



## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case Number: 4103603/2022**

5 **Hearing held at Glasgow on 22 – 24 May 2023**

**Deliberations 25 and 26 May 2023**

**Employment Judge D Hoey**

**Mr D Blair**

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**Claimant**  
**Represented by:**  
**Ms S Gallagher -**  
**Lay Representative**

**Kibble Education and Care Centre**

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**Respondent**  
**Represented by:**  
**Mr C Donnelly -**  
**Solicitor**

## **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

20 The claimant was not unfairly dismissed. The claim is therefore dismissed.

### **REASONS**

1. The claim that required to be determined was one of unfair dismissal. The issue arising was in sharp focus, namely, whether or not it was fair for the respondent to dismiss the claimant when he was not prepared to comply with the relevant Government guidance in connection with the pandemic required of the claimant by the respondent. This had become focused as a result of significant case management in this case, including a case management preliminary hearing which had identified the key issue in this case.
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2. The hearing was conducted in person with the claimant being assisted by a lay representative and the respondent being legally represented. I explained to the parties how evidence is heard and the importance of ensuring relevant evidence is provided to the Tribunal. Both the claimant and Ms Gallagher were permitted to ask relevant questions (and make submissions) as the case proceeded.

### **Case management**

3. The parties had worked together to focus the issues in dispute and had provided a statement of agreed facts and a list of issues. The initial statement was relatively brief and it appeared to me at the commencement of the case that a large number of the facts in this case ought to be capable of being agreed, the dispute likely being around the fairness of the dismissal.

4. The parties had agreed that there was no dispute that the respondent had a potentially fair reason for dismissal (namely conduct or some other substantial reason), with the issue to be determined the issue of fairness of the dismissal.

5. The parties were given the first day to finalise the statement of agreed facts and statement of loss as the parties considered that would expedite progress of the case. Regrettably, due a dispute, the parties were unable to finalise the statement and evidence required to be led. However, following conclusion of the evidence it was apparent that in fact the key issues were not in dispute.

6. The parties worked together to assist the Tribunal in achieving the overriding objective, in dealing with matters justly and fairly taking account of the issues, cost and proportionality.

### **Issues to be determined**

7. The issues to be determined are as follows:
1. It was conceded that the claimant had been dismissed and that the reason for the dismissal was a potentially fair one, namely relating to conduct or some other substantial reason. There was therefore no

dispute that the claimant had been dismissed for a potentially fair reason.

2. The issue was whether the respondent in dismissing the claimant for that reason acted fairly and reasonably in the circumstances, taking account of the size and administrative resources of the respondent. Did the respondent act reasonably or unreasonably in treating that as a sufficient reason for dismissing the claimant in all the circumstances (applying the legal tests in this area)?

3. If the claimant succeeded the Tribunal would consider remedy, While broad figures had been agreed, the disputed issue was whether the claimant had properly mitigated his loss, the respondent arguing that the claimant had failed properly to seek an alternative role.

### **Evidence**

8. The parties had agreed the productions running to 327 pages.

9. The Tribunal heard evidence from Mr Warner (head of corporate services who was responsible, in part, for the communication of the approach taken during the pandemic), Mr Evaskitas (service manager, part of the panel that led to the claimant's dismissal), Mr Soutar (chief operating officer who heard an appeal against the claimant's dismissal), the claimant and a colleague of the claimant who accompanied him to the hearings. The Tribunal assisted the claimant to ensure witnesses were each asked appropriate questions and that the overriding objective was achieved.

### **Facts**

10. The Tribunal is able to make the following findings of fact which it has done from the evidence submitted to it, both orally and in writing. The Tribunal only makes findings that are necessary to determine the issues before it (and not in relation to all disputes that arose nor in relation to all the evidence led before the Tribunal). The majority of the facts were not ultimately in dispute.

### **Background**

11. The respondent is a specialist provider of services for at risk children. It provides a range of integrated services to build positive futures for children and young people aged 5 to 19 years with complex social, emotional and educational needs.
- 5 12. The respondent exists to support vulnerable and at-risk children and young people across a range of campus and community-based services. Many of the young people the respondent cares for have experienced significant trauma in their lives and the respondent exists to provide dedicated care and support to help them move forward and achieve the best outcomes possible.
- 10 These services include residential, secure services and community support, as well as dedicated education and wellbeing services.
13. The services are provided on a 24 hour basis, 7 days per week and 365 days per year.
14. The claimant commenced full time employment with the respondent on 6
- 15 September 2008.
15. On 9 August 2017 the claimant's contract changed to a part time contract whereby he worked a 15 hour shift every fortnight on alternating Saturdays and Sundays. His usual hours of employment were 7.30am to 10.30pm.
16. The claimant was employed as a Child and Youth Care Worker and required
- 20 to support those in his care. The claimant's duties included work directly with children and young people by supporting and assessing their individual needs. His role followed the placement cycle of a young person incorporating the assessment phase, care programme and then recording and reporting on the implementation of the programme. The claimant's role involved working
- 25 in close physical contact with children and colleagues as well as family members, social workers and other professionals and third parties who attended the premises.
17. The claimant could not carry out his role remotely (e.g. by home working).

**Policies and procedures**

18. The respondent has a disciplinary procedure which set out the approach to be taken in disciplinary matters. Employees were expected to conduct themselves in an appropriate manner and should familiarise themselves with relevant policies. If matters cannot be resolved informally a formal disciplinary process would be followed. Issues arising would be investigated and a process is set out in respect of disciplinary hearings and appeals.
19. During the pandemic (from March 2020) the respondent issued regular emails and updates referring to Government guidance and of the requirements to stay safe and protect people. Staff were asked to familiarise themselves with the guidance that was being issued. FAQs were also issued in relation to COVID to all staff.
20. On 15 December 2021 the respondent introduced an organisational resilience policy. On the header page of this document (which was issued to all staff, including the claimant) it is stated that the respondent 's response to COVID 19 was "fluid and subject to regular review due to changes in both the infection rate within the group and the government's response". If clarification was required staff were asked to contact Mr Warner. The policy set out the respondent's approach to managing risk, such as in relation to absence, training, travel, protective equipment, infection control, positive cases, testing and vaccination. All staff were required to test a minimum of once a week to allow the respondent to understand the position. The intranet contained further details.
21. A different approach existed in relation to those who worked in schools (which mirrored the Government's approach to those who worked in mainstream schools) and other staff. The only exception to the testing protocols were staff who had tested positive in the preceding 90 days. If symptoms developed such staff should self isolate and seek separate advice.
22. The claimant received and was aware of the respondent's policies and approach in relation to the pandemic which mirrored those within general society.

**Regulatory environment**

23. The respondent operated in a regulated environment and was subject to regulatory control. In this regard the regulator required the respondent to ensure suitable and sufficient processes were introduced that properly managed the risk (as was understood from time to time). Government  
5 guidance required to be followed (as a minimum approach).

**Pandemic**

24. On or around March 2020 the country went into lockdown in response to a pandemic. Despite the lockdown the respondent still required to ensure those within its care were properly and safely looked after.

10 **Claimant's position**

25. The respondent sent a letter to the Claimant on 19 February 2021 asking him to provide details of his first dose of a COVID 19 vaccine. This was a letter send to all staff whom the respondent understood had not yet obtained the vaccine. This was an important way of keeping a record of those who had the  
15 vaccine which facilitated a better understanding of the risk that arose.

26. In response to that letter the claimant telephoned a person in the HR department and stated that he would not accept any COVID 19 vaccine. That matter was not escalated further.

**Training event**

20 27. The claimant attended a Safe Crisis Management training event on Friday 7 January 2022. The training provided refresher training on how to safely restrain a child or young person. It required attendees to have close physical contact with each other.

25 28. On Sunday 9 January 2022 the claimant received a voicemail message from a duty manager, requesting a call back. When the claimant returned the call he was told that he had been a close contact of someone who had tested positive for COVID19. The claimant was asked to attend at the respondent's premises to take a test in line with the respondent's policies.

29. The claimant refused to do so and stated that he would not take any tests.

30. On Monday 10 January 2022 the claimant spoke with an HR officer and stated that he would not take a test.
31. On 12 January 2022 the respondent sent a "Please Explain" letter to the claimant asking him to explain his refusal to undertake any form of testing for COVID-19. The letter explained that in accordance with Government guidance and the respondent's policy any employee identified as a close contact of a positive case was required to take a test to ensure risk was managed. The letter noted that the claimant had indicated he was not willing to comply with Government guidelines or the respondent's policy and participate in any form of testing. He was asked to provide a written explanation of his position. He was advised that there was a risk of disciplinary action if no reasonable explanation was provided.
32. The claimant attended work on the 15 January 2022 and was sent home by the duty manager as he had not self isolated for 10 days as the policy required.
33. The claimant responded to the "Please Explain" letter on 17 January 2022 with queries regarding the guidelines referred to in the letter. He asked about the Government guidelines and respondent's policy.
34. The respondent replied in an email dated 20 January 2022 with links to Government guidelines and the respondent's policies on its intranet and noted that the respondent's policies were found on the intranet (with the link provided). The claimant was also reminded that an email had been sent to all staff highlighting that any close contact of a positive test required to test
35. The claimant responded by letter indicating that he would decline to take any test. He argued the tests were not reliable and he said he felt it is not advisable or necessary for him to take any test. He also argued that he did not consider the test to be adequately safe
36. The claimant attended work on Saturday 30 January 2022 and Sunday 12 February 2022.

37. In the intervening period the respondent was exploring its options. The respondent had no experience of any other employee refusing to comply with the COVID 19 requirements.

**Invite to disciplinary hearing**

5 38. On 22 February 2022 the claimant was invited to attend a disciplinary hearing on 25 February 2022. The letter noted that a disciplinary hearing was being convened to consider the claimant's refusal to comply with the testing requirements and the fact that he had indicated that he was not willing to comply with Government guidance or the respondent's process and  
10 participate in any form of testing. The claimant was advised that disciplinary action could result from any such hearing.

39. Following further correspondence between the parties, the hearing proceeded on 8 March 2022. This was as a result of the availability of the parties (including the claimant and his companion).

15 40. During the hearing on 8 March 2022 the claimant confirmed that he would not take any tests for the reasons set out in his response above. The claimant said that he would not comply with the guidance as he did not agree with it. He felt that he did not need to explain anything further.

**Outcome**

20 41. By letter dated 22 March 2022 the claimant was advised that the points the claimant made had been taken into account. The claimant did not believe testing was reliable or safe and that there was no law he felt requiring him to comply with the guidance. The panel noted that this was the first time they had been advised as to the claimant's position and refusal to follow  
25 Government guidance in this regard.

42. The letter noted that the respondent had repeatedly set out its approach throughout the pandemic and had placed trust in employees that staff would follow the processes to keep everyone safe. Failure to comply with the processes increased the risk for others.



43. The letter noted that the claimant would not comply with the guidelines going forward and that he had said he had never complied with them. The claimant had said that he did not believe in the Government guidelines and they were “not [his] reality”. This was not something known by the panel until the matter had arisen in January and it had been understood that all staff were following the guidance to safeguard those within the respondent’s premises.

44. The claimant’s service and right to choose were taken into account together with all he had said. The respondent considered that the claimants’ actions were contrary to the ethos of the respondent’s organisation and could have endangered those for whom the respondent was responsible. The claimant’s approach presented an unacceptable risk to the health and welfare of those for whom the respondent was responsible. The claimant confirmed he would not comply with the guidelines in the future. The conclusion reached was that the respondent’s policy was clear and that the Government and respondent’s approach existed to reduce or prevent the transmission of the virus which guidance had been clearly communicated to the claimant. The respondent had a duty of care to those within its control and the claimant’s refusal to comply with the guidance going forward represented an unacceptable risk to the health and well being and dismissal was a necessary and proportionate outcome.

45. The principal reason for the claimant’s dismissal was the claimant’s clear refusal to engage with the COVID testing regime at any time. He was not prepared under any circumstances to engage with the process and made it clear that he would not do so under any circumstances in the future. That was the principal reason for the claimant’s dismissal which the respondent concluded presented an unacceptable risk to those within its control (as it was not possible to assess the risk of transmission to those who came into contact with the claimant).

**Appeal against dismissal**

46. The claimant appealed against his dismissal on 29 March 2022 arguing that his stance had been open and honest throughout the pandemic and he had

advised his manager as to the position. At no point had the claimant consented to undergoing any medical procedure and there were examples of the respondent not fully complying with the rules.

5 47. Mr Soutar, Chief Operating Officer, heard the appeal of the decision by the disciplinary hearing on 19 April 2022.

48. Ahead of the appeal hearing the claimant lodged additional documents to support his position regarding his refusal to take tests. Those documents were considered by Mr Soutar.

10 49. During the appeal the claimant confirmed that he would not undertake any tests. The claimant said that at no point had he consented to taking any tests. Mr Soutar had not been advised as to the claimant's views prior to the hearing. The claimant explained that there was some authority in support of the position that one should not be testing. The claimant said he had been a hard worker during his lengthy service and he just wanted to attend work and do his job. The claimant would not look at the guidelines as he would not be  
15 complying with them.

**Outcome of appeal**

20 50. Following consideration of the submissions made during the appeal and the information the claimant provided, Mr Soutar upheld the decision to dismiss the claimant.

25 51. By letter dated 25 April 2022 the respondent noted that the claimant maintained his stance had been clear throughout the pandemic and that he was not complying with the guidance. The claimant was advised that this was not something known by senior management. The claimant was advised that the respondent's policies were clear and had been communicated to all staff including the claimant. Those for whom the respondent was responsible were put at risk by those who did not comply with the policies given the Government guidance and position at that time. It was not possible to have the claimant work elsewhere and while his service and hard work was noted and taken into  
30 account the ongoing refusal to comply with the guidance created a real risk to

those with whom the claimant came into contact which is contrary to the ethos of the organisation and could lead to further absence placing considerable pressure on an already stretched organisation. The claimant's continued refusal presented an unacceptable risk and as a result the claimant's appeal was refused.

52. The claimant was advised as to a final right of appeal to the chief executive which he exercised.

### **Further appeal**

53. Mr Gillespie, chief executive, heard the final appeal of the decision by the disciplinary hearing on 31 May 2022.

54. During the second appeal the claimant reiterated that he would not undertake any tests. The claimant reiterated that he strongly disagreed with the Government guidelines. Mr Gillespie advised the claimant that all staff were entitled to their own opinions but the respondent was governed by a regulator and had to comply with the Government guidance. The aim was to manage risk and seek to keep everyone as safe as possible. The absence of a test resulted in a lack of knowledge as to the position which created a risk. The claimant was advised that the respondent was no different to other employers who had to ensure staff were safe and risks managed. The claimant said he did not agree with testing.

55. Following consideration of the submissions made during the appeal, Mr Gillespie upheld the decision to dismiss the claimant.

56. By letter dated 9 June 2022 Mr Gillespie advised the claimant that he had concluded the claimant posed an unacceptable risk to those for whom the respondent was responsible by refusing to follow the guidance. This was the first case the respondent had encountered where an employee was refusing to engage with the Guidance which had caused delay in responding to the claimant in what was an unprecedented situation. The respondent's approach had been clearly communicated to all staff including the claimant and it was the claimant's responsibility as a professional to familiarise himself with the

guidance. Mr Gillespie had not been aware of the claimant's position until it had recently been brought to his attention. He stated that it had been understood that the policies were being followed.

57. The points the claimant made were taken into account together with the  
5 claimant's beliefs but the respondent had a duty to follow the Government  
guidance in this area and at no point had any concern been raised by the  
claimant formally. Mr Gillespie explained that the claimant's decision not to  
comply with the procedure in the future results in his position being untenable  
given the duty of care to all those for whom the respondent is responsible that  
10 the claimant would meet during his employment. The serious nature of the  
issues arising result in a risk that the respondent cannot take. The appeal was  
therefore refused.

#### **Observations on the evidence**

58. Each of the witnesses sought to recollect matters to the best of their abilities.  
15 Other than one matter, there were no few disputes as to the key issues in this  
case that the Tribunal required to resolve.

59. The issue that the Tribunal had to consider was whether or not the claimant  
had received the guidance and policy documentation relied upon by the  
respondent. While the claimant indicated that he did not receive this, he did  
20 accept that he had received a "torrent" of emails about the respondent's  
approach to COVID 19. He also made no effort to seek out the specific policies  
and procedures (despite that being an obligation upon all staff).

60. Given the fact the pandemic was something that was unique with the position  
changing on a very regular basis, it was not surprising the respondent was  
25 communicating frequently with its staff. The respondent trusted its staff to  
keep up to date and ensure best practice was adopted to keep everyone safe.

61. The Tribunal considered that it was more likely than not that the claimant had  
received the Resilience Policy (and other ongoing emails as to the  
respondent's approach to the pandemic). The claimant was aware of the  
30 broad approach taken and understood the Government position that applied

across the country. His personal position was that he did not accept the science or position that was being advanced and he was not prepared to agree to the restrictions (particularly with regard to testing and immunisation). It was not surprising therefore that the claimant did not know the detail of the policy because he did not consider it relevant to him and he would not have complied with it., whatever it said.

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62. The claimant was clear in his approach when he was at work. His approach had not reached the senior management team who were unaware that the claimant had not been complying with the position that had been set out. The senior management team had relied upon staff following the policies that had been clearly communicated and had expected any staff who had an issue to raise it formally (and not informally with colleagues). That was not something the claimant had done, albeit he had not hidden his views with his immediate colleagues.

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63. The Tribunal considered that the claimant had received the guidance document but because he did not agree with the position set out it was more likely than not to be the case that he did not consider the document to apply to him, as he would not follow its terms in any event. He did not consider it relevant to him as he would not be following Government guidance at all.

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64. While the claimant had telephoned and spoke with HR as to his attendance at work following the training event, he had not received a response prior to returning to work and chose to return to work.

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65. The respondent was not asked in evidence to explain why the respondent had been unable to revert to the claimant prior to his return to work despite his call to the HR team. It appeared from Mr Gillespie's outcome letter that the position facing the respondent was unprecedented and the respondent was seeking to consider all its options. The claimant's position was not known by the senior management team.

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66. Mr Soutar stated that had he known the claimant had been at work in breach of the policy, action would have been taken. His position was that once the claimant's position was known, the action that was ultimately taken would

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have been taken given the risks created. The fact the claimant had been allowed to remain at work was anomalous and should not have happened. While it was regrettable the claimant's position had not been escalated to senior management sooner (by the claimant or others) the reality was that senior management only learned of the claimant's position during the disciplinary process. The Tribunal was satisfied that had the claimant's position been known by management (that the claimant was not complying with the guidance) the disciplinary action that was ultimately taken would have been raised immediately, given the seriousness with which the respondent took this issue.

### Law

67. Section 94 Employment Right Act 1996 provides that an employee with sufficient qualifying service has the right not to be unfairly dismissed. Section 98 provides:

*“(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show – (a) the reason (or, if more than one, the principal reason) for the dismissal, and (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*

*(4) [...] where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and shall be determined in accordance with equity and the substantial merits of the case.”*

68. A dismissal is potentially fair if it is for 'some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held'.

69. There is a conflict between the needs of the business and those of the employee, and the Tribunal must consider whether or not the employer has sought to resolve that conflict in a manner which a reasonable employer might have adopted. That includes considering whether the respondent carried out a reasonable investigation, if required. With regard to “some other substantial reason”, provided the reason is not whimsical or capricious (**Harper v National Coal Board** [1980] IRLR 260), it is capable of being substantial and, if, on the face of it, the reason could justify the dismissal then it will pass as a substantial reason (**Kent County Council v Gilham** [1985] IRLR 18).
70. The Tribunal should not substitute its decision as to whether or not it would have dismissed but rather decide whether on the facts the decision to dismiss fell within the range of responses open to a reasonable employer acting reasonably. All relevant factors should be considered in assessing the reasonableness of the respondent’s actions with particular consideration being given as to the impact upon the claimant and the organisation.

### Submissions

71. The parties had been given a time to consider the evidence that had been led and the legal issues arising. Both parties had provided written submissions with time being given for the parties to consider each other’s submissions and provide any supplementary submissions considered necessary. Each of the parties was able to fully engage with the issues and present their submissions which have been taken into account when dealing with the decision below.

### Discussion and decision

#### *Reason for the dismissal*

72. It had been agreed that the respondent had a potentially fair reason for dismissing the claimant, namely matters relating to conduct or some other substantial reason in accordance with section 98(1)(a) of the Employment Rights Act 1996).
73. From the evidence it was clear that this was a sound concession. The respondent had dismissed the claimant principally because he made it clear

that there were no circumstances whereby he would comply with the COVID 19 steps required by the respondent of its employees. The principal reason for the claimant's dismissal from the evidence was his refusal to comply with the guidance going forward. Under no circumstances would the claimant undertake any testing. The respondent concluded that this presented an unacceptable risk as they were unable to manage the risk of transmission of the virus, from the information before them.

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74. The principal reason for the claimant's dismissal was some other substantial reason pursuant to section 98(1)(a) of the Employment Rights Act, his decision not to comply with the guidance going forward. While there were other reasons that led to the dismissal (which related to the claimant's conduct) the principal reason was his refusal to comply with the Guidance regarding COVID. That was a reason that was honest and genuinely held by the respondent and was the reason for the claimant's dismissal. This was not disputed by the parties.

*Was the dismissal fair on the facts*

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75. The key question in this case was whether the dismissal of the claimant is fair, namely whether the respondent acted fairly and reasonably in dismissing the claimant for the reason above, taking account of size and resources of the respondent and whether the respondent acted reasonably in treating the reason it had as sufficient to dismiss the claimant.

*Procedure*

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76. The claimant had been advised in advance as to what the respondent's position was and the claimant had been given an opportunity to set out his position.
77. A hearing had been fixed at which the claimant was given the opportunity to set out in full his position. The issues the claimant had raised were fully considered and an outcome letter was issued.



78. The claimant was given a further 2 opportunities to challenge the decision and at each hearing the claimant's position was taken into account and a decision issued.

5 79. The issue the claimant raised at the Hearing was that the procedure was unfair because the time that it had taken was unreasonable. A period of 5 weeks had passed.

10 80. It is important the Tribunal does not substitute its decision for that of the respondent but instead consider the approach of a reasonable employer. It is also important to assess the matter in light of the position that existed at the time. During the pandemic there were a large number of uncertainties and the position was entirely unclear. The respondent had no experience of an employee refusing to comply with the policies and the position generally with regard to the pandemic was developing on a day to day basis. The issues arising were serious but equally they had an impact upon the claimant. The claimant was not suspended and the status quo continued to apply until the hearings had taken place.

15 81. The claimant had advised the respondent as to his position. There was accordingly no investigation needed with regard to the key issue in this case. The respondent understood that the claimant would not comply with the guidance going forward. On that basis his position was clear and there were no outstanding issues that required to be followed up.

20 82. Looking at matters objectively the Tribunal considered that while some reasonable employers would have expedited the process quicker it could not be said that the approach taken by this employer in the particular (and unique) circumstances of this case was unreasonable.

25 83. While there was some adverse impact upon the claimant in having matters "hanging over him" he had not been suspended and was able to continue to work and earn a living. During the 5 week period the respondent required to manage its operation and grapple with complex issues in a changing and complex environment where the guidance was changing regularly.

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84. There was no evidence of the claimant formally raising a concern about the time that had been taken nor of the impact upon him, particularly given he was permitted to continue to work as normal.

5 85. The respondent acted fairly and reasonably with regard to the procedure adopted in dismissing for the reason in this case. While some other, equally reasonable, employers would have acted differently (and concluded the process within a shorter period of time) given the facts and circumstances at the material time, an equally reasonable employer could have acted as the respondent in this case did. The claimant worked alternate weekends and the  
10 issue occurred during a pandemic when the position was unclear and changing (and the respondent took time to consider how to deal with matters).

86. In all the circumstances the procedure that was undertaken was fair and reasonable. The procedure that was followed fell within the range of responses open to a reasonable employer given the context at the time.

15 *Substantive issues – did the respondent act fairly and reasonably in dismissing for some other substantial reason*

87. The key issue is whether or not the claimant's dismissal was fair in all the circumstances. Having considered the evidence in detail and applied the legal tests, the decision to dismiss the claimant for refusing to comply with the  
20 testing regime was, on the facts of this case, a decision that fell within the range of responses open to a reasonable employer.

88. It is important to apply the statutory wording and the legal test in assessing the fairness of the dismissal.

89. The main basis upon which the claimant argued that his dismissal was  
25 substantively unfair was that the respondent ought to have known his position with regard to the COVID issues which had not changed throughout his employment. The claimant's position was that if nothing adverse had happened in the time he had been working (and not complying with the rules) prior to his dismissal, it was unfair to dismiss him as there was unlikely to be  
30 anything adverse occurring in the future.

90. The challenge for the claimant was that in fact it was not possible to say, with certainty, that nothing had happened in the period to the point he was dismissed. The fact the claimant had refused to comply with the rules meant that there was no evidence to say (for example) that in fact the claimant had been COVID positive and transmitted the virus (even if asymptomatic). He was refusing to engage with the process and as a result there was no information as to the claimant's COVID status. Any issues would not have been identified in the absence of the claimant's compliance. The respondent (and indeed the claimant) could not know that there had not been any issues arising and could not say how this had impacted upon others with whom the claimant came into contact. There had been at least one occasion where a colleague of the claimant (at a training event) had become COVID positive. Without knowing the status of the claimant, there was no way to ascertain the risk his attendance at work and coming into contact with others presented.
91. The Tribunal accepted that those dismissing the claimant did not know of the claimant's principled stance against the rules until the hearing when the claimant advised them. The claimant accepted that there was no evidence the individuals in question knew. His position was that they should have known because he said he had been open with his colleagues as to his position. As a matter of fact those charged with considering the claimant's future employment only learned of his position during the hearing. The Tribunal accepted their evidence that had the claimant's position been known action would have been taken.
92. At no stage had the claimant formally raised any issue or concern with the policy that the respondent had reasonably requested be followed by all staff. Any concerns the claimant had were raised informally. There was no evidence that the management team were aware of the claimant's position and the Tribunal was satisfied that had the management team known of the claimant's position sooner, the process would have progressed sooner.
93. Further, the fact that the claimant had been working in the way he had did not mean that there was no risk going forward. In light of the information available to the respondent at the material time not knowing the status of individuals

created uncertainty and risk. It was possible the claimant could contract and transmit the virus unwittingly. If he was not prepared to engage with the testing regime in any way (and there was no alternative way identified of ascertaining the claimant's COVID status) the respondent was reasonable in considering that such an approach created a risk, not only to the claimant himself but others with whom he contacted during his work. While the claimant may disagree with the science, and may be right in his view, the respondent's approach and belief (in following Government guidance at the time) was a reasonable approach to take.

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10 94. The respondent's conclusion about the risk the claimant presented if he were allowed to continue to attend work without complying with the guidance, was a reasonable conclusion from the material before the respondent at the time. It was entirely reasonable for the respondent to wish to take as many steps as it could to protect those within its care. Furthermore the respondent worked within a regulated environment and required to do all it could to protect those in its care.

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20 95. The Tribunal was satisfied that the respondent had sought to approach the matter consistently. The policy made it clear that staff required to comply with the Government's approach. The regulator had made it clear that this was mandatory for the respondent.

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30 96. While the claimant said he had told those with whom he worked of his views there was no evidence of any senior manager knowing (or being made aware) of the claimant's position. The Tribunal considered that it was more likely than not that if the claimant's position was known by managers the action that was taken would have been taken at that juncture. The respondent regarded compliance with the rules in this area as a serious matter. The claimant had not raised his concerns formally at any time. At the time there was no alternative way of the respondent managing or containing the risk. The nature of the respondent's organisation and in particular the nature of the claimant's role and the close contact he had with others rendered it very important that the rules were followed to allow the respondent to assess the risk arising.

97. While the claimant disputed the science and that in his view there was no risk, the respondent's approach was reasonable. The respondent's position was that staff required to comply with the rules to ensure safety. It was important to know who was at risk and take appropriate steps. If the risk could not be identified or assessed, the respondent was unable to take steps to protect those within its care, the very purpose of the respondent.
98. The claimant's agent argued that a risk assessment ought to have been taken and an exception made for the claimant. The difficulty with that assertion was that without the information on which to base an assessment of risk it was not possible to objectively assess matters. The claimant had made it clear he would not comply with the rules at all going forward. The claimant was making it clear that he was not prepared to give the information to the respondent that would allow it to make an assessment. There was no other way that was suggested by the claimant that would allow the respondent to make an assessment of the risks (reasonably understood) to exist.
99. The Tribunal recognises the importance of respecting the rights of the claimant which are fully taken into account in assessing the fairness of the claimant's dismissal. The Tribunal also recognises that there are a number of arguments that support the claimant's view. The actual position with regard to the science of the matters arising may well be discovered in due course and the claimant may well be proved right but that is not the issue.
100. It was the duty of the respondent to ensure, so far as it can, the safety of all its staff, service users and third parties and it could only do so from the information before it. The respondent can only proceed with the information it had at the time, which was Government guidance. The claimant was unable to suggest a way in which the respondent could fairly assess the risk whilst allowing the claimant to continue to work given his stance. Without knowing about the virus with regard to the claimant, allowing him to continue to attend work and enter into close contact created a risk that the respondent could not reasonably take (from the information available at the time).

101. The respondent did consider whether there were any alternatives to dismissal but given the unique circumstances of this case there was none. The claimant could not undertake his duties in any other way and there was no lesser way of protecting the claimant and those with whom he came into contact.  
5 Dismissal was ultimately the only sanction that would allow the respondent to properly manage the risk arising, to the claimant and the others with whom he came into contact given the nature of his job.

*Claimant's abilities not in dispute*

102. The claimant had been a hard working employee with a clear disciplinary record. The decision the respondent took was not about the claimant's abilities or service, which were not in dispute, but rather the potential impact his refusal to engage with the process had upon those whom the respondent had a duty to support going forward and the absence of any alternative way to manage the risk in light of the claimant's approach.

15 *Inconsistent approach to enforcing the rules?*

103. The claimant argued that guidance and regulation was not monitored and policies and procedures were not followed. He argued that it is only effective if they are monitored and implemented properly. The Tribunal accepted the evidence of the respondent that their approach to applying the rules was clear and consistent. While the claimant experienced a situation where the rules may not have been rigorously applied, the clear evidence from the respondent was that the policy they introduced was taken seriously. As a regulated body and given the sector in which the respondent operated taken together with the individuals within the respondent's care and the prevailing situation (the pandemic's impact upon people's lives, specifically within the sector) it was more likely than not that the respondent did apply the rules it had introduced (and was required to introduce). The fact the claimant was sent him when he should have been isolating (and by a person whom the claimant know to share his views as to the pandemic) underlined the seriousness of the matter. There  
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30 was no flexibility in applying the rules given what was at stake.

104. The respondent was not perfect and there would have been occasions where individuals did not comply with the rules. Nevertheless the respondent trusted its staff to apply the rules and comply with the guidance to ensure their own and others' safety. It was impossible to achieve 100% compliance all the time.  
5 It was not unreasonable of the respondent to rely upon staff and good faith to ensure staff familiarised themselves with the rules and followed them. There was no evidence of anyone having formally raised concerns that the rules were not being followed. It was not unreasonable for the management team to assume, absent the matter having been raised with them, that all staff were  
10 keeping themselves and others safe by following the rules that the respondent had communicated.

105. It was not disputed that the claimant had made it clear from the outset that he was not participating in any of the COVID rules and that he gave loyal service. The claimant's decision not to comply with the rules had not been identified  
15 by senior management until this process was initiated. The issue, however, is whether it was reasonable for the respondent to dismiss the claimant in all the circumstances – taking account of his position (and his rights) but also the position that applied across the organisation with due regard for the rights of others, particularly given the close contact nature of the claimant's role. There  
20 was no other way in which the claimant could continue to carry out his duties whilst managing the risk.

*The time taken*

106. The claimant submitted that no investigations had been undertaken within the 5 week period and it was unlikely that his position went unnoticed. Given the  
25 claimant was clear in his position, namely that he would not under any circumstances comply with the rules, there was no further investigations needed. It was not disputed that the claimant had been working until the point the matter was determined but the issue for the respondent was whether they could reasonably continue to allow the *status quo* to pertain. From the  
30 information before the respondent at the time they concluded that they could not do so given the reasonable risks they considered to arise. That was a reasonable position to adopt.

107. The claimant was given time to respond to the issues arising and the hearing was convened at a time that was suitable to him and his companion. Given the matter had been ongoing for a number of weeks (and the claimant wanted matters to progress expeditiously) the fact the claimant was called to a hearing within a number of days was not unreasonable, particularly where the availability of the claimant and his companion was taken into account.
108. The Tribunal did take into account the fact that the claimant had been working (every other weekend) during the pandemic without following the rules. However, that was not something known to the senior managers. Had that been known it was a matter that would have been dealt with. The fact this matter was not reported to senior managers is an internal matter for the respondent given the issues arising.
109. The Tribunal also took into account the fact the respondent did not remove the claimant (by suspension or otherwise) when the matter arose. The claimant worked a further 2 shifts during that period when the respondent knew the claimant's position. That was a relevant factor supporting the claimant's case. There is no rule as such that requires an employer to suspend an employee in these cases. The issue for the Tribunal was whether the failure to do so rendered the decision to dismiss unfair. While the decision undoubtedly increased the risk (since it was possible the claimant could have transmitted the virus or contracted the virus during his working time) the evidence before the Tribunal which was accepted was that the respondent could not continue to run the risk that had arisen. The conclusion was that going forward the risk was too great.
110. Considering matters objectively, the approach the respondent took was a reasonable and fair position to adopt. While nothing expressly had arisen to date, it could not be said, from the information available at the time that there was no risk going forward. On the contrary. It was entirely possible that the claimant's clear refusal to engage with the testing programme could give rise to a very real risk. The respondent acted fairly and reasonably notwithstanding the fact this had not been discovered until this point and notwithstanding the fact the claimant had not been suspended.



*Respondent's knowledge*

111. The claimant argued that it the real reason for dismissal was to protect people then service users would not have been put at risk for 16 months or even after it was brought to their further attention on 7th January. This fact was  
5 consistent with the claimant's position that the rules were not rigorously applied (since his position would have been raised had the matter been taken seriously). The respondent has 700 or so employees. The respondent also trusts its staff to comply with the policies. The claimant's dedication to his role was not disputed. His refusal to comply with the policies was, however, a  
10 matter that gave rise to concern with senior management once the matter came to their attention. There was no evidence that the matter had been raised with them sooner (even if the claimant was clear in his approach with his colleagues at the time) and even if this was a matter that ought to have been escalated sooner. There was no evidence that the claimant had raised  
15 the matter formally with management or not any other individual had raised the fact that the policies (which staff were required to follow) were not being followed. It had been understood staff had been following the policies given the risks arising and prevailing situation in society generally.

*No legal obligation to test – Claimant's rights balanced with others*

20 112. The claimant also argued that the Government's approach to dealing with the pandemic was not fair (or consistent with science). His position was that there was legal obligation requiring him to undergo testing and that he was entirely within his rights in adopting the position he did and dismissing him for so doing (when he was otherwise prepared to comply with his contract) was unfair.

25 113. The difficulty with the claimant's approach is that while he is entirely right in that he was a hard working an loyal employee who had the right to take the stance he took, his actions necessarily had an impact on those with whom he worked and came into contact. There was no alternative raised by the claimant (or respondent) that would allow the respondent to monitor the safety  
30 of the claimant and those with whom he came into contact absent knowledge of COVID status. If the claimant had the virus but chose not to test or disclose

the fact, that could have a major impact upon the claimant and those with whom he came into contact at work, a matter which fell within the responsibility of the respondent. The respondent already had challenging staffing issues and they required to maximise attendance at work and reduce staff absence. Requiring staff to comply with the Government guidance was a fair, reasonable and proportionate way to ensure their organisation was able to continue to function during a very challenging time for everyone.

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114. The claimant's actions created significant risk. If the respondent allowed the claimant to continue ignoring the rules, the risk to health and safety remained. The respondent was duty bound to take action to protect those within its care. The claimant's position and approach was taken into account (as was his right not to engage with the procedures required) but that had to be balanced with the impact such actions had upon others for whom the respondent was responsible (and the absence of alternative ways of protecting such individuals). The balance the respondent took, recognising the claimant's right not to subject himself to a test, with the impact upon others of that decision, was that he be dismissed. That was a fair and reasonable approach in all the circumstances in light of the information available at the time.

*Dismissal was fair*

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115. In all the circumstances of this case the respondent acted reasonably in choosing to dismiss the claimant when he made it clear that he would not comply with the Government guidance and respondent policy with regard to the pandemic. For the respondent health and safety was its principal concern (including that of the claimant and others) and in the absence of any way in which to assess the risk created it was not possible to fairly to continue to employ the claimant. The respondent genuinely and honestly believed in the risk arising and acted fairly and reasonably in their approach. It was reasonable to dismiss the claimant at that point.

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116. While the procedure that was followed was not perfect, the requirement is that the respondent act fairly and reasonably. The procedure that was followed was, in the circumstances, a procedure that a reasonable employer could

have taken. It fell within the range of responses open to a reasonable employer.

117. The decision to dismiss the claimant in the circumstances of this case, taking account of the evidence before the Tribunal, and taking account of size, resources, equity and the substantial merits of this case, was fair.

*Summary*

118. Taking a step back, the decision to dismiss the claimant was fair and reasonable taking account of size resources equity and the substantial merits of the case, the dismissal being for a fair reason.

119. This decision does not mean that the claimant acted unreasonably. There were cogent and genuine reasons why the claimant chose to act as he did. The claimant's approach, however, requires to be balanced with the impact upon others, particularly given the reasonable risk that was understood, from the information available at the time, that the virus created and the respondent's regulatory position and duty to protect those within its care. The claimant is entitled to the views he had. Equally, the respondent is under an obligation to ensure those within its care are properly protected.

120. On the facts of this case the respondent acted reasonably having balanced all of the factors, in dismissing the claimant. Applying the law to the facts of this case, the claimant was dismissed fairly.

121. The claim is accordingly dismissed.

**Employment Judge: D Hoey**  
**Date of Judgment: 31 May 2023**  
**Entered in register: 01 June 2023**  
**and copied to parties**