EMPLOYMENT TRIBUNALS

Claimant: Mr A Booth

Respondent: Creative Support Ltd

Heard at: Manchester **On:** 27-30 March 2023

Before: Employment Judge Phil Allen (sitting alone)

REPRESENTATION:

Claimant: In person
Respondent: Mr J Gilbert, senior litigator

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant was not unfairly dismissed. The claimant's claim for unfair dismissal does not succeed and is dismissed.

The Judgment having been sent to the parties on 5 April 2023 and the claimant having requested written reasons in emails of 5 and 13 April 2023, the written reasons below are provided.

REASONS

Introduction

1. The claimant was employed by the respondent as a support worker from 10 March 2014 until his dismissal effective on 20 February 2021. The claimant contended that his dismissal was unfair. The respondent contended that he was fairly dismissed by reason of conduct.

Claims and Issues

2. There had previously been three preliminary hearings conducted in this case, on 29 June 2021, 11 November 2021 and 7 March 2022. The claimant had originally claimed disability discrimination, discrimination on the grounds of religion or belief, and claims arising from alleged public interest disclosures. During the progress of

the claim, all of those claims had ceased. The one claim which was left to be determined at this hearing was the claimant's claim for unfair dismissal. It is not necessary for me to recount those previous decisions, save to confirm that Employment Judge McDonald found in a reserved Judgment following the preliminary hearing on 11 November 2021 that the claimant has suffered from anxiety since 2017 (52) (whilst finding that there was insufficient evidence before him to find that it amounted to a disability as defined by the Equality Act 2010).

3. In the case management orders produced following the preliminary hearings on 29 June and 11 November 2021 there had been appended a list of issues. The issues to be determined for the unfair dismissal claim were materially the same in both of those lists of issues. At the start of this hearing, those issues (42) were confirmed and agreed with the parties. It was also agreed that the Tribunal would first determine the liability issues, with the remedy issues being left to only be determined later if the claimant succeeded in his claim.

4. The liability issues identified were as follows:

Dismissal

1.1 Can the claimant prove that there was a dismissal?

Reason

1.2 Has the respondent shown the reason or principal reason for dismissal?

1.3 Was it a potentially fair reason under section 98 Employment Rights Act 1996?

Fairness

1.4 If so, applying the test of fairness in section 98(4), did the respondent act reasonably in all the circumstances in treating that reason as sufficient reason to dismiss the claimant?

1.5 If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:

1.5.1 The respondent genuinely believed the claimant had committed misconduct;
1.5.2 there were reasonable grounds for that belief;
1.5.3 at the time the belief was formed the respondent had carried out a reasonable investigation;
1.5.4 the respondent followed a reasonably fair procedure;
1.5.5 dismissal was within the band of reasonable responses.

1.6 Did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant?

Procedure

5. The claimant represented himself at the hearing. Mr Gilbert, a consultant, represented the respondent.

6. The hearing was conducted in-person with the parties and all witnesses attending at the Employment Tribunal in Manchester.

7. An agreed bundle of documents was prepared in advance of the hearing. The bundle ran to 315 pages. At the start of the hearing, I read the witness statements which had been provided and the documents in the bundle which were referred to in those statements (plus one additional document referred to by the claimant). I also read the pages which were referred to during cross-examination. Where a number is included in this document in brackets, that is a reference to the page number in the agreed bundle.

8. I heard evidence from each of the following witnesses called by the respondent, each of whom were cross-examined by the claimant: Ms Colette Leigh, service director; Ms Julie Cooke, service director; Ms Leigh Birch, service director and the person who made the decision to dismiss the claimant; and Ms Lyndsey Downes, service director and the person who heard the claimant's appeal.

9. I also heard evidence from the claimant, who was cross examined by the respondent's representative.

10. At the very end of the claimant's evidence, he referenced a document which he had obtained from his GP dated 23 September 2021. That document had not previously been disclosed or included in the bundle. After it was referred to, a copy was provided to the respondent's representative who objected to it being considered by me. He did so (in summary) on three grounds: the lateness of it being identified/provided; the fact that the letter referred to another document which was not before me; and the fact that it was not relevant to the issues to be determined as it had not been before the respondent's decision-makers at the relevant time. The claimant was given the opportunity to say why he should be able to refer to it. Having heard what was said and on balance, I decided that I would not consider the document because of: the very late stage at which it had been identified (being long after the respondent's evidence had concluded and when none of the respondent's witnesses were still present in the hearing), when it had existed for approximately eighteen months; and (more importantly) because I could not see how it could be relevant to the issues which I needed to determine, it not having been available to those at the respondent when they reached their decisions.

11. After the evidence was heard, each of the parties was given the opportunity to make submissions. Each party provided a written document and then expanded upon it and updated it in oral submissions (both documents having been prepared before the last part of the claimant's cross-examination).

Facts

12. The claimant worked for the respondent from 10 March 2014 as a support worker. The respondent is a charitable organisation which promotes the

independence, inclusion, and wellbeing of vulnerable adults with care and support needs. The claimant worked in a property which is a shared house for four service users with enduring mental health needs. That property consists of four ensuite bedrooms, a kitchen/dining room, and a shared lounge. The property also has a basement in which there is an office (or offices). That office is used by the support workers for that premises as well as being used by members of the respondent's North Manchester Community Team. The office space has no windows and limited ventilation, albeit (as the claimant emphasised) it had sufficient ventilation to be appropriately used as an office and there was a window by the stairs. The claimant was able to and did take breaks outside the building when he worked there, such as for cigarette breaks.

13. I was provided with the claimant's terms and conditions of employment (61) and the job description for his role (66). The bundle also included the respondent's relevant procedures (70), albeit that neither party made any reference in the hearing to any specific element of those procedures.

14. From the outset of the pandemic the respondent put in place various steps to accord with the requirements and guidance which applied to care providers. There was no objection raised by the claimant to the steps put in place generally prior to the change in policy which was the main issue in this case. The claimant wore a mask when working with service users.

15. The issues in this claim arose from a change in the respondent's approach to the requirement to wear a face mask in the office. The respondent's case was that this followed changes in the guidance issued by Public Health England about when masks should be worn. The relevant Public Health England guidance on PPE for community health and social care settings (122) set out when face masks were required. A clear poster issued by the respondent (in collaboration with Public Health England) (121) set out that surgical face masks were mandatory in social care settings, for all tasks, all time, and all staff. That meant that the respondent's position, from the change, was that a face mask had to be worn in the office (albeit there appeared to be an acknowledgement that might not be required if only one individual was in the office entirely on their own). The evidence of the respondent's witnesses was that exceptions were allowed to this rule in individual cases in other locations, where not wearing a face mask was backed up by medical evidence. The respondent's evidence was that in all of those cases, visors were worn rather than face masks.

16. A document dated 5 November 2020 was sent to all employees setting out various requirements, including the fact that it was compulsory to wear the correct PPE when supporting vulnerable clients and working within the adult care and social care sector (99). That document spelt out that failure to follow the measures could lead to suspension without pay followed by disciplinary action. The document itself did not explicitly address the wearing of face masks in the office, but it attached the documents I have referred to. On 11 November 2020 the claimant signed that he had read and understood the contents. In this hearing the claimant stated he was coerced into signing it, but there was no contemporaneous evidence that evidenced that he was coerced to do so, and the claimant did not raise that as an issue at any time during the respondent's investigation, disciplinary or appeal processes.

17. The claimant sent an email to his team leader dated 24 November 2020 (119). In the email he spelt out his reasons for refusing to wear a mask in the office. I will not reproduce the whole note, but in the introduction the claimant said the following, which showed clearly the claimant's position at that time:

"*My main concerns are that by reducing oxygen intake you can trigger seizures and permanent, irreversible, neurological damage in the brain i.e strokes etc. As far as I'm aware there is no risk assessment stating that it is 100% safe and there is no danger of permanent brain damage as a result of drastically increasing carbon dioxide intake while reducing oxygen levels at the same time. To my understanding, masks have an air resistance amount (which provides the filtration of "killer droplets") and I don't feel happy wearing something that can cause the type of issues described when the air resistance hasn't been measured against a safe oxygen reduction amount"*

18. The claimant also highlighted the absence of any studies at the time into the effectiveness of wearing masks and Covid transmission. The claimant expressly stated that these were his personal opinions. The claimant did not address anxiety or panic attacks in that email, nor did he rely upon anxiety or panic attacks as being the reason why, at that time, he was not willing to wear a face mask in the office.

19. On 26 November the claimant was suspended by Ms Reynolds-Newby, an area manager. Ms Leigh gave evidence that she (that is, Ms Leigh) had made the decision to suspend the claimant. A letter was sent to the claimant confirming the decision from Ms Bateson, Head of People and Performance (105). The letter explained that the matter of concern was the claimant's alleged refusal to wear a mask. The letter invited the claimant to an investigatory meeting.

20. The investigatory meeting took place the following day on 27 November 2020. Notes of the meeting were provided (109). The meeting was initially arranged to take place by Zoom, but there were issues with connection and, at some point in the meeting (according to Ms Leigh's recollection), the meeting was converted to be by telephone. The notes did record various occasions when what was said was recorded as being inaudible.

21. According to the notes, the claimant explained that the reason why he had chosen not to follow the respondent's guidelines and policy was because of the change in mask wearing policy, so it was now required in the office. He said it had been fine to wear a mask in acute settings. When it was confirmed that the company policy was now to require masks to be worn in the office, the claimant replied that if it was company policy to wear a mask in the office then he would have to find another job (109).

22. The claimant explained that he did not feel comfortable wearing something which could potentially cause serious physical harm (my emphasis), and he referred to this being a risk with face masks because the blood oxygen level was reduced and there was increase CO2 intake (110). He explained that he was fine wearing a mask in an acute setting and in a shop, but he said now he was required to wear one literally for hours at a time with no risk assessment, he did not feel comfortable. The claimant also referred to two members of his family who had recently had strokes. He stated (111) that he thought the company policy was putting his life in danger and

went on to say that if that meant he could not work for the company then he "*can't work*".

23. Notably, in the investigatory meeting, the claimant did not explain that the reason he would not wear a mask throughout the time he was in the office was because he was unable to wear a mask for that time due to anxiety or panic attacks. That reason was not given at all.

24. Following the meeting, Ms Leigh wrote to the claimant on 30 November 2020 (107). That letter highlighted that the claimant's place of work was a supported living service for vulnerable adults. It also referred to the office as being a small, confined area, without windows. It stated that it was important that all staff members must wear a mask for their own protection and that of their colleagues and the service users. A suggestion was made that the claimant could wear a full head visor in the office instead of a face mask and the respondent could look to minimise the time he spent in the office. A hearing was arranged for 4 December 2020 by Zoom and details were confirmed. The allegations which would be considered were set out and various documents were enclosed.

25. Importantly the letter also provided the claimant the opportunity, by 3 December 2020, to: submit medical evidence about the risk to life of wearing a mask; or confirm that he would wear a visor at all times. In her witness statement, Ms Leigh explained that this was the opportunity for the claimant to speak to his GP to secure a written statement. The claimant did not provide either: medical evidence that he was exempt from wearing a mask; or confirmation that he would wear a visor.

26. The claimant provided the respondent with a fit note dated 27 November 2020 which stated that he was not fit to work for a month due to anxiety. As a result, the claimant moved from unpaid suspension to receiving Statutory Sick Pay. During this hearing the claimant emphasised the financial difficulties that being suspended on nil pay caused and he suggested that he sought a fit note because he was on nil pay. As the doctor who signed the certificate considered that the claimant was not fit for work at that time, I accept that was the case. The disciplinary hearing did not go ahead on the date proposed. It was the claimant's evidence that whilst the Doctor recorded anxiety on the note, personally the claimant did not use that terminology and he considered the issue to be better described for him as panic attacks.

27. On 1 December 2020 the claimant emailed Ms Royal and quoted extensively from a book written by a Dr Vernon-Coleman (131). When he was asked about what was said, the claimant was keen to emphasise that what was included in the email were not his own words. Nonetheless what was sent started with the view that face masks had ben proven to do harm, but not proven to do good. It stated that being forced to wear a face mask was a form of oppression and that support for wearing face masks was for political rather than health reasons. The extract quoted also said that wearing visors was just as useless as wearing a mask, but they were (in that writer's view) less dangerous to wearers (134).

28. The Tribunal was shown a file note from the same date which appeared to record a telephone conversation between a senior HR officer, Mr Gittins, and the claimant (135). The claimant could not recall the specific call and, as I did not hear from Mr Gittins, I gave the note less weight as evidence than if I had done. However,

the note recorded Mr Gittins as asking the claimant if he had considered wearing a visor, and the claimant had responded that it was his own personal body and that he would not have anything imposed on him.

29. In an email of 7 December 2020 (137) the claimant informed Ms Royal that there was no point in wearing masks it was pure politics.

30. Ms Cooke, the service director with HR responsibility, contacted the claimant on 15 December 2020 to discuss the requirement to wear a face mask. In her evidence, Ms Cooke explained that the matter was handed over to her from Ms Leigh, due to its serious nature and because of Ms Cooke's HR responsibilities. Following the conversation, Ms Cooke emailed the claimant to confirm what was said (152). That email explained the offer for the claimant to wear a visor rather than a face mask when using the office. The email made a number of references to wearing a visor instead of a face mask as being an alternative which had been offered to, or was available to, the claimant. The email said that when the visor had been discussed with the claimant, he had stated that was still an issue.

31. The claimant responded by email on 16 December 2020 (151). He said that he didn't think he would be able to carry on working there. He said that it was ridiculous for him to have to "*suffocate*" himself on a daily basis and he said he could not see himself working there again "*at least until this ridiculous, enforced mask wearing stops*". He ended his email by stating that it was his choice to wear anything and if he had known that he would have to cover his nose and mouth for the duration of a shift then he would not have applied for the job in the first place. The response sent did not address the suggestion made to wear a visor specifically at all, nor did it contradict what Ms Cooke had recorded as being what had been discussed about the visor.

32. In cross-examination the claimant accepted that he was not exempt from wearing a visor. He emphasised that nobody had ever actually physically given him a visor when it was proposed that he wear one. I agree with the respondent's submission that, in the answers the claimant gave, he did not give a credible explanation about why he failed to engage with the suggestion of a visor, even though the emails which I have referred to evidence that it was raised with him.

33. There was further contact between Ms Cooke and the claimant. The claimant provided a further fit note which stated he was not fit to work between 23 December 2020 and 31 January 2021 due to anxiety (168).

34. In her evidence, Ms Cooke explained that the pandemic was some of the hardest years of her working life, due to the impact of the virus and the fatal effects it had. She confirmed that sadly sixteen clients of the respondent died in a short period of time. She also recounted having staff testing positive who became incredibly unwell and staff struggling with their mental health.

35. Shortly before the expiry of the fit note, the claimant explained in an email of 26 January 2021 that he would not be obtaining a further fit note and would rather move on from this now, either back into his role or apart from the company (171). Ms Cooke responded (170) asking the claimant to confirm he would be able to wear a face mask or to provide full medical details if he had a disability which prevented him

from doing so. She stated that it was her understanding that the claimant was not exempt due to a disability but that he had made the decision due to his personal beliefs. The claimant responded at some length. His email concluded by referring to a history of strokes in his family. He said that if the respondent required a further doctor's note in addition to the two fit notes stating that he had anxiety "*thus making me exempt*" he could do that "*straight away*". There was nothing in the fit notes which linked the anxiety to mask-wearing.

36. On 1 February 2021, Ms Bateson wrote to the claimant enclosing a consent form for disclosure of medical evidence, to be used to obtain information from the claimant's GP (179). The signed consent form was returned on 3 February 2021 (181). On the same date the claimant was invited to a disciplinary hearing to be held on 9 February 2021 at 2 pm to be conducted by Zoom (183). That letter set out the matter which would be considered at the hearing: Alleged breach of health and safety guidelines, namely refusing to wear a face covering in service users home potentially placing colleagues and service users at risk.

37. The disciplinary hearing took place on 10 February 2021. Full notes were provided (191) (the claimant did not dispute their accuracy). The notes do not record how the meeting took place, but Ms Cooke's evidence was that she believed it had been intended to be conducted by Zoom but, due to connectivity issues, it was instead conducted by telephone using a conference phone. The call/meeting was attended by Ms Cooke, the claimant, and Ms Birch, another service director who had been asked to chair the meeting. From the notes, it is clear that it was a relatively lengthy meeting in which both Ms Cooke and the claimant were provided with the opportunity to say what they wished to.

38. I won't recount everything which was addressed in the meeting, but some important points I noted were:

a. In the meeting Ms Cooke explained that the potential alternative option of the claimant wearing a visor in the office had been offered to the claimant (197). The claimant did not expressly dispute what was said, or express a willingness to wear a visor;

b. The claimant said that not wearing a mask was from his main perspective "*a psychological thing going off the research in terms of efficacy and what have you*". He said "*there doesn't seem to be any evidence to support the fact that forcing people to wear it stops any level of transmission so that is where I'm coming from*" (198);

c. The Claimant explained that when he had spoken to his GP they had referred to the guidance and said that they don't generally give exemption letters. However, as part of the same passage in which he explained that position, the claimant went on to say "*If you're saying that there's no possible way that I can work at* [the premises] *without suffocating myself constantly all day then I don't want to work there anymore it's as simple as that. I can resign but like I say I would class that as unfair dismissal based on the fact that there is exemption, it's not just nothing*"; and

d. The claimant also said "*if you've five, six, seven people in the office, you know, it goes without saying you would wear a mask, you know, that's a given, what I'm saying is if someone is sat in the office way across the way and I'm sat in the other one but then you're expected to just wear it all the time, not only does it impede your own concentration, breathing, that kind of thing but also communication*" (202). He then went on to address facial expressions and service users.

39. What is most notable about the notes of what was said in the disciplinary hearing is that the claimant did not rely upon anxiety or panic attacks as being the reason why he could not wear a mask all of the time he was in the office. Whilst the claimant's explanations in the meeting were not always entirely clear or specific to one explanation, nonetheless the claimant did not explain his objections by reference to anxiety about wearing a mask and an inability to do so as a result. The closest the claimant came to doing so, was an answer to a question about whether he had suffered any ill health from wearing a mask (196), when he confirmed that he had not to his physical health, "*but you could say mental health, yes*".

40. It was Ms Birch's evidence that if the claimant had not felt that he had the opportunity to put something forward during that meeting/call she would have expected him to say so that in the hearing. The notes do not record the claimant as objecting to the hearing being conducted by phone. The claimant did not say in his evidence in this Tribunal hearing that he did so. He said in evidence that he thought that if he objected it would be treated as refusing to attend and he felt he had no choice, so hadn't objected. I find that he did not object at the time to the hearing proceeding by phone (whatever the claimant's unvoiced reasons were for not doing so).

41. The outcome was provided in a letter from Ms Birch dated 19 February 2021 (206). The letter repeated the allegation from the invite letter and went on to say that the allegation was found to be substantiated. I won't repeat all that was said in that letter, save to highlight a few things.

42. Ms Birch explained that she felt she would need to conclude the outcome without taking the GP consent form into consideration, referring to the fact that the process of consent had not progressed since 3 February.

43. Ms Birch explained that the respondent had a small cohort of employees that had been issued with a mask exemption by their medical practitioner, but she was unaware of any cases where the mask exemption was issued to partly exempt wearing for certain duties, in the way the claimant was requesting it.

44. The decision reached was that the allegation against the claimant was substantiated, constituted gross misconduct, and that summary dismissal was the appropriate sanction (208). The dismissal was stated as being effective on the day the claimant would be reasonably believed to receive the letter, which was 20 February 2021.

45. In explaining her decision to the Tribunal Ms Birch emphasised a couple of things. She said that: "*At the time of making my decision, mask wearing was*

essential within health and social care settings. As a social care organisation, we are required to follow guidance from Central Government, Local Authorities and Public Health England". She also said "*The PHE PPE guide dated 11 September 2020, which was enclosed within Adam's disciplinary pack, is explicit about the need to wear a mask*".

46. Ms Birch also explained that, during the claimant's suspension, the respondent had 245 cases of Covid 19 reported in clients, of which 56 required hospitalisation and 21 sadly died. Ms Birch's evidence was that throughout the entire pandemic 76 clients and three staff died due to Covid 19. Ms Birch's evidence was that she considered a lesser sanction such as a written warning for the claimant but did not consider it appropriate due to the claimant's outright refusal to wear a mask in the office and the significant risk this posed to clients and colleagues. With regard to the request for information from the claimant's GP, in her evidence Ms Birch said that, whilst this had been requested, she formed the view based on the claimant's representations that if he was prepared to wear a mask while caring for clients, that he could have worn a mask while in the office. In answers to questions, Ms Birch stated that she felt that, based upon what the claimant had said, his reasons for not wearing a mask were more based on a belief system.

47. The claimant appealed on 22 February 2021 (215). One aspect of the claimant's appeal was that he objected to a decision having been made at a meeting conducted by telephone, which he contended was not genuinely a meeting. Within his appeal the claimant raised the difficulty of obtaining advice from a GP on face mask exemptions and included screen shots of the advice of his own and other GP practices that it was not the role of the surgery to issue an exemption letter or certificate (216). The claimant stated that he believed that the respondent should have made a decision based on the presumption that the exemption would be given and he said "*or at least to acknowledge that it is unlawful to force someone to wear something over their nose and mouth for hours and hours at a time*".

48. Following his initial appeal, the claimant also provided a number of other emails setting out information he wished to be considered at the appeal hearing. The content of those emails became less focussed and, in my view, more difficult to follow. I particularly noted what was said at the end of the email of 25 February (246/247). I won't reproduce all that was said, but it included the statement "*The government are murdering people out right and Creative Support are fully behind it and want it to happen. You've tried to kill me but it hasn't worked, you tried to get me to kill myself and that hasn't worked*".

49. The claimant was invited to an appeal hearing in a letter of 1 March 2021 from Ms Downes who was the person who would hear the appeal (251). In that letter she responded to the claimant's request for the appeal meeting to take place face to face. She said: "*unfortunately this cannot be facilitated as a Service Director is required to chair the meeting and, as per government guidelines, all travel must remain local and it would be potentially in breach of the lockdown laws to ignore this. Therefore, all formal meetings across the organisation have taken place by video conferencing or by conference call*" (251). I accept Ms Downes evidence that at the time of the appeal meeting, due to the restrictions in place at the time, she was unable to travel for the meeting to take place face-to-face.

50. The appeal meeting or call took place on 8 March 2021. Full notes were provided (259) (which were not disputed). It appears to have been a relatively lengthy meeting. What is clear from the notes is that the claimant interrupted on a large number of occasions. Ms Downes' evidence was that she was unable to ask all the questions she had wanted to due to the claimant's conduct. The claimant, amongst many other things, referred to the information he had provided from Dr Vernon-Coleman (131). He informed Ms Downes that he had already reported the respondent to the police. He said that he felt like screaming and smashing the phone on the wall (268). In her evidence, Ms Downes detailed the claimant's unacceptable conduct. The claimant in his own evidence to this Tribunal referred to himself as being heightened at the time. In the Tribunal hearing the claimant apologised to Ms Downes for the way in which he had conducted himself at the appeal and he repeated that apology in cross-examination. The claimant explained that his mental health was not tip top at the time, something which was clear from his conduct in the appeal.

51. The appeal decision was provided in a letter of 24 March 2021 (279). In it, Ms Downes emphasised that the respondent, as a service provider, had to follow the guidance issued by Public Health England, regardless of the personal opinions of the employee. She set out the basis upon which she considered the claimant's position on mask wearing in the office to be gross misconduct. She acknowledged that a face-to-face meeting was favourable, but stated that she had been unable to understand any matters that the claimant had been unable to raise during the disciplinary meeting/call, and she concluded that a telephone meeting had been appropriate given the pandemic and the Government guidelines. She addressed the claimant's complaint of discrimination. At the end of her letter, she referred at length to guidance and the reasons why it was in place. She concluded that (in her view) the claimant's refusal to follow the policies was gross misconduct. She referred to the claimant's unacceptable conduct in the appeal meeting. She confirmed that she had found that there was no evidence of a valid medical exemption. She said that the claimant's strong views regarding Covid-19 and the wearing of face coverings were reasonable, but stated that did not override the requirement to follow the respondent's policy in relation to PPE. The original decision was confirmed.

52. The claimant emailed Ms Downes on 23 March 2021 and, following an exchange of emails which included provision of that decision letter, sent a lengthier email in the evening of 24 March (278). In that email the claimant thanked Ms Downes for her decision letter which he said was clear, concise and accurate. He thanked her for being reasonable and patient and praised her for her timeliness and patience with what must have been quite a tricky and unusual situation. In the Tribunal hearing the claimant said that what he recorded spoke to Ms Downes' professionalism, which was good. I found Ms Downes to be an entirely genuine witness who clearly had tried to consider the claimant's appeal as best she could in a fair and even-handed way. I accept that the decision she reached was entirely for the reasons she evidenced.

53. In his email of 24 March, the claimant summarised his position. He referred to the fact that no medical certificate was required to prove a medical exemption. He then went on to say (278): "*my main concerns are that a lot of people will get very ill from prolonged mask wearing or even die*".

54. In the bundle before the Tribunal was a letter from Dr Northfield dated 30 March 2021. That confirmed that the claimant has had a long history of suffering from anxiety which can be severe and that he can have significant anxiety episodes. The letter was not one which was before the decision-makers at the respondent, having been provided after the claimant's dismissal. The letter did not make any observations on the impact which the claimant's anxiety had, or could have, on his ability to wear a mask.

55. In his witness statement the claimant said that the only evidence presented to him was nothing more than baseless hysteria and referred to people acting on a hysteria based on fear. When asked about what was said, he clarified that he was not alleging that the rules and guidance in place at the time were based on hysteria, rather this was a reference to what was said in the respondent's witness statements.

56. The claimant confirmed in evidence that when he described himself as being mask-exempt (something which was stated in his witness statement), he was referring to himself as being exempt both because of the physical mask-wearing issues and the mental health issues such as the anxiety from which he suffered.

57. There was some dispute in the evidence at the Tribunal hearing about the period of time during each shift when the claimant might be in the office and required to wear a face mask as a result of the change in policy. The evidence was not entirely consistent. The claimant in the Tribunal described as a general guide that (pre-pandemic) half of his time would be supporting service users in the residence. That would appear to be consistent with the job description. The claimant did not refuse to wear a face mask in the time he was with service users. The respondent during their internal procedures identified that 10-20% of the claimant's time would be spent in the office, and therefore that would be the limited additional time for which a face mask would need to be worn as a result in the change in policy. The claimant disputed that figure, as indeed he did in the disciplinary hearing, and he highlighted the difficulties in identifying this precisely because of the support provided to service users not resident in the property and that during the pandemic that support changed because some of the service users did not want face-to-face meetings and were supported (more) by phone and video. I do not need to make any specific findings about the additional time the claimant would have been required to wear a face mask following the change in policy, save to record that prior to the change in policy the claimant would have worn a face mask for some notable part of his working time when dealing with service users and, after the change, the requirement to wear a mask applied for more of the claimant's working day and for longer periods. Ms Birch in her decision accepted the evidence of 10-20% and based her decision on that evidence. In any event, in answer to a question from me, Ms Birch's evidence was that in all honesty the percentage did not make much difference to her decision.

58. In cross-examination the claimant accepted that he wanted to receive an outcome timeously during the internal process. The claimant emphasised that whilst he was suspended on no pay (as he was) that caused financial difficulties (which, of course, I understand). He could not access benefits whilst he was still employed awaiting a decision. Following his suspension, the claimant received statutory sick pay during the periods of certificated absence and agreement was reached for him to take annual leave for a few days in early February as a means to offset the loss of

pay. It was clear that the claimant did have a wish for the process to be concluded timeously, largely due to those issues.

The Law

59. As an unfair dismissal claim it is brought under Part X of the Employment Rights Act 1996. The respondent bears the burden of proving, on the balance of probabilities, that the dismissal was for misconduct. If the respondent fails to persuade me that it had a genuine belief in the claimant's misconduct and that it dismissed him for that reason, the dismissal will be unfair.

60. If the respondent does persuade me that it held the genuine belief and that it did dismiss the claimant for that reason, the dismissal is only potentially fair. I must then go on and consider the general reasonableness of the dismissal under section 98(4) Employment Rights Act 1996. That section provides that the determination of the question of whether a dismissal is fair or unfair depends upon whether in the circumstances (including the respondent's size and administrative resources), the respondent acted reasonably or unreasonably in treating the misconduct as a sufficient reason for dismissing the claimant.

61. In conduct cases, when considering the question of reasonableness, I am required to have regard to the test outlined in **British Home Stores v Burchell** [1980] ICR 303. The three elements of the test are:

(1) Did the employer have a genuine belief that the employee was guilty of misconduct?

(2) Did the employer have reasonable grounds for that belief?

(3) Did the employer carry out a reasonable investigation in all the circumstances?

62. The additional question is to determine whether the decision to dismiss was one which was within the range of reasonable responses that a reasonable employer in those circumstances and in that business might have adopted (**Iceland Frozen Foods Ltd v Jones** [1982] IRLR 439).

63. I must not substitute my own view for that of the respondent. I must not slip into what is sometimes called the substitution mindset. It is not for me to decide whether the claimant committed the misconduct alleged or whether the respondent has proved that he did so. I also must not decide whether I would have dismissed the claimant had I conducted the disciplinary hearing and considered the evidence which was in front of the decision-maker. The real question for me is whether the respondent acted fairly and reasonably in all the circumstances at the time of the dismissal.

64. In considering the investigation undertaken, the relevant question for me is whether it was an investigation that fell within the range of reasonable responses that a reasonable employer might have adopted. When considering fairness, it is important that I look at the process followed as a whole, including the appeal.

65. I am also required to have regard to the ACAS code of practice on disciplinary and grievance procedures, albeit neither party referred to any particular parts of the code in this case.

Conclusions – applying the Law to the Facts

66. I won't endeavour to reproduce all of the matters raised by the parties in their submissions.

67. In his submissions the claimant emphasised that he did love the job with the respondent, and it was heart-breaking for him to go through what he went through. The claimant said that he did not believe that the respondent's procedures were followed in an ordinary sense. He believed that he was dismissed due to anxiety, and the pandemic was the reason behind all of that and he did not think that the rules should go out of the window because of that. He also felt that there was a blurring of policy, law and guidance, and the respondent not having or applying a clear distinction between the three was heavy-handed and unfair.

68. In his submissions the respondent's representative emphasised the fatal effect of Covid-19 across the respondent's business operation and he emphasised the evidence of Ms Cooke about the pandemic which I have already referred to. He went so far as to submit that the respondent's obligation to comply with the PPE requirements, such as those set down by Public Health England, at the material time genuinely was a matter of life and death. The magnitude of the pandemic and the effect it had on the respondent's operation was unprecedented. I accept and agree with those submissions.

69. In his submissions the claimant said that he had provided enough evidence for any reasonable person to at least suspect that masks may be harmful. I do not agree with that submission and the claimant has certainly not presented to me evidence which shows that is the case. However, I should also say that I have not been shown any evidence in this hearing that masks were effective in combating infection; I accept the respondent did not need to do so to prove their case on the issues to be determined. I do appreciate that there may be a debate about the effectiveness of masks, and I entirely accept that there was such a debate during the pandemic at the time that these events occurred.

70. I would start by emphasising that section 98(4) requires me to take into account all the relevant circumstances. In this case, that means I must take into account that the events which occurred and the decision that was reached, all took place during the unprecedented time which was the first year of the pandemic. I hope those circumstances were unique, but that context is important. The position taken by the claimant reflected, at least in part, the fact that decisions were taken, and guidance issued, which imposed new requirements on people of a type which we had not seen before. The guidance made had a particular impact on those working in health and social care. I think it is not controversial to say that the guidance was issued without necessarily the efficacy of the steps having the same evidence behind them, as would have existed if the guidance had come in at other times. Objections to the guidance and requirements were not uncommon; and were certainly not restricted to the claimant. Many people also faced mental health challenges in part contributed to by the pandemic and the measures faced; the

claimant was certainly far from being alone in that respect. For the respondent, as its representative emphasised in his submissions, the evidence I heard related to a period of time when the decisions it made had potential life and death consequences for its service users and employees. When considering all the circumstances of the case, as I am required to do, those circumstances which applied at that time are a key part of that context.

71. There was in practice no dispute that the claimant was dismissed.

72. The first question I am required to determine from the list of issues was whether the respondent has shown the reason or principal reason for the dismissal? That question was considered alongside the second question; was it a potentially fair reason under section 98 of the Employment Rights Act 1996?

73. I found that Ms Birch dismissed the claimant for the reasons she explained in evidence and which she documented at the time in her letter of 19 February 2021 (206). She dismissed the claimant based upon her view that the claimant had breached health and safety guidelines by refusing to wear a face covering in the office located in the service users' home, potentially placing colleagues and (to a lesser extent) service users at risk. In particular, and specifically, she dismissed the claimant because he was not willing to agree to wear a face mask or visor when he was present in the office in the relevant property when other people were also present. I appreciated that the claimant does not agree with the characterisation of this decision as being misconduct. However, I found that the reason why Ms Birch dismissed the claimant was for the reason she gave, which was one of misconduct in the light of the guidance in place and the instruction given to the claimant by the respondent.

74. Towards the end of his evidence, the claimant stated that he had not refused to wear a face mask in the office. I found that statement to be incorrect. The claimant set out his position on mask wearing in the email of 24 November 2020 (119). At the investigation meeting on 27 November 2020 the claimant clearly stated that if it was company policy that he had to wear a mask in the office then he would have to find another job (109). He also made clear that he was not willing to wear a mask in the office at the disciplinary hearing and the appeal hearing. That was clearly and obviously the understanding of Ms Birch and Ms Downes of the claimant's position and I have seen nothing from either hearing which would suggest that they were in error in their understanding. I found that the reason why the claimant was dismissed was because he had (or at the very least it was believed he had) refused to wear a face mask in the office, which was a breach of the respondent's policy at the time.

75. Having found that the reason for the claimant's dismissal was conduct (which was a potentially fair reason), I then needed to go on and decide whether, applying the test of fairness in section 98(4) of the Employment Rights Act 1996, did the respondent act reasonably in all the circumstances in treating that reason as sufficient reason to dismiss the claimant?

76. The list of issues helpfully set out the key issues which are usually considered when determining this in cases of misconduct. Those issues reflect the **Burchell** test I have set out. The first such question was whether the respondent genuinely believed the claimant had committed misconduct? I have to some extent already

addressed that when considering the reason why the claimant was dismissed. I found that Ms Birch was a genuine and truthful witness when she evidenced why she dismissed the claimant. She genuinely believed that the claimant had committed the misconduct she found. I have also already addressed Ms Downes' credibility as a witness, and I have no doubt that, when she reached the appeal decision, she also genuinely believed that the claimant had committed the misconduct alleged.

77. The next part of the test was whether there were reasonable grounds for that belief? The claimant was not willing to wear a face mask in the office. The respondent's policy (at least after the change in November 2020) was that when someone was in the workplace they should wear a mask. That was based upon the Public Health England guidance for community health and social care settings (there was no dispute that the claimant worked in such a setting), see for example 125A. That was reduced to the collaborative poster (121 – a collaboration between Public Health England and the respondent) which said face masks are required for all tasks, all times, and all staff. As the claimant emphasised, the reduction of the policy to that slogan meant that it was not always true; there were exceptions made for mask-exempt staff to instead wear a visor. Nonetheless it was the policy applied to the claimant when he was working in the office. The claimant was not willing to wear a mask. I found that the claimant did not produce any evidence that substantiated his assertion that he was exempt from the requirement to wear a mask. He did not agree to wear a visor instead. I found that there were reasonable grounds for Ms Birch to hold the belief that the claimant had committed the misconduct alleged. There were also reasonable grounds for Ms Downes to hold the same belief.

78. The next question asked was whether, at the time the belief was formed, the respondent had carried out a reasonable investigation? I considered that specific question alongside the more general one of whether the respondent followed a fair and reasonable procedure? A fair investigation is one which falls with the range of reasonable responses which a reasonable employer could undertake. There was an investigatory meeting with the claimant on 27 November 2020. The claimant was sent details of the allegation against him and was provided with relevant documents. A disciplinary hearing took place on 10 February 2021. It was a lengthy meeting at which the claimant was given the opportunity to have his say. The decision was taken by the person who conducted the hearing, and it was set out clearly in writing. Following the dismissal decision, the claimant was given a right of appeal. He appealed and his appeal was considered at an appeal hearing when, again, the claimant was given the right to have a say. I will address separately in more detail the way in which the meetings were conducted and the issue of GP documentation, but I found that a full and fair procedure was followed. I found both the disciplinary decision-maker and the appeal decision-maker to have followed a full and fair process in reaching their decisions and there was nothing identified about the investigation which fell short of the standard required. As I have stated, in his verbal submissions the claimant stated that he did not believe the respondent had followed its own procedures, but I did not find that he had evidenced any way in which that was the case.

79. A point which the claimant emphasised in his internal appeal, and in the course of this Tribunal hearing, was that the process did not take place in-person. Following his suspension, all meetings were not in fact face-to-face in person meetings. It had been intended that both the disciplinary hearing and the appeal

hearing would take place by Zoom, but that had not proved possible (neither party was able to shed any light on why exactly that had proved to be the case). Both meetings took place as telephone conversations. I fully understand why the claimant looking back at the process followed has felt that was not ideal and felt that meant that he had not been able to get his point across, as he submitted. He said he believes it is harder to empathise with someone by phone and he is probably right. Ms Downes accepted in her appeal decision letter that a face-to-face meeting would be more favourable. Nonetheless I did not find that the fact that the key meetings were conducted by phone rendered this dismissal otherwise unfair. In reaching that decision I particularly took into account the following:

a. The hearings were conducted at the height of the Covid-19 pandemic, and the pandemic necessitated all organisations to undertake alternative procedures for meetings. The respondent needed to do so;

b. Whilst the claimant did identify the gaps in the notes from the investigation meeting which suggested that the way that meeting had been conducted had had some impact, he did not identify any material shortcomings in the disciplinary or appeal meetings, which were fully noted in detail;

c. The claimant did not identify anything specific which he believed would have happened differently had the meetings not been by phone, save for the general point about empathy, which I have addressed;

d. The claimant did not object to the disciplinary meeting proceeding by phone at the time, nor did he raise the issue during the disciplinary hearing;

e. In the appeal meeting, the claimant was asked to identify any matters which he had been unable to raise in the disciplinary meeting and did not do so. That was a matter which Ms Downes considered when she reached her appeal decision; and

f. For the appeal, I accept Ms Downes' evidence that her attending a face-to-face meeting was not possible due to the restrictions in place at the time and, therefore of necessity, the appeal meeting had to be conducted in an alternative way.

80. The other procedural issue which I have considered very carefully is not one upon which the claimant himself particularly focussed. On 1 February 2021 the respondent's head of people and personnel wrote to the claimant seeking his consent to the respondent obtaining information from the claimant's GP. On 3 February the claimant provided that consent. On the 19 February the claimant was dismissed without any information having been obtained from the GP.

81. In her decision letter (207), Ms Birch stated that the process had not progressed further and that she needed to reach a decision without taking the GP consent form into consideration, she said given the length of time it took to receive the information from the claimant. I found that was not a fair explanation of the position nor, in my view, did it accurately reflect what had occurred. However, in her

witness statement and in her evidence to the Tribunal, Ms Birch explained that she had formed the view based upon the claimant's representations that if he was prepared to and able to wear a mask with service users, that he could also have worn a mask in the office. It was her oral explanation that the decision was based on the claimant's responses and explanation at the meeting. I accepted her evidence that she felt that, based upon what the claimant had said, that his reasons for not wearing a mask were more based upon a belief system and therefore the GP advice was not required.

82. When asked about this during submissions, the respondent's representative submitted that it was something of a red-herring and highlighted the steps taken by the respondent to provide the claimant with an alternative including a visor. He also highlighted that the GP letter provided later did not take the matter any further. He emphasised the claimant's own wish to receive a decision in a timeous manner (as the claimant submitted in response, this was due to the lack of pay). Whilst I do not find that this issue was a red-herring as submitted, as it was relevant to the fairness of the process followed, I nonetheless accept that the claimant's position on wearing a visor meant that any further period allowed to obtain evidence of a face mask exemption or medical advice about why such an exemption should be given, would have made no difference to the outcome as those who were face mask exempt were instead required to wear a visor. As I have said, I accepted Ms Birch's reasons why she did not await such a report and found that to be reasonable in all the circumstances in the light of her understanding of the claimant's reasons. I found that that the absence of allowing further time to obtain advice from the GP did not render an otherwise fair dismissal to be unfair (in all the circumstances).

83. The next question set out in the list of issues was whether dismissal was within the band of reasonable responses? I do understand why the claimant is critical of the restrictions and obligations applied to him at the time of the pandemic and he clearly struggled with the restrictions which were applied to him at the time. The claimant was not alone in struggling with such restrictions. He is perfectly entitled to have his own view of the obligations imposed, such as those which applied to mask wearing, and of the effectiveness of those obligations. However, the respondent as an organisation which employed people in health and social care settings was clearly obligated to follow the advice and guidance of Public Health England (irrespective of the legal status of that guidance). That advice was that the respondent's employees working in social care settings must wear a face mask, including in the office in the service users' home in which the claimant worked. The claimant was not willing to do so. He did not evidence that he was exempt from doing so. He had not shown that he was willing to wear a visor instead, which was the adjustment which the respondent had made for those who had demonstrated that they were exempt from wearing a mask. I also note and accept the evidence given about the tragic impact that Covid-19 had on the respondent, its service users, and its employees. I accept that, as the respondent's representative submitted, whatever the claimant's views, the respondent's hands were effectively tied by the Public Health England guidance. In those circumstances, I found dismissal was within the range of reasonable responses.

84. It followed from what I have explained, that I found that the respondent did act reasonably in all the circumstances in treating what was found as a sufficient reason to dismiss the claimant.

85. Turning to the way in which the claim was pursued at the Tribunal hearing. I would observe that the way in which the claimant has pursued his arguments has not always been consistent, primarily during the respondent's internal procedures but also in the Tribunal hearing itself. I do not think that has helped the claimant.

86. I do not accept that the claimant was exempt from wearing a mask where he was otherwise required to do so, due to physical issues. I understand why the recent history of strokes in his family should concern the claimant. I understand that he believes that wearing face masks for a long period of time can be harmful. However, those concerns and beliefs did not constitute a genuine reason why a face mask should not be required. To the extent that the claimant asserted that he was exempt from wearing a face mask due to physical issues for him, I do not accept that was genuinely the case. More importantly for the issues to be determined by me in the unfair dismissal claim, those concerns did not oblige the respondent to waive the health and safety requirements applied at the time, or mean that the dismissal was unfair in the circumstances where the claimant declined to wear a face mask in the office.

87. The claimant's strongest argument related to anxiety. In summary the claimant asserted that: he had anxiety; that meant that he could not wear a face mask for the long periods required if he had to wear it in the office; in his view he was therefore mask-exempt; and it was impossible for him to provide the medical advice on the exemption sought because his GP practice was not willing to provide it. I do accept that some people were considered exempt from the general requirements to wear face masks in places such as shops because of anxiety, because the way in which their anxiety impacted upon them made it difficult or impossible to wear a face mask (or potentially made it difficult/impossible to wear one for long periods). I found that the claimant had not evidenced that his anxiety impacted on him in that way. The medical evidence before this Tribunal evidenced anxiety, but not the link to mask-wearing which the claimant contended. I accepted the difficulties faced by the claimant in proving that he was face mask exempt in the light of the position of his GP. He was in something of a catch-22 position where he was told that such evidence must be provided but he was unable to obtain it. I did also accept the respondent's position that if it was to have waived the conditions to which it was subject, it would have needed some tangible evidence of the need to do so, over and above the claimant's own assertions. However, the primary reason why the claimant's claim to the Tribunal could not succeed on this basis, was because it was not the case he put forward during the respondent's internal procedures. Within this Judgment I have addressed the facts and have highlighted the parts of the evidence which led me to that conclusion. It was certainly not what either of the decision-makers understood the claimant's position to be, based upon what the claimant said and wrote at the time. In the disciplinary hearing the claimant made no reference to anxiety or panic attacks; he made a brief reference to mental health. He did not explain his unwillingness to wear a face mask in the office long-term as being referrable to his anxiety. Ms Birch believed the claimant was refusing to wear it, not that he was unable to do so due to anxiety. She reached her decision based upon the information in front of her. As I have already explained, I have found that decision to be fair in all the circumstances. For the appeal, the claimant had provided the details about his GP practice's approach and had referenced being an exempt person, but he still did not clearly spell out that he was asserting that he was exempt because his anxiety meant he was unable to wear a face mask. The appeal hearing

was difficult and not well conducted by the claimant (albeit I appreciated the reasons for that). As I have explained, in an unfair dismissal claim the questions asked are focussed on the respondent's decisions at the time, the reasonableness of the investigation, and the information before the decision-makers. Whilst the claimant clearly put together a better explained case before me than he did for the respondent's internal hearings, that explanation in the Tribunal hearing did not mean that he should succeed in his unfair dismissal claim.

88. There was also a secondary reason why the claimant's claim could not succeed based upon the strongest argument which I have described in the previous paragraph. The respondent's approach to those who were mask-exempt, was to require a visor to be worn. The claimant did not agree to wear a visor. Had I needed to consider the fairness of the dismissal based upon the claimant having explained this case fully to the decision-makers, that would have been an issue which would have meant that I would still have found the claimant's dismissal to have been fair in all the circumstances.

Summary

89. For the reasons I have explained, I found that the claimant's unfair dismissal claim did not succeed.

Employment Judge Phil Allen
19 April 2023

WRITTEN REASONS
SENT TO THE PARTIES ON
20 April 2023

FOR THE TRIBUNAL OFFICE