask.*

242. *Adjustments*

243. *What steps could have been taken to avoid the disadvantage? The claimant suggests:*

244. *In April 2020:*

a. Allocating the Claimant to a non-Covid area.

245. Even if the duty to make adjustments did arise, the Tribunal found that this was not a reasonable adjustment at any time.

246. The Tribunal accepted the Respondent's evidence that, in April - July 2020, there were no non-covid areas where the Claimant could work without a face mask. The office areas were not being cleaned and all wards had potential covid patients, so required a surgical fluid-resistant face mask. The Respondent was short of cleaning staff, so staff needed to work on the wards. The Claimant could not be allocated to a non-covid area at this time.

247. When the Claimant was offered evening office cleaning in July 2020, she did not respond. Allocating the Claimant to non-covid office cleaning in the evening was not a reasonable adjustment if the Claimant did not agree to it.

248. When the Claimant returned to work in November 2021, there were no areas of the hospital where a mask was not required, p176, 179.

249. On 13 January 2022 Occupational Health advised that the Claimant needed to wear a mask and that a visor alone would not be sufficient, even in low risk covid areas, p287- 288.

250. On 8 February 2022, Jane Callway, Lead Nurse Infection Prevention and Control at the Hospital, emailed to Kwame Boahen saying, "You haven't said whether your colleague can wear a fluid resistant surgical mask. However, I do agree with OH that working in clinical areas, wearing a visor alone will not provide adequate protection." P245.

251. The Claimant presented her claim on 1 March 2022.

252. It was not until 8 April 2022, after the Claimant presented her claim, that there was any advice from a suitably qualified professional that she could safely work wearing a visor, rather than a mask, in low risk covid area, p269.

253. Accordingly, at all times before she presented her claim, there were either no non-covid areas available, or the Claimant did not agree to work in other areas in the evening, or expert advice was that the Claimant could not safely work without a mask, even in a low risk covid area. This adjustment was therefore not practicable or safe for the Claimant or for others around her.

b. Providing the Claimant with a 'mask exempt' lanyard.

254. As a matter of common sense, a mask exempt lanyard would not protect either the Claimant, or others, from the risk of covid transmission. The lanyard would simply advise others that the Claimant was exempt from wearing a mask. On the facts, Hospital rules and relevant OH and infection control experts required the Claimant to wear a mask until April 2022. She was not exempt from wearing a mask until then. She could therefore not have worn a lanyard, saying she was exempt, until then. A mask exempt lanyard was not advised as appropriate at any time before the Claimant presented her claim. It was never identified, on its own, as a reasonable adjustment by any relevant expert. This was not a reasonable adjustment.

C. Providing the Claimant with a different type of mask.

255. The Claimant alleged that she was unable to wear a fluid resistant surgical mask. No different "mask" has ever been identified as suitable for the Claimant. A different mask was therefore not a reasonable adjustment.

d. Having weekly meetings to review the Claimant's progress.

256. Having weekly meetings would not have removed the requirement to wear a mask. This would have been an ineffective and unreasonable adjustment.

e. Allow the Claimant to wear only a visor

257. As stated above, it was not until 8 April 2022, after the Claimant presented her claim, that there was any advice from a suitably qualified professional that she could safely work wearing a visor, rather than a mask, in low risk covid area, p269. Occupational Health had specifically advised, as late as 13 January 2022, and even after the Claimant had been double vaccinated, that it would not be appropriate for the Claimant to wear a visor alone. This was not a reasonable adjustment at any time before the Claimant presented her claim.

258. To be clear, these adjustments together were not advised as safe or suitable, even in combination, until 8 April 2022. They were not reasonable for the Respondent to make until that time.

259. *In July 2021: All of the reasonable adjustments mentioned above in respect April 2020.*

Providing Twice weekly lateral flow tests.

Encouraging the Claimant to be vaccinated.

260. Again, providing twice weekly lateral flow tests and encouraging the Claimant to be vaccinated were never advised as appropriate before April 2022.

261. The Tribunal decided that it would not have been reasonable for the Respondent to make any of these adjustments until the adjustments were approved by suitably qualified professionals, either in Occupational Health or in the hospital's infection control department.

Deductions from Wages

262. *Was the Claimant absent without leave from 07 April 2020? The Claimant maintains fit, willing and able to work between 07 April 2020 and July 2022. Is this assertion correct? Was the Respondent contractually entitled to be paid for 37.5 hours per week during her absence from work between 07 April 2020 and 17 July 2022?*

263. The Claimant submitted a FIT note dated 07 April 2020 , p322. The note stated that Claimant may be fit for work if consideration could be given to "other duties or masks". The note explained: "You could go back to work with the support of your employer. Sometimes your employer cannot give you the support you need and if this happens your employer will treat this form as though you are 'not fit for work'.

264. As the Tribunal has already decided, there were no "other duties" available for the Claimant in April – June 2020, other than cleaning wards and areas of the hospital which required or included mask wearing. The potential office work in the evening, which might not have required a mask, was not available until July 2022.

265. As the Tribunal has also decided, no "other mask" was ever identified as suitable for the Claimant.

266. Accordingly, the suggested adjustments could not be made, so the April and May 2020 Fit Notes provided that the Claimant was not fit for work.

267. That meant that, for the duration of the Fit Notes, she was to be treated according to her contractual provisions for sick pay.

268. The Claimant eventually did receive sick pay for the duration of the Fit Notes. No deductions were therefore made from her wages in that period.

269. The Claimant did not provide Fit Notes after 25 May 2020.

270. As she was to be treated as being sick because the suggested adjustments could not be made, her contract required,

"If sickness absence continues beyond seven days, on the eighth day, you must submit a Doctor's medical certificate…

As a condition of service the Company reserves the right, at any time, to require an employee to produce a medical certificate stating the reasons for absence, which is signed by a registered medical practitioner at the time of absence…

You are asked to note that where questions arise as to eligibility to receive sick pay allowance, it is for you to demonstrate entitlement to the Company's satisfaction, by following the required sickness reporting procedures and any associated management instructions. In the event that you fail to comply with any of the above, the Company reserves the right not to pay you sick pay." P133 – 134.

271. As the Claimant did not provide a Fit Note after 25 May 2020, she had not complied with the requirements of her contract. She had not demonstrated entitlement to sick pay and the Respondent was contractually entitled not to pay her.

272. Her contract was also clear that, "Your hourly rate is payable for hours worked whilst working your contracted working week … During those hours designated by your manager as your working hours, then excepting for statutory and/or other permitted breaks in your work, you are required to be at your workplace and performing your duties." P126.

273. The Claimant was therefore not entitled to be paid if she did not work.

274. Further, the Claimant's contract was supplemented by the Respondent's absence policy which provided "*If the employee fails to attend work and doesn't notify their Line Manager within the timescales stipulated in the absence procedure, this is classed as absence without leave. If the employee makes no contact, pay will be suspended and the necessary procedures will be followed dependent upon the circumstances.*

275. The Tribunal decided that Ms Leim and Mr Soares tried to make contact with the Claimant by telephone, WhatsApp message and by writing to her in 2020. The Claimant did not respond to these messages. She did not respond to Mr Soares' offer, via her union representative, that she work in the evening, cleaning offices. The Claimant did not attend work and did not contact her employer. Her contract did not provide for her to be paid in those circumstances.

276. The Claimant resigned without notice on 03 December 2020. The Claimant cannot have been available, ready and willing to work for the Respondent having sent a letter stating with the subject "Resignation with immediate effect" p141.

277. Much later, in December 2021, the Claimant submitted a backdated sick note for the period 25 May 2020 to 14 August 2020. The Defendant did backdate SSP for that period.

278. The Respondent paid the Claimant sick pay for all the periods of absence in respect of which she provided a Fit Note.

279. Otherwise, she did not provide the appropriate certification and she did not work. Her contract was clear that the Claimant needed to work in order to be paid. She did not maintain contact with the Respondent. The contractual onus was on her to maintain contact. Instead of responding to the Respondent's letters in 2020, she resigned.

280. The Claimant did not work for the whole period in respect of which she claims. She was not entitled to be paid and no unlawful deductions were made.

281. The Claimant might rely on her GP letter dated 3 December 2021 saying, “She was unable to tolerate wearing the face masks supplied at work at last year due to her history of asthma. It was recommended that she was allowed to use other forms of personal protection (example face shield) If appropriate or be redeployed to a less risky area of work. Medical certificates were issued for this, covering the period of April to August 2020 but the recommendation still hold still now.” P324.

282. She might argue that she relies on that letter as a Fit Note, so that she should have been treated as sick for the whole period when such adjustments could not be made. The Tribunal has decided that such adjustments were not reasonable for the whole of the period up to the submission of the Claimant’s claim. The Claimant might argue, therefore, that she should have been paid the maximum 28 week period of SSP after 7 April 2020.

283. However, even if the Claimant might assert entitlement to sick pay on that basis, the Respondent disputes her entitlement to SSP. That dispute is not one which the Tribunal has jurisdiction to consider.

284. The Tribunal refers to *Taylor Gordon & Co Ltd v Timmons* [2004] IRLR 180 where the EAT held that an employment tribunal does not have jurisdiction to determine whether an employee is entitled to statutory sick pay. The employment tribunal's only jurisdiction in relation to SSP is in a case where the employer has admitted entitlement but is withholding all or part of it, or where the statutory authorities had determined that the statutory payment was payable.

285. In this case, the Respondent disputes entitlement to sick pay after August 2020. The Claimant wound need to bring a claim in that regard to the officers of the Board of the Inland Revenue and, on appeal, the Commissioners.

286. For all those reasons, the Tribunal has decided that the Claimant’s claim for unlawful deductions from wages fails.

287. All the Claimant’s claims fail. There will not be a remedy hearing.

_____

Employment Judge **Brown**

Date: 7 March 2023

SENT to the PARTIES ON

14/03/2023

FOR THE TRIBUNAL OFFICE