



EMPLOYMENT TRIBUNALS

Heard at: Croydon (by video) **On:** 17 May 2023

Claimant: Miss Sarah Synan

Respondent: ITF Licensing (UK) Limited

Before: Employment Judge E Fowell

Representation:

Claimant In Person

Respondent Charlene Ashiru of counsel, instructed by Squire Patton Boggs

JUDGMENT

1. The claimant's dismissal was unfair.
2. The claimant is awarded compensation in the sum of £27,465

REASONS

Introduction

1. These written reasons are provided at the request of the respondent following oral reasons given at the hearing on Wednesday this week. Some editing has taken place to avoid repetition, and these written reasons now stand as the final version.
2. Miss Synan worked for the International Tennis Federation, or ITF. (In fact their correct legal identity is ITF Licensing (UK) Ltd, and the name is amended by agreement.) They are the governing body for tennis worldwide, supervising the organisation of the sport from the grassroots upwards. That includes wheelchair tennis, Miss Synan's area of work. She was dismissed in February 2022 following the introduction of a new policy on Covid vaccinations. The ITF's position was that international travel was an important requirement of her role, that she should not go if she was unvaccinated, and so she was unable to fulfil all the requirements of her role.

Procedure and evidence

3. The sole complaint here is of unfair dismissal. At her request, I heard evidence from Miss Synan first, to make the process more manageable for her as an unrepresented party, and then on behalf of the ITF from her manager, Mr Williams, and Ms Jane O'Sullivan, the Head of HR.
4. Two further witness statements were provided by former colleagues of Miss Synan - Amy Platt and Yvonne Akwetey. These were to the effect that Miss Synan was dedicated and hard-working, that her dismissal was unjustified and that there was no legal obligation to be vaccinated. Ms Ashiru, for the ITF, took the view that none of this evidence was directly relevant and so neither of them attended to give evidence in person.
5. There was also a bundle of about 200 pages. Having considered this evidence and the submissions on each side, I make the following findings of fact.

Findings of Fact

Background

6. The ITF has about 130 staff, mainly based at its headquarters in Roehampton. The head of the organisation is the President, supported by a senior leadership team which includes Ms O'Sullivan, as Head of HR. The wheelchair tennis team had five members, three of them with the title Team Lead, like Miss Synan. Each had their own areas of responsibility. Miss Synan's area was not to do with the grassroots tennis but the other end of the spectrum, with arranging and attending prestigious international competitions such as the Paralympics or US Masters. It was a varied and responsible role, with a salary of £37,500 per annum. It involved a lot of organisation, liaising with athletes and building relationships. At the time of her dismissal she had been there for about four years, and had a good working relationship with Mr Williams, who spoke highly of her.

The pandemic

7. The only difficulty arose over her reluctance to get vaccinated, and that only became a problem once the vaccine arrived. Recapping the main features of the pandemic, there was a second lockdown over Christmas 2020; in February 2021 the Prime Minister published a roadmap for lifting the lockdown; schools reopened in March; in April, pubs and restaurants followed suit, subject to social distancing; then in May, the "rule of six" was introduced, allowing households to mix indoors for the first time. By then the vaccination programme was in effect, with people being invited to take it up in stages depending on their age. In July 2021 stage 4 of the roadmap was reached, and most legal limits on social contact were removed; even nightclubs were allowed to reopen.

8. During the autumn of 2021 things were more back to normal but there was concern that the NHS would be unable to cope during the winter season, and in December the Omicron variant made its appearance. Facemasks were reintroduced for a time in various settings but there were no further lockdowns or restrictions on businesses opening.
9. One of the staging posts, to which Miss Synan drew my attention, was the announcement by the Prime Minister on 21 February 2022 that the policy was to move away from government restrictions in favour of relying on personal responsibility. He announced that from Thursday of that week, 24 February, the legal requirement to self-isolate following a positive covid test would end. That announcement was on the day before Miss Synan was dismissed.
10. All this had caused huge disruption to the ITF, as with many organisations. In 2020 all international competitions were cancelled or put on hold. Foremost among them was the Olympic Games, or Paralympics in the case of wheelchair tennis. This had been due to take place in Tokyo but was put back to the following year.
11. Employees at the ITF were encouraged to come back into the office in July 2021. Staff were strongly encouraged to get the vaccine, but there was no formal requirement to do so. The delayed Paralympic Games were in August, and Miss Synan went along with the rest of the team. She had not been vaccinated, but this did not cause any difficulty with the travel arrangements. Each of them had to provide a negative test before departure and wear a mask. If they tested positive on the way back they would have to quarantine.

New policy introduced

12. After that the next major event was the US Masters in Florida, which was in late October 2021. All the arrangements had been made, including flights, when Miss Synan received a message from Mr Williams to say that a new policy was coming in that all staff must be double vaccinated to travel. At that time there was no need to be vaccinated to enter the US, but she responded to say that she understood. The position was confirmed a few days later, and she was not allowed to go, so one of her colleagues went in her place - accompanied by a freelance cameraman, who was also unvaccinated.
13. Emails at the time show that there was some internal debate about this (page 83 to 84). Mr Williams' preference was for Miss Synan to go, but Ms O'Sullivan said that the new rule was based on legal advice, adding:

"This is serious stuff and I think we need to take a hard line on non 'vaxxed' people."
14. Guidelines were then distributed among the senior leadership team about the need for vaccination. Ms O'Sullivan told me that this initiative came from the President

himself. He felt that it was no longer acceptable for any member of the ITF to represent them at an international event if they had not been vaccinated.

15. By then it had been established that there were only a handful of individuals in question. Apart from Miss Synan there were two others; one who decided to get vaccinated and another who did not have any travel obligations. So, she was the main concern. Consequently the guidelines were not distributed to all members of staff. Instead they were simply cascaded more discreetly through the management chain to those affected.
16. Consequently, Miss Synan received them in an email from Mr Williams on 3 November 2021 (pages 94 to 95). Although the focus of this hearing has been on the restriction on international travel, there were five other elements:
 - (a) that each individual needed to provide evidence of a negative lateral flow test for every day they were in the office;
 - (b) that they had to get approval from their manager before taking any holidays overseas;
 - (c) that they discuss with their manager how to manage their attendance at staff meetings or social gatherings;
 - (d) they should be “extra diligent” about wearing a mask at all times and in all meetings and when walking around the office and using the communal areas; and
 - (e) that they should be aware that any non-compliance with the procedure may lead to disciplinary action.
17. These are particularly severe restrictions. It had never been part of government guidelines, for example, that office workers should wear facemasks at all times in the office, and this was long after most restrictions had been lifted, so it was certainly taking a hard line with the three unvaccinated members of staff. In keeping with this approach, Miss Synan was not invited to the Christmas party.
18. Miss Synan was not unduly concerned however. In fact, she responded to Ms O’Sullivan to say that she understood the need have such a policy, but she felt it should have been published as a policy, not simply passed on to her by email in this way. That would have given her the opportunity to make an informed choice about getting the vaccine.
19. I did not explore with her in any detail the reasons for her reluctance to get vaccinated but she said that she had anxiety about it, and at this stage, as far as she as aware, the only downside was a restriction on her travel. Mr Williams thought

that she was planning to get fully vaccinated and that she had already had one jab; it was only in December that he became aware that she had not.

Meeting of 18 January 2022

20. The situation was not allowed to continue however. On 18 January 2022 Miss Synan was required to attend a meeting with Mr Williams and a Ms Nesbitt, another senior manager, to discuss her vaccination status and how it impacted her role. There are no minutes of that meeting but an outcome letter was sent by Mr Williams on 4 February (page 116). In it, he noted that she could no longer travel to the US without a vaccine, and if she went to France she would need to quarantine for 10 days, at ITF expense. In those circumstances, he went on, it was not an unreasonable management request that she should be vaccinated. It went on:

“You made it reasonably clear to us that you did not intend to revisit your position on the vaccination. That is obviously your choice and we must respect that decision. However, it is a decision which needs to be made in the clear understanding that it is likely to lead to the termination of your employment here on the grounds above, i.e. that it is not appropriate for us to permit you to continue in your current role.”

21. The letter ended with a requirement to attend a further meeting with him and Ms Hodgson, another senior manager, on 8 February, at which she might be dismissed. The letter was sent out on a Friday, so the meeting was the following Tuesday. Miss Synan asked for it to be put back, saying that her union representative was not available, and it went ahead after a two day delay.

Meeting of 10 February 2022

22. In the event, Miss Synan was not accompanied, and by agreement the meeting was recorded. Ahead of the meeting she had been provided with two alternative job specs; one for an IT manager and one for a data scientist, neither of which were at all suitable. Ms Hodgson explained that they had wanted to send everything to her for the sake of transparency.
23. Miss Synan made a number of points, starting with the fact that since so few employees were unvaccinated there was very little risk to others, who were presumably all vaccinated. She confirmed that she had had Covid in March 2020, and a mild episode more recently in 2021, so she felt that she had a measure of natural immunity. And she pointed out that she had been to Tokyo and then another trip to Sardinia straight afterwards, without any problem. She could not longer go to the USA, but she could have gone before the rules changed and was prevented. As to trips to France, one of her colleagues, she said, was a fluent French speaker and did most of the trips to France anyway. In fact, she had had conversations with the other members of the team and they would be delighted to travel in her place to these events.

24. She also asked whether any modifications had been considered and was told that this meant the extra measures in place for people who had not been vaccinated, such as daily testing and mask wearing. These, however, were already in place.
25. The discussion therefore circled round the main question, which was whether Miss Synan was willing, at this late stage, to get vaccinated. Miss Synan also avoided this issue, and raised questions about the process and the lack of any formal policy. Ms Hodgson said that the meeting was part of a disciplinary process. Miss Synan asked what she was being disciplined for and Ms Hodgson is recorded as saying:

“So this would be ... it would fall under a couple of different things. So it’s basically failure to follow a reasonable management instruction or some other substantial ground.”
26. The meeting ended in stalemate. Miss Synan said that she had made her position clear, and left it for the two managers to consider.

Dismissal

27. Mr Williams wrote to her with the outcome on 15 February. In his letter he responded to some of the points made in the meeting, stating that her lack of vaccination put visitors at risk, reminding her that she may catch Covid in future and defending the way in which the new rules had been cascaded. As to the willingness of other team members to travel instead of her, he said that was his decision, not theirs, and explained why it was not viable:

“Given the size of the team, the wide-ranging distribution of activities and responsibilities, the skill sets of team members, the existing workloads, contingency options in case of illness and the wider department and company needs, redistribution is not practicable.”
28. However, he did not dismiss her in that letter. Instead he invited her to a further meeting on 22 February. It may well have been hoped that she would change her mind at the eleventh hour but she did not, and the final meeting went ahead. Miss Synan described it as lasting about eight minutes, during which there was no discussion and Mr Williams read from a script. That decision was confirmed by letter the following day. She was dismissed with immediate effect and paid in lieu of notice.

The appeal

29. The letter gave her the right of appeal, which she exercised. Again, I did not hear from the manager concerned, Mr Stuart Miller, but no complaint is made about the appeal process. The hearing took place on 18 March 2022, by which time all restrictions in the UK had ended. The minutes suggest that Miss Synan was more forthcoming in this meeting, taking Mr Miller back over the series of events in some detail and complaining that she was being singled out. Mr Miller asked her if things would have been different if she had been told in terms to get vaccinated. This was

an opportunity to say that she would have agreed to get vaccinated, or that she now would, but that has never been her position.

Travel Obligations

30. It is important to considering the actual extent of Miss Synan's travel obligations. The first point to note is that I am only concerned with overseas travel. Ms O'Sullivan confirmed that Miss Synan was allowed to attend UK events, despite the mask wearing and other precautions. It is not clear whether she did actually so after the cancellation of her trip to the US, but the new guidelines clearly refer to overseas travel only.
31. The job description for her role (which she did not in fact receive) states in bold at the top:

"This role will include some travel worldwide, sometimes for extended periods and at weekends."
32. Her terms and conditions of employment state merely that she was required to work at the headquarters in Roehampton and

"may be required to travel worldwide as part of your duties."
33. There is perhaps little difference in practice, since the words "may be required" do not give her any option to refuse.
34. At the time of her dismissal Mr Williams circulated a list of the events in 2022 which she would need to attend (page 113B). There were 10 in total including several events in the UK including Wimbledon. Only six of them were overseas. Two of them were for the whole team to attend and the other four called for an individual representative for the ITF. So, for the foreseeable future, at the time of her dismissal, there were essentially these four events for which the ITF would need to send a replacement.

Applicable Law

35. Turning to the applicable law, the right not to be unfairly dismissed is set out in s.94 Employment Rights Act 1996 (ERA), and by s.98, the employer has first to show a fair reason for the dismissal. The main grounds are of conduct, capability, and redundancy, but the final alternative is

"some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held."
36. Here, the ITF relies on this "some other substantial reason" (SOSR) category and the reason itself it is set out in the grounds of resistance at paragraph 14 as follows:

“... her failure to take (or even suggest let alone commit, that she would soon take) steps to becoming vaccinated, and that in the absence of any suitable alternative role or viable modifications to the claimant’s own role, the respondent acted reasonably in relying upon that reason to justify her dismissal.”

37. So the reason is twofold – her refusal to become vaccinated (which is clear) and the absence of any alternative role or viable modifications (which is less clear).

38. If that reason is shown, then by s.98(4)

...the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

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

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

39. That broad test is as far as the statutory provisions provide any guidance. There are many decided cases explaining how to approach this test in cases of gross misconduct or redundancy, but SOSR is raised in all sorts of situation and there are no such clear landmarks.

40. By way of example, there is sometimes an overlap between SOSR and cases of misconduct, such as where someone’s behaviour at work is so disruptive that the working relationship breaks down; but this is not a case of that sort. The ITF were perfectly happy to continue to employ Miss Synan providing that she was vaccinated, so despite the references to misconduct in the hearing on 10 February 2022, no real guidance can be obtained from cases in that area.

41. Covid-related cases have appeared more recently and I was referred to a decision of the Employment Tribunal at Leeds concerning a Mrs Dimitrova and four others, against Barchester Healthcare Ltd (1803315/2021). Ms Ashiru invited me to adopt the statement of legal principles used in that case. I have considered it carefully, but it is in a very different context. Mrs Dimetrova was a care worker who objected to taking the vaccine and was dismissed as a result, given the risk to patients. From 11 November 2021 it became mandatory to have had vaccine to remain in that employment, but this group of employees was dismissed before then.

42. Clearly, the risk to elderly and infirm patients was much greater in a care setting, and the main issue in that case was whether the employer was entitled to insist on the vaccination. It was not a two-fold reason as here, where the main question is whether Miss Synan’s role could be modified. Modification of duties to avoid patients was not a realistic option in that case.

43. That Tribunal found guidance in a line of cases about employers who try to cut pay or conditions. In **Catamaran Cruisers Ltd v Williams** [1984] IRLR 384 the Employment Appeal Tribunal held that an employer can fairly dismiss an employee for refusing to accept such changes where there was a “good sound business reason” for doing so, not just where the survival of the business is at stake. On that basis, I was urged to adopt the approach that the dismissal was fair as long as the ITF had a good sound business reason for it, but that does not seem to me to take into account the need to consider modifications. Section 98(4) requires me to consider all the relevant circumstances. As a comparison, in a redundancy situation the question is not simply whether the employer had a good sound business reason for making redundancies, the Tribunal also has to consider whether they acted reasonably in making each individual redundant and whether they considered suitable alternatives.
44. There are however some common principles across all cases.
- (a) Firstly, in all cases the statute requires that the employer’s size and administrative resources have to be taken into consideration.
 - (b) Secondly, things cannot be judged in hindsight. I have to look at the situation as it appeared to Mr Williams at the time and not in the light of later events.
 - (c) Finally, as in cases of alleged misconduct, I should not try to substitute my view of the seriousness of the matter for his, unless that view is outside “the range of reasonable responses”. That reflects the fact that whereas one employer might reasonably take one view, another might with equal reason take another.

Conclusions

Reason for dismissal

45. The first question is whether the ITF have established the reason for the dismissal. There was clearly some confusion during the hearing on 10 February, but this is not a case with any hidden agenda. From the outset the ITF had a concern about vaccination, and there is no reason to believe that the reason for dismissal was anything other than the two-fold reason set out above. They followed a similar process to a disciplinary situation, for understandable reasons, but in practice it was never approached on the basis that Miss Synan’s refusal to have the vaccine was an act of gross misconduct.

Fairness

46. Starting with the employer’s size, this is a substantial and professional organisation, with expert HR advice and so a high degree of fairness is to be expected.

47. Part of the assessment of the fairness of the dismissal is the importance of the policy on vaccination. Miss Synan certainly accepted that it was understandable. She said so when she was told that her trip to the US Masters was at risk.
48. In the course of his evidence Mr Williams suggested that the risk of infection to athletes was a serious concern, and that anything that affected their respiration or musculature could have a devastating effect on their career. However, this was not something raised at the time or discussed in any of the meetings. It is also at odds with the fact that Miss Synan was able to travel to events in the UK and mix with athletes there, not to mention her trips to Tokyo and Sardinia, so I cannot accept that that was a live concern at the time.
49. A more practical concern was the cost of quarantine. Of course, it would only arise if Miss Synan caught the virus while travelling. There might be a cost, but that could no doubt have been mitigated by her working from home.
50. Ms O'Sullivan's explanation at the hearing perhaps came closest to explaining things – i.e. that this policy came from the President and that he felt it was not appropriate for ITF representatives to be travelling abroad without the vaccine. That suggests that reputational concerns and the promotion of best practice were the main concerns.
51. There is also the fact that some countries, such as the US, would not have admitted Miss Synan in any event, and so there was no need for a policy in that case. It only applied in cases where the host country was happy for her to go, which itself calls the whole approach into question.
52. Further, an unvaccinated cameraman went to Florida when she was not allowed. It was said by the ITF that they would not have the cost of quarantine in his case since he was freelance, which is certainly true, but the fact that he was allowed to go reinforces my view that the main concern was over any possible reputational damage to the ITF.
53. Against that background, I find that the policy was understandable, and legitimate, but that it would be overstating matters to describe it as a good, sound business reason, particularly once all restrictions in the UK had ended.
54. I accept that it would be an error to judge things in hindsight. Nevertheless, the national and international covid situation were clearly improving at the time of Miss Synan's dismissal. It was over a year since the last lockdown in the UK and as already emphasised the government had announced the ending of all restrictions. Certainly by the time of the appeal hearing there could no longer be any doubt that it was just a matter of time. Restrictions surrounding the Omicron variant had been and gone. Fairness requires all that to have been considered. The ITF should at least have applied their minds to how long restrictions were likely to last. In fact,

the schedule of events prepared by Mr Williams, showing the six remaining international events, suggests that they did, and that they felt there was no need to be concerned beyond the end of 2022.

55. The obvious alternative here would have been to rearrange things so that Miss Synan's colleagues took up the international travel for the duration, to cover the four solo international visits. Her colleagues were ready and willing to do so. It certainly does not seem an unmanageable number of events particularly given that Miss Synan was a valued employee.
56. The evidence about the ITF's inability to rearrange matters in this way was rather thin. I have already set out the passage from his letter dealing with this, but this was never discussed in a meeting. It is essentially just a list of considerations with no discussion about particular events, some of which were a long way off. It also seems that there was no difficulty in a substitute going to Florida or, on previous occasions, to France.
57. In his oral evidence Mr William accepted, in response to my questions, that other members of staff could have gone. This was revisited in re-examination, and he said – according to my note -

“Yes, in reality, they could have taken on more travel. But given their responsibilities it would not have been practical to do that.”
58. This is still rather ambiguous, and I take it to mean that others could have gone but it would not have been so convenient. To dismiss Miss Synan in those circumstances seems to me to be a decision which is outside the range of reasonable responses.

Polkey and Contribution

59. No criticism is made of the procedure followed save in very limited respects to do with the timing of meetings and confusion over the process, so it is not a case in which any reduction should be made on the basis of procedural unfairness.
60. I was also urged to make a finding of contributory fault on the basis that Miss Synan ought to have agreed to have the vaccine. Contributory fault is a doctrine which is appropriate in cases of misconduct, but the respondent's position was that they respected her decision not to have the vaccine. The unfairness arises from their insistence that they could not accommodate it, and that does not involve any fault on her part.
61. For all of the above reasons the claim is upheld.

Compensation

62. Miss Synan obtained about eight weeks work at the Commonwealth Games in the summer of 2022 but otherwise was out of work until she obtained permanent employment at a slightly higher level on 13 April 2023. I am therefore in a position to assess her financial loss to date and there is no need to consider any future loss.
63. She provided evidence from LinkedIn and emails of over a hundred job applications which she said was only part of the total. I allowed some questions about this but the onus of showing a failure to mitigate lies on the employer. No such evidence has been produced from them and so I approached matters on the basis that she was trying to obtain alternative employment throughout and is entitled to her losses in full.
64. The relevant figures are as follows:

Pay in former employment	Per year	Per month	Per week
Gross pay	£37,500	£3,125	£721
Lunch allowance	£1,248	£104	£24
Total pay and benefits	£38,748	£3,229	£745
Net pay after tax and NI	£27,888	£2,324	£536
Employer's Pension 8%	£3,000	£250	£58
Total net package	£30,888	£2,574	£594

Basic Award

Weeks' pay	3
Week's pay (up to £544)	£544
Basic Award	£1,632

Compensatory Award

Net loss of earnings from	22 February 2022 to 13 April 2023
Period	1 Years 1 Months and 22 Days
Amount	£35,329
Loss of Statutory Rights	£500

Subtotal	£35,829
LESS	
Pay in lieu of notice	£6,148
Commonwealth Games	<u>£3,848</u>
Sub-total	(£9,996)
Net loss to date	£25,833

65. Hence:

66. Basic Award £1,632

67. Compensatory Award £25,833

Total Award £27,465

Employment Judge Fowell
Date 17 May 2023