



EMPLOYMENT TRIBUNALS

Claimant: Mr L Hammond

Respondent: Sunseeker International Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Heard at: Southampton

On: 27 February to 1 March 2023

Before: Employment Judge Gray
AND Members Mr Flanagan and Ms Lloyd-Jennings

Appearances

For the Claimant: In person
For the Respondent: Mr Curtis (Counsel)

JUDGMENT

The unanimous judgment of the Tribunal is that:

- **The complaint of harassment is dismissed on withdrawal.**
- **The complaints of discrimination arising from disability and for a failure in the duty to make reasonable adjustments, fail and are dismissed.**

JUDGMENT having been delivered orally on the 1 March 2023 (and sent to the parties on the 15 March 2023), and written reasons having been requested by email from the Claimant's representative dated 15 March 2023, in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. By a claim form presented on 6 October 2021 the Claimant complains of disability discrimination.
2. The ACAS certificate is dated 3 August 2021 to 14 September 2021. This means anything on or after the 4 May 2021 would be in time and within the Tribunal's jurisdiction.
3. As is detailed in the background of the case summary from the case management hearing in this claim, the Claimant has been employed by the Respondent as a Deck Fitter on luxury yachts since 11 November 2018. He remains employed. His complaints centre around his claim that he is exempt from wearing face masks in Covid. He asserts that the Respondent sought to insist he wear a mask between November 2020 and 23 August 2021 before finally accepting he was indeed exempt.
4. This claim was listed for four days to determine matters.
5. The timetable for the hearing had been agreed at the case management hearing before Employment Judge Smail on the 19 January 2022 and this was confirmed at the start of this hearing with liability being determined first and then remedy. The parties had separate remedy paperwork to submit at that point.
6. Evidence and submissions were concluded just before 1pm on day 2. It was confirmed that as timetabled for deliberations the hearing would resume with oral judgment on liability from 11am on day 3.
7. For reference at this hearing, we were presented with the following:
 - a. An agreed hearing bundle consisting of 261 pages (with separate index).
 - b. The Claimant's witness statement.
 - c. Three witness statements in support of the Respondent from:
 - i. Jo Pavey (JP) – HR Business Partner
 - ii. Paul Cheeseman (PC) – Business Manager
 - iii. Martin Dodd (MD) – Head of Support Services and Risk manager
 - d. An opening note from the Respondent's Counsel which included a copy of the case management order and copies of the subsequent emails in

respect of the parties' clarifications on their positions in respect of the Claimant's disability and the harassment complaint.

- e. Respondent's chronology.
 - f. Claimant's chronology.
 - g. The Respondent's copy of a timeline of UK government coronavirus lockdowns and measures.
8. The issues as to liability were agreed as follows based on those set out by Employment Judge Smail in his case management summary and following discussion with the parties at the start of this hearing, which included the Claimant confirming that he withdrew the harassment complaint. The clarifications arising from the discussions are highlighted in ***bold italics***:

1. Time limits

1.1 Given the date the claim form was presented and the dates of early conciliation, any complaint about any act or omission which took place more than three months before that date (allowing for any extension under the early conciliation provisions) is potentially out of time, so that the tribunal may not have jurisdiction.

1.2 Were the discrimination and victimisation complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

1.2.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act or omission to which the complaint relates?

1.2.2 If not, was there conduct extending over a period?

1.2.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

1.2.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

1.2.4.1 Why were the complaints not made to the Tribunal in time?

1.2.4.2 In any event, is it just and equitable in all the circumstances to extend time?

2. Disability

2.1 Did the Claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about? The Tribunal will decide:

2.1.1 Whether the Claimant had a physical impairment.

The Claimant says the disabilities are a deviated septum/nasal breathing difficulty and asthma

By email dated 17 March 2022, the Respondent confirmed that it accepted that the Claimant had asthma and breathing difficulties due to a deviated septum at the relevant time.

However, it clarified that it does not accept that the Claimant had cluster headaches and mental health issues at the relevant time because the Respondent had no knowledge of these conditions and they do not appear to be supported in the medical evidence the Claimant has provided.

2.1.2 Did it have a substantial adverse effect on the Claimant's ability to carry out day-to-day activities?

2.1.3 If not, did the Claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?

2.1.4 Would the impairment have had a substantial adverse effect on his ability to carry out day-to-day activities without the treatment or other measures?

2.1.5 Were the effects of the impairment long-term? The Tribunal will decide:

2.1.5.1 did they last at least 12 months, or were they likely to last at least 12 months?

2.1.5.2 if not, were they likely to recur?

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

3.1 Did the Respondent treat the Claimant unfavourably by

3.1.1 Insisting he wore a face mask between November 2020 and 23 August 2021;

3.1.2 Requiring him to furlough for periods rather than work because he was refusing to wear a mask;

3.1.3 Requiring him to work on a larger boat where social distancing was easier.

3.2 Did the following things arise in consequence of the Claimant's disability? The Claimant's case is that the inability to wear a face mask arose from his disability.

The Respondent's position is that it had knowledge from January 2021 (the second GP letter) but there is a difference between a face mask (PPE based) and a face covering which is COVID related. It accepts at this stage that the Claimant had an inability to wear a close-fitting face covering. It does not accept re other face coverings (at this stage).

3.3 Was the unfavourable treatment because of any of that/those things?

3.4 Was the treatment a proportionate means of achieving a legitimate aim?

The Respondent clarified that the legitimate aims were detailed in paragraphs 13, and 16 to 21 of the grounds of response (see pages 30 to 32 of the hearing bundle) and are summarised as:

- ***Ensuring a reasonably safe workplace***
- ***Limiting risk of COVID 19***
- ***Complying with relevant guidelines re COVID 19.***

The Claimant acknowledged that he understood these to be said by the Respondent as its aims.

3.5 The Tribunal will decide in particular:

3.5.1 Was the treatment an appropriate and reasonably necessary way to achieve those aims;

3.5.2 Could something less discriminatory have been done instead;

3.5.3 How should the needs of the Claimant and the Respondent be balanced?

3.6 Did the Respondent know, or could it reasonably have been expected to know that the Claimant had the disability? From what date?

4. Reasonable Adjustments (Equality Act 2010 ss. 20 & 21)

4.1 Did the Respondent know, or could it reasonably have been expected to know that the Claimant had the disability? From what date?

4.2 A "PCP" is a provision, criterion or practice. Did the Respondent have the following PCPs: to require the wearing of face masks during Covid between November 2020 and 23 August 2021.

The Respondent accepts it has this PCP save that it applied to July 2021 when a new policy was then put in place.

4.3 Did the PCPs put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that he could not wear the mask whether comfortably or at all.

As for the S15 – the Respondent accepts at this stage that the Claimant had an inability to wear a close-fitting face covering. It does not accept re other face coverings (at this stage).

4.4 Did the Respondent know, or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?

4.5 What steps (the 'adjustments') could have been taken to avoid the disadvantage? The Claimant suggests:

4.5.1 Withdrawing the requirement to wear a face mask.

4.6 Was it reasonable for the Respondent to have to take those steps and when?

4.7 Did the Respondent fail to take those steps?

THE FACTS

9. We found the following facts proven on the balance of probabilities after considering the whole of the presented evidence, both oral and documentary, and after considering and listening to the factual and legal oral submissions made by and on behalf of the respective parties.
10. According to the grounds of resistance (page 29 of the bundle) the Respondent designs, manufactures and sells luxury motor yachts. It employs 1,729 employees over six sites.
11. It is not in dispute that the Claimant commenced employment with the Respondent on 12 November 2018. He is employed as a Deck Fitter, specifically fitting Teak decking. His employment is ongoing, but he has been on sick leave since the 26 August 2021. Copies of his employment contractual documentation, including a job description, are at pages 41 to 65 of the bundle.
12. The Claimant says he is a disabled person by reason of a deviated septum/nasal breathing difficulty and asthma. In his witness statement he explains the damage to his septum was caused by an injury in September 2000 (paragraph 3).
13. By email dated 17 March 2022, the Respondent confirmed that it accepted that the Claimant had asthma and breathing difficulties due to a deviated septum at the relevant time.

14. Whether the Claimant was a disabled person or not was not in dispute and we accept this.
15. As to knowledge and substantial disadvantage, the Respondent's position is that it had knowledge from January 2021 (following receipt of the second GP letter at page 118) but asserts there is a difference between a face mask (PPE based) and a face covering which is COVID related. It accepted at the start of the hearing when the issues were confirmed that the Claimant had an inability to wear a close-fitting face covering. It did not accept (at that stage) in relation to other face coverings, such as visors.
16. During the oral evidence the Claimant clarified that his particular issue with face masks/coverings is due to his deviated septum, wearing masks cause him to overheat. He says he is only able to wear an FFP2 mask for short periods which is a mask to prevent dust inhalation as it does not restrict his out breaths. He also refers to this distinction in his witness statement at paragraph 13.
17. The Claimant confirmed in his oral evidence that he could not wear a visor due to it also causing overheating. The Claimant had expressed to the Respondent at the time that he would not wear a visor.
18. The Claimant is furloughed from the 23 March 2020 to 29 June 2020 as a consequence of COVID.
19. There is then a further period of furlough to the 3 August 2020 (from 13 July 2020, reference paragraph 10 of JP's statement) which the Claimant explained in his oral evidence he was placed on to manage his domestic circumstances.
20. A summary of the Claimant's circumstances in the March to November 2020 period when not on furlough was accepted by the parties as being accurately recorded by Lee Symes (the Claimant's Team Leader) who was interviewed by PC as part of the C's grievance (page 160).

"PC: When back from COVID did you have mask issues?"

PC: For the months he was working was he wearing a mask?"

LS: He would put it on but had to remind him to put it on. Maxine – Health and Safety Rep and Steve Hasler Production Manager had a few complaints not wearing a mask. I tried to put him in areas 2m away from people but whilst walking around try and wear mask or visor. A couple of complaints gone into Steve and Maxine not wearing a mask near people. We did have a chat with him. Was a bit of a battle to comply. We understood he had restricted breathing tried to put him in areas he could work alone. Just asked him to pop it on if someone comes in your area and you can ask them to work in a different area"

21. In oral evidence the Claimant confirmed that when working he would leave his mask hanging from one ear and then pull it across his face when in proximity to others.
22. It is then on the 12 November 2020 the Claimant beings a period of sick leave due to neck pain until his return to work on the 11 January 2021 (see page 111 to 113).
23. At the same time as being signed off for neck pain he also obtains a letter from his GP dated 12 November 2020 that is provided to the Respondent on the 16 November 2020. The Claimant said he requested it because of the issues over his mask wearing.
24. It says (page 110) ... "This patient suffers with asthma and nasal problems Wearing a mask for prolonged periods affects his breathing. ... Please can this be taken into account with wearing a mask for work".
25. The Claimant accepted that the letter did not say he was exempt from wearing a mask.
26. It is then on the 11 January 2021 when he returns to work, he communicates that he is exempt from wearing a mask. There are no documents from what happens on that day, but a number of more contemporaneous accounts than now are available from the Claimant's grievance (at page 136) and the statement form of JP (at page 195). This matter is also addressed in paragraphs 12 and 13 of her statement.
27. In short, what we find happened on the balance of probability is the Respondent considered the Claimant would need to be sent home if he was unable to wear a mask, this happens. There is then communication between the Claimant and JP shortly after that where JP expresses to the Claimant that what he is now saying about the mask is different from what the GP had previously said and suggests he seeks input from his GP.
28. The Claimant does this and it results in a letter from the GP dated 13 January 2021 (page 118) which says ... "This man has asthma and nasal problems. He cannot wear a face mask due to his medical problems. If he cannot attend work without his mask in a safe, socially distanced and well-ventilated environment then I recommend he shields and is furloughed."
29. By email dated 15 January 2021 (page 119) it is confirmed to the Claimant he is on furlough from the 11 January 2021.
30. No complaint is raised by the Claimant about this status. In oral evidence he said that it was better than no pay.

31. The Claimant remains on furlough and the next event is on the 3 June 2021 with the Claimant being invited to a welfare meeting (pages 122 to 124).
32. The welfare meeting takes place on the 16 June 2021 and alternative roles are discussed, such as night shift work and the possibility of social distancing, but nothing suitable is identified and it is agreed that the Claimant will be referred to OH. It is also communicated to the Claimant that it is expected that furlough will come to an end at the end of June 2021. The notes of this meeting are at pages 126 to 129 of the bundle.
33. The Claimant subsequently withdraws his consent to be referred to OH.
34. By correspondence dated 29 June 2021 the Claimant then raises a grievance (pages 135 to 139).
35. There is then a grievance meeting on the 7 July 2021 (the notes for this are at pages 145 to 153). Within those notes reference is made to the Claimant working in shipyards, 3, 2, 5 and being dotted everywhere, albeit mainly shipyard three doing teak work (page 145).
36. It records the Claimant confirming that he still does not want to get an OH report (page 150) and that he is not prepared to try other masks (page 152).
37. We heard evidence from PC who heard the Claimant's grievance. He describes a thorough process including the interviewing of six individuals. The outcome letter at pages 200 to 206 (dated 30 September 2021) is a full response to the issues the Claimant raises.
38. On the 23 July 2021 the Claimant is invited to a meeting to discuss a return to work and a face mask exemption policy (page 176). The Claimant is unable to attend due to childcare cover (page 178) and then takes annual leave from the 26 July 2021 to 22 August 2021.
39. The meeting with the Claimant to discuss face covering policy and a return to work then takes place on the 23 August 2021. Notes of this meeting are at pages 185 to 186. Options are discussed for returning to work and the new mask exemption policy is discussed and the note records the Claimant confirming at the end of the meeting that he is happy with the solution. The Claimant said in oral evidence although he communicated that, he did not feel happy.
40. The Claimant chases up the outcome to his grievance.
41. It is then on the 26 August 2021 that the Claimant provides a fit note saying he is unfit due to "work related stress" (page 191). The Claimant has not returned to work since then.

42. The Claimant then says by email dated 30 August 2021 (page 192) that [sic]:

“I was scheduled for a meeting tomorrow but unfortunately I am unable to attend. Due to stress from the current situation regarding my work. Upon reflection I am not happy with moving shipyards. My "team" colleagues are in shipyard 3 where I have been base from day one. I am also unhappy being asked to be singled out by completing an application form and wearing a badge. This does not adhere to the equalities act. By being asked to do so is singling out myself and or other members of staff, which in turn is a form discrimination.

Also I submitted my grievance over two months ago now and I have still not received a written response. Not I am being asked to attend another meet to clarify certain points even though I have done this already in the original grievance meeting.

Because of all this I haven't been sleeping and have felt very uptight and tense. I spoke with my doctor and she felt it right to sign me off until this issue to resolved once and for all.”

43. The grievance outcome is provided on the 30 September 2021 (pages 200 to 206). It addresses the concerns the Claimant raised, not finding them proven and addresses the recent issues reference the moving shipyards and exemption badge. The Claimant accepted in oral evidence that the letter confirmed they would look again at the shipyard move (page 205), and he said he had not understood that at the time. It also provides an understandable reason for the badge (page 205), referring to a means of making people aware of a genuine exemption, in view of a rotating work force.

44. This was also confirmed by MD, who had heard the Claimant's grievance appeal, in his oral evidence confirming that not all people on site would be aware of the Claimant's particular circumstances.

45. It is not in dispute that the Claimant is given a right of appeal about his grievance, it is taken up by the Claimant, carried out in writing in accordance with the Claimant's request, and an outcome provided (see pages 229 to 233). MD also gave evidence to this hearing explaining his involvement in the appeal and why he decided what he did.

46. We would remind ourselves that this claim is about the wearing of face masks during the heightened stages of the COVID pandemic.

47. The Claimant summarises his claim in paragraph 15 of his witness statement as a very simple one ... “I was discriminated against when I was refused access to work for being unable to wear a face covering.”.

48. That refusal was on the 11 January 2021. The Claimant is invited to a return-to-work meeting on the 23 July 2021 as there is a change of face mask policy. He takes holiday from 26 July 2021 to 22 August 2021 so does not attend that meeting until the 23 August 2021. A return to work is agreed without a face mask.
49. The Claimant then decides against the offered return, due to not wanting to wear an exemption badge and the suggested shipyard move. He is then informed by the Respondent that they will look at the shipyard move again. This is not therefore the Claimant being refused access to work for being unable to wear a face mask, no such requirement in place at the Respondent from on or around the 23 July 2021.
50. It is not in dispute that there is such a restriction in place that impacts on the Claimant's ability to work prior to this.
51. A key issue for us therefore is to consider the Respondent's asserted legitimate aim and whether the treatment the Claimant was subjected to was a proportionate means of achieving that legitimate aim.
52. At the start of this hearing the Respondent clarified that its asserted legitimate aims were as detailed in paragraphs 13, and 16 to 21 of the grounds of response (see pages 30 to 32 of the hearing bundle) and were summarised as:
 - a. Ensuring a reasonably safe workplace.
 - b. Limiting risk of COVID 19.
 - c. Complying with relevant guidelines re COVID 19.
53. The Claimant acknowledged at that start of this hearing that he understood these to be said by the Respondent as its aims.
54. Reference was also made to the Claimant's contract of employment (in particular clauses 15.2 and 15.3 (page 55)) and the express reference to its obligations under the Health and Safety at work laws, as well as reference to the Health and Safety at Work etc Act 1974.
55. We were referred to a risk assessment verified in July 2020 and assessed in September 2020 confirming COVID related risks including spread by aerosol (see pages 82 and 83). It confirms the control measure being to, if possible, work away from others and if working with others and the two-meter social distancing cannot be maintained face coverings must be worn by all parties.
56. All three of the Respondents witnesses were cross examined by the Claimant as to why they did not exempt him from wearing a mask and they all confirmed

that it was done to reflect health understandings at that time and protect the safety of employees and their families. Reference is also made to the policy and its communication by JP in her statement at paragraph 9 and with reference to pages 106 and 107 which is an Information and Rules for Working document.

57. The Respondent has a statutory and contractual obligation to provide a safe working environment. The COVID pandemic was an unprecedented worldwide health issue. We accept that the Respondent had a legitimate aim as it asserts.

THE LAW

58. This is a claim alleging discrimination on the grounds of a protected characteristic under the provisions of the Equality Act 2010 (“the EqA”).
59. The Claimant complains that the Respondent has contravened a provision of part 5 (work) of the EqA. The Claimant alleges discrimination arising from disability and failure in the duty to make reasonable adjustments.
60. The protected characteristic relied upon is disability, as set out in sections 4 and 6 of the EqA.

Disability

61. As set out in **section 6 and schedule 1 of the Equality Act 2010** a person P has a disability if he has a physical or mental impairment that has a substantial and long-term adverse effect on P’s ability to carry out normal day to day activities. A substantial adverse effect is one that is more than minor or trivial, and a long-term effect is one that has lasted or is likely to last for at least 12 months or is likely to last the rest of the life of the person.
62. It is not in dispute in this claim that the Claimant is a disabled person at times material to the matters complained about.

Burden of Proof

63. The provisions relating to the burden of proof are to be found in section 136 of the EqA, which provides that if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred. However, this does not apply if A shows that A did not contravene the provision. A reference to the court includes a reference to an employment tribunal.
64. In respect of the burden of proof, there is a two-stage process for analysing the complaint. At the first stage, the Claimant must prove facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the

Respondent had committed an unlawful act of discrimination against the Claimant. At the second stage, if the Claimant is able to raise a prima facie case of discrimination following an assessment of all the evidence, the burden shifts to the Respondent to show the reasons for the alleged discriminatory treatment and to satisfy the tribunal that the protected characteristic played no part in those reasons (**Igen -v- Wong [2005] EWCA Civ 142** as affirmed in **Ayodele -v- CityLink Ltd [2018] ICR 748**).

65. We also note the recent decision of **Efobi v Royal Mail Group Ltd (2021) ICR 1263** which confirmed that the reverse burden of proof remains good law under the EqA.

Discrimination arising from disability (Section 15 Equality Act 2010)

66. Section 15 of the Equality Act states:

15 Discrimination arising from disability

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

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

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

(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.

67. We remind ourselves that the correct approach to the operation of section 15 was set out at paragraph 31 by Simler P in the case of **Pnaiser v NHS England [2016] IRLR 170**. In essence, as summarised by Harvey at Q [1468], the position is:

(1) Was there unfavourable treatment and by whom?

(2) What caused the impugned treatment, or what was the reason for it?

(3) Motive is irrelevant.

(4) Was the cause/reason 'something' arising in consequence of the claimant's disability?

(5) The more links in the chain of causation, the harder it will be to establish the necessary connection.

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

(7) The knowledge requirement is as to the disability itself, not extending to the 'something' that led to unfavourable treatment.

(8) It does not matter in which order these matters are considered by the tribunal.

68. In terms of knowledge, there need only be actual or constructive knowledge as to the disabilities themselves, not to the causal link between the disability and its consequent effects which led to the unfavourable treatment.

69. The test of justification is an objective one, according to which the employment tribunal must make its own assessment, see **City of York Council v Grosset [2018] IRLR 746, CA.**

70. Whether an aim is 'legitimate' is a question of fact for the Employment Tribunal. The categories are not closed, although cost saving on its own cannot amount to a legitimate aim. As was stated by Mummery L.J. in **R (Elias) v Secretary of State for Defence [2006] IRLR 934 CA ...** " ... *the objective of the measure in question must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that end.*"

71. As for proportionality, in the same case it was held that a three-fold criteria should be applied, firstly whether the objective is sufficiently important to justify limiting a fundamental right, secondly whether the measure is rationally connected to the objective and thirdly whether the means chosen are no more than is necessary to accomplish the objective. There is a further consideration that is separable from the third criterion, namely whether the steps complained of strike a fair balance between the need to accomplish the aim and the detriment suffered, see **DWP v Boyers [2022] IRLR 741** at paragraph 23.

Reasonable adjustments

72. Section 20 of the Equality Act states:

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

73. **Paragraph 20(1) of Schedule 8 to the EqA** provides that a person is not

subject to the duty to make reasonable adjustments if he or she 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 a disadvantage by the employer's PCP, the physical features of the workplace, or a failure to provide an auxiliary aid — **paragraph 20(1)(b)**.

74. There is guidance in the case authority of ***Environment Agency v Rowan* [2008] IRLR 20, [2008] ICR 218** as to what needs to be found in such claims, namely that in order to make a finding of failure to make reasonable adjustments there must be identification of:

- a. the provision, criteria or practice applied by or on behalf of an employer;
or
- b. the physical feature of premises occupied by the employer;
- c. the identity of non-disabled comparators (where appropriate); and
- d. the nature and extent of the substantial disadvantage suffered by the claimant.

75. The duty to make adjustment arises by operation of law, a claimant is not required to identify what should be done, although commonly this happens.

76. The test of reasonableness imports an objective standard, Maurice Kay LJ in ***Smith v Churchills Stairlifts plc* [2006] IRLR 41** at paragraph 45.

Time limits

77. Section 120 of the EqA 2010 confers jurisdiction on claims to employment tribunals, and section 123(1) provides that the proceedings on a complaint within section 120 may not be brought after the end of – (a) the period of three months starting with the date of the act to which the complaint relates, or (b) such other period as the employment tribunal thinks just and equitable.

78. Section 123(3)(a) of the EqA 2010 provides for conduct that extends over a period to be treated as being done at the end of that period.

79. Section 123(3)(b) of the EqA 2010, failure to do something, is to be treated as occurring when the person in question decided upon it. Where there is no evidence to the contrary, s.123(4) of the EqA 2010 provides a default means by which the date of the 'decision' can be identified, either when there is an inconsistent act or alternatively the expiry of the period in which the employer might reasonably have been expected to do it.

80. Respondent's Counsel submitted that in relation to conduct extending over a period, it is a consideration of a one-off decision or continuing act versus a regime, rule, practice, or principle. In this claim there is a rule for face coverings

which is applied for the relevant period being considered in this claim. Respondent's Counsel submits it is not open to the Tribunal to say it is a one-off act, it should be considered to be a continuing act that applies over the period.

The Health and Safety at Work etc Act 1974

81. We were referred to the Health and Safety at Work etc Act 1974 by Respondent's Counsel in his closing submissions as well as the express contractual obligation about it in the Claimant's employment contract (see page 55). We were referred in particular to sections 2(1) and 2(2)(e) of that Act:

"... 2.— General duties of employers to their employees.

(1) It shall be the duty of every employer to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees.

(2) Without prejudice to the generality of an employer's duty under the preceding subsection, the matters to which that duty extends include in particular—

... (e) the provision and maintenance of a working environment for his employees that is, so far as is reasonably practicable, safe, without risks to health, and adequate as regards facilities and arrangements for their welfare at work."

THE DECISION

82. We were assisted in this matter by focused and well considered closing oral submissions from both parties.

83. We would also observe that there were very few factual disputes in this case.

84. The Claimant is a disabled person at times material to this claim by reason of a deviated septum/nasal breathing difficulty and asthma.

85. It is not in dispute that this causes the Claimant to have an inability to wear face coverings and puts him to a substantial disadvantage compared to someone without the Claimant's disability in that he could not wear a face covering whether comfortably or at all.

86. There is no dispute that the Claimant's medical circumstances are confirmed to the Respondent by his GP's correspondence dated 12 November 2020 (page 110) and the substantial disadvantage confirmed by his GP's correspondence dated 13 January 2021 (page 118).

87. Considering then the discrimination arising from disability complaint.

88. There are three allegations of unfavourable treatment:

- a. Insisting the Claimant wore a face mask between November 2020 and 23 August 2021;
- b. Requiring the Claimant to furlough for periods rather than work because he was refusing to wear a mask;
- c. Requiring the Claimant to work on a larger boat where social distancing was easier.

89. About the first allegation, it is not in dispute that there was an insistence that the Claimant wore a face mask. In the period of March 2020 to November 2020 when the Claimant was working there is an insistence the Claimant wears a mask if he cannot be more than 2 meters distanced and the Claimant does his best to achieve that. By letter dated 12 November 2020 the Claimant's GP confirms the Claimant cannot wear a mask for prolonged periods. It is from the 11 January 2021 that the dynamic changes because the Claimant then confirms to the Respondent that he is exempt and will not wear a mask. The requirement of the Respondent for mask wearing then remains in place until on or around 23 July 2021.

90. About the second allegation, it is not in dispute that the Claimant was furloughed for periods rather than work because he was refusing to wear a mask. This is from the 11 January 2021 to the change of policy.

91. About the third allegation, it is in dispute that the Claimant was required to work on a larger boat where social distancing was easier, it being suggested and agreed to at the meeting on the 23 August 2021, then subject to review after the Claimant raises an objection. The Claimant did not work to such a requirement, being on sick leave and the proposal then being subject to review. We therefore do not find that this alleged unfavourable treatment as asserted by the Claimant has been proven on the balance of probability.

92. It is accepted that the Claimant's inability to wear a face covering arose from his disability.

93. It is accepted that the proven unfavourable treatment (the first and second allegations) was because of that thing.

94. It is not in dispute that the Respondent knew or could reasonably have been expected to know that the Claimant had the disability by the period the unfavourable treatment is active.

95. We therefore need to consider whether that treatment was a proportionate means of achieving the Respondent's legitimate aim of ensuring a reasonably

safe workplace, limiting risk of COVID 19, and complying with relevant guidelines re COVID 19. We accept this legitimate aim.

96. We then need to decide in particular:

- a. Was the treatment an appropriate and reasonably necessary way to achieve those aims;
- b. Could something less discriminatory have been done instead;
- c. How should the needs of the Claimant and the Respondent be balanced?

97. As Respondent's Counsel submitted to us the legitimate aim has a foundation in health and safety at work provisions and was considered through risk assessments. Although the Claimant points out a difference between the government guidelines and the Respondent's practice this is explained by them having different purposes, the government focusing on public safety and public life, the Respondent being under a statutory and contractual duty to provide a safe working environment.

98. As Respondent's Counsel submitted what could the Respondent have done that was less discriminatory. Alternative face coverings were explored, and they did not work. Face covering only within 2 meters had been explored, and did not work, a change in role to night shift did not work. The Claimant did not have any suggestions save for him being exempt from wearing a face covering.

99. We accept that this evidences the Respondent looking at less discriminatory ways to achieve the same aim. The only less discretionary step for the Claimant would be to allow him to attend work without wearing a face covering and that would not have achieved the legitimate aims of the Respondent.

100. We therefore find that the proven unfavourable treatment in this claim was a proportionate means of achieving a legitimate aim. As soon as the guidelines changed the Respondent offered the Claimant the option to attend without wearing a mask.

101. Considering next the complaint of the Respondent failing in the duty to make reasonable adjustments. It is accepted the Respondent knew of the disability and substantial disadvantage of the Claimant being unable to wear a face covering around the 13 January 2021.

102. It is not in dispute that the Respondent had the PCP to require the wearing of face masks during Covid between November 2020 and end of July 2021 when the policy changed [rather than 23 August 2021 as asserted by the Claimant in the list of issues].

103. It is not in dispute that the PCP put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that he could not wear the mask whether comfortably or at all.
104. So, to consider what steps (the 'adjustments') could have been taken to avoid the disadvantage? The Claimant suggests withdrawing the requirement to wear a face mask.
105. Was it reasonable for the Respondent to have to take those steps and when? For the same reasons as considered in respect of the arising from disability complaint we do not find that it was reasonable for the Respondent to do this, so it did not fail to take that step.
106. It is therefore the unanimous decision of the Tribunal that the complaints of discrimination arising from disability and for a failure in the duty to make reasonable adjustments, fail and are dismissed. For these reasons we do not need to consider the time limit jurisdictional issues.
107. We would note here that the COVID pandemic was an unprecedented time. Lives of millions were adversely and devastatingly impacted. Employers were managing difficult situations under the duty of needing to provide a safe working environment. Although not a perfect situation for the Claimant, the majority of his income was preserved with the furlough pay and his job continues. Masks in the workplace are no longer an issue. We would hope that the Claimant can move forward from this point, returning to work, and drawing this difficult chapter to a close.

Employment Judge Gray
Dated 22 March 2023

Judgment sent to Parties on 30 March 2023

For the Employment Tribunal