EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr B Kongo	**v**	**London Borough of Brent**

Heard at: Watford
On: 3-6 July 2023

Before: Employment Judge R Lewis
Ms B Saund
Mr W Dykes

Appearances
For the claimant: In person (assisted by Mr M Dallaway, a friend)
For the respondent: Mr T Lester, counsel

JUDGMENT having been sent to the parties on 24 August 2023 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

1. This was the combined hearing of claims presented by the claimant on 18 August 2021 and 14 November 2021. The claims had been the subject of a case management hearing before Employment Judge Maxwell on 15 June 2022, at which the above dates were listed, a timetable set for hearing, and the issues defined. Judge Maxwell made further case management orders on 31 January and 5 May 2023. Last minute case management was undertaken in correspondence by Employment Judge Quill and by the present Judge.

2. There was a single agreed bundle which exceeded 1,100 pages. The organisation of the bundle was not always easy to follow, and many documents were duplicated. Some of the contents of the bundle were not conceivably likely to assist the tribunal. A core bundle would have greatly assisted. Although not directed by Judge Maxwell a chronology and cast of characters would also have been of assistance.

3. The parties had exchanged witness statements. The witness statements were without exception focused, concise and helpful. The claimant was the main witness on his own behalf. He had also served a witness statement from Mr J Blake, who adopted his evidence on oath, and was not questioned by counsel or the tribunal.

4. The respondent had served witness statements from:-

   4.1 Mr A Davies, Head of Commissioning, who had dismissed the claimant;

   4.2 Ms C Brown, Operational Director, who had rejected the claimant's appeal against dismissal;

   4.3 Ms A Ambroziak, Manager of the centre where the claimant had been employed, who was the claimant's line manager's line manager; and

   4.4 Ms J Powers-Nott, HR Advisor, whose evidence was replaced shortly before the hearing by a witness statement from Ms S Bush, also of HR.

5. The following practical and case management matters arose on the first day of hearing:-

   5.1 It was explained that Ms Powers-Nott would be unable to attend the hearing for health reasons, and agreed that Ms Bush was permitted to give evidence, in effect in her place, drawing on HR sources and materials.

   5.2 The respondent's application for Ms Ambroziak to give evidence remotely on health grounds was agreed in principle, the position to be reviewed when she came to give evidence;

   5.3 It was agreed that this hearing would deal with liability and, if advanced, contribution, but that remedy issues if required would be dealt with separately;

   5.4 As directed by Judge Maxwell it was confirmed that the claimant would be heard first.

   5.5 Before the hearing the claimant had applied to produce evidence on video. The tribunal staff had informed him that he would need to provide suitable playing equipment for that to be done, and the claimant told the tribunal that he was unable to source equipment and therefore did not pursue the point. As a number of the video items post-dated dismissal, and as one appeared to be a speech on the subject of vaccination by United States Senator Ron Johnson (Republican, Wisconsin), it was unlikely that the video material would have been admitted in any event.

   5.6 The tribunal adjourned to read. Neither side had produced a reading list. We therefore directed ourselves to the documents referred to in the witness statements.

   5.7 Mr Lester sought clarification of the list of issues. This request was a concern to the tribunal, as the list of issues had been the working basis for preparation for the previous year. His point however was quite straightforward: did the claimant base the case of discriminaiton entirely on his Rastafarian religion / belief, or did he in the alternative

rely on a belief which, without religious underlay, was hostility or opposition to vaccination or covid testing. After some discussion the claimant confirmed that the former was the case.

Timetable of the hearing

6. The first morning was taken up with reading and case management. Mr Blake's evidence took a few minutes on the first afternoon, and the claimant gave evidence for the remainder of the first afternoon.

7. On the second day of the hearing, the claimant continued evidence, with a break mid-morning, until about 12.15. The tribunal took an early lunchbreak, and Mr Davies gave evidence at 1.30, and Ms Brown at 2.55. In relation to both those witnesses, Mr Dallaway, a friend supporting the claimant, helped the claimant in cross examination. With agreement of the tribunal, he put a number of questions to each witness, before the claimant took over the task of cross examination.

8. It was necessary on a number of occasions during cross examination to intervene where questions were on points not relevant to this hearing; or purported to be based on a premise which was in dispute; or otherwise appeared to be not a proper representation of the claimant's case. In particular, the claimant wanted to ask both witnesses questions which were based on the premise that the claimant had been unsupported during the events in question, and in particular, not properly supported by the GMB. It did not seem to us fair or appropriate to put to management witnesses questions based on what was clearly a satellite grievance or dispute between the claimant and the GMB, and it did not seem to us that the respondent could be asked to accept responsibility for any problems which arose in that relationship. The relevant points seemed to us to be whether the respondent had respected the claimant's right of representation, and whether it was reasonable and flexible in accommodating difficulties which arose from a number of changes of GMB representative.

9. On the morning of the third day of hearing, the respondent gave additional disclosure of a modest number of emails, which were added to the end of the bundle. They evidenced the process of information and consideration between managers, and although they were relevant, and should therefore have been disclosed earlier, little appeared to turn on them, with one exception. The final document added to the bundle as page 1065 was an email sent on 17 December 2020 by Ms Adamiak, which was forwarded to Ms Ambroziak, and which we deal with below.

10. The tribunal asked the claimant whether he objected to the document's late inclusion in the bundle, and he did not. On that basis it was admitted, although the Judge commented that if it were a matter for him individually, he would not have permitted late inclusion of a plainly discoverable document, particularly in a case where another judge had made an unless order the previous January as a result of failures by the respondent in the disclosure process.

11. The main witness on the third day was Ms Ambroziak**.** Ms Bush was the final witness (standing in for her sick colleague). Witness evidence concluded before the lunchbreak, after which the tribunal heard

submissions from Mr Lester. We took a break after Mr Lester's submissions, after which Mr Dallaway replied on the claimant's behalf.

12. The arrangement for the final day of hearing was that the tribunal met for deliberations in the morning, and meet the parties by video at 12.30, with a view to delivering judgment, or making other arrangements. The tribunal gave judgment. There was then no request for written reasons. The claimant wrote to ask for reasons on 8 July. Due to office error, his request was not seen by the Judge until 31 August. That error in turn led to the delay in sending these Reasons, for which the tribunal apologises to the parties.

The legal framework

13. Judge Maxwell identified four headings of claim. The first was a claim of unfair dismissal.

14. This was a claim of "ordinary" unfair dismissal brought under the provisions of s.97 Employment Rights Act 1996.

15. The task of the tribunal in a case of unfair dismissal is first to identify, if in dispute, the reason for dismissal, namely the operative factual consideration in the mind of the dismissing officer which led to termination of employment. In this case, it was not disputed that the dismissing officer was Mr Davies, and that the operative reason was the claimant's non-attendance at work, categorised by the respondent in this case as "some other substantial reason."

16. That is a potentially fair reason for dismissal in accordance with s.98 of the Employment Rights Act. The tribunal must consider the reason in light of s.98(4) which states as follows:

> "The determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and shall be determined in accordance with equity and the substantial merits of the case."

17. In considering this question, the tribunal must take care not to substitute its view for that of the employer, and must also keep well in consideration that where an employer is called upon to make a decision through the exercise of judgment, there may be more than one right decision. In other words, the question for the tribunal may be whether the employer has acted in accordance with the range of reasonable responses.

18. If the tribunal finds a dismissal to have been unfair, it may be called upon to decide whether the claimant brought dismissal upon himself, or whether his conduct before dismissal is such as to lead to a reduction in compensation. The tribunal may also have to consider a Polkey reduction, namely asking the question whether a fair procedure would have made a difference to the outcome, and, if so, whether that impacts on any compensatory award either by percentage chance reduction or by passage of time, or both.

19. The claimant brought discrimination claims which were expressed to be

both direct and indirect discrimination claims, although the factual events identified by Judge Maxwell (105-106) were identical for both, namely (1) 'requiring the claimant to undergo a PCR test as a condition of returning to work'; and (2) 'not discussing with the claimant whether his religious belief would allow him to take a PCR test.'

20. In each type of claim, the claimant must show that his treatment by the respondent amounts to a detriment. A detriment is not measured purely from the perspective of the aggrieved employee, and a sense of grievance of itself is not sufficient to prove that there has been a detriment. A detriment must be an event which a reasonable employee would regard as constituting a disadvantage at work.

21. In a claim of direct discrimination the claimant must show that because of a protected characteristic (Rastafarian religion in this case) Brent treated the claimant less favourably than it treated or would have treated others. That requires the claimant to demonstrate a comparison between himself and a non-Rastafarian colleague, whose material circumstances were the same as those of the claimant, and who was treated better than he was, or would have been. The words "would have been" reflect that a comparator in law may be a hypothetical comparator, not a named individual. Judge Maxwell understood the comparator in this case to be a hypothetical comparator. Certainly no individual actual comparator was named by the claimant at any stage.

22. The claim was also advanced as a claim of indirect discrimination, in which it was said that the above two factual events (set out at #19 above) each constituted applying a provision, criterion or practice, ("PCP") which was applied to the claimant, and to other non-Rastafarian colleagues, and put Rastafarians, including the claimant, at a substantial disadvantage.

23. Where the above elements of the claim of indirect discrimination have been made out, it is for the respondent to demonstrate that its actions were "justifiable", or, in the full phrase in the statute, a proportionate means of achieving a legitimate aim. The tribunal will have to consider whether the discriminatory actions were put in place to achieve an aim of the respondent; whether that aim was legitimate; and whether there might have been a non-discriminatory means of achieving the same objective.

24. In analysing the claims for religious discrimination, the tribunal must inquire as to whether the claim is properly analysed as discrimination on grounds of the religion or belief as such, or discrimination in response to a manifestation of the religion or belief. This is particularly important for two reasons: a claim which is based on a manifestation of religion is much more likely to be a claim of indirect discrimination than of direct; and secondly, if that is so, the tribunal may be called upon to weigh up the competing interests in the case. The recent detailed discussion in Higgs vs Farmor's School 2023 EAT 89 is likely to be helpful.

25. Finally, there was a claim for unlawful deductions. It was common ground that the claimant had not been paid for the period between 25 January 2021 and his dismissal on 1 October 2021. The claim was brought as a claim for unlawful deductions (although it could equally have been brought as a claim for breach of contract). In any event, the question was for the claimant to

demonstrate a contractual entitlement to be paid the sums which were not paid to him.

26. Protective legislation restricts the right of an employer to make deductions from an employee's earnings. Section 13 Employment Rights Act 1996 provides:

> "(1) An employer shall not make a deduction from wages of a worker employed by him unless
>
> (a) The deduction is required or authorised to be made by virtue of… a relevant provision of the worker's contract, or
>
> (2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised (a) in one or more written terms of the contract of which the employer had given the worker a copy on an occasion prior to the employer making the deduction in question, or (b) in one or more terms of the contract (whether express or implied and, if expressed, whether oral or in writing) the existence and effect or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion."

27. In submission on the unlawful deductions claim, Mr Lester helpfully reminded the Tribunal of Northwest Anglia NHS Foundation Trust vs Gregg 2019 EWCA Civ 387. Although the factual matrix for that claim is very different from the present one, we noted in particular the discussion at paragraphs 52 to 54. At paragraph 54 Lord Justice Coulson, giving the single judgment of the court, states as follows:

> "I consider that the starting point for any analysis of the Trust's attempt to deduct Dr Gregg's pay must be the contract itself (*Walker*, *Knowles*, *Paterson*). Was a decision to deduct pay for the period of suspension in accordance with the express or the implied terms of the contract? If the contract did not permit deduction, then, as envisaged by Lord Templeman in *Miles v Wakefield*, the related question is whether the decision to deduct pay for the period of suspension was in accordance with custom and practice. If the answer to both these questions is in the negative, then the common law principle – the 'ready, willing and able' analysis summarised at paragraphs 52 – 53 above – falls to be considered. But, in my judgment, a considerable degree of caution is necessary before concluding that someone like Dr Gregg, who was and remains the subject of an interim suspension imposed in the public interest, is not 'ready, willing and able' to work, or is to be characterised as avoidably or voluntarily unable to work."

Policy documents

28. The bundle contained a number of the respondent's policy and procedure documents. The polices were found together at pages 196-243(j) inclusive. Some of them were duplicated in the bundle.

29. The claimant's particulars of employment provided for a 36 hour week; and his place of work was at the John Billam Resource Centre. The contract reserved to the respondent (199):

> "The right to move you to an alternative location in a similar position within or outside the Borough, either on a temporary or permanent basis according to

> business demands."

30. The provision for hours of work (200) was:

> "Your working hours and days may be varied subject to service requirements or in a response to a request from you for flexibility. Your manager will notify you of any changes."

31. The respondent's Code of Conduct (207) set out aspirations, standards and expectations. The Disciplinary policy and procedure (216) was described as containing 'general principles' and 'responsibilities' It was expressly stated (in the particulars of employment) not to be contractual (202).

32. In relation to suspension the procedure stated that the power to suspend rested with a manager at Head of Service level or higher, or, in their absence, the Head of HR. Suspension was covered by an eight paragraph procedure (223-224). We note the following:

> "Suspension should be used during the investigation/disciplinary process when it is clearly inappropriate for the employee to remain in the workplace or where their presence at work may pose a risk…
>
> Suspension will normally be with full contractual pay and must be approved by the Head of HR or HR Manager..
>
> A manager may send the employee home pending a decision on formal suspension… in exceptional circumstances where the employee's continued attendance at work may pose an immediate risk…
>
> Employees must be available to the Council at all times during paid suspension…
>
> The suspending manager will confirm the reasons for suspension to the employee in writing. The suspending manager will keep the employee updated on how long the suspension is likely to last. Suspensions should be for as short a time as possible and should be reviewed on a regular basis…"

33. In addition, the policy set out six obligations of the suspended employee, which include obligations during suspension to return all Council equipment, and not to contact any employee, 'customer' (which we understand to mean service user) or elected member.

34. The disciplinary procedure (285) dealt with investigation and arrangements for a disciplinary hearing, along with sanctions and appeal. The disciplinary procedure was perhaps unexceptional for a local authority setting.

35. We noted also the Time Off Policy of August 2020. It covered annual leave and special leave, but not flexi time or family related leave. We noted the following statement of general principles (243C), of which the final paragraph is most important:

> "Requests for leave will be considered in the context of the needs of the service and must be approved in advance by the employee's line manager.
>
> Special leave will not be deducted from annual leave entitlement…
>
> Any leave entitlements and benefits will be provided pro rata…

> Any leave which has been taken but not been approved in advance will be considered unauthorised absence and may result in disciplinary action and pay being withheld."

36. The provision for special leave opens with the acknowledgement (243H):

> "That employees need to balance work and domestic responsibilities as well as other duties and events…
>
> Special leave is not an entitlement but a discretion and will be considered by line managers, on the merits of each request and based on the needs of the service.
>
> Special leave, with or without pay should not exceed 10 days in any 12 month rolling period other than in very exceptional circumstances or during jury service."

37. The procedure then deals with possible reasons for the grant of paid special leave and proposals for its duration, or for public duties, and for employment related education or professional development.

General approach

38. Before we move to our findings of fact, we set out a number of points of general approach, some of them commonplace in our work.

39. In this case, as in many others, evidence and submission touched on a wide range of issues. Where we make no finding on a point about which we heard, or where we do make a finding, but not to the depth with which the point was discussed before us, that is not oversight or omission. It is a reflection of the extent to which the point was truly of assistance to us.

40. While that observation is made in many cases, it was particularly important in this one, where the events were emotive, and where the claimant had not had professional advice, but was supported by friends who were deeply committed to him and his case, but inexperienced in the law and procedure of the Tribunal.

41. We approach this case on a number of common sense understandings. The Tribunal does not expect anyone to go to work and achieve perfection when they get there. Everyone who goes to work makes mistakes. The Tribunal should, in our view, recognise that reality, and not impose on anyone an unrealistic standard. The appropriate standard in our cases is that of the reasonable employee and the reasonable employer, given all the relevant circumstances at the time.

42. That approach involves avoiding the wisdom of hindsight. Likewise, and stating the obvious, the Tribunal does not expect anyone to bring to work the ability to foresee the future. That is an important point in any case when the employer makes decisions based on an understanding of how matters might develop. The question remains one of reasonableness.

43. There was a striking example of the risk of hindsight in this case. The events with which we were concerned related to the pandemic, and focused in part on January 2021. With hindsight, we now know that that was the month in the pandemic with the single highest monthly total of Covid related

deaths. We should bear in mind that at the time, nobody knew that the terrible events of that month would be the peak of the pandemic.

44. The bundle contained a lot of office based correspondence, of which we were taken to relatively little. We should bear in mind that office emails are written in context, between colleagues who are often also meeting and chatting. Email encourages speed of response, but not always reflection or the use of measured language. We should not apply an unrealistically high standard to our assessment of email. Finally, we note that no author of any document or email necessarily had in mind that it might be scrutinised in the Tribunal years after it was written.

45. Finally, our approach should include an understanding of proportionality. In the artificial setting of Tribunal litigation, we focus on how the individual claimant was managed. We should not lose sight of the fact that at the time of the events in question, nobody may have given these events the importance which the artificiality of our process requires. That is another commonplace observation, and one of particular relevance when we look back at the uncertainty and pressures of managing the pandemic.

Findings of fact

46. The events with which this case was concerned took place primarily between December 2020 and autumn 2021, and related to the covid pandemic. The lived experience of almost everyone was that it was a time of very considerable stress and uncertainty, particularly for anyone working in the public service, and in the service of care to the vulnerable. The social and legal framework changed many times, and the state of public understanding and information about covid also changed with the passage of time. It would have been helpful if the parties had put to the tribunal an agreed framework of external events. It was, for example, not helpful that there was no consensus before the start of this hearing on how and when international travel restrictions were imposed, modified, and eventually lifted.

47. As a matter of scene setting, we noted on Gov.UK that the number of certificated covid related deaths per week was at a daily average figure of 493 on 13 December 2020; 1,036 on 7 January 2021; 1,391 on 19 January 2021 (the highest peak figure of the pandemic) and 128 on the day of the claimant's dismissal on 27 September 2021. We understand that restrictions on entry into the UK, which at the time of the claimant's dismissal prohibited international travel by an unvaccinated, untested individual, were eased in late February 2022, about five months after the claimant's dismissal.

48. The claimant, who was born in 1968, was employed by the respondent from 17 May 2018. He was a community support worker, providing face to face support to vulnerable adults, notably autistic adults. It is right to record that this case was defended on a number of shared understandings: that the claimant was a respected and highly capable colleague, who was successful in a difficult and demanding job, that he loved the job, and that his dismissal was a loss to the service. The claimant told the tribunal that he is Rastafarian. In accordance with his faith he believes in living in a natural way, which includes control of diet, abstention from alcohol and smoking,

and not using artificial intrusive or chemical aids to health. In reply to questions, he said that he is registered with a GP but does not take the medication that he is prescribed, and that he does not go to the dentist.

49. Mr Dallaway asked the respondent's witnesses and the Tribunal to consider that the claimant looked and presented like a Rastafarian. We understand his point to have been that his managers knew or assumed that the claimant is Rastafarian. That point did not assist us. We find that the respondent accepted at face value that the claimant's refusal to be tested (or vaccinated) was on religious grounds.

50. The centre where the claimant worked was closed in March 2020 at the first lockdown. It re-opened on 7 December 2020.

51. Re-opening coincided with a continued rise in covid related deaths, which reached its peak the following month in January 2021. As a local authority, the respondent was required to set up static sites for public testing or vaccination, and the respondent instructed 'front line' staff, including the claimant, that they were themselves expected to undergo regular covid testing as a condition of returning to work. The parties agreed at this hearing that the requirement to test was not compulsory, but the sanction for not testing was inability to carry out one's duties.

52. At that time the claimant's line manager was Ms Adamiak, who in turn reported to Ms Ambroziak.

53. The claimant had a conversation with Ms Adamiak on 14 December. He had not been tested, and he told her that he would not agree to being tested. Ms Adamiak told the claimant that as a result he would not be scheduled for work.

54. We do not accept the claimant's submission that that constituted the claimant's suspension by the respondent. The respondent's disciplinary procedure sets out a detailed suspension process (281, 283 to 284) and gives the power to suspend to a manager at Head of Services level. None of that applied in this situation, and Ms Adamiak was not at the appropriate level to suspend. Her decision not to schedule the claimant to work was a short-term response in a complex management situation.

55. At that time, the claimant had booked a flight to Amsterdam on 21 December, intending to spend the Christmas break with his wife and children, who we understand live there permanently.

56. On 15 December, and as a result of being told that he was not scheduled for work, the claimant booked a train ticket to Amsterdam and travelled there by Eurostar the following day. There were two main reasons for this: one was that as he was not working, and would not meet the pre-condition of returning to work, there was no point his staying in London for another week to wait for his flight; and secondly, and perhaps of more practical importance, was that at that time he could travel by train to Amsterdam without having been tested, but to board a flight, testing or proof of testing was required. We accept that the decision to travel was a legitimate decision for the claimant at that time, in those circumstances; his comment at this hearing that the respondent could not expect him to miss Christmas

with his children seemed to us misplaced. However, in the public health situation at the time, leaving the UK carried the risk of difficulty in returning. The claimant assumed that risk, and when the risk materialised, and international travel became impossible for an untested and unvaccinated individual, the responsibility for the predicament which followed was his, and his alone.

57. Throughout these events, the fundamental, over-arching reasons which kept the claimant away from work were first that he was stranded outside the UK; secondly that no one knew how long that situation would go on; and thirdly, that even if he had been in the UK, he would not have been permitted to return to work without being tested, a procedure which he refused to undergo.

58. The following day, 17 December, Ms Adamiak wrote to Ms Ambroziak the email disclosed on the third morning of hearing (1065) as follows in full:

> "I am writing to you with concerns that I have regarding one of the support workers' Kongo Banga decision not to undergo covid 19 testing.
>
> He claims that due to his convictions and believes around covid19 testing he will not get tested. … I contacted HR consultant Ms Ibe ... [she] advised me to make Kongo aware that unless he gets tested he cannot return to work. If he cannot return to work due to his refusal to test for covid 19 he would not get paid. I informed Ms Ibe that I was not prepared to put that in writing to him without a written confirmation from HR. Ms Ibe on the other hand stated that before making those sorts of statements she was expecting to see a written confirmation about the necessity for the support workers to undergo regular testing from public health or the senior management which we do not have.
>
> Please advise on the way forward in this situation."

59. It is plain from that document that a number of those involved in the claimant's management were clear that he was not entitled to be paid, but that there was unanimous reluctance on the part of a number of individuals to commit to that position in writing. That reluctance seemed to us to indicate a failure of leadership.

60. The claimant had booked annual leave over Christmas, from which he was due back at work on 7 January 2021. He did not attend. Ms Adamiak phoned him, and he said that as a result of contact with covid he had to self-isolate for 10 days. Ms Adamiak asked HR for advice on what she considered was the claimant's failure to inform her in a timely manner that he had to self-isolate; and how his absence was to be categorised. Ms Bush replied on 19 January (1054) to state that the claimant was "currently AWOL unless he wishes to take a period of unpaid/annual leave."

61. That in turn led to an important email sent on 20 January by Ms Adamiak to the claimant (244) in which she summarised the position, and wrote:

> "As you are abroad you are unable to complete your work duties. You do not have any annual leave left at the moment. I am informing you that the only option left is to code your absence as an unpaid leave until the day of your return to work. Please keep me updated on your progress on returning to the UK."

62. The claimant replied on 22 January, repeating that he was awaiting advice from the GMB. He wrote (245),

> "Therefore my absence is due to the fact that I have been waiting for some clarifications and questions that are not yet be answered. I chose to wait here as I am already abroad knowing I will not be scheduled for work. By the way, as it is been scientifically known that a pregnant woman is a gold standard for a pregnancy test, can Brent Council provide us with a scientific peer review journal whereby we can find a gold standard for PCR test?."

63. The first portion of that reply was at best disingenuous. By that date, covid had been present in Europe for about a year. The claimant was stranded in the Netherlands. As an untested and unvaccinated person, he could not travel internationally from the Netherlands to the UK. The claimant knew that that was the position, and he knew the reasons for it. He knew that he was not absent from work because of a lack of clarification. He was absent from work because he had taken the risk of travelling abroad, and been unable to return. He also knew that even if he had been in London, he would not have been permitted to return to work, as he had not been tested and refused to be tested. That remained the position for the remainder of the claimant's employment.

64. The second portion was disingenuous in a different way. It was an attempt to impose on the respondent an obligation to prove, to the claimant's individual satisfaction, the harmlessness of PCR testing, in language which purported to be objective ('gold standard,' 'peer review'), but which was not. We do not accept that there was any such obligation, or that, in all the circumstances, including the claimant's principled objection to an invasive procedure, and the dynamic state of scientific understanding of covid at the time, that that was reasonable.

65. On 25 January Ms Adamiak replied to the claimant. After summarising the position to date, she set out the respondent's position, as it was on that date, and remained for the rest of the claimant's employment (249):

> "You have not informed me when you intend to return to work or requested a period of unpaid absence and therefore, I have no option but to consider your period of absence as unauthorised and your salary will be stopped with effect from today. It is clear that on your return to the UK there will be a period of quarantine required and therefore I look forward to hearing from you further once you have had your meeting with your Union Rep. I must however advise you that continued unauthorised absence could potentially lead to disciplinary proceedings."

66. We summarise. The claimant remained in the Netherlands, because he could not travel back to the UK as an untested and unvaccinated traveller; even if he had been in the UK, the respondent would not have permitted him to return to work unless he were covid tested, which he refused to undergo; he was regarded by the respondent as being on unauthorised, unpaid leave. He was paid up to 25 January, but not paid after that date.

67. At this hearing the claimant returned more than once to the argument that as he had been suspended on 14 December, it was not open to Ms Adamiak to "unsuspend" him. Therefore, he argued, he was entitled to be on full pay throughout the period of suspension, which he submitted to be

the entire duration from 14 December 2020 to at least the following October. We do not accept any part of that line of argument. Our first finding is that he was not suspended, within the meaning or process of the respondent's own procedures. Our second finding is that irrespective of the analysis of the reason not to allocate him work on 14 December, the respondent was entitled to review and categorise the claimant's absence and its consequence as matters developed, and that it did so properly on 20 January, and then again on 25 January. The emails sent to the claimant on those days made clear that he was then regarded as on unauthorised absence. We therefore find that even if he were suspended on 14 December 2020, his suspension was terminated, at the latest, on 25 January 2021, after which he was on unauthorised absence.

68. We deal briefly with a matter which took up some considerable time at the hearing. Ms Adamiak triggered a disciplinary investigation into the claimant's failure to communicate properly with management in the period after 14 December and up to 25 January 2021. She held a meeting by teams with the claimant and a GMB representative on 22 February attended also by Ms Ambroziak as team manager but also as note taker. There was some discussion of the religious basis of the claimant's objection to testing.

69. Ms Adamiak then wrote a report, concluding that the claimant was in breach of the respondent's requirements for advance approval of absence, and for reporting absence, and recommended formal disciplinary consideration (315-316).

70. In due course, the matter came to a disciplinary hearing by teams on 13 May 2021 conducted by Mr Pearce. The claimant attended with a GMB representative, and Ms Ambroziak presented the case against the claimant.

71. Mr Pearce gave the outcome by letter dated 18 May (385). The allegations were of a failure to agree leave of absence in advance and of not following procedure for reporting absence. Mr Pearce did not uphold either allegation. In so doing, he wrote that he noted "the absence of any formal written directions with respect to your work status at the time:" that was the consequence of the managerial failure which we have identified at #59 above. He wrote that he accepted what the claimant had said about "your confusion regarding your work status". He advised that the claimant should be referred to occupational health in light of what he considered to be "the impact on your emotional wellbeing due to the impact of your continuing absence from work"; and in response to concerns expressed by the claimant about public health aspects of the pandemic, he arranged for the claimant to have a one to one teams appointment to discuss the position with a public health consultant.

72. Although the occupational health referral was made, the claimant did not co-operate with it, and he was never seen by occupational health. He did have a Teams meeting with Dr Licorish on 3 June, on the subject of public health and wrote the next day to express his disappointment at the meeting. The claimant's email to Dr Licorish makes plain that the claimant attended the meeting with expectations which were unrealistic, unreasonable, and could never be met (419):

> "You have failed to provide me the name of a published Scientific Peer-review

> that has a 'Gold-standard' for a PCR test,. Also, you have failed to do the same for Sars-Cov 2 to proof whether it has ever been isolated in order to produce any vaccine which they have been forcing people to take through fear tactics. Instead. You did everything in your power to avoid those **2** specific questions ..
>
> Furthermore, I find that these **2** questions are the most relevant to the issue ..
>
> Finally, you have offered no new or scientific evidence that I have been expecting."

73. On 20 May, after receiving the outcome from Mr Pearce, the claimant wrote to ask for his pay to be reinstated. It was obvious that he thought that he had 'won' his disciplinary hearing, and that he was therefore entitled to receive backpay from 25 January. That was, at best, a clear misunderstanding on the claimant's part. Ms Ibe replied the same day to say, (390) "Unfortunately, as you are still off work it is not possible to do this."

74. On 24 June Ms Ambroziak wrote to summarise the position as it then stood. It was that the claimant had not attended an OH appointment on 18 June, and had had the meeting with Dr Licorish. She then wrote (454):

> "As you are aware, the recommendations from the Hearing Outcome Letter, were put in place to support you and your wellbeing. However, you have now been absent from work since 18th January 2021 due to a refusal to undertake the Covid-19 test and this is no longer sustainable and is impacting the support we are able to provide our service users.
>
> I would like to arrange a meeting with you to discuss your plans about returning to work. In addition, how I can support you in your transition back into work."

75. There was delay in the meeting taking place and it in fact did not take place until 2 August on teams (491). The delay appears to have risen from difficulties experienced by the claimant in arranging GMB representation. The claimant's rights were respected by the respondent: it agreed to postponement, and did not require the claimant to take part in the meeting unrepresented.

76. At this hearing, it appeared to be suggested that the respondent was at least partly responsible for arranging representation. We wholly disagree. The relationship between the claimant and the GMB was entirely for the claimant to manage with the GMB. The respondent, so far as we saw, entirely respected the claimant's right to union representation, and correctly accommodated any question of delay or the unavailability of a specific representative.

77. In the event, on 2 August, a new union representative attended at the start of the meeting. The representative was punctual, and the claimant was late. After a short wait, the representative left the meeting. Shortly after that, the claimant joined the meeting, which therefore continued as a meeting between Ms Ambroziak and the claimant only. The discussion about return to work was short. The claimant was still in Amsterdam. He told Ms Ambroziak that in order to cross the UK border, he had to be tested, and otherwise he was unable to return to the UK. Ms Ambroziak spoke about the difficulties of keeping his post covered, given the uncertainty about how

long the situation would remain, including the closed borders.

78. On 5 August Ms Ambroziak wrote a report (499), in which she summarised the position to date and wrote the following conclusion (508-509):

> "Currently, Kongo remains in Amsterdam. He claims that he is against being tested for Covid-19, which consequently stops him from travelling back to the UK. He is unable to travel back to the country due to the requirement of receiving a negative Covid-19 test result to cross the border."
>
> Since the recommendations were put in place following the Disciplinary Hearing in May 2021, Kongo did not show any readiness to return to work. He was not willing to resolve the issue regarding his return to work or come to a mutual agreement on the return to work arrangements.
>
> I would like to emphasise, that Kongo left the country in December 2020, which was during his annual leave. Following on the annual leave period and self-isolation period while still aboard, he did not attempt to return to the country and subsequently return to his duties. He has left the country voluntarily, knowing that a testing regime was demanded as part of the travel agreement on rules and restrictions relating to foreign travels. The test for travel was required if flying, Kongo managed to take a train to Amsterdam and avoided it, however that has changed since earlier this year.
>
> Over the last eight months and the presented evidence in this report show that Kongo had plenty of time to make appropriate arrangements to travel back to the UK, return to work and engage with his terms and conditions of employment, and meet his contractual obligations.
>
> .. His absence has had an impact on the overall service delivery, as duties had to be shared amongst other staff. … [The role] can be demanding and requires from the worker to provide direct and engaged support to service users…
>
> This absence has led to low productivity, poor employee morale, and a slow attrition to the team overall."

79. Ms Ambroziak's recommendation was that matters "should now be addressed formally and consider a termination of Kongo's employment."

80. Arrangements were made for a disciplinary hearing on that basis to take place on 25 August. Mr Davies wrote to the claimant to invite him to a formal hearing. He was told that Mr Davies had the option of dismissal, and the claimant was properly advised of his right to accompaniment, and of the availability of the respondent's employee assistance programme.

81. It seemed clear that another issue then arose between the claimant and the GMB as to representation. The meeting was rescheduled to 27 September, when neither the claimant nor any representative attended.

82. We accept that Mr Davies attended, and that Ms Ambroziak presented the management case. Two HR colleagues and a minute taker were present. We accept the integrity of the note of the meeting (531-534). On 1 October Mr Davies sent the claimant a lengthy dismissal letter (535-540).

83. The letter should be read in full. It set out the management case put forward by Ms Ambroziak, and in particular it included discussion of the

possibility of redeployment, which Ms Ambroziak indicated was not feasible as the claimant could not work from home when outside the UK. One point was that the respondent did not allow working from a home outside the UK; she added that more service users were returning to in person meetings; and that working remotely would require the claimant to have a Brent laptop, which he did not have and could not access.

84. Mr Davies summarised the claimant's response, and included reference, without comment or challenge, to the claimant's religious beliefs**.** He accepted, without comment, question or challenge, the underlying proposition that the claimant's refusal to be tested arose from a religious conviction. He then set out his deliberation and decision (539-541) which again included a consideration of redeployment. Mr Davies summarised his decision:

> "Following careful consideration of all the information available to me, I am of the view that you will not return to the UK at any point in the near future and therefore will not be available to work. This is an unsustainable position for the council…
>
> Your refusal to cooperate in this matter is unfortunate as I was not able to question you directly at the hearing on your plans to return to the UK. But given the Covid-19 testing requirements that remain in place for international travel, your imminent return is unlikely. Therefore, this leaves the organisation with no option but to terminate your employment."

85. The letter then dealt with the practicalities of the decision, including the right of appeal. The claimant submitted an appeal, which he did not attend in the absence of union representation (676). We accept that Ms Brown conducted a formal consideration of the claimant's appeal, that she read the material from both sides which was before her, and she rejected the appeal by letter dated 30 December (696).

86. Both Mr Davies and Ms Brown gave evidence at this hearing, and both presented as measured, thoughtful witnesses, whose eyes were clearly open to be gravity of the decisions they were asked to make.

Discussion and conclusions

Unfair dismissal

87. When we consider the claim of unfair dismissal our first question is to identity the reason for dismissal, namely the actual, factual considerations in the mind of Mr Davies at the point of dismissal. We accept that they are accurately set out in the dismissal letter (540), which refers to prolonged absence to date, and the lack of certainty about a prompt return to work:

> "You will not return to the UK at any point in the near future and therefore will not be available to work. This is an unsustainable position for the council… where your work is being covered due to your ongoing absence… given the Covid-19 testing requirements that remain in place for international travel, your imminent return is unlikely."

88. We accept that the underlying reason was therefore prolonged absence, which placed burdens on the respondent, its service users and the

claimant's colleagues, and without any identified prospect of a prompt return to work.

89. We find that that reason is a substantial reason, which does not fall within one of the other designated categories of potentially fair reasons for dismissal. We find that the stated reasons fall within the broad category of 'some other substantial reason,' and that therefore the reason is one which falls within section 98 Employment Rights Act 1996. It is a potentially fair reason.

90. The tribunal must then consider the factors of fairness which arise under section 98 (4).

91. We find that the respondent broadly followed fair process. The claimant was alerted to an investigation, and invited to attend a meeting at which the situation was discussed. Although the general accuracy of notes of meetings has been challenged by the claimant, there has been no specific note which he has identified as inaccurate, and he has not identified any specific omission. We accept that the notes which we saw are broadly and generally accurate, although not full transcripts.

92. The respondent properly informed the claimant of his right of representation and accompaniment. Given the prolonged difficulties which the claimant had with appointing GMB representatives, we add that the right to be accompanied applies to any other employee of Brent and is not limited to a GMB representative. In evidence the claimant commented that as he was abroad he could not arrange a colleague to accompany him. We do not accept that; it was an assertion which fell within that part of the claimant's approach which attributed any adverse event to being stranded in the Netherlands. The claimant had had three years of respected service, and he had access to his mobile phone and to emails. We do not accept that he was unable to contact any colleague and ask for accompaniment. In principle, it was also open to him, if unable to find another representative, to ask the respondent to extend discretion to allow him to be supported by a friend or relative.

93. In dealing with representatives, the respondent respected the right of accompaniment and changed meeting dates to accommodate the availability of a representative.

94. We accept that the claimant was properly informed of the allegations against him. He was given the opportunity to reply to the allegations against him. He did so extensively in writing, and he had the opportunity to take part in the disciplinary meeting and the appeal meeting remotely. We add that although the claimant's evidence suggested that he felt emotionally unable to take part in the meetings, he put forward no professional or medical advice or evidence to explain his absences, or to seek another postponement. On the contrary, his absences from both meetings appeared to us a deliberate choice, possibly on advice from others, and certainly ill judged. The reason is simple and straightforward: the person who is not in the meeting does not have the opportunity to be heard. The claimant had put his points in writing, but with his job at stake, he would have been very well advised to join the meetings and say what he wanted to say as best he could.

95. We accept that Mr Davies considered all the material that was before him. In particular, we accept that portion of his letter in which he explained that he had considered redeployment, but that it was not a feasible option for an employee located abroad. It is not for the tribunal to decide if the claimant could have worked remotely in a redeployed role; it is sufficient that we find that the respondent's refusal to permit him to do so was a managerial decision which was reasonably open to it in the circumstances set out above.

96. Finally, in the circumstances, and on the information available to Mr Davies, we accept that dismissal was within the range of reasonable responses. His dismissal letter was a model of clarity, and his oral evidence to us was thoughtful and impressive.

97. Although the claimant put points of appeal in writing, he was likewise ill advised not to attend the appeal, for the same reasons as given above. We accept that Ms Bush gave fair consideration to the limited material before her at appeal, and for avoidance of doubt we add that there was no procedural unfairness which required to be cured at the appeal stage.

98. We make no Polkey decision, as it is not necessary for us to do so; we add as comment that as it is now known that travel restrictions remained in place for another five months after the claimant's dismissal, the claimant would have struggled to overcome severe Polkey difficulties if there had been a compensation hearing.

Discrimination

99. We now turn to discrimination on grounds of religion. The claimant is Rastafarian. Mr Dallaway questioned all the respondent's witnesses about diversity and inclusion, Brent's commitment to it, and the extent of their training. He asked what knowledge each had of the customs of Rastafarianism, and the witnesses candidly replied that they had little or none. He probed the question of whether or not they should have undertaken further inquiries into Rastafarian belief at the time of the claimant's employment.

100. The value of that entire line of cross examination was unclear to us. It is for the individual, not their employer, to identify their religious faith, and in a case which concerns a manifestation of faith, it is also for the individual to explain, if necessary, the close connection between the faith and the manifestation in question **(**Eweida vs United Kingdom 2013 ECHR 37). It is not the role of an employer to interrogate an employee about matters of faith, nor to apply to an employee its own understanding of their religion. There would, in our view, be much to criticise if an employer were to do as Mr Dallaway suggested, and challenge an individual employee about their religious faith.

101. Our finding is that the respondent accepted (from 17 December 2020 at the latest, if not before) that the claimant's aversion to testing was based on religious belief. The respondent took that information at face value. It did not challenge the claimant's sincerity, or the validity of the belief. There was not a word in the voluminous evidence which bore out the allegation that there was within the respondent an atmosphere of hostility towards the

claimant or towards Rastafarianism.

102. We find, and we approach the claimant's case on the footing that, the treatment of which he complains was not related to his belief in Rastafarianism as such. As is common in cases of religious discrimination, the claimant's case, properly analysed, was that he was subjected to detriment because of the manifestation of belief. In this case, the manifestation was his refusal to undergo testing.

Direct discrimination

103. We go first to the two claims of direct discrimination. The first was a complaint that the respondent discriminated against the claimant by

> "requiring the claimant to undergo a PCR test as a condition of returning to work."

104. That claim was self-evidently misconceived as a claim of direct discrimination. A claim of direct discrimination is at heart a complaint that the claimant has been treated differently from another or others. The whole thrust of the claimant's case was that he had been treated in the same way as colleagues. His complaint was about the application to him of a blanket policy, and a claim of that nature is by definition a claim of indirect discrimination. The first claim of direct discrimination fails because by definition almost there was no evidence of any non-Rastafarian who in the same circumstances had been treated differently or better.

105. The second claim of direct discrimination was:

> "not discussing with the claimant whether his religious belief would allow him to take a PCR test."

106. We ask first, did the pleaded event take place. We find that there was no discussion to that effect. We also find that the dismissal letter and appeal letter both make clear that the writers of both were well aware that the claimant's refusal to test had a religious basis. Was the absence of such discussion a detriment, in the sense of an event which a reasonable employee would consider a disadvantage in the workplace? We accept, taking the matter generously and broadly, that the absence of an opportunity to explain a matter of profound personal conviction to the employer constitutes a detriment; but we add the comment that the claimant had, at least, two such opportunities (the disciplinary meeting and the appeal meeting) and rejected both by his failure to take part.

107. Was the absence of discussion on grounds of religion? There was no evidence to that effect. On the contrary, common sense suggests, and we find, that no discussion took place because the claimant absented himself from the last two meetings at which it might have done. We are confident that Mr Davies and Ms Brown would have listened respectfully to the claimant if at either meeting he had sought to explain his actions by describing his religious beliefs.

108. That said, the formulation of the claim perhaps contains its own failure. The claimant could not and did not call evidence that a non-Rastafarian in

identical circumstances was or would have been treated better. In an aside in oral evidence, Mr Davies mentioned (clearly unknown to the claimant) a Seventh Day Adventist whose refusal to accept testing had been individually discussed with them. That person may have been a comparator to the extent that they refused to be tested, but the evidence about them went no further than that.

109. In the circumstances our finding is that the claimant has made a bare assertion that the absence of discussion was on grounds of his religious belief, and has failed to demonstrate any causal connection between the detriment and the protected characteristic.

Indirect discrimination

110. The two factual complaints of direct discrimination (set out at # 103 and 105 above) were each also pursued as claims of indirect discrimination.

111. We accept that the requirement to test was applied to the claimant, and to non-Rastafarians. We accept that it was a provision criterion or practice of the respondent. We accept the claimant's evidence that the PCP put Rastafarians at a substantial disadvantage because they were, on faith based grounds, unable (or less able numerically) to take the test, and that that refusal in turn inhibited access to employment.

112. We then turn to justification. We find that testing was in place at that time to meet the aim of promoting public health, and securing, so far as possible the public health safety of service users and the claimants' colleagues. We find that that is a legitimate aim.

113. Did the means (ie testing) further the aim which we have described? We accept that mainstream, and scientifically reliable guidance at the time advised that it did.

114. The final question is whether the means was proportionate; and whether the aim could have been achieved in a non-discriminatory manner.

115. The claimant spoke about whether Brent could find a non-invasive form of testing. There was no evidence before us that that was a proportionate or legitimate method of testing that was available at the time under consideration. If we have to weigh up in the balance the respondent's legitimate aim against the discriminatory effect upon the claimant, we have no doubt that the test of justification is met. One significant point is that the scientific guidance at the time alerted the public to the presence in the community of asymptomatic Covid carriers, who might unwittingly spread the virus. Testing was a legitimate and proportionate means of reducing that risk. Testing was particularly advised in work circumstances such as the claimant's, which brought close proximity with vulnerable service users.

116. We come finally to the indirect discrimination claim which is the mirror of what is stated **at** 105 above. It was common ground that there was no discussion with the claimant about religious belief. We have noted that this was a matter to which Mr Dallaway returned repeatedly in questioning, and we have commented on the point above.

117. The first question at this stage is whether or not there was a PCP. We find that there was not, and therefore the claim fails. We follow the guidance of the Court of Appeal in Ishola vs TFL 2020 EWCA Civ 112, and in particular the passage quoted below, which places emphasis on the need for a PCP in law to contain an element of system and repetition and cannot arise simply in the discretionary management of an individual:

> 37. "In my judgment, however widely and purposively the concept of a PCP is to be interpreted, it does not apply to every act of unfair treatment of a particular employee. That is not the mischief which the concept of indirect discrimination and the duty to make reasonable adjustments are intended to address. If an employer unfairly treats an employee by an act or decision and neither direct discrimination nor disability related discrimination is made out because the act or decision was not done/made by reason of disability or other relevant ground, it is artificial and wrong to seek to convert them by a process of abstraction into the application of a discriminatory PCP.
>
> 38. In context, and having regard to the function and purpose of the PCP in the Equality Act 2010, all three words carry the connotation of a state of affairs (whether framed positively or negatively and however informal) indicating how similar cases are generally treated or how a similar case would be treated if it occurred again. It seems to me that "practice" here connotes some form of continuum in the sense that it is the way in which things generally are or will be done. That does not mean it is necessary for the PCP or "practice" to have been applied to anyone else in fact. Something may be a practice or done "in practice" if it carries with it an indication that it will or would be done again in future if a hypothetical similar case arises. Like Kerr J, I consider that although a one-off decision or act can be a practice, it is not necessarily one."

118. We can see no element of system in how the respondent managed the claimant's absence as alleged, because his circumstances were unique. We find that managers managed his case as an individual event as matters of judgement. We do not agree that there was a PCP, and that being so, the claim fails.

Arrears of pay

119. We turn finally to the claim from lawful deductions. We preface this part of our discussion with the observation that questioning of the respondent's witnesses on whether their management of the pay issue was fair or reasonable was, in our view, misplaced for two reasons. The first reason is that the questioning showed no insight into its own underlying logic, which was the unattractive argument that the claimant was entitled to be fully paid for ten months of not working. The second reason is that the question for the Tribunal was whether or not the claimant was contractually entitled to be paid during that period, not whether it would have been reasonable to pay him.

120. The guidance in Gregg, quoted above, took us first to consider whether the non-payment, or deduction, was made in accordance with the claimant's contract (198). We have found that there are two limbs to this point. We ask first, is the respondent's time off policy contractual; and secondly, if so, was the failure to pay the claimant after 25 January 2021 done in accordance with the policy. We answer both questions in the affirmative,

for reasons which now follow.

121. We note that the time off policy is not referred to expressly in the claimant's particulars. However, we also note at section 15 of the particulars the sentence, "The disciplinary procedure is a policy document only and does not have contractual effect." That does not mean that all other policies are of contractual effect, but it is an indication that where a policy was not contractual, the particulars said so.

122. We found greater assistance in section 27, which should be read in full (204-205). In the context of special leave, it states (bold in original),

> "Subject to qualifying criteria you may be entitled to the following entitlements and benefits eg Special leave …
>
> A range of staff benefits that are **not contractual** may be available to you."

123. This tells us that the contract distinguishes clearly between benefits of employment which are regarded as, "entitled entitlements" and on the other hand benefits which are offered on the basis of "non contractual may be available." In lawyers' terms, the distinction is plainly between contractual versus discretionary benefits, and only the former category are considered to be available as of legal right.

124. When we turn to the time off policy specifically (243a) we can see that it is a mixture of statements of policy and aspiration and of statements of specific contractual entitlement. We accept that the last three bullet points in the "General Principles" section, despite the heading, contain and confirm contractual entitlements, including the sentence,

> "Any leave which has been taken but not been approved in advance will be considered unauthorised absence and may result in disciplinary action and pay being withheld."

That wording mirrors the evidence of Ms Bush, who said that when leave is being considered, two separate decisions have to be made: is leave granted; and if so, is it paid or unpaid. The quoted section distinguishes between the mandatory application of the policy (ie '<u>will</u> be considered') as opposed to the money consequences ('<u>may</u> result in .. pay .. withheld').

125. We summarise the steps in our reasoning as follows:

(a) The policy on time off and special leave is contractual in those portions and respects which are capable of conferring definable and enforceable benefits and obligations;

(b) The provision that unauthorised absence was not counted as paid leave was contractual;

(c) The claimant was fully paid up to 25 January 2021;

(d) The claimant was informed, on that date, and with effect from that date, that he was on unauthorised leave;

(e) The respondent was contractually entitled not to pay the claimant

from 25 January 2021 onwards;

(f) The position did not change before the claimant's dismissal the following October.

126. We find therefore that the decision to withhold pay was made in accordance with contractual provisions and therefore is covered by the exemptions found in section 13 in the Employment Rights Act 1996.

127. As we find that the deductions in this case were made in accordance with the contract, strictly we need not go on to the two alternative stages identified in Gregg. However, as we have heard the evidence and submission, our brief answer on the second and third possibilities are the following. If we had found that the deduction was not in accordance with the contract, we would have gone on to consider custom and practice. Our ruling would have been that there was no evidence of custom and practice in parallel circumstances in relation to deductions. We would thirdly therefore have gone on to ask whether the claimant was ready willing and able to work. Our answer would have been that while he was willing to work in theory, his willingness was a qualified one, that of willingness to work on his own terms (as to testing), and a rejection of his employer's terms: that does not, in our view, count as willingness. We would find also that an employee stranded in a foreign country cannot properly be called ready or able to work, and the claim would have failed on that basis.

128. It follows that all the claimant's claims fail.

_____

Employment Judge R Lewis

Date: 3 October 2023

Judgment sent to the parties on
16 October 2023

For the Tribunal office