EMPLOYMENT TRIBUNALS

Claimant: Miss K Saniuk

Respondent: Guardian Homecare Ltd

Heard at: Manchester **On:** 28 to 31 March 2023
26 April 2023 (In Chambers)

Before: Employment Judge Holmes
Ms S Howarth
Ms H Sheard

Representatives
For the claimant: Mr R Jones, Counsel
For the respondent: Ms L Halsall , Counsel

RESERVED JUDGMENT

It is the unanimous judgment of the Tribunal that:

1.The claimant's application to amend her claims to add a claim of further disadvantage in not being given any shifts after December 2021 is refused.

2. The claimant was at the material time a person with a disability.

3. The respondent did not discriminate against the claimant by failing to make reasonable adjustments and these claims are dismissed.

4. The claimant was unfairly dismissed.

5. Had the respondent followed a fair procedure, the claimant would have been dismissed in any event, and the Tribunal makes a reduction from the compensatory award of 100% pursuant to the principles in ***Polkey v.***

6. The claimant is entitled to a basic award, which the Tribunal leaves the parties to agree, or in default, or for any other reason, either party is to seek a remedy hearing by **21 July 2023**

REASONS

1. Firstly, the Employment Judge apologises for the delay in promulgation of this judgment, following the In Chambers discussion held on 26 April 2023. This has been occasioned largely by pressure of judicial business, and in particular the Employment Judge's continued involvement in a long – running part heard case, around which other work has had to be accommodated. By a claim form presented on 8 April 2022 the claimant brought complaints of unfair dismissal and disability discrimination. In box 8.2 there was a narrative which related to the claimant's inability to wear a mask during carrying out her role because of asthma. She asserted that it should have been permissible for her to wear a visor instead. The response form was filed on 6 June 202, in which the respondent defended the claim. It pointed out that the disability discrimination complaints were not clearly formulated, and denied that the claimant was a disabled person and denied any breach of the Equality Act 2010. It pointed out that the claimant had not been dismissed.

2. The case came before Employment Judge Feeney for case management on 10 October 2022. The dates for the final hearing were listed. It transpired that the claimant had been dismissed on 17 June 2022, and Employment Judge Feeney suggested that the claimant might apply to amend her claim so as to complain of unfair dismissal and disability discrimination. It was also clear that the claimant needed to provide particulars of which sections in the Equality Act 2010 were replied on so that the precise type of disability discrimination complaint could be identified. The claimant was ordered to make any amendment application by 24 October 2022, and to provide clarification of the legal basis for the disability discrimination complaints by 31 October 2022.

3. The application to amend was made on 17 October 2022. The claimant applied only to amend to add a complaint of unfair dismissal, not to amend her disability discrimination claims. Permission was subsequently granted for that amendment by Employment Judge Dunlop. At a preliminary hearing on 8 February 2022 the liability issues were recorded and set out in the Tribunal's record to that hearing.

4. A further preliminary hearing was held on 8 February 2023. The claimant was represented by Robert Oulds of the Workers of England union. The claims that the claimant was making were further amended.

5. At this final hearing, however, the claimant was represented by Mr Jones of counsel, and the respondent by Ms Halsall of counsel. Mr Jones withdrew the claim for indirect disability discrimination. The claims were therefore :

Unfair dismissal

Failure to make reasonable adjustments

The issues were accordingly as set out in the Annex to the record of the preliminary hearing held by Regional Employment Judge Franey on 8 February 2023 (pages 63 to 66 of the bundle), with the deletion of the indirect discrimination claim.

6. Disability remained in issue, and was subsequently determined as a preliminary issue during the final hearing on 29 March 2023, and reasons were given orally. If reasons for that decision are required, a request must be made within 14 days of the sending of this judgment to the parties.

7. Having determined the issue of disability, the Tribunal went on to hear the claims. An application was made , during the hearing, for permission to amend the claims to include a further claim of disadvantage , in relation to failure to make reasonable adjustments , under para. 5.3 of the List of Issues that "the claimant was offered no shifts, and therefore was not paid " in the period from 15 December 2021 up to the date of her dismissal on 17 June 2022".

8. That application was refused, and reasons given orally at the time, and written reasons were promulgated on 30 March 2023.

9. The claimant gave evidence , and for the respondent Angela Fairclough, Margaret McDonald, and Wendy McCall gave evidence. There was an agreed bundle, in hard copy. It has to be noted that parts of this , mainly email traffic , are virtually illegible, being reproduced in very small font, and copied very faintly. Having heard the evidence, considered the documents in the bundle to which the Tribunal was referred, and considered the submissions of the parties, the Tribunal unanimously finds the following relevant facts.

9.1 The claimant started employment with the respondent, which is part of the City and County Healthcare group, on 27 June 2019 as a zero-hours domiciliary care worker. Her work involved visiting clients in their homes, and assisting them with their care needs. She worked part time, usually weekdays for 4 hours , between 5.30 and 10.00 p.m., and weekends every fortnight. She had regular clients, and worked in the Lostock Hall , and the Leyland areas in Lancashire. Prior to November 2021 the claimant was working 20 to 28 hours per week in this role.

9.2 In March 2020 the Covid pandemic broke out, and surgical face masks became policy at the respondent when entering a clients' home. The claimant wore a face mask initially, without issue.

9.3 On 1 November 2021, however, the claimant was off work sick, self certifying, that she was 'feeling unwell, cough (on asthma inhaler)' (page 301 of the bundle). the claimant has a history of asthma, and the Tribunal has previously determined that this condition amounted to a disability.

9.4 On 8 November 2021 the claimant remained unfit for work, under a fit note from 8-15th November 2021 citing 'upper respiratory infection' and 'sinusitis' (page 303 of the bundle) . On 15 November 2021 the claimant telephoned in and spoke to Christine Sanderson , who explained the need to wear a mask. Angela Fairclough was within earshot, and the claimant heard her say "basically, no mask, no job".

9.5 On 19 November 2021 the claimant provided a further fit note backdated to 15 November 2021 to 29 November 2021 citing 'asthma' (page 312 of the bundle). On 1 December 2021 a further fit note was provided , covering the period 30 November 2021- 15 December 2021, again for asthma.

9.6 On 14 December 2021 the claimant sent an email to Angela Fairclough , her Branch Manager, informing her that her fit note expired the following day, and stating that she was ready to return to work if she could wear a visor only. She referred to her medical condition, and how wearing a mask may cause her further health problems. Angela Fairclough replied later the same day, saying that the same rules still applied,

and all staff must wear masks in the community. She asked what the claimant would be doing, going forward. The claimant replied, at 16.37 that day, saying that she was feeling fit for work, and that wearing a visor would be enough for the tasks that she had to perform. She loved her job, and was missing her clients. She said that she had done nothing wrong, and her decision was based on her health issues, not a decision not to wear a mask (pages 334 and 335 of the bundle).

9.7 Ross McCrann, another Branch Manager became involved, and the claimant also wrote to him in the same terms (page 337 of the bundle). On 15 December 2021 Angela Fairclough , on HR advice, wrote to the claimant to request her consent for a referral to OH (occupational health) . The claimant gave her consent on 15 December 2021, and also asked for sight of the grievance procedure (pages 338-340 of the bundle for this exchange) .

9.8 On 30 December 2021 Margaret MacDonald, Regional Manger for the North West, replied to the claimant , enclosing a copy of the grievance policy (page 357 of the bundle) . She stated that the claimant had not been suspended from work, but that she must wear a mask to see the service users, and that she was “refusing to do this”.

9.9 On 3 January 2022 the claimant raised a grievance. This is a lengthy document (pages 359 to 364 of the bundle), in which the claimant claims that she was “suspended” for not wearing a mask. She complained that the respondent was operating a “no mask, no job” policy, which she considered was “psychological manipulation”.

9.10 The claimant also took issue with the email from Margaret MacDonald in which she had said that the claimant was “refusing” to wear a mask. She was not, she was unable to do so for medical reasons. She also contended that the respondent was acting illegally, and that she was exempt from having to wear a mask, which she argued was a health risk for her, and indeed, anyone. She cited various sources of research on mask wearing, and legislation which she said permitted exclusions from that requirement. She alleged that by suspending her the respondent had violated legislation and her human rights, and asked for proof and the legal justification for her not being permitted to carry out her work wearing a visor only. Her letter ends with a reference to “the Nuremburg principles”, to the effect that it is not a valid defence for a person to claim that they acted merely in accordance with orders.

9.11 On 5 January 2021 the claimant sent a letter to Nicholas Goodban, a Director (pages 365 to 366 of the bundle). This alleged that the Government had committed Treason, contrary to Magna Carta 1215, and that the respondent had inappropriately and unlawfully applied COVID 19 measures. She, in effect, invited him to consider her grievance, and said, which the Tribunal accepts, that this was sent with no malice or ill will.

9.12 On 7 January 2022 the OH referral was sent to HR by Angela Fairclough (pages 376 to 379 of the bundle). She completed it, giving the reason for absence as “Is saying that she is unable to wear a mask to do her job which is a requirement as she has got asthma”. To the box (on page 379 of the bundle) with the question “Are there any other positions/jobs/tasks available either short term or long term?” , Angela Fairclough answered “No”.

9.13 On 7 January 2022 Katie Brown of HR acknowledged the grievance, and asked for the OH referral (page 381of the bundle).

9.14 Whilst there has been some suggestion that on 13 January 2022 the claimant refused OH, this is not documented. The claimant , however, does accept (see her grievance appeal letter , page 417B of the bundle) that she did refuse OH. Whatever the position, the claimant's grievance proceeded, and was assigned to Wendy McCall, a Regional Director, for (amongst other places) the North. She was one of 5 Regional Directors, and it was to her that Margaret McDonald reported.

9.15 On 25 January 2022 a grievance meeting was held between the claimant and Ms McCall, by Skype. The notes are at pages 405-408 of the bundle. The claimant took part in that meeting alone.

9.16 In the meeting, the claimant largely reiterated what she had said in her written grievance. She had asked for, but had not been provided with, the relevant COVID policies. She complained of a lack of support, and she had suggested that she could maybe do some shopping duties,. She did not, however, see the justification for mask wearing. She argued that masks were not in fact PPE, and that she should not (the word is omitted from the notes on page 406, but clearly should be there) be coerced into wearing a mask due to her medical condition. She said that OH was for people who had hurt their back, and she had never said that she was not capable. She made reference to fear that she would lose her job, and its effect upon her mental health. Again there was reference to human rights, Nuremburg and other legal issues. She said that there was no justification for why she could not work. She said that as of March 2020 CVID was no longer considered to be a high consequence infection disease, but the WHO continued to consider it a public health emergency, which she said means these people were lying. She also disputed the Government's right to mandate vaccinations. She said that a risk assessment should be carried out, and the respondent should be mindful and respectful of those workers who could no wear face coverings.

9.17 On 8 February 2022 Katie Brown of HR sent an email to the claimant (page 401 of the bundle, but better quality at page 577) informing the claimant that Margaret MacDonald would like to discuss with her the possibility of her carrying out some calls such as domestic and shopping calls. The claimant replied the next day that she would love to do such calls, or help wherever she could.

9.18 On 10 February 2022 Wendy McCall provided her grievance outcome (pages 413-416 of the bundle). In it, she confirmed that the claimant had not been suspended from work. She went on to acknowledge the claimant's concerns about lack of support, and the comment made on 15 November 2021, and upheld this part of the grievance.

9.19 In response to the claimant's request to be permitted to return to work wearing a visor rather than a mask, Wendy McCall explained how, although it was no longer mandatory to wear masks in public spaces, government guidance was that their use would continue to be required in health and care settings. She went on say how the use of a visor was not a suitable alternative in terms of the protection provided. The claimant had been referred to OH in order to gain a better understanding of her condition and how it affected her. It was suggested that the claimant had refused this, but this option remained open to her.

9.20 Wendy McCall went on to say how the respondent did need to assess whether she could wear a mask, and to assess the effect upon her asthma, She did not believe that asthma would be classed as an exemption. The respondent's view was that if the claimant delivered personal care, a face covering was still required, and she could not agree to the claimant's request to work wearing a visor alone.

9.21 She went on to provide the claimant with two documents she had requested, but did not respond in relation to her request for a signed risk assessment. She explained that none was carried out for all workers, only for those who fell within the category of clinically very vulnerable.

9.22 The claimant was advised of her right of appeal, and on 16 February 2022 she did appeal to Charlotte Donald , another Regional Director, (pages 417A-F of the bundle) . In that letter the claimant reiterates a lot of what she had previously raised, and argued that her asthma should give her an exemption. In respect of the visor, she said that she agreed that a visor did not offer the same protection. She pointed out, however, that many of her clients had family members visiting without masks or visors, and that they went out shopping without any such protection. She reiterated that there was no justification for masks in the first place, and cited CDC (Centre for Disease Control and Prevention) advice that masks did not prevent the spread of or contraction of COVID, and that she believed that visors would be perfectly fine, especially as her evening visits did not involve long times in close contact with her clients.

9.23 The claimant went on, in conclusion, to refer to a suggestion that had been made by then that she be allocated clients who might need help with shopping laundry or domestic work. This was different to the type of work that the claimant did. It did involve less contact with the client, but was only a small part of the care packages that the respondent provided. It would not necessarily be available at the times that the claimant generally worked. In response to this suggestion, however, the claimant did say that she would have to carefully consider it, but due to mistreatment and discrimination by management she had no faith and trust that she would be supported in the future if any problem were to arise.

9.24 A grievance appeal meeting was held on 28 February 2022, but there are no notes of it, and Charlotte McDonald was not called to give evidence. Her outcome letter is dated 16 March 2022, and is at pages 427 to 428 of the bundle.

9.25 Charlotte McDonald referred to the claimant's request to be allowed to wear a visor, but stated that it remained government policy that masks be worn in health and care settings. The claimant had stated that she should not be required to wear a mask, but did not consider that she had to prove that she was exempt. She had not claimed to be extremely vulnerable. Charlotte McDonald maintained the position that the respondent was following government guidelines, and it was considered to be in everyone's best interests that masks were worn. She rejected the appeal.

9.26 On 7 April 2022 a welfare meeting was held with the claimant. Margaret McDonald chaired it, and Ross McCrann was also present. The claimant had by now enlisted the support of the union, Workers of England, and Robert Oulds attended the meeting to represent the claimant .The notes of the meeting are at pages 439 to 442 , and (amended) at pages 443 to 446 of the bundle.

9.27. The claimant summarised her situation, and how she did not consider that she was off sick since 15 November 2021, she had no choice but to extend her sick note. She said she did not feel that she had been properly treated and that she was being discriminated against. Margaret McDonald stated that Public Health were providing the guidance that the respondent needed to follow. Vulnerable staff had been furloughed, but the claimant had not been included in this. Robert Oulds suggested that the Equality Act required reasonable adjustments to be made, and no attempt should be made to force the claimant to wear masks. He reiterated that the claimant was willing to wear a visor. The claimant suggested that the government was breaking the law, and committing crimes for which everybody who followed their guidelines was also liable.

9.28 Robert Oulds continued to suggest that the guidance was incorrect, and had been scrapped, and there needed to be an exemption under the Equality Act. The claimant explained more about her symptoms, and how they affected her. Margaret McDonald asked what could be done to resolve the situation, and the claimant replied that it sounded like coercion if she was asked to wear a mask when it caused her harm. She said she could work, if she could come back and have her calls back, but she would not wear a mask. Robert Oulds suggested that this may be some form of offence under the 1992 Act.

9.29 Margaret McDonald tried to move things on by pressing for an OH assessment. The claimant agreed, after some discussion. Towards the end of the meeting the claimant said:

“I don’s see reason why I could not continue with my usual calls. Only in the time that I am available in the evenings, not at other times. I would love to have my calls back, I loved my job. And I should be able to wear a visor instead of a mask.”

9.30 On 20 April 2022 the claimant had an OH assessment by telephone. The ensuing report (pages 447-449 of the bundle) is undated, but is likely to have been prepared that day or the day after, as by letter of 22 April 2022 (page 450 of the bundle) to the OH Nurse who prepared it, the claimant raised some points about it, contending that it did not accurately reflect what had been discussed. She cited some missing details, and also things that she did not agree with.

9.31 In terms of what the claimant contends was missing from the report, matters that she told the OH Nurse, we accept that the “missing details” she has set out in her document were probably said by her in this consultation. Of the bullet points in this section of the document, only the second and third are of direct relevance. In the former the claimant states that the report does not mention how her condition affected her when she ran, which she described as ”not as comfortable as it used to be and makes me cough”. In the other point, the claimant wanted it recorded that she had told the Nurse that her concentration had been affected, as she had “become more irritable due to all the stress this situation” had caused her.

9.32 In the later section “Things I do not agree with” in the first bullet point the claimant refers to telling the respondent that from 18 November 2021 she was fit to work, but wearing a visor instead of a mask.

9.33 The claimant did not agree to the release of the OH report to the respondent. There appears to have been more email traffic between the claimant and the OH Nurse (which does not appear in the bundle), but the upshot was that on 29 April 2022 the OH provider sent an email to Katie Brown informing her that the claimant had not given her consent to the release of the report (page452 of the bundle).

9.34 In an email exchange of 6 May 2022 the respondent sought further clarification of the issues that the claimant had raised, and the OH provider responded by a further email that day (page 454 of the bundle).

9.35 The respondent accordingly decided that the matter needed consideration in a capability hearing. Margaret McDonald accordingly wrote to her on 11 May 2022 (pages 456 and 457 of the bundle) , inviting her to a meeting on 17 May 2022. She was warned that one of the options that would be considered would be the termination of her employment. The claimant was given the right to be accompanied at the meeting by a trade union official.

9.36 The ill health capability meeting duly took place on 17 May 2022, and the notes of it are at pages 462-464 of the bundle. Margaret McDonald chaired the meeting, again supported by Ross McCrann, who took the notes. Katie Brown of HR was also present, and the claimant was again represented by Robert Oulds.

9.37 In the meeting, much old ground was gone over again, the claimant explaining why she could not wear a mask, and Margaret McDonald exploring what adjustments could be made for her. The only one that the claimant suggested was being able to wear a visor only. She did not see why she should not work when she could do her job. Robert Oulds suggested that the NHS had withdrawn the requirement for mask wearing, and that the claimant should have the choice not to wear masks. Katie Brown said that the respondent was followjng Department of Health and Social Care guidance. She also referred to the claimant choosing not to share the OH report. Robert Oulds said that the claimant had explained why she could not wear a mask. Katie Brown went on to say that it was necessary to understand what adjustments could be made in more detail. She said that there could be consideration of domestic visits, shopping visits, or alternative work.

9.38 Robert Oulds' response, however, was that the claimant was "exempt" and should be returning to her previous role, and should be allowed to do so without wearing a mask. The claimant went on to refer to "so – called COVID", and how she had offered the potential adjustment of wearing a visor. She suggested that her clients could be contacted and asked if they were OK with her attending without a mask. Most of her clients needed tasks where close contact was not required.

9.39 When asked what outcome she sought, the claimant replied that she wanted her position back and to be able to wear a visor. She wanted her clients to be able to see her smile. Whilst Robert Oulds contended that they were now in a more normal stage, Margaret McDonald stated that COVID had not gone away, and was still having an impact. It was agreed that the meeting would be ended and reconvened at another time.

9.40 The meeting was reconvened, by letter of 26 May 2022 (pages 465 and 466 of the bundle) for 17June 2022. The notes of the meeting, which was by Skype, are at pages 470—472 of the bundle. The personnel in attendance were as previously, save that Hanna Dedman, Senior HR advisor, was present in place of Katie Brown. Margaret McDonald opened the meeting by asking if anything had changed since the last meeting, and the claimant said that nothing had. She was not able to wear masks. Margaret McDonald stated that the respondent's position also had not changed. The claimant said that she could not understand why the requirement to wear masks had not been lifted. Robert Oulds stated that the respondent's policies needed to conform to the law, and that the claimant should not be made to wear a mask. Hanna Dedman stated that the guidance was that PPE , including masks, must be worn, to which Robert Oulds replied "unless exempt".

9.41 The discussion moved on to alternative solutions such as different working activities, Hanna Dedman stating that the respondent had tried to find alternative solutions , such as different working activities, and had tried to find out as much information as possible, but the claimant had not shared the OH medical opinion. Robert Oulds stated that this was "neither her nor there", and contended that the Equality Act was being breached. The respondent was forcing a clinical procedure upon the claimant by trying to get her to wear a mask, and had no right to prevent her from returning to work.

9.42. There then ensued some technical difficulty , with the claimant falling out of the call. Upon all parties re-logging in, Margaret McDonald informed the meeting that during the break the information had been considered. She said this:

"we have considered the current guidance in place, our policies and procedures, the fact that we have been unable to see an OH report and no formal evidence of exemption, and that alternative work was declined. As we are still in the scenario where Kat is stating that she is unable to wear a mask and we cannot come to an agreement, we are considering that Kat is not capable to undertake the requirements of her job role and therefore we have taken the decision to dismiss with immediate effect on the ground of capability."

9.43 The claimant was told that this would be put in writing and that she would have a right of appeal. After some further comments from the claimant and Robert Oulds, the meeting ended.

9.44 The claimant was sent a letter dated 22 June 2022 (pages 473-474 of the bundle) in which Margaret McDonald set out her reasons for the dismissal. In the dismissal letter, after reciting the claimant's position in 6 bullet points (page 473 of the bundle) , which it appeared the respondent accepted (i.e that she could not wear a mask because it made her asthma symptoms worse) , Margaret McDonald goes on to say that she considered the claimant's "explanation" to be "unsatisfactory". There ensue 5 bullet points, two of which relate to the relevant guidance, the third relates to the claimant declining alternative work, the fourth to there being no evidence of exemption, and the fifth to the claimant refusing access to the OH report.

9.45 Whilst the claimant was dismissed with immediate effect, she was paid in lieu of notice. She was advised of her right of appeal, and the procedure for doing so.

9.46 The claimant did appeal, by letter of 27 June 2022 (pages 518 to 519 of the bundle). In this letter the claimant made a number of points in bullet points. The first was that guidance and mandates are not laws, the second was that no proof of formal exemption needed to be provided, and the third that an employee has the right refuse an OH assessment, and she explained why had sought amendment of the report.

9.47 The fourth bullet point relates to the alleged offer of alternative calls, where the claimant said this:
"You have mentioned alternative calls and stated that I have declined is a false statement.

I only stated that I don't see reason why I should lose my regular calls and clients and I stated that '….. If its within my availability times'.

I have never declined as such , never said I won't do it. No further discussion of what calls, hours, area, nothing was discussed or offered to me. No further attempts to expand on this possibility was made. The statement from grievance outcome letter:

"… your branch will discuss these with you within a day or so"

There was no communication since receiving the letter. I belief (sic) *there was insufficient attempts to help and support me. I wasn't contacted in regards those calls."*

9.48 She went on to refer to the need for compliance with employment laws, the Public Health Act, UNESCO Article 6, Human Rights, the Equality Act and data protection legislation. She made reference to her requests for documents, and events after she went off work in November 2021. She also mentioned that she had been falsely accused of refusing to wear masks, which was hurtful, as she had breathing difficulties, and stress when wearing masks.

9.49 Wendy McCall, who had dealt with the claimant's grievance appeal, was assigned as the appeal officer for the claimant's appeal, and she wrote to her on 5 July 2022 (pages 521 to 522 of the bundle) acknowledging the appeal, and setting a date for it to be heard on 12 July 2022.

9.50 The claimant provided (it is unclear when and how) Wendy McCall with written grounds of appeal "Statement for appeal meeting" which are at pages 478 to 480 of the bundle. In that document she makes reference (page 479 of the bundle) to IPC guidance, and a letter dated 1 June 2022. That document, which the claimant appears to have sent in for the appeal is from NHS England and NHS Improvement, and is addressed to NHS Trusts and Foundation Trusts, Care Commissioning Groups, and regional offices of NHS England and NHS improvement. In it the authors (the National Medical Director and the Deputy Chief Nursing Officer for England) set out the next steps for infection prevention and control (IPC). On the second page, they advise that health and care staff are in general not required to wear facemasks in non – clinical areas, such as offices and social settings. The claimant cited this art of the advice in her appeal grounds.

9.51 The claimant's other grounds of appeal in this statement included that she had not refused shopping or laundry calls. She said that if calls were within her availability

(by implication) she would consider them, but she had never offered any suggested hours, shifts, areas or available times, and no one had reached out to her.

9.52 The appeal was held by Teams meeting on 12 July 2022. The claimant was again represented by Robert Oulds, and Wendy McCall was supported by Katie Brown. Despite her presence to take minutes, no notes of the meeting have been disclosed by either party (the Tribunal would have also expected Robert Oulds to have some, but none have been forthcoming).

9.53 Wendy McCall considered the claimant's grounds of appeal documents, and what was said in the meeting. There was discussion of the contention that the claimant had "refused" alternative work, the claimant clarifying that she had not done so. The claimant's refusal to share the OH report was also discussed, and Wendy McCall again tried to encourage the claimant to allow the respondent to have sight of it, but she would not.

9.54 On 4th July 2022 Wendy McCall sent the claimant the appeal outcome letter (pages 482-483 of the bundle). In her letter Wendy McCall referred to the alleged refusal of the claimant to carry out shopping or laundry calls, and did accept that the word "refusal" may not be appropriate, but the claimant had said in an email that she needed more time to consider the proposal. She confirmed that visors were not a suitable alternative, and no other calls could be offered to her.

9.55 She went on to explain that throughout the pandemic the respondent had based its policies and practices around government and local authority guidelines. She acknowledged the IPC document of 1June 2022 that the claimant had supplied, but pointed out that as a social care provider , the respondent was not regulated or governed by NHS guidelines. She referred to the OH report, and accepted the claimant's right to decline a referral, but the claimant had agreed to it. She could not look into the issues that the claimant had with the report any further. She acknowledged the claimant's contention that mandating the wearing of face masks was not law, but said that the respondent followed guidelines to protect its staff and vulnerable service users. Whilst expressing sympathy for the claimant's situation , she upheld Margaret McDonald's decision.

9.56 The relevant guidance in force at the time that the claims relate to was as follows. The respondent is part of the City and County Healthcare Group. It provides domiciliary care to Lancashire County Council. Up until 4 April 2022 the relevant Government guidance for care workers providing services by visiting service users in their homes was set out in a document entitled "Covid – 19 – how to work safely in domiciliary care", a copy of which is at pages 384 to 400 of the bundle. The type of mask which is discussed in this guidance is a fluid – repellent surgical mask ("FRSM"), also known as a Type IIR. This is to be distinguished from a visor type mask, which is referred to as eye – protection. The guidance was that such a mask should be used in conjunction with the FRSM mask. The use of FRSM masks was recommended where a care worker was likely to be within 2 metres of an individual carrying out personal care or domestic duties.

9.57 That advice was also included in the "PPE guide for community and social care settings including care homes" issued by the UK Health Security Agency (pages 429 to 436 of the bundle) , in force until April 2022.

9.58 Government guidance was updated (precisely when is unclear, but the changes were in force by 24 August 2022) in a document entitled “Infection prevention and control in adult social care Covid 19 Supplement” , which is at pages 489 to 515 of the bundle. Page 499 contains a Table, which relates to PPE requirements when caring for a person not known or suspected to have Covid – 19. In this the wearing of face masks (distinguished from eye protection) is included in the column for social contact with clients, staff and visitors.

9.59 Lancashire County Council , the respondent’s client, provided guidance of what was required of care providers. The most recent in the context of these claims was in a webinar held on 25 February 2022. This was by way of an update, reflecting changes in legislation and guidance , in particular the Living with Covid Plan. The guidance on masks is at page 426 of the bundle. It provides that the guidance on mask wearing in social care settings had not changed (it previously being that mask wearing was required in social care settings), that social care workers were to continue to wear Type IIR masks, and that there were no staff exemptions for mask wearing in social care settings.

9.60 On 11 May 2022 the respondent’s head office issued a Management bulletin (pages 458 to 460 of the bundle).The first item in it was entitled “Pandemic news and PPE reminder”. This referred to the falling number of Covid cases, and how there had been enquiries made as to whether it was still necessary for staff to wear face masks and other PPE. It was pointed out that as a social care provider the respondent still had to adhere to the DHSC infection control guidance, which still required, amongst other things, that care workers wore appropriate PPE when delivering care, including a Type IIR fluid repellent face mask, using a fresh mask for each care visit.

9.61 As at the date of the hearing, the respondent still requires its care providers to wear face masks when providing domiciliary care.

9.62 The respondent provides various types of care, delivered in “packages” contracted for by Lancashire County Council . The major part of the services it provides in these packages is domiciliary care, where carers visit service users in their own homes. Care in these circumstances can involve food preparation, dressing, assistance with hygiene needs, and preparation for sleeping, or waking up. The claimant was engaged on this type of work. She generally did it in the late afternoon , into the evening, and at weekends every fortnight. This fitted her childcare arrangements, and she worked in an area where she lived, and hence her travelling times were short.

9.63 The other type of service provided is less personal care, and more of domestic assistance. It will involve going out shopping for the service user, or carrying out domestic tasks such as laundry, cleaning, and changing bedding. The service user would usually not be in the same room when these tasks were being caried out. The time of day this is carried out varies, but shopping trips are generally during the day, usually between 1.00 p.m. and 4.00 p.m.. This type of work makes up a minority of the services provided by the respondent. Further, it is not always a “stand alone” service, but can be added onto a “package” for a service user, in addition to domiciliary care. The carers who carry it out also, like the claimant , work part time, and the hours that they provide are generally agreed between them and their service users, to suit them

both. They are employed on the same type of contract as the claimant .This type of service is provided across all the areas covered by the respondent. Workers are not paid travelling time or expenses for assignments they accept.

9.64 The respondent does not have a computer - based system in which all the care services provided by all its carers for all its service users over all the areas it covers are easily checked. A people planner (a physical document) is used. Carers provide their availability for rotas, which are then completed and they are matched to services users by a Co – Ordinator . Like the claimant's work , these duties are usually regular ones, with the same clients and the same times each week. Margaret McDonald estimated that there might be 8 to 10 hours of such work available, but she was not sure of this, there may have been more, but this would cover the whole of the area covered by the respondent, which would include South Ribble.

9.65 To change a rota to enable the claimant to be offered a domestic type visit, or visits, would require consultation with those carers who were usually rota'd to provide these visits, and their service users to advise them of any potential change. Any carer who was asked to give up such an assignment would not be guaranteed any replacement work, and may also be unable, due to their availability, to take up any other work which they may then be offered. Further, "stand alone" shifts of this nature would have to be identified , where the domestic services were not an adjunct to other domiciliary care which the claimant would not be able to provide if she could not wear a mask.

10. Those then are the relevant facts. They were not greatly in dispute. English is not the claimant's first language, but she did not need an Interpreter. The Tribunal does not consider that she or any other witness did anything but tell the Tribunal the truth as they saw it, and nothing in this judgment turns upon the credibility of any witness before it.

11. The parties made written submissions , to which they spoke, and which are on the Tribunal file. It is not proposed, therefore, to repeat them here, the relevant arguments raised will be considered as each issue is determined.

12. The relevant legal principles were not controversial, and the relevant statutory provisions , if not referred to in the body of this judgment , are set out in Annex B to it. In terms of the law on capability dismissals, one of the leading cases is ***East Lindsey District Council v Daubney [1977] IRLR 181***, cited by Ms Halsall, but this largely approves the guidance provided by ***Spencer v Paragon Wallpapers Ltd [1976] IRLR 373***. In that case, Phillips J. said that every case depends on its own circumstances. The basic question which has to be determined in every case is whether, in all the circumstances, the employer can be expected to wait any longer and, if so, how much longer?" The relevant circumstances include 'the nature of the illness, the likely length of the continuing absence, the need of the employers to have done the work which the employee was engaged to do'. This case, of course, is not strictly about illness, but similar principles will apply. In terms of alternative work , an employer will find it difficult to claim that he has acted reasonably if it takes no steps to try and fit the employee into some other suitable available job. This is likely to be more so in an ill-health case than in an incompetence case (see ***Bevan Harris Ltd v Gair [1981] IRLR 520***). The scope of this duty is discussed in the following passage from the judgment of

O'Connor J in the High Court decision in ***Merseyside and North Wales Electricity Board v Taylor [1975] IRLR 60:***

"… when one comes to consider the circumstances of the case, as to whether they make it reasonable or unreasonable to act upon his incapacity and to dismiss him, it cannot be right that, in such circumstances, an employer can be called upon by the law to create a special job for an employee however long-serving he may have been. On the other hand, each case must depend upon its own facts. The circumstances may well be such that the employer may have available light work of the kind which it is within the capacity of the employee to do, and the circumstances may make it fair to at least encourage him or to offer him the chance of doing that work, even if it be at a reduced rate of pay'.'

Taylorplan Catering (Scotland) Ltd v McInally [1980] IRLR 53 also emphasised that there is no duty actually to create a job (although this is in the context of a claim for unfair dismissal, different consideration may apply in respect of reasonable adjustments). Ultimately the question of whether an alternative job should have been offered is primarily one of fact for the tribunal. As Slynn J said in ***Garricks (Caterers) Ltd v Nolan [1980] IRLR 259 :***

"Clearly employers cannot be expected to go to unreasonable lengths in seeking to accommodate someone who is not able to carry out his job to the full extent. What is reasonable is very largely a question of fact and degree for the industrial tribunal'.'

(i)Unfair dismissal.

a)The potentially fair reason for dismissal.

13. The Tribunal will commence with its determination of whether the claimant was unfairly dismissed. The respondent admits that the claimant was dismissed, so the first issue to decide is whether the respondent has shown that the claimant was dismissed for a potentially fair reason. No suggestion has been made that there was any ulterior motive for her dismissal, indeed the evidence was that the claimant was a valued and capable employee, whom the respondent would have preferred to retain.

14. Mr Jones submits that the respondent falls at the first hurdle, as it has failed to show a potentially fair reason. Whilst the reason given has been “capability”, he invites the Tribunal to consider whether this is in fact so, and whether, in reality, the reason was conduct, or some other substantial reason. This confusion , he submits , means that the respondent has failed to show any potentially fair reason, and therefore the dismissal was unfair.

15. The Tribunal disagrees. The factual reason for the claimant’s dismissal was her inability to wear a face mask which her employer considered was a requirement for her to carry out the type of work that she was employed to do. The Tribunal has then to consider what “label” to attach to that factual reason, and whether that factual situation falls within any potentially fair reason falling within s.98 of the ERA.

16. Section 98(3)(a) defines “capability” as :

(a) 'capability', in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality,

17. It seems to us that the claimant's inability to wear a mask, because, we accept, of her health falls quite squarely within this reason. Capability is to be assessed "by reference to" , amongst other things, health, or any other physical or mental quality. Her inability to wear a mask related to her health, and possibly her physical condition of asthma, or her mental condition of increased anxiety when wearing masks. However viewed, the Tribunal is quite satisfied that the respondent has established that the dismissal was for the potentially fair reason of capability.

b)Was the dismissal fair in all of the circumstances?

18. This is the nub of the case on unfair dismissal. Whilst mindful of the strictures that the Tribunal must not substitute its own views for those of the employer, whose decision must be considered against the yardstick of the reasonable employer, there are some unsatisfactory aspects of the process , and the decision to dismiss on the part of Margaret McDonald. Firstly, she refers, in the capability meeting and the dismissal letter, to the claimant "declining" alternative work. Whilst it is true that the claimant's position on this was not always consistent, and she did revert back to the position that she should be allowed back into her existing role without the need for a face mask, the assertion that she had declined alternative work is something of an overstatement. Further, in the dismissal letter, after reciting the claimant's position in 6 bullet points (page 473 of the bundle) , which it appeared the respondent accepted (i.e that she could not wear a mask because it made her asthma symptoms worse) , she goes on to say that she considered the claimant's "explanation" to be "unsatisfactory". There ensue 5 bullet points, 2 of which relate to the relevant guidance, the third relates to the claimant declining alternative work, the fourth to there being no evidence of exemption, and the fifth to the claimant refusing access to the OH report.

19. This is, with respect, a rather confused picture. The first two bullet points cannot be relevant to the whether the claimant's explanation was unsatisfactory. They may be relevant as to why the respondent could not accept it, and why mask wearing was still required. Similarly, exemption (an issue also raised by Robert Oulds in the meetings) was irrelevant. Whether the claimant was or should have been exempt from being required to wear a mask would have no bearing upon whether she could carry out her usual duties without one. This may have given rise to issues as to whether the claimant should have been put on furlough, but that is not the point. Exemption, if the claimant had "proved" it would not have led to the respondent relaxing the requirement for her to carry out her duties wearing a mask.

20. Despite this somewhat confused picture, the respondent does appear to have accepted , as indeed it would have been reasonable to do so, that the claimant could not wear a mask because of her health concerns.

21. In terms of alternative work, the Tribunal has considered whether the respondent acted reasonably in dismissing the claimant when the need for dismissal may have been avoided by the claimant being assigned other duties for which she would not need to wear a mask.

22. This was mentioned, and the claimant , as she made clear in her appeal had not refused it, although that she was not always clear on her position, as she or her representative would revert back to the position that she did not see why she could not continue in her existing role, by wearing only a visor.

23. That said, we consider that there was a duty upon the employer to explore the possibility of other work, which may have kept the claimant in employment. Whether or not she would accept such work would then be a matter for her, but there would at least have been a proposal from the respondent for her to consider.

24. Whilst it may have been a doubtful exercise (which will be considered in the context of remedy under the ***Polkey*** principle) , we consider that the respondent failed to make adequate enquiries into the possibility of alternative work. Nothing appears to have been explored in this regard between the two capability meetings in May and June 2022, despite Katie Brown of HR actually raising the issue in the May meeting. The ensuing month should have afforded the respondent the opportunity to explore this option more fully, and then to discuss it further with the claimant prior to the final decision to dismiss her, but it did not do so. That may have been partly because the claimant was being somewhat ambivalent about this option, but that did not relieve the respondent of the obligation to explore that option. That is particularly so when one of her grounds of appeal was that she had not refused to consider such an alternative. Wendy McCall accepted that, but did not really take the matter any further. She should have done, although the result, as will be seen, may well have been the same.

25. Mention of the appeal brings the Tribunal to another aspect where the respondent failed to act fairly, in that it failed to comply with a relevant Code of Practice. That was the ACAS Code of Practice on Discipline and Grievances (6 April 2009) , which at para. 27 provides , in relation to appeals:

27.
The appeal should be dealt with impartially and wherever possible, by a manager who has not previously been involved in the case.

It breached the Code , of course, in appointing Wendy McCall as the appeals officer. She had heard the claimant's appeal against her grievance outcome , and hence had prior involvement in these issues. Ms Hasall for the respondent submitted (para. 30 of her written submissions) that there was no difficulty in this, as the subject matter was not the same, and that Wendy McCall had new information that the claimant had refused alternative work. This is , with the greatest of respect, a specious argument. Wendy McCall had dealt , when considering the claimant's grievance appeal, with the issue of whether she could be required to wear a mask, and had rejected her grievance. Whilst the grievance was a different procedure , that is a technicality. The wording of the ACAS Code refers to the manager having been "involved in the case". That , in the Tribunal's view, is a broad term, and it is common sense that a manager who has been involved in determining a grievance in relation to an aspect of the employee's behaviour which then leads to her dismissal should not be involved (unless there is good reason) in an appeal against that dismissal. That there was an additional aspect introduced in the dismissal consideration does not alter that position. The involvement of Wendy McCall (who was one of 5 Regional Directors) also renders the dismissal unfair.

c).Remedy issues.

26. The Tribunal therefore has to consider remedy for the unfair dismissal. The respondent has argued for reductions in the compensatory award on the basis of ***Polkey*** , and for contribution. The Tribunal will deal with them in reverse order.

27. The power to make a reduction for contribution is contained in s.123(6) of the ERA, which provides:

(6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

27. The respondent relies upon the claimant's refusal to allow the respondent access to the OH report as entitling the Tribunal to make such a reduction. The test to be applied was set out by Langstaff P in ***Steen v ASP Packaging Ltd [2014] ICR 56,*** where he advised tribunals to address in their deliberations and their judgment four questions—(1) what was the conduct in question? (2) was it blameworthy? (3) (in relation to the compensatory award) did it cause or contribute to the dismissal? (4) to what extent should the award be reduced? In relation to the type of conduct required, the correct test is to consider if the conduct was culpable, blameworthy, foolish or similar which includes conduct that falls short of gross misconduct and need not necessarily amount to a breach of contract (see ***Nelson v British Broadcasting Corporation (No. 2) [1979] IRLR 346***.)

28. The Tribunal's view is that the claimant's decision not allow the respondent access to the OH report falls short of the threshold for such conduct. She explained her reasons, and had sought amendments of the report , which were not agreed, so she would not release it. That is not blameworthy or foolish conduct, it was something she was perfectly entitled to do. Further, she was not warned that failure to allow disclosure may itself lead to her dismissal. As to contributing to her dismissal, the claimant was not dismissed because she would not release the report. Withholding it merely made it more difficult for the claimant to argue that her dismissal was unfair, and she has had to accept that consequence. Finally, even if the Tribunal were wrong on both these points, it would not consider it just and equitable to make any reduction, given that the non – availability of the report had no bearing on the two aspects in respect of which the dismissal has been found to be unfair. For completeness, the Tribunal would not, for the same reasons, make any reduction in the basic award under s.122(2) of the ERA either.

29. The Tribunal now turns to the other basis upon which reduction is sought, the principle in ***Polkey v AE Dayton Services Ltd [1987] IRLR 503***. This has been summarised *in* ***Grayson v Paycare (A Company Ltd by Guarantee) UKEAT/0248/15/DA,*** by Kerr, J as follows:

"21 *Elias J's summary [in* ***Software 2000****] provides a useful reminder that Tribunals need to disentangle in their minds distinct questions that may need to be addressed in particular cases. The following are possible formulations of the questions that may arise in particular cases:*

(1) How long the employee would have continued working for the employer, but for the dismissal; this is the question that in ordinary cases must be answered on the balance of probabilities, to assess loss;

(2) Whether either party has adduced evidence entitling the Tribunal to conclude (the burden of satisfying the Tribunal being on the employer) that the employee would or might have ceased to be employed in any event had fair procedures been followed;

*(3) Is the evidence relied on to support a **Polkey** reduction in compensation too unreliable or vague to be useful, and is the exercise of seeking to reconstruct what would have happened too uncertain to ground any sensible prediction based on it?*

(4) If not, what is the chance - not the probability or likelihood - that that would have happened at a time in the future, and if so at what point in the future might that chance have produced the relevant event, namely the end of the employment?

(5) Has the employer satisfied the Tribunal that there was a chance of the employment terminating in the future, and if so how great or small was that chance? This is commonly expressed as a percentage.[1]

(6) Has the employer satisfied the Tribunal that employment would have continued, but only for a limited fixed period, whether or not for reasons wholly unrelated to the circumstances relating to the dismissal itself?"

30. There are two aspects to this. The first is the procedural one of the involvement of Wendy McCall in the appeal against the dismissal. Whilst unfair, the Tribunal is quite satisfied that Wendy McCall gave the appeal proper consideration, and came to a decision on what she was presented with. That was a decision which, but for the two aspects identified in this judgment , the Tribunal would have found fell within the band of reasonable responses open to the employer in these circumstances. The Tribunal is quite satisfied that another , independent , appeals officer presented with the same information would have come to same conclusion, and would have upheld the dismissal. This procedural failure accordingly made no difference (it would not affect the timing of the dismissal as it postdates it) , and a 100% reduction will accordingly be made on this basis.

31. The Tribunal has also considered a second aspect, namely whether the offer of alternative work in the form of domestic visits would have been a realistic possibility, which , had the respondent adequately explored it, would have, or may have had, a chance of keeping the claimant in employment, in the sense of meaningful, paid, employment, as opposed to keeping her "on the books" on zero hours, but never getting any work (it being borne in mind that such reductions are against the amount of any compensatory award, and thus the Tribunal will have to consider what the chances were of the claimant continuing to earn, and if so, in what sums).

32. Whilst the evidence as to what the position was, or would have been, was not contained in the respondent's witness statements, Margaret McDonald, when recalled, was able to provide the Tribunal in her supplementary evidence a much clearer picture of the possibilities. Whilst the possibility of redeployment into domestic visits (to use that term) where the claimant could have worn a visor may have seemed to offer the

possibility of the claimant being retained in her employment, an examination of what this was likely to have entailed raises real questions as to its feasibility.

33. To start with, there were no vacant posts into which the claimant could have been redeployed. The respondent's business was not organised on the basis of employees occupying set roles , where there may from time to time arise vacancies. Rather, the respondent has hours of work, assignments, which its employees, who are , the Tribunal understands, like the claimant, mostly engaged on zero hours contracts. They are free to accept, or decline, offers of assignments as they wish. The respondent cannot force them to accept any particular assignments, nor can the employees force the respondent to provide them with work.

34. That said, like the claimant , many employees of the respondent had their "regular" clients, and many worked part time, working hours that suited them and their clients. In order, therefore , for the claimant to be accommodated in any attempt to provide her with work that did not involve mask wearing the respondent would first have to identify those assignments of such a nature, and then see how they were presently being allocated. They may not be, or may not all be, in the same area, and may therefore have involved the claimant in having to travel outside her usual area, which would have time and cost implications for her. Once identified, the respondent would then have to approach any of its employees who were actually, or usually, rota'd for such assignments. The service user too would be consulted (entirely reasonably in the Tribunal's view) and the proposed change to the claimant providing those services discussed. Whilst the respondent would be legally entitled to refuse to allocate any such assignment to any particular current worker , acceding to the claimant's suggestion would inevitably involve the equivalent of "bumping" other employees off the rota for such work. It is very doubtful that any such displaced employee would simply be in a position to take over the claimant's clients, as they may be in a different area, and available at different times of the day, so simply "swapping" would be unlikely. Further, this exercise would have to be repeated in respect of each of the assignments in question, of which, the evidence was, there are not many.

35. The claimant was earning around £210 per week in her job until she was not given any more shifts in November 2021. The respondent in the ET3 states that she worked 18.5 hour per week, although the claimant estimated she had probably actually worked extra hours, especially after the pandemic struck, taking this up to 20 to 28 hours per week. Thus whilst still a part – time job, the claimant was working regularly, and had an established clientele. The Tribunal considers it most unlikely that she would achieve anything like that level of working if the respondent had managed to identify any suitable shifts, displace the current or likely incumbent, and obtain the agreement of the service user.

36. The claimant herself indicated that she would have to consider whether she would accept such assignments, and whilst not refusing to consider them, the Tribunal accepts that she did (quite reasonably) indicate that she may not accept all such assignments.

37. This is , the Tribunal accepts , an exercise in speculation. The Tribunal's conclusion is that whilst the respondent ought to have done more to explore this possibility before proceeding to dismiss, the Tribunal is quite satisfied that had it done so, it would have concluded , quite reasonably , that such an alternative was not feasible. Regardless of whether the claimant would have accepted all such

assignments, and whether all those available would have fully replaced the income that she lost by losing her "own" assignments , the Tribunal considers that it would not have been unreasonable to refuse to offer the claimant such assignments, as to do so would require the "bumping" off them of other employees who may not be in a position to accept any other work from the respondent, and would require the agreement of the service users.

38. A further complication is that the evidence was that such domestic care services are not often provided as "stand alone" shifts, but are part of a package which would include domiciliary care, which the claimant could not carry out. To accommodate the claimant therefore would require the respondent to arrange for the domestic care to be provided by the claimant , whilst the domiciliary care would be provided by another carer, so that the service user would then need two carers to attend. This option, therefore, would be time consuming, complex, and difficult to manage, and would require the co-operation of the potentially displaced workers providing these services, and their service users.

39. The employer is only under a duty to act reasonably in seeking alternatives to dismissal, and is not obliged to take every conceivable step that may avoid dismissal. Thus, had the respondent carried out these enquiries , which it should have done between the two meetings, the result would, the Tribunal is quite satisfied, have been the same, and the claimant would have been dismissed, and dismissed at the time that she was.

40. The Tribunal accordingly also makes a 100% reduction in the compensatory award pursuant to ***Polkey*** .

41. It follows therefore that the Tribunal, whilst declaring that the dismissal was unfair, makes a 100% reduction to any compensatory award, which will be nil. The claimant is entitled to a basic award, and the parties are invited to agree that, or in default, seek a remedy hearing

ii)Disability discrimination – failure to make reasonable adjustments.

a)The respondent's knowledge, and whether the duty to make reasonable adjustments arose.

42. The Tribunal now moves on to consider the claims of disability discrimination. The Tribunal has determined that the claimant was a person with a disability, and the claims made are that the respondent failed to make reasonable adjustments for that disability.

43. The first issue, therefore, is whether the respondent applied a "PCP" (provision, criterion or practice), namely a requirement that a care worker in a role delivering care face to face with clients wear a Type 2 or IIR face mask that put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that she contends due to her deteriorating asthma she could not wear a mask? The respondent (para. 45 of Ms Halsall's submissions) accepts that it did apply such a PCP to the claimant . It does not, however, concede substantial disadvantage, as it argues that the claimant was not necessarily liable to dismissal because she could not wear a mask. That, with respect, misses the point. Whether she was liable to dismissal

is not the disadvantage, not being offered assignments with her usual clients in a domiciliary care setting was.

44. The respondent also pleads lack of knowledge of the disability , and, of the substantial disadvantage. This is based, of course, upon the Equality Act 2010 Sch 8, Pt 3, para 20, which provides:

'A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—(a) in the case of an applicant or potential applicant, that an interested disabled person is or may be an applicant for the work in question; (b) [in any case referred to in Part 2 of this Schedule] that an interested disabled person has a disability and is likely to be placed at the substantial disadvantage referred to in the first, second or third requirement'.

45. Taking those in turn, the respondent argues that it did not know that the claimant had a disability. That may be so, in that none of the respondent's witnesses appear to have addressed the issue when dealing with her in late 2021. The respondent, however, can only rely upon this provision if it also shows that it could not reasonably have been expected to know that the claimant was a person with a disability. The respondent contends that it can satisfy this provision as well. Ms Halsall points out that whilst the respondent was told by the claimant that she had asthma, that is not in itself a disability. Mr Jones, however, responds that the claimant had informed Christine Sanderson in November 2021 that wearing a mask made her asthma worse, and she had provided fit notes for asthma . Further, in her grievance of 3 January 2022 she stated that as a sufferer with asthma symptoms she had a "hidden disability". Ms Halsall, however, relies upon the claimant's failure to release the OH report as supporting the respondent's contention that it could not reasonably have been expected to know of the disability or of its effect upon the claimant. She cites ***Cox v Essex County Fire and Rescue Service UKEAT/0162/13*** in this connection, as an instance where an employer was found to lack the requisite knowledge where the claimant had not afforded the employer the opportunity of full medical evidence of his condition and its effect. The Tribunal has considered that case, and it is no more than a refusal of the EAT to overturn a Tribunal's (perhaps surprising) findings on the facts before it that the employer lacked the requisite actual or constructive knowledge. The non – availability of the OH report to the respondent is, of course, a relevant fact, but it is only one factor to be taken into account in determining knowledge.

46. "Knowledge" here means knowledge of the *facts* constituting the disability; where the employer merely relied on the *opinion* of its occupational health adviser that the employee was not disabled for statutory purposes, that was insufficient to establish the defence under para 20: ***Gallop v Newport City Council [2014] IRLR 211.*** The relevant extract from the judgment of Rimer L J is para. 36, where he says:

"I come to the central question, namely whether the ET misdirected itself in law in arriving at its conclusion that Newport had neither actual nor constructive knowledge of Mr Gallop's disability. As to that, Ms Monaghan and Ms Grennan were agreed as to the law, namely that (i) before an employer can be answerable for disability discrimination against an employee, the employer must have actual or constructive knowledge that the employee was a disabled person; and (ii) that for that purpose the required knowledge, whether actual or constructive, is of the facts *constituting the employee's disability as identified in s.1(1) of the DDA. Those facts can be regarded*

as having three elements to them, namely (a) a physical or mental impairment, which has (b) a substantial and long-term adverse effect on (c) his ability to carry out normal day-to-day duties; and whether those elements are satisfied in any case depends also on the clarification as to their sense provided by Schedule 1. Counsel were further agreed that, provided the employer has actual or constructive knowledge of the facts constituting the employee's disability, the employer does not also need to know that, as a matter of law, the consequence of such facts is that the employee is a 'disabled person' as defined in s.1(2). I agree with counsel that this is the correct legal position."

47. Thus it is the facts of which the respondent was , or ought reasonably to have been aware, that matter. It is also correct that all the elements of disability are relevant, but by January 2022 at the latest the respondent knew that the claimant had asthma, a condition which , even without medical evidence, anyone would expect to have lasted for 12 months or more, or to be likely to, and that it was having an effect upon the claimant's ability to wear a mask, an activity that the Tribunal has found in its judgment on disability to be a day to day activity. The respondent accordingly, in the view of the Tribunal, had the requisite knowledge , or ought reasonably be expected to have had the requisite knowledge, of the facts that the claimant had a disability and that it was putting her at the substantial (i.e more than trivial) disadvantage of not being able to carry out her work of delivering domiciliary care.

48. The duty to make reasonable adjustments therefore did arise, and certainly had done so by January 2022.

b). Did the respondent fail to make reasonable adjustments?

49. What reasonable adjustments therefore did the respondent fail to make? Only two were pleaded :

To allow the claimant to perform her role wearing a visor instead of a mask;

To move the claimant to a different role where she was not required to wear a mask.

50. Turning to the first, the Tribunal cannot agree that it would have been a reasonable adjustment to allow the claimant to carry out her work wearing only a visor. That would have been contrary to all the guidance to which the respondent was obliged to adhere, particularly that from Lancashire County Council, in effect the respondent's client, which had , in February 2022 reiterated its requirement that all care providers wore masks when delivering care of the nature that the claimant was providing. Whilst Robert Oulds and the claimant may have disagreed with this position, and maintained that the claimant should have been exempt from this requirement, it would not be a reasonable adjustment to expect the respondent to disregard this guidance from its major client , and risk sanctions or even loss of the contract for such service provision. In any event, it would be likely that such a departure from previous practice would have to be discussed with the service users themselves. Whilst many of them may have agreed, and indeed may have been tolerant of their own family members not wearing masks at all, it would still have been, the Tribunal considers, an unreasonable imposition upon them to even ask them to consider this change in practice for the claimant.

51. In relation to the second, the reasonable adjustment was to "move the claimant to a different role where she was not required to wear a mask". That moving an employee to a different role can amount to a reasonable adjustment has been considered in a number of the authorities, notably ***Archibald v Fife Council [2004] IRLR 651*** , ***Tarbuck v Sainsbury's Supermarket Ltd [2006] IRLR 664*** and ***The Chief Constable of South Yorkshire Police v Jelic [2010] IRLR 744***, where, in the judgment of Cox, J. , she said this:

"44.
*In **Archibald** the House decided that, on the facts of that case, the employment tribunal had erred in finding that the employers had not failed to comply with their duty to make reasonable adjustments. Ms Archibald was dismissed in circumstances in which she had become totally incapable of doing the job for which she was employed, but was able to do other, vacant jobs within the organisation. It was held that the duty to make reasonable adjustments could include transferring, without the necessity for competitive interviews, a disabled employee from a post she can no longer do to one that she can, and for which she is qualified and suitable, even if that post is at a slightly higher grade than her own. The tribunal had therefore erred in concluding that they could not even consider whether that was a reasonable adjustment, and the case was remitted in order for them to do so.*

45
*We do not accept Mr Jones' submission that a tribunal is precluded, as a matter of law, from holding that it would be a reasonable adjustment to create a new job for a disabled employee, if the particular facts of the case support such a finding. We find ourselves in agreement, on that point, with the observations of the EAT in **Southampton City College v Randall [2006] IRLR 18**, where at paragraph 22 they said:*

'We are mindful that each case is fact specific. In this case, the appellant (employer) did nothing and did not consider reasonable adjustments at all. Further, s.6(3) [now 18B] does not, as a matter of law (our emphasis), preclude the creation of a new post in substitution for an existing post from being a reasonable adjustment. It must depend upon the facts of the case.'

46
The facts of that case reveal the reasons for what might, at first blush, be regarded as a surprising result. It was not being suggested that the employer should have created a post which was not otherwise necessary. In fact, the college had embarked upon a substantial reorganisation and restructuring process. The claimant's line manager conceded in evidence that he had had 'a blank sheet of paper' for this process and for the job specifications which resulted. The tribunal held that it would have been possible in these circumstances to devise a job which would both take account of the employee's disability and harness the benefits of his successful career and experience, but the employer was found not to have taken this or any other reasonable step to accommodate a long-serving and valuable employee. The EAT found that this conclusion was open to the tribunal on the specific facts of the case.

47
*In our view there is nothing in **Tarbuck** which undermines this reasoning. In that case, during a redundancy exercise, the employers failed to interview the disabled employee*

for a vacant post being advertised internally, and for which she was suited. In fact, nobody was interviewed for it at any stage because the employers finally determined, in what was found to be a 'highly fluid situation', that the post should not be filled. In the circumstances, the EAT upheld the tribunal's decision on the specific facts of the case that there was no less favourable treatment of the employee, and no failure to make a reasonable adjustment for her. As Elias P explained at paragraph 49:

'[The claimant's] case has never been that ... she should have a post specifically created for her. Nor can there be an obligation on the employer to create a post specifically, which is not otherwise necessary, merely to create a job for a disabled person.'

48
That, however, was not the case in ***Randall*** *and nor is it the case in the present appeal, where there were two jobs, both considered necessary at the time and both being carried out by the claimant and another police officer. We do not find that* ***Tarbuck*** *assists Mr Jones on this point."*

52. Thus, whilst it has been held that there is no requirement on an employer to create a new job for the employee by way of a reasonable adjustment (***Tarbuck***) , where an appropriate job already exists and the employee currently doing it can be moved, it may be a reasonable adjustment to make that job swap.

53. That, however, would not be the situation here. There is no evidence that there were any "vacancies" in the type of work where the claimant would not have to wear a mask, rather the opposite was the case. That work, like the work that the claimant did, was allocated on a rota basis, and various employees , also on zero hours contracts, generally offered themselves and were accepted to carry out that work. To allow the claimant to be allocated those duties would require disrupting those rotas, and removing the current incumbents from them, when such employees would not necessarily be able simply to take over shifts that the claimant was not then doing.

54. Whether an adjustment is reasonable has to be considered on an individual case by case basis, and in all the circumstances. For largely the same reasons as the Tribunal has made the 100% reduction in the compensatory award , as set out above, it also finds that it would not have been a reasonable adjustment for the respondent to made this type of adjustment. The Tribunal accepts that it need not be satisfied that the proposed adjustment would have the effect of preventing the disadvantage, and that it would be enough if it had the prospect of at least reducing it, applying ***Romec v Rudham [2007] All ER (D) 206 (Jul)***, and ***Cumbria Probation Board v Collingwood [2008] All ER (D) 04 (Sep)*** **as approved in** ***Leeds Teaching Hospital NHS Trust v Foster*** **UKEAT/0552/10,** ***[2011] EqLR 1075.*** The Tribunal would accept that such an adjustment may have had a prospect of reducing the disadvantage to which the claimant was put, but, however, finds that such an adjustment would not be a reasonable one, and this claim must fail on that basis.

Conclusion.

55. Thus, with some sympathy for the claimant , whose fault none of this was, the only claim upon which she succeeds is that of unfair dismissal. That the claimant , who impressed the Tribunal as a hard working, committed and genuine person, with

obvious abilities , should find herself in this position is unfortunate, and she is yet another, if collateral, victim of the pandemic that has had such wide – ranging and sometimes unforeseen consequences across the nation.

Employment Judge Holmes
DATE: 21 June 2023.

ORDER SENT TO THE PARTIES ON
29 June 2023

FOR THE TRIBUNAL OFFICE

Annexe A
Complaints and Issues

Unfair dismissal

Reason

Has the respondent shown the reason or principal reason for dismissal was a potentially fair reason under section 98 Employment Rights Act 1996? The respondent says the reason for dismissal was the claimant's inability/refusal to wear a mask despite a requirement that a mask be worn in the care worker role performed by the claimant. The respondent says that this is a potentially fair reason which relates to capability, and/or conduct, and/or is some other substantial reason.

Did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The claimant will argue that the dismissal was unfair because it was outside the band of reasonable responses to require the claimant to wear a mask in that role when there was no legal foundation for doing so.

Disability [Now determined]

Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

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

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

A requirement that a care worker in a role delivering care face to face with clients wear a Type 2 or 2R face mask?

Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that she contends due to her deteriorating asthma she could not wear a mask?

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

Did the respondent fail in its duty to take such steps as it would have been reasonable to have taken to avoid the disadvantage? The claimant says that the following adjustments to the PCP would have been reasonable:

To allow the claimant to perform her role wearing a visor instead of a mask;

To move the claimant to a different role where she was not required to wear a mask.

By what date should the respondent reasonably have taken those steps?

ANNEXE B

The relevant statutory provisions.

Employment Rights Act 1996

98 General

(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.

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

[(ba) …]

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

[(2A) …]

(3) In subsection (2)(a)—

(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.
[(3A) …]

(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)—

(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.

Equality Act 2010

20 Duty to make adjustments

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

(2) The duty comprises the following three requirements.

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

(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

(6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.

(7) A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.

(8) A reference in section 21 or 22 or an applicable Schedule to the first, second or third requirement is to be construed in accordance with this section.

21 Failure to comply with duty

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person