EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr Benjamin Gerrish	AND	Cambian Asperger Syndrome Services Ltd

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD REMOTELY BY VIDEO (VHS) **ON** 29 June 2023

EMPLOYMENT JUDGE N J Roper

Representation
For the Claimant: Ms J Kerr of Counsel
For the Respondent: Mr J Boyd of Counsel

JUDGMENT

The judgment of the tribunal is that the claimant's claims for direct discrimination on the grounds of religion and belief and for unfair dismissal have little reasonable prospect of success and are subject to the attached Deposit Order.

RESERVED REASONS

1. This is the judgment following a preliminary hearing to determine: (i) whether the claimant was treated less favourably than his chosen comparators; and (ii) whether the claimant was unable to continuing work without contravention of an enactment; and (iii) whether the claimant's claim should be struck out on the grounds that it has no reasonable prospect of success, or whether the claimant should be ordered to pay a deposit as a condition of continuing with the claim because it has little reasonable prospect of success.
2. In this case the claimant Mr Benjamin Gerrish has brought claims alleging unfair dismissal, and direct discrimination because of religion or belief. The claims are denied by the respondent.
3. This has been a remote hearing which has been consented to by the parties. The form of remote hearing was by VHS Video. A face-to-face hearing was not held because no one requested the same and all issues could be determined in a remote hearing. The documents that I was referred to are in a bundle of 160 pages, the contents of which I have recorded.

4. I have considered the grounds of application and the response submitted by the parties, together with the claimant's further and better particulars. The claimant has also provided a written witness statement of evidence for the purposes of this hearing. I have considered the oral and documentary evidence which it is proposed will be adduced at the main hearing. I have also listened to the factual and legal submissions made by and on behalf of the respective parties. I have not heard any oral evidence, and I do not make findings of fact as such, but my conclusions based on my consideration of the above are as follows.
5. The Background to this Hearing:
6. This hearing follows a detailed case management preliminary hearing and subsequent order made by Employment Judge O'Rourke dated 17 November 2022 (which was sent to the parties on 29 November 2022). I refer to this case management order in this Judgment as "the CMO". The claimant was represented by counsel at that hearing.
7. As noted in the CMO: "The claimant was employed from April 2015 to 12 November 2021 as a Deputy Manager in a care home owned by the respondent accommodating persons with autistic spectrum disorders and learning disabilities. He contends that the respondent's decision to dismiss him was both unfair and discriminatory on the basis that his refusal to be vaccinated against Covid was less favourable treatment on the basis of his belief (namely that as the vaccine was not proven to be effective and safe and offended against his religious and philosophical beliefs, he should not be obliged to be vaccinated to remain in his employment). The respondent's case is that they had no option but to insist on vaccination as it was a statutory requirement of the Regulator (the CQC) and in any event the claimant's belief in this respect does not meet the requirements of section 10 of the Equality Act 2010 ("the EqA"). They also state that the claimant was offered alternative employment in which there was no vaccination requirement, but he refused to accept it."
8. The list of issues which fell to be determined at any final hearing was discussed and agreed, and it was set out in the CMO. The claimant's claims are limited to unfair dismissal and direct discrimination because of religion or belief. As for the unfair dismissal claim, the respondent asserts that the dismissal was for a reason related to illegality and/or some other substantial reason such as to justify dismissal which are both potentially fair reasons for dismissal under subsections 98(1) and (2) of the Employment Rights Act 1996. As for the discrimination claim, the claimant relied (at that stage at least) on two religious or philosophical beliefs: (i) the philosophical belief that the Covid vaccine was not proven to be effective and safe and that accordingly he should not have to been required to be vaccinated to retain his employment (which the respondent does not accept amounts to a philosophical belief which is protected under the EqA); and (ii) as a Roman Catholic, a religious objection to taking the vaccine "because they were admitted to have been made using aborted foetuses".
9. The claimant also asserted that there was an actual comparator, namely a person who did share his beliefs, and who refused to be vaccinated, but was not dismissed in the same circumstances. He was ordered to provide further particulars to clarify this assertion.
10. In the meantime, Employment Judge O'Rourke listed this preliminary hearing to determine the following issues: (i) whether the claimant was less favourably treated than the hypothetical comparator of a fellow employee who had also refused to be vaccinated, but who did not share his religious or philosophical beliefs (and it was noted that the claimant had also raised the possibility of an actual comparator, to be clarified as noted above); (ii) was it the case that the claimant could not continue to work in his then position, unvaccinated, without contravention on the respondent's part of a duty or restriction imposed by or under an enactment? The respondent's position was noted to the effect that the claimant's employment was in a Care Quality Commission (CQC) regulated home and the respondent was required by the Health and Social Care Act 2008 (Regulated Activities) (Amendment) (Coronavirus) Regulations 2021 to ensure that he was fully vaccinated unless exempt; (iii) whether one or both claims should be struck out, as having no reasonable prospects of success, or, in the alternative, have a deposit order(s) made on the basis of having little reasonable prospect of success; and (iv) to make such further case management orders as may prove necessary.

11. The order for Further and Better Particulars in paragraph 5 of the CMO required the claimant to specify (i) his position as to the appropriate comparator in his claim of direct discrimination; and (ii) his rationale for asserting that the respondent was incorrect in deciding that he could not continue to work in his then position, unvaccinated, without contravention on their part of the duty or restriction imposed by or under an enactment.
12. The claimant subsequently filed Further and Better Particulars pursuant to the CMO, which were prepared by counsel. Under the heading Discrimination Claim this document reads: "The claimant claims that he was directly or indirectly discriminated against because of his philosophical religious belief which is that he is a Traditional Roman Catholic who follows the creed of pre-Vatican 2 status. He does not adhere to anything post the conclusion of the 1965 Second Ecumenical Council of the Vatican. This compels him to be deeply suspicious of any substances which may subsequently changes blood or DNA on a permanent basis, as he believes that these are God-given. As an adult he has declined vaccinations for this reason. Moreover, the three Covid-19 vaccines available at the material times had all been developed, tested or produced using aborted foetal cell lines which would be unconscionable for a Traditional Roman Catholic who follows the creed of pre-Vatican 2 status. For the purposes of the indirect discrimination claim, the PCP was a policy of dismissing employees who had not received the Covid 19 vaccinations and had not been expressly declared medically exempt."
13. Pausing there for a moment, this is the first occasion on which a potential claim of indirect discrimination has been raised. There is no such claim in the claimant's claim form, and it did not feature in the Agreed List of Issues in the CMO (following a hearing at which the claimant was represented by counsel). The respondent objects to its conclusion now on the basis that if the claimant wishes to pursue such a claim, then he must make a formal application to amend his claim, which has not yet happened. I agree with that contention, and for the record there is no claim for indirect discrimination on the grounds of religion or belief currently before this tribunal, and accordingly it does not fall to be considered at this hearing.
14. In addition, it is to be noted that the claimant no longer relies upon the first philosophical belief set out in the CMO (which the respondent had asserted does not attract protection under the EqA). The respondent does accept that the second belief set out in the CMO, which is now relied upon by the claimant, is a belief which is capable of protection as a protected characteristic under section 10 of the EqA.
15. The claimant's Further and Better Particulars also dealt with the other two outstanding issues as previously directed. Under the heading The Claimant's Comparator it is stated: "The claimant relies on an actual comparator namely Carla Felix. Ms Felix declined the vaccination and was not dismissed. In the alternative the claimant relies on a hypothetical comparator: an employee who did not share his philosophical religious belief." With regard to the duty or restriction imposed by or under an enactment, it is stated: "The respondent's position is that in dismissing the claimant they were following the guidance of the Secretary of State for Health who is responsible for passing the Health and Social Care Act 2008 (Regulated Activities) (Amendment) (Coronavirus) Regulations 2021 ("the 2021 Regulations") which introduce a general requirement for care home employees to receive the Covid 19 vaccination. However, it is not correct to say that the respondent will be acting unlawfully by refraining from dismissing the claimant. There are three reasons for this: (a) the respondent was aware that there was a procedure for self-certification permitted under the 2021 Regulations to allow unvaccinated employees to continue in post if they declared themselves unsuitable for vaccination. The claimant was not made aware that he could avail himself of this procedure; (b) to the claimant's knowledge the respondent did not dismiss all unvaccinated employees to which the 2021 Regulations applied; and (c) the claimant could have been but was not redeployed, for example, in a role working at the college rather than the care home."
16. That is the background to this preliminary hearing.
17. The Likely Evidence:
18. I have not heard any oral evidence, and I do not make findings of fact such as to bind any future Tribunal. Based on the relevant contemporaneous documents which I have seen,

and having considered the evidence which is likely to be given as any full tribunal hearing, a summary of the factual background appears to be as follows.

19. The respondent is a member of the Care Tech Group of Companies which provide social care services to children and adults, including those suffering from Asperger's or autism and learning difficulties. The claimant was employed as a deputy manager at one of the respondent's care homes in Bournemouth from 15 April 2015 until 12 November 2021. During the coronavirus pandemic the Government introduced the Health and Social Care Act 2008 (Regulated Activities) (Amendment) (Coronavirus) Regulations 2021 ("the 2021 Regulations"). These Regulations required workers deployed in CQC regulated homes to be fully vaccinated against coronavirus unless they were medically exempt. There was a 16 week grace period from 22 July 2021 to enable workers to receive two doses of the Covid 19 vaccine. The last date for workers to get their first vaccine dose (in order for them to be fully vaccinated before the 2021 Regulations came into force) was 16 September 2021. The Regulations came into full force on 11 November 2021. The 2021 Regulations allowed an exemption for medical reasons. Employees were allowed to self-certify that they were thus exempt from vaccination, and a non-exhaustive list of examples of medical exemptions included those receiving end-of-life care; those with learning disabilities; those with severe allergy to the Covid 19 vaccines or their constituents; or those who had had an adverse reaction to the first dose. This self-certification process allowed the worker in question to self-certify and then support the medical exemption with medical evidence. That period of grace was extended during December 2021, and the 2021 Regulations were subsequently repealed with effect from March 2022.
20. On 6 August 2021 the respondent wrote to its employees, including the claimant, explaining the effect of the 2021 Regulations. The attachment to the email was headed "Important Staff Notice - Mandatory Vaccine Requirement". That notice made it clear that employees with a specific medical condition might qualify for medical exemption from the mandatory vaccine and that verification would be needed by way of a letter from a GP.
21. The claimant was opposed to being vaccinated and responded with a letter running to nearly four pages making it clear that he did not consent to being vaccinated and explaining why in his opinion the vaccine was unsafe and unlawful. This resulted in a disciplinary process against him and his eventual dismissal. At an initial management investigation meeting on 28 October 2021 the claimant was asked why he refused to receive the Covid 19 vaccine and he replied: "my decision is I suppose you can call it a philosophical decision." The claimant was informed that his refusal to receive the vaccine could well result in his dismissal and he was given a list of internal vacancies throughout the respondent's organisation where he could work without being vaccinated. It was made clear to the claimant that he was welcome to apply for any such vacancies. On 20 October 2021 the claimant was sent a list of vacancies both with the respondent and its Care Tech Group running to nearly 40 pages. The claimant did not apply for redeployment or alternative employment within the respondent organisation.
22. By letter dated 1 November 2021 the claimant was invited to a disciplinary hearing. He was invited to be accompanied by a work colleague or trade union officer. He was informed that if he considered himself unable "to receive a vaccine due to clinical grounds then please ensure you have evidence of this at the hearing". It was made clear to the claimant that "unless you're otherwise legally exempt from having a vaccine or redeployed into a position that does not require proof of being fully vaccinated then the likely outcome of this dismissal meeting will be the termination of your employment on notice."
23. The hearing took place on 12 November 2021 (after the 2021 Regulations had taken full effect), and the claimant was accompanied by his chosen trade union representative. The claimant confirmed that it remained his intention not to be vaccinated and that accordingly he would be unable to work in the respondent's CQC registered homes. He confirmed that he had not applied for any other vacancies. He was asked if he had any medical exemption and he replied: "not on an exemption basis as far as I know. It is something I have looked into but I do not think my particular issue is on the list." When asked whether anything else should be considered he replied: "I do not think there is anything I can say that is going to change everything". His trade union representative then confirmed that the claimant was

"not submitting a medical exemption". There was then a discussion about what pay and notice pay the claimant should receive.

24. The claimant was dismissed by letter dated 17 November 2021 which confirmed that the claimant had refused to receive the Covid 19 vaccine, and that the claimant had no clinical reason which might qualify as a legal exemption. It was noted that he had not applied for any alternative positions. The claimant appealed the decision to dismiss him, and the appeal hearing took place on 7 January 2022. The claimant was accompanied by his trade union representative, who again confirmed at that hearing that the claimant had "never made a case for medical exemption" but that he objected to his dismissal because it was discrimination because of his philosophical belief. The claimant's appeal was rejected. When the 2021 Regulations were repealed in March 2022, the respondent wrote to the claimant on 25 March 2022 notifying him of available vacancies, and it invited him to apply.
25. Meanwhile another of the respondent's employees, namely a care worker called Carla Felix, had also objected to the requirement for her to be vaccinated. It was made clear to her in a letter dated 22 September 2021 that she was not entitled merely to object to the vaccination, but that she was entitled to provide self-certified medical exemption. The respondent had a standard form which Ms Felix signed on 7 October 2021 confirming that she met the medical criteria for exemption. She acknowledged that it was a temporary medical exemption only which would expire in 12 weeks, and thereafter she would be required to have an authorised medical exemption, or be vaccinated. She attended an investigation meeting on 2 November 2021 which explored the claimant's self-certification and whether it was within one of the clinical exemptions. On 9 November 2021 the respondent confirmed that she was entitled following her self-certification to remain working until 24 December 2021, after which more formal evidence of exemption would be required. It was made clear to her that 24 December 2021 was the last day when she could work in the home as self-certified and thereafter she would need to have a formal medical exemption. She was later informed on 15 December 2021 that this self-certification process had now been extended until March 2022. At no stage was Ms Felix disciplined or dismissed because she had not agreed to be vaccinated.
26. The relevant law which I considered is as follows:
27. <u>The Law:</u>
28. Having established the above facts, I now apply the law.
29. The Employment Tribunal Rules of Procedure 2013 are in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 and are referred to in this judgment as "the Rules".
30. Rule 37(1) provides that at any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on the grounds: (a) it is scandalous, or vexatious, or has no reasonable prospect of success; (b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious; (c) for non-compliance with any of these Rules or with an order of the Tribunal; (d) that it has not been actively pursued; (e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).
31. Rule 39 provides that where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument. Under Rule 39(2) the Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.
32. In this case the reason for the dismissal relied upon was illegality and/or some other substantial reason such as to justify dismissal, both of which are potentially fair reasons under subsections 98(1) and (2) of the Employment Rights Act 1996 ("the Act").
33. Section 98 (4) of the Act provides "…. 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".

34. This is also a claim alleging discrimination on the grounds of a protected characteristic under the provisions of the Equality Act 2010 ("the EqA"). The claimant complains that the respondent has contravened a provision of part 5 (work) of the EqA. The claimant alleges direct discrimination. The protected characteristic relied upon is religion or belief, as set out in sections 4 and 10 Religion or belief of the EqA.
35. As for the claim for direct discrimination, under section 13(1) of the EqA a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.
36. The provisions relating to the burden of proof are to be found in section 136 of the EqA, which provides that if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred. However this does not apply if A shows that A did not contravene the provision. A reference to the court includes a reference to an employment tribunal.
37. The Health and Social Care Act 2008 (Regulated Activities) (Amendment) (Coronavirus) Regulations 2021 are also relevant ("the 2021 Regulations"). In short, with effect from 11 November 2021, regulated care homes were precluded from allowing persons to enter their premises unless that person had been vaccinated with the complete course of doses of an authorised vaccine, unless that person should not be vaccinated with any authorised vaccine for clinical reasons.
38. I have also considered section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, and in particular section 207A(2), (referred to as "s. 207A(2)") and the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures 2009 ("the ACAS Code").
39. I have considered the cases of Igen v Wong [2005] IRLR 258 CA; Madarassy v Nomura International Plc [2007] ICR 867 CA; Hewage v Grampian Health Board [2012] IRLR 870 SC; Nagarajan v London Regional Transport [1999] IRLR 572 HL; Chief Constable of West Yorkshire v Khan [2001] IRLR 830 HL; Iceland Frozen Foods Limited v Jones [1982] IRLR 439 EATNorth Glamorgan NHS Trust v Ezsias [2007] IRLR 603 CA; Anyanwu v South Bank Students' Union [2001] IRLR 305 HL; Hussain v UPS Limited UKEAT/0221/17/DM Tayside Public Transport v Reilly [2012] IRLR 755 CS; and Blockbuster Entertainment Ltd v James [2006] IRLR 630 CA; and Balls v Downham Market High School & College [2011] IRLR 217 EAT.
40. With regard to the claim for direct discrimination, the claim will fail unless the claimant has been treated less favourably on the ground of his belief than an actual or hypothetical comparator was or would have been treated in circumstances which are the same or not materially different. The claimant needs to prove some evidential basis upon which it could be said that this comparator would not have been dismissed.
41. In Madarassy v Nomura International Plc Mummery LJ stated: "The Court in Igen v Wong expressly rejected the argument that it was sufficient for the claimant simply to prove facts from which the tribunal could conclude that the respondent "could have" committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an act of discrimination". The decision in Igen Ltd and Ors v Wong was also approved by the Supreme Court in Hewage v Grampian Health Board. The Court of Appeal has also confirmed that Igen Ltd and Ors v Wong and Madarassy v Nomura International Plc remain binding authority in both Ayodele v Citylink Ltd [2018] ICR 748 and Royal Mail Group Ltd v Efobi [2019] EWCA Civ 18.
42. For the unfair dismissal claim, the starting point should always be the words of section 98(4) themselves. In applying the section the tribunal must consider the reasonableness of the employer's conduct, not simply whether it considers the dismissal to be fair. In

judging the reasonableness of the dismissal the tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer. In many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might take one view, and another might quite reasonably take another. The function of the tribunal is to determine in the particular circumstances of each case whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.

43. The correct approach is to consider together all the circumstances of the case, both substantive and procedural, and reach a conclusion in all the circumstances. The band of reasonable responses test applies as much to the question of whether the investigation was reasonable in all the circumstances as it does to the reasonableness of the decision to dismiss.
44. Rule 37 Strike Out:
45. As for the decision to strike out, HHJ Eady QC as she then was in Hussain v UPS Limited UKEAT/0221/17/DM gave the following guidance as to the legal principles to be applied (at paragraphs 19 to 25):
46. "[19] The power to strike out an ET claim is provided by Rule 37 of Schedule 1 of the 2013 Rules, which allows that an ET may strike out all or part of the claim on the basis that it has no reasonable prospects of success. This is, for example, to be contrasted with an ET's power to order that an allegation or argument may only be pursued upon payment of a deposit, which requires that the ET consider that the allegation or argument in question has little reasonable prospect of success.
47. [20] In Ezsias v North Glamorgan NHS Trust v [2007] ICR 1126 CA, Lord Justice Maurice Kay stated as follows: "29 … It would only be in exceptional case that an application to an employment tribunal will be struck out as having no reasonable prospect of success when the central facts are in dispute. An example might be where the facts sought to be established by the claimant were totally and inexplicably inconsistent with the undisputed contemporaneous documentation …"
48. [21] Guidance was further provided by the EAT in Balls v Downham Market High School & College [2011] IRLR 217 at paragraph 6. [6] "Where strike out is sought or contemplated on the ground that the claim has no reasonable prospects of success ... The tribunal must first consider whether, on a careful consideration of all of the available material, it can properly conclude that the claim has *no* reasonable prospects of success. I stress the word "no" because it shows that the test is not whether the claimant's claim is likely to fail nor is it a matter of asking whether it is possible that his claim will fail. Nor is it a test which can be satisfied by considering what is put forward by the respondent either in the ET3 or in submissions and deciding whether their written or oral assertions regarding disputed matters are likely to be established as facts. It is, in short, a high test. There must be *no* reasonable prospects." (Original emphasis).
49. [22] more specifically, in Tayside Public Transport Co Ltd t/a Travel Dundee v Reilly [2012] IRLR 755 CS, it was noted that in almost every case the decision in an unfair dismissal claim is fact sensitive, and it was further observed that: "30 … Where the central facts are in dispute, a claim should be struck out only in the most exceptional circumstances. Where there is a serious dispute on the crucial facts, it is not for the tribunal to conduct an impromptu trial of the facts …"
50. [23] And further, where there is a dispute as to the reason for dismissal, it has been stated that it would be very rare indeed that the dispute could be resolved without hearing from the party or parties who actually made the decision (per Langstaff J in Romanowska v Aspirations Care Ltd UKEAT/0015/14 at paragraph 15).
51. [24] As for discrimination cases, it has been recognised that involving, as they do, an investigation as to why an employer took a particular step, they will generally (allowing for the exceptional case) dictate that the evidence needs to be heard and no summary decision taken as to the merits; see Anyanwu v South Bank Students' Union [2001] ICR 391 HL. In that case, which involved a complaint of race discrimination, Lord Steyn identified what might be described as the public policy reasons why discrimination claims

should not be struck out: “24 … Discrimination cases are generally fact sensitive, and their proper determination is always vital in our pluralistic society. In this field perhaps more than any other the bias in favour of a claim being examined on the merits or demerits of its particular facts is a matter of high public interest …” Similarly, Lord Hope of Craighead stated: “37 … Discrimination issues of the kind which have been raised in this case should as a general rule be decided only after hearing the evidence. The questions of law that have to be determined are often highly fact sensitive. The risk of injustice is minimised if the answers to these questions are deferred until all the facts are out. The tribunal can then base its decision on its findings of fact rather than on assumptions as to what the claimant may be able to establish if given an opportunity to lead evidence …”

52. [25] whilst, therefore, the ET retains the power to strike out discrimination claims or claims of constructive unfair dismissal, the case law makes clear that in such cases that power shall be exercised with far greater caution than in other less fact sensitive types of claim.”
53. The Discrimination Claim:
54. In my judgment the claim for direct discrimination is apparently doomed to fail for the following reasons. The claimant has a belief which it is conceded is a Protected Characteristic for the purposes of section 10 EqA. The discrimination claim is limited to one of direct discrimination under section 13 EqA. There is one allegation of less favourable treatment only, namely the claimant’s dismissal. The burden of proof is on the claimant to show that he has suffered the less favourable treatment of dismissal because of his belief when his chosen comparator was or would not have been. The claimant relies on one actual comparator, namely Carla Felix, and/or a hypothetical comparator. The comparator relied upon must be in the same, or not materially different, circumstances as the claimant.
55. Much has been made on behalf of the claimant of the differential and more lenient treatment meted out to Carla Felix who also refused to be vaccinated. However, their circumstances are materially different. Carla Felix asserted that she had a medical exemption, and self-certified to that effect. The claimant agreed throughout the entirety of his disciplinary process that he was not relying on any medical exemption. In addition, the assertion made on behalf of the claimant that Carla Felix was afforded information about self-certification, when the claimant was not, is in my judgment both irrelevant, and in any event factually incorrect (because the initial information provided to all employees alerted them to the possibility of medical exemptions). In my judgment any claim of direct discrimination relying on the actual comparator Carla Felix cannot succeed for this reason.
56. Similarly, I cannot see how the claimant is helped by any reference to a hypothetical comparator who must be in the same, or not materially different, circumstances as the claimant. A hypothetical comparator in the same circumstances is someone who refused to be vaccinated, had no medical exemption, and who had not applied for redeployment when invited within the respondent’s organisation. The respondent was not allowed by reason of the 2021 Regulations to allow that person to continue working in a regulated home. There is no reason to suggest this hypothetical comparator would not been dismissed in the same way that the claimant was.
57. In any event under section 13 EqA the claimant would have to prove that he has been treated less favourably than his chosen comparator because of his protected characteristic. That was not the case. The claimant was dismissed because the respondent was not allowed by reason of the 2021 Regulations to allow that person to continue working in a regulated home. It was not because of the protected characteristic relied upon.
58. I was tempted to strike out this claim for these reasons, but I have in mind the above comments of Lord Steyn in Anyanwu, and I declined to do so for those reasons. However, I am clearly of the view that this claim has little reasonable prospect of success, and accordingly I have made the attached Deposit Order.
59. The Unfair Dismissal Claim;
60. It was clarified today that the claimant has three reasons why he alleges his dismissal was unfair. He does not assert that the procedure adopted by the respondent was of itself unfair or unreasonable. The reasons relied upon, and my observations, or as follows.
61. The first allegation of unfairness is that the claimant was not made aware that he could avail himself of the self-certification procedure. I agree with the respondent’s objection to

this ground which is twofold. In the first place all employees were made aware of the possibility of medical exemptions, and the claimant was well informed as to the arguments and debate about vaccinations, and he was represented by his trade union officer throughout. He was not precluded by any act or omission of the respondent from relying on self-certification if appropriate. On the contrary, the respondent checked with him during the process that he was not relying on any medical exemption, and the claimant confirmed that he was not. The second point, as noted by the respondent, is that the claimant would have to have completed a dishonest and unsafe self-certification form for this to have had any impact on the decision to dismiss him in the absence of any such form.

62. The second allegation of unfairness is that the claimant did not dismiss Carla Felix even though the 2021 Regulations applied to her. For the reasons explained above their circumstances were materially different. Ms Felix had the self-certification for medical exemption, whereas the claimant confirmed that he did not rely on any medical exemption.
63. The third allegation of unfairness is that the claimant was not redeployed, for example in a role working at a college rather than a care home. I cannot see how the claimant can rely on any such argument in circumstances where it was made clear to him that he would be dismissed if he was unable to find redeployment, and he was then sent a list of 40 pages of opportunities for redeployment within the respondent's group. The claimant failed to apply for any one of them.
64. In this case the respondent had a valid reason for the claimant's dismissal, and its reliance on the 2021 Regulations in my judgment amounts to some other substantial reason such as to justify dismissal. The procedure adopted was fair and reasonable. It is difficult to see how the respondent's decision to dismiss the claimant was not within the band of reasonable responses open to the respondent when faced with these facts.
65. Again, I considered striking out this claim, but I am conscious that I have not considered all of the evidence which might be adduced at any full main hearing. For this reason, I declined to strike out the claim. However, I am clearly of the view that this claim also enjoys little reasonable prospects of success, and I have made Deposit Order for this claim under Rule 39 as well.
66. I have considered the claimant's means when setting the level of the Deposit Order. The claimant is now undertaking a course at university and is a student. He does not own his own property and has no income other than his student borrowing. I have reduced my initial conclusion as to the correct amount of the Deposit Order to £200 for each claim. I do not consider that this is set at a level so high that it operates to impede the claimant's access to justice, and it is important to bring home to the claimant what are in my judgment the obvious limitations to each of the two claims.
67. I have also prepared a second Case Management Order which gives directions for the further conduct of this claim.

Employment Judge N J Roper
Date: 29 June 2023

Judgment sent to Parties: 07 July 2023

FOR THE TRIBUNAL OFFICE