RESERVED JUDGMENT

EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT	**RESPONDENT**
MR R O'SHEA	**V HYWEL DDA UNIVERSITY LOCAL HEALTH BOARD**

HELD AT PEMBROKESHIRE LAW COURTS ON: 9, 10, 11 & 12 OCTOBER 2023

BEFORE: EMPLOYMENT JUDGE S POVEY
MRS M HUMPHREYS
MR W HORNE

REPRESENTATION:
FOR THE CLAIMANT: **MR ARNOLD (COUNSEL)**
FOR THE RESPONDENT: **MS WILLIAMS (COUNSEL)**

JUDGMENT

The unanimous judgment of the Tribunal is as follows:

1. The complaint of unfair dismissal is not made out and is dismissed.

2. The complaint of wrongful dismissal is not made out and is dismissed.

3. The complaint of a breach of the duty to provide a written statement of particulars of employment is not made out and dismissed.

4. The complaint of unauthorised deductions for wages is not made and is dismissed.

5. The complaint of discrimination arising from a disability is not made out and is dismissed.

6. The compliant of a failure to make reasonable adjustments is not made out and is dismissed.

7. The complaint of harassment related to disability is not made out and is dismissed.

REASONS

1. These are complaints brought by Mr Richard O'Shea ('the Claimant') against Hywel Dda University Local Health Board ('the Respondent').

Introduction

2. By way of a brief introduction to the claim:

    2.1 The Claimant is a GP. He worked as a locum GP at the Respondent's Tenby Surgery between August 2018 and February 2022.

    2.2 The Claimant commenced ACAS Early Conciliation on 11 April 2022 and the ACAS Early Conciliation Certificate was issued on 22 May 2022. He presented his claim to the Tribunal on 22 June 2022, alleging various forms of discrimination (arising from claimed disabilities), unfair dismissal, wrongful dismissal, unauthorised deductions from wage and a breach of the duty to provide a statement of written particulars of employment.

    2.3 In its response, the Respondent resisted the claim in its entirety. It denied that the Claimant was an employee and did not concede disability. In any event, the Respondent denied dismissing the Claimant, unfairly or at all, denied discriminating against him and claimed that all sums and duties owed to him had been met.

The Hearing

3. The hearing was conducted in person, save that the non-legal members of the Tribunal, Mrs Humphreys and Mr Horne, joined remotely by video link. We heard oral evidence from the Claimant. For the Respondent, we heard oral evidence from the following employees (save that Dr Mackintosh is now retired):

    3.1. Mr Matthew McGivern (Business Manager of General Medical & Provider Services)

    3.2. Ms Rhian Bond (Assistant Director, Primary Care)

    3.3. Ms Anna Swinfield (Head of General Medical Services for Sustainability)

    3.4. Ms Debra Morgan (Practice Manager, Tenby Surgery)

3.5. Dr Martin Mackintosh (GP & Clinical Lead, Tenby Surgery)

4. All of the witnesses provided and adopted written statements as their evidence in chief.

5. The Tribunal was also provided with a paginated bundle of documents to which we were referred throughout the hearing ('the Bundle'). Finally, we received written and oral submissions from Mr Arnold for the Claimant and from Ms Williams for the Respondent.

6. The issues to be determined by the Tribunal were agreed over the course of a number of case management hearings and confirmed by the parties at the outset of the final hearing. So far as they related to liability, they are set out at Annex 1.

7. The Tribunal heard oral evidence and submissions from 9 to 12 October 2023. We deliberated thereafter on 13 and 16 October 2023 and due to lack of time, reserved judgment.

8. In reaching our decision, the Tribunal had regard to all the evidence we saw and heard, as well as the submissions we received.

The Relevant Law

Employment Status

9. Section 230 of the Employment Rights Act 1996 ('ERA 1996') denies 'employee' and 'worker' as follows:

> (1) In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.
>
> (2) In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.
>
> (3) In this Act "worker" (except in the phrases "shop worker" and "betting worker") means an individual who has entered into or works under (or, where the employment has ceased, worked under) —
>
> (a) a contract of employment, or
>
> (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;
>
> and any reference to a worker's contract shall be construed accordingly.

…

10. The definition of 'employee' in Section 230 (1) of the Employment Rights Act 1996 turns on the meaning of the phrase 'contract of service' in sub-section 230(2). That phrase is not defined but it has been understood as incorporating the distinction between a 'contract of service' and a 'contract for services.'

11. In Ready-Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497, Mckenna J said that:

> A contract of service exists if these three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service.

12. In Carmichael v National Power plc [1999] UKHL 47, the House of Lords confirmed that there is an "irreducible minimum" of mutual obligation necessary to create a contract of employment. Mutuality of obligation is said to be the obligation of the putative employer to provide work and the obligation of the putative employee to accept it. Unless there is mutuality of obligation and a sufficient degree of control, there cannot be a contract of employment. In his speech, Lord Irvine of Lairg stated as follows:

> If this appeal turned exclusively - and in my judgment it does not - on the true meaning and effect of the documentation of March 1989, then I would hold as a matter of construction that no obligation on the C.E.G.B. to provide casual work, nor on Mrs. Leese and Mrs. Carmichael to undertake it, was imposed. There would therefore be an absence of that irreducible minimum of mutual obligation necessary to create a contract of service (Nethermere (St. Neots) Ltd. v. Gardiner [1984] I.C.R. 612, 623C-G per Stephenson L.J., and Clark v. Oxfordshire Health Authority [1998] 1.R.L.R. 125, 128 per Sir Christopher Slade, at paragraph 22).

13. A checklist approach is not appropriate. In Hall (Inspector of Taxes) v Lorimer 1994 ICR 218, CA, the Court of Appeal upheld the decision of Mr Justice Mummery in the High Court (reported at 1992 ICR 739), who had said:

> …this is not a mechanical exercise of running through items on a checklist to see whether they are present in, or absent from, a given situation. The object of the exercise is to paint a picture from the accumulation of detail. The overall effect can only be appreciated by standing back from the detailed picture which has been painted, by viewing it from a distance and by making an informed, considered, qualitative appreciation of the whole. It is a matter of evaluation of the overall effect of the detail… Not all details are of equal weight or importance in any given situation.

Unfair Dismissal

14. By virtue of section 94 of the ERA 1996, an employee (but not a worker) has the right not to be unfairly dismissed by his employer. In respect of what constitutes an unfair dismissal the relevant law is to be found within section 98 of the ERA 1996.

Unauthorised deductions from wages

15. Section 13 of the ERA 1996 affords a worker the right not to suffer unauthorised deductions from wages. This involves a consideration of what sums the worker is entitled to under his contract of employment and what sums he has been paid.

16. For the purpose of section 13 of the ERA 1996, the definition of "wages" includes "any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise" (per section 27(1)(a) of the ERA 1996).

Written statement of particulars of employment

17. Prior to 6 April 2020, section 1 of the ERA 1996 stated:

> Where an employee begins employment with an employer, the employer shall give to the employee a written statement of particulars of employment

18. By virtue of the Employment Rights (Employment Particulars and Paid Annual Leave) (Amendment) Regulations 2018/1378, the duty under section 1 of the ERA was extended to workers. However, the duty only applies "*where the worker to whom the statement must be given begins employment with the employer on or after 6 April 2020*" (per Regulation 8).

Discrimination

19. Section 39(2) of the Equality Act 2010 ('EqA 2010') states:

> An employer (A) must not discriminate against an employee of A's (B)—
>
> (a) as to B's terms of employment;
>
> (b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;
>
> (c) by dismissing B;
>
> (d) by subjecting B to any other detriment.

20. Section 6 of the EqA 2010 defines disability for the purposes of the Act. Disability is one of the protected characteristics under the EqA 2010.

21. Section 15 of the EqA 2010 defines discrimination arising from a disability as follows:

> (1) A person (A) discriminates against a disabled person (B) if—
>
> (a) A treats B unfavourably because of something arising in consequence of B's disability, and
>
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
>
> (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

22. Section 20 sets out the duties to make reasonable adjustments in respect of disabled persons. So far as relevant, section 20 states:

> (1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
>
> (2) The duty comprises the following … requirements.
>
> (3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
>
> …

23. Schedule 8 to the EqA 2010 provides more details as to the duty to make reasonable adjustments. In addition, section 212 EqA 2010 defines "substantial" as "*more than minor or trivial."*

24. If a person fails to comply with the duty to make reasonable adjustments, that person discriminates against the disabled person (per section 21 EqA 2010).

25. Section 40(1) of the EqA 2010 states:

> (1) An employer (A) must not, in relation to employment by A, harass a person (B)—
>
> (a) who is an employee of A's;
> …

26. Harassment is defined by section 26 of the EqA 2010 and, so far is relevant, states as follows:

> (1) A person (A) harasses another (B) if—
>
> > (a) A engages in unwanted conduct related to a relevant protected characteristic, and
> >
> > (b) the conduct has the purpose or effect of—
> >
> > > (i) violating B's dignity, or
> > > (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
>
> …
>
> (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
>
> > (a) the perception of B;
> > (b) the other circumstances of the case;
> > (c) whether it is reasonable for the conduct to have that effect.

27. The "relevant protected characteristics" include disability (per section 26(5) EqA 2010).

28. Section 123 of the EqA 2010 requires that proceedings under the EqA 2010 may not be brought after the end of the period of three months starting with the date of the act to which the complaint relates or such other period as the Tribunal thinks just and equitable. By reason of section 123(3), conduct done over a period of time is treated as being done at the end of the period, for the purpose of calculating the three-month time limit for bringing proceedings.

Preliminary Issues

Employment Status

29. As detailed in the List of Issues, the parties were in dispute as to the Claimant's employment status. The Claimant claimed to be an employee. The Respondent accepted that the Claimant was a worker (as defined by section 230(3)(b) of the ERA 1996) but did not agree that he was an employee.

30. The Claimant's employment status was of particular importance in these proceedings, since the complaint of unfair dismissal was only available to him if he was an employee. In addition, the duty to provide written particulars of employment was, at the time that the duty in this case arose, only applicable as regards employees, not workers (who only

obtain the right to written particulars if they were employed on or after 6 April 2020).

Findings of fact

31. The Claimant began working at the Tenby surgery as a locum GP in April 2018. He initially began working at the surgery on Tuesdays, Wednesday and Thursdays (which equated to seven sessions). At the time, the Claimant was also working at another GP surgery for a different health authority. From January 2020, the number of sessions the Claimant worked at Tenby surgery reduced from seven to six and thereafter reduced further to two days per week (Wednesdays and Thursdays).

32. In or around June 2020, the Claimant joined the Tarian Group as a GP partner at their Llandaff Fields surgery, where he routinely worked Mondays, Tuesdays and Fridays. It followed that he was only in reality available to work for the Respondent on Wednesdays and Thursdays.

33. By way of context, the Tenby surgery was, until August 2018, a partnership with a General Medical Services contract. However, from August 2018, the contract was returned to the Respondent and the surgery became a managed practice (that is, it was managed and operated directly by the Respondent).

34. It was not in dispute that there was no written contract of employment between the parties.

35. We made findings under the broad headings of mutuality of obligations, control and integration (which also reflected the parties' submissions). However, we thereafter undertook an overall evaluation to reach our conclusions on whether the Claimant worked under a contract for services (i.e. a worker) or a contract of service (i.e. an employee).

Mutuality of Obligations

36. There was no obligation on the Respondent to offer work to the Claimant and no obligation on the Claimant to accept any offers of work. Although not accepted in terms, the Claimant appeared in his oral evidence to concede that if he told the Respondent that he was not available to work at the Tenby surgery, it would have no option but to accept that. He also accepted that if there was no work available for him at the Tenby surgery, he would in turn have to accept that, referring to occasions when his sessions at the surgery had been dropped (albeit the Claimant asked for some notice in advance of any cancellation of a session).

37. The Claimant did not have to book annual leave or seek the Respondent's permission in advance of any leave. Rather, he simply informed the Respondent that he would be unavailable to work (an

example appeared at [109] of the Bundle). That was in contrast with the Respondent's Salaried General Practitioner's Job Description, which required six week notice in writing of proposed annual leave and included an expectation that the needs of the service would be taken into account (Paragraph 8.6 at [532] of the Bundle).

38. The Respondent would routinely ask the Claimant when he was available to work and await his conformation before booking him for sessions at Tenby surgery (see, for example, [149] – [151] and [154] of the Bundle).

39. On occasion, the Respondent would ask the Claimant if he was available to work at a different surgery (see, for example, [155] of the Bundle).

40. What was clear from the evidence was that the Respondent would always have to seek the Claimant's agreement to work in advance and that the Claimant was always entitled to refuse to work or tell the Respondent that he was unavailable to work (for example, at [153] and [157] of the Bundle). That was the reality of the relationship between the parties and that reality was not undermined by the fact that this arrangement endured from 2018 until 2022. It endured on the basis of that key premise, namely that the Respondent was not obliged to offer work and the Claimant was not obliged to accept work.

41. That conclusion regarding offering and accepting of work was also not undermined by another reality, namely that the Respondent was desperate for GP-cover across its primary care services (see, for example, the letter of 31 August 2021, at [169] of the Bundle). That led to what was, in effect, a demand-led relationship, wherein the Respondent was almost always in need of locum GPs. However, it was still the case that, had the Respondent been able to recruit sufficient numbers of salaried GPs, the need to offer work to locums like the Claimant would have diminished and, importantly, it would have been open to the Respondent to simply reduce or stop offering sessions to the Claimant.

42. The Claimant was paid for the sessions that he did work and was not paid for sessions that he did not work. The Claimant would invoice the Respondent for the work undertaken (see, for example, at [389] of the Bundle). Tax and national insurance were deducted by the Respondent at source (at [500] – [527] of the Bundle).

43. From September 2018 until January 2021, the Claimant's payslips referred to IR35 (at [500] – [518] of the Bundle). Although we were not expressly addressed on this by the parties, the Tribunal took this as a reference to HMRC's off-payroll working rules (the purpose of which is to ensure that workers and contractors pay roughly the same tax and national insurance as an employee). Throughout this period, the Claimant's payslips did not include an hourly rate, simply a lump sum

payment. From February 2021, the payslips issued to the Claimant changed (at [519] – [527]). They contained an hourly rate, the number of hours worked and a payment referred to as "*WTR Pay"* (a reference to the Working Time Regulations 1998 and considered further, below).

44. The Claimant was not paid (and did not claim) for absences due to ill-health or bereavement. As noted above, he was not paid for sessions that he did not work. By way of example, on 20 January 2022, the Claimant informed the Respondent that he was unable to attend his booked session that day because his father-in-law had sadly passed away. The Claimant was not paid for that absence nor was he entitled to be paid (see, for example, the Respondent's internal email exchange at [267] – [268] of the Bundle).

Control

45. The Respondent had expectations of its locum GPs (at [169] – [171] of the Bundle, with specific reference to [171]). Those expectations appeared wholly reasonable in the context of the work being undertaken by locum GPs (whether in undertaking sessions with patients or as duty doctor) and consistent with their overarching professional standards and obligations (for example, with the General Medical Council). These expectations were in contrast with the Respondent's Salaried General Practitioner's Job Description (at [528] – [535] of the Bundle), which included the following strategic and leadership responsibilities, over and above the provision of clinical services (at [530]):

> The General Practitioner will…maintain quality standards, develop and initiate new systems of working and encourage and promote the development of clinical governance through practice.

46. If the Claimant accepted an offer of work, the Respondent controlled to a degree the work undertaken by the Claimant, in that it decided if he was duty doctor or had consultation sessions. The Respondent also told the Claimant where the work being offered was located (for example, at the Tenby surgery).

47. However, it was, in our judgment, not the case that the Claimant had become the Tenby surgery duty doctor (per Paragraph 29.8.2 of Mr Arnold's written submissions). Whilst the Claimant may have been asked to be duty doctor more often than not, that falls some way short of saying he was the de facto duty doctor, not least because, from June 2020, he was only available to work at the Tenby surgery on two days during the week.

48. It was not in dispute that during the course of his sessions either in consultations or as duty doctor, the Claimant acted with a significant degree of autonomy (by reason of his professional training, qualifications and experience). In addition, it was important to note that a material

degree of control of the work undertaken by the Claimant arose, in any event, from the fact that he was a GP regulated by the General Medical Council and the regulatory obligations which arose as a result, obligations and duties which were wholly separate from the Respondent.

49. The Claimant also alleged that the Respondent's disciplinary and performance policies applied to him. In particular, the Claimant alleged that he had been spoken to about patient complaints under the auspices of the Respondent's disciplinary policy. Mr McGivern in his oral evidence recalled the discussion and claimed that it had been part of an informal meeting. In his oral evidence, the Claimant accepted that he did not know the outcome of any complaints against him, did not know the outcome of any disciplinary proceedings and had never received any correspondence informing him that the meeting was part of a disciplinary process.

50. There was, in our judgment, insufficient evidence to suggest that the Claimant was subject to the Respondent's disciplinary policy, as alleged or at all. The Claimant did not claim to have been told by the Respondent (or anyone on behalf of the Respondent) that, as a locum GP, he was subject to its disciplinary policy. The Claimant appeared to have inferred that being spoken to about patient complaints was evidence of the application of the disciplinary policy. However, the Claimant's subjective opinion was unsupported by the evidence before us. There was no documentary evidence that the Claimant's role was covered by the Respondent's disciplinary policy. The Claimant was not told that his role was covered by the Respondent's disciplinary policy. In the specific example relied upon by the Claimant, he did not suggest that anyone in the meeting told him that he was being spoken to under the remit of the Respondent's disciplinary policy. There was no follow up to that meeting, whether orally or in writing.

51. For all those reasons, the Tribunal found that the Claimant was not subject to the Respondent's disciplinary policy, as claimed.

52. We were not addressed specifically on the application of the Respondent's performance policy on the Claimant or his role. However, as noted above, there were expectations on locum GPs but, as we have explained, these were distinct from the duties, obligations and expectations placed upon salaried GPs.

Integration

53. The Respondent maintained that the role of a salaried GP (which the Respondent accepted was that of an employee) was distinct and different from that of a locum GP, since the locum had no responsibility for anything other than the clinical work they undertook. In response, the Claimant suggested that he had been involved in duties and tasks over

and above the clinical services he provided. Two examples in particular were relied upon.

54. At Paragraph 6 of his statement, the Claimant claimed that he mentored an Advanced Nurse Practitioner ('ANP') within the Tenby surgery. This was later clarified as being an Advanced Paramedic Practitioner ('APP') and, in his written submissions, Mr Arnold accepted that this was informal mentoring (as opposed, presumedly, to mentoring under a formal scheme operated by the Respondent).

55. In Paragraph 5 of his statement, the Claimant also said that he offered advice and guidance to other health care professionals ('HCPs'). However, that was part of the role of duty doctor (at [171] of the Bundle and per Paragraph 14 of Mr McGivern's statement) and, otherwise, any informal mentoring, support or guidance the Claimant gave to colleagues was not a requirement of his broader locum role and very much his choice. Any advice he gave to members of the wider medical community operated outside his working relationship with the Tenby surgery. Other than in the role of duty doctor, the Respondent did not require the Claimant, as a locum GP, to mentor (informally or otherwise) or give advice to other HCPs.

56. The Claimant also claimed at Paragraph 6 of his statement to have been personally "*asked by Anna Swinfield…on behalf of the [Respondent] to submit a formal proposal relating to a redesign of the service provided by the Surgery and neighbouring Tenby Cottage Hospital. Sadly, due to the Pandemic this was not followed through."*

57. In his oral evidence, the Claimant referred to two other locum GPs (Drs Baker and Davies) whom he claimed had been asked, with him, to submit the aforesaid proposal. This was at odds with his written evidence which contained no details of any other collaborators (the Claimant saying that "*I was asked by Anna Swinfield"*).

58. In addition, the Claimant did not adduce any evidence from Dr Baker or Dr Davies nor provide any explanation for why not or what efforts, if any, had been made to secure evidence from them. There was also no copy of the alleged proposal or any drafts.

59. In her evidence, Ms Swinfield recalled that the proposal related to an enquiry by the locum GPs, including the Claimant, after the Tenby surgery had become a managed practice, as to whether the General Medical Services contract would be re-tendered. Ms Swinfield also shared the recollection that Drs Baker and Davies were part of the consortium who, along with the Claimant, were enquiring about the contract for Tenby surgery. She denied ever asking the Claimant or others to submit any formal proposals.

60. There was a clear dispute as to nature of the proposed project and the context. Ms Swinfield does not recall ever asking the Claimant to do anything about redesigning the GP service with the cottage hospital building but did accept that the two properties being part of an enhanced service "*was put to us*" but in the context of a re-tendering of the General Medical Services contract for the Tenby surgery.

61. On balance, we did not find that the Claimant was asked, as he claimed, to submit a formal proposal for the redesign of the Tenby surgery services. At most, he enquired with other locum GP colleagues about whether the surgery would be re-tendered in the future.

62. For those reasons, the Tribunal found that the Claimant's role as a locum GP was not comparable to that of a salaried GP, since locum GPs responsibilities were limited to purely clinical services (and the attendant administrative tasks which flowed from those clinical services). In contrast, salaried GPs had additional operational, strategic and leadership responsibilities, over and above their clinical obligations.

Analysis & Conclusion

63. Mutuality of obligations are the irreducible minimum required for the creation of a contract. In the field of employment law, what type of contract is created depends, in part, on the nature of those mutual obligations.

64. The parties agreed that the Claimant was, at a minimum, a worker (in this case, a so-called 'limb (b)' worker, per section 230(3)(b) of the ERA 1996). It was therefore accepted that a contract existed between the Claimant and the Respondent (albeit that contract was implied and not contained within a contract of employment).

65. The Claimant undertook to perform work personally for the Respondent and the Respondent was not a client or customer of the Claimant. That is relevant regarding the degree of integration. When working for the Respondent, the Claimant was an integral part of its operation and the work he performed as a locum GP was central to the Respondent performing and delivering its primary care functions at the Tenby surgery.

66. However, for the contract to be one of service, the mutuality of obligations between the parties must usually include an obligation on the employer to provide work and an obligation on the employee to accept and perform that work. For the reasons set out above, we found that there was no such obligation on the Respondent or the Claimant.

67. It was not suggested that, when not working for the Respondent, the Claimant was under any overarching contractual obligation. There was no "irreducible minimum" between sessions nor any overarching contract

punctuated by periods of work. In reality, the Claimant worked on an assignment-by-assignment basis and, in regard to those assignments, there was no contractual obligation on the Respondent to offer assignments nor on the Claimant to accept them. Indeed, for much of the time that he was working for the Respondent, the Claimant was a partner in another GP practice in another health authority region.

68. The fact that the Respondent regularly and consistently asked the Claimant if he were able to work and the Claimant regularly and consistently said he could does not change the fact that there existed no mutuality of obligation to offer and accept such work. At most, it reflected (and no doubt continues to reflect) the realities of supply and demand in the NHS. What was more telling was the fact that the Respondent had to ask the Claimant if he was able to work and the Claimant had to confirm whether he was available to work.

69. Whilst there was a degree of control and integration (albeit not to the extent contended by the Claimant, for the reasons explained above), there was no obligation on the Respondent to provide work to the Claimant or on the Claimant to undertake work for the Respondent. Standing back and looking at the relationship in the round, the absence of mutuality of obligation was, in our judgment, decisive. There was no contract of service and the Claimant was not an employee.

70. Rather, there was a contract for services and the Claimant was a worker.

Disability

71. It was not accepted by the Respondent that, at the relevant time, the Claimant was disabled as defined by section 6 of the EqA 2010. If the Tribunal agreed with the Respondent, the Claimant's disability discrimination complaints would fall at the first hurdle.

72. By the time of the Respondent's closing submissions, it was accepted that at the relevant time, the Claimant had a mental health impairment (depression) which was long term (per Paragraph 16 of the Respondent's written submissions).

73. However, the Respondent did not accept that the mental health impairment had a substantial effect of the Claimant's ability to undertake normal day-to-day activities.

74. For reasons we explore elsewhere in this judgment, the medical evidence provided by the Claimant was limited (at [321] – [324] of the Bundle).

75. However, we did find assistance from the Claimant's Impact statement (at [319] – [320] of the Bundle). In particular, Paragraphs 9 & 10 detailed, in the Claimant's own words, the effects of his mental health upon his

day-to-day life. The Claimant explained how, in mid-2021 and as a result of his depression, he "*became more withdrawn, irritable, no longer enjoying company"* and "*shied away from contact with broader society and friends in particular"* (Paragraph 9, at [319]). He went on to describe how he "*withdrew from social media "groups & chats""* and *"no longer met with friends in the pub,"* the Claimant finding it *"so hard to engage with discussions relating to the health crisis"* (Paragraph 10, at [320]).

76. The Claimant was not challenged on these aspects of his written evidence and the Tribunal had no reason not accept them as presented. We therefore found that the Claimant's mental health impairment substantially affected his ability to socialise and to form or continue with social interactions. The ability to socialise is a normal day to day activity. The fact that the Claimant was able to perform other tasks, not least associated with his professional life, was not conclusive.

77. In addition, the Claimant had undergone counselling and by September 2021 was on prescribed medication for his mental health.

78. For those reasons, the Tribunal found that the Claimant's depression did have a substantial affect on his ability to carry out normal day-to-day activities. It followed that the Claimant was disabled by reason of depression at relevant time.

Substantive Findings of Fact

79. As detailed above, we heard from a number of witnesses throughout the course of the hearing. Every witness did their best to assist the Tribunal and answered the questions they were asked candidly and honestly. We did not find any witness to be evasive or dishonest. However, we were required to resolve a number of relevant factual disagreements. Where we have resolved those in a manner which is at odds with some or all of the evidence of a witness, the Tribunal did so because we found other recollections to be more reliable and often supported and corroborated by other evidence, including from within the extensive bundle of documentary evidence before us.

Background

80. As detailed above, the Claimant began working as a locum GP for the Respondent at the Tenby surgery from April 2018. However, the focus for this case was on the period from June 2021 until 3 February 2022, which was the last day that the Claimant worked at the Tenby surgery.

81. It was not in dispute that from the summer of 2020, the Claimant, like many other HCPs, wore a fluid resistant surgical mask ('FRSM') whilst working at the Tenby surgery. In addition, he was fitted for (albeit unsuccessfully) a category 3 filter face piece ('FFP3'), which provided higher protection from infection (for example, when treating those with

Covid symptoms or a Covid diagnosis, in what the was termed the 'red room').

82. However, in or around June 2021, the Claimant informed Ms Morgan (as Tenby surgery practice manager) that he was medically exempt from wearing a face mask (whether a FRSM or FFP3). The Claimant met with Ms Swinfield (who had operational oversight for the Tenby surgery) in September 2021, where the issue of the Claimant's medical exemption was discussed further.

83. The Claimant had a meeting with Dr Mackintosh (as the surgery's clinical lead) on 5 January 2022 and again on 12 January 2022. It was not in dispute that, from 12 January 2022, the Claimant was informed that, by reason of not wearing a face mask, he was suspended from any face-to-face consultations with patients, would be referred to occupational health ('OH') and would not be booked for further sessions beyond 3 February 2022 (the date up to which he was already booked).

84. On 18 January 2022, the Claimant raised a grievance. On 24 January 2022, the Respondent extended the time frame for offering locum sessions to the Claimant to the end of February 2022 (to allow more time of the OH process to be completed). However, the Claimant did not work for the Respondent beyond 3 February 2022.

85. In addition, the referral to OH was never completed. The Claimant's appointment with the OH of 27 January 2022 was rearranged by the Respondent to 16 February 2022, following the death of the Claimant's father-in-law. On 12 February 2022, the Claimant informed Ms Swinfield that he would not be attending the rearranged appointment.

86. As detailed above, the Claimant alleged that these actions and omissions by and on behalf of the Respondent constituted various forms of discrimination and unfair dismissal. In particular, the Claimant alleged (and the Respondent denied) that:

    86.1. He had a medical exemption against wearing a face mask

    86.2. He was treated less favourably, placed at a substantial disadvantage and harassed for not wearing a face mask

    86.3. He was dismissed by the Respondent at the meeting on 12 January 2022, his dismissal taking effect on 3 February 2022.

87. We considered the factual allegations and issues in more detail, before going on to consider and determine the substantive complaints.

The requirement to wear face masks

88. Much was made in the course of the hearing about whether there was any law, policy or guidance in force at the relevant time which required HCPs to wear face masks in clinical settings (such as Tenby surgery). This was relevant because the Respondent contended that it had obligations and duties to protect the public and adhere to Welsh Government guidance during the pandemic, which was why it was unable to allow the Claimant to continue seeing patients in person without wearing a face mask.

89. There were no policy or guidance documents in evidence which stated that it was a requirement for HCPs to wear masks in the Tenby surgery. It was therefore left to us to consider the other evidence available to us to determine whether such a requirement was in existence, as claimed by the Respondent.

90. The Claimant wore a FRSM at the surgery early into the of Covid pandemic and was fitted, albeit unsuccessfully (because of his beard), for an FFP3. In addition, there was uncontested evidence of the Claimant not wearing the FRSM properly around the surgery, either wearing it under his chin or having it hanging off his ear and being asked by Ms Morgan (at Paragraph 14 of her statement) and Mr McGivern (at Paragraphs 21 & 23 of his statement) to pull it back up. This was also accepted by the Claimant in his oral evidence.

91. Dr Mackintosh also recalled the Claimant not wearing his FRSM properly because of the size of his face and neck (at Paragraph 9 of his statement). Dr Mackintosh's oral evidence was that there was a policy in place that the wearing of face masks by HCPs in the surgery was mandatory, albeit he was not asked about whether medical exemptions existed to that policy. This was also reflected in Dr Mackintosh's written evidence. At Paragraph 12 of his statement, he recalled the following from his meeting with the Claimant on 5 January 2022 (which we consider in more detail, below):

> …During this discussion, I explained the clear guidance from infection prevention in the Health Board in relation to wearing a mask.

92. The existence of guidance requiring HPCs to wear face masks in clinical settings was also supported by the following:

92.1. The fact that the Claimant believed that he needed a medical exemption to not wear a mask

92.2. The fact that the Claimant claimed that he sought patient consent prior to consultations to not wear a mask.

92.3. In response to a query by Ms Swinfield about the Respondent's policy for staff who declined to wear a face mask, Sue Rees of the Respondent's Infection Prevention & Control team ('IP&C') wrote the following on 21 December 2021 (at [187] of the Bundle):

> As you are aware the [Respondent] has approved for use the national IPC guidance - Seasonal Respiratory infections in health and care settings policy and hence expected compliance by staff to this policy, of which PPE use in clinical settings is monitored/audited in health. Non-compliance to FRSM, if not a formal medical exemption, is a risk that needs to be addressed with the individual member of staff as non-compliance to [Respondent] policy . If the exemption is medical then this will need to be risk assessed in terms of front line workers and risks to patients and colleagues. I have been aware of only a few of these to date and in fact on further investigation none of them had formal exemptions and were informed by managers that they were to wear FRSM.
>
> So yes formal exemption required and then risk assessment of role and patient contact (? different mask /daily [lateral flow test]/ etc)

93. In addition (and as explored in more detail below):

93.1. The Respondent's Deputy Medical Director, Dr Sion James, stated in an email on 6 January 2022 that "*[M]ask wearing is mandatory in healthcare premises"* (at [194] of the Bundle);

93.2. Ms Swinfield informed the Claimant on 19 January 2022 that *"[A]s per Government rules and Health Board policy, it is mandatory for NHS staff to wear face masks at all times when seeing patients face-to-face in clinical areas to comply with [Infection Prevention & Control] guidance. This is not something specific to the Health Board and is a standard all NHS organisations and staff are required to comply with"* (at [259] of the Bundle).

94. Despite the lack of any applicable written policy or guidance in evidence, the Tribunal were able to infer from the above that there was a policy or requirement that HCPs, including the Claimant, wore FSRMs (or other approved face masks) whilst at work in the surgery.

<u>The Claimant's medical exemption</u>

95. Was the Claimant medically exempt from wearing a face mask (whether a FSRM or FFP3) and if so, from when?

96. As noted above, the Claimant first told Ms Morgan that he was medically exempt from wearing a face mask in June 2021 (see also Paragraph 15 of the Respondent's Amended Grounds of Resistance, at [63] of the Bundle). He later made the same claim to Ms Swinfield (on 27 September 2021) and Dr Mackintosh (on 5 January 2022). The Claimant

did not disclose the basis of his claimed exemption to Ms Morgan or Ms Swinfield.

97. In addition, despite an email from Ms Swinfield to Ms Morgan of 16 November 2021 asking for evidence of any claimed medically exemptions (at [178] – [179] of the Bundle) being forwarded to the Claimant (in addition to all staff at the Tenby surgery), the Claimant did not provide any evidence or further information regarding his claimed exemption to either Ms Morgan or Ms Swinfield.

98. The Claimant did, however, provide further details to Dr Mackintosh on 5 January 2022, who recalled in his written evidence how the Claimant "*elaborated on the reason that he felt unable to wear a face mask"* and that "*the exemption was because he had been suffering from anxiety and depression*"(at Paragraph 13 of his statement).

99. We had sight of medical evidence adduced by the Claimant. This was a letter from his own GP (dated 1 November 2022, at [321] – [322] of the Bundle), a letter from a registered counsellor (dated 29 October 2022, at [323]) and a print out from his medical records detailing consultations between June 2021 and June 2022 (at [324]). We understood that this evidence had been provided with this litigation in mind and that the two letters had been requested specifically for that purpose.

100. The medical records showed that the Claimant had a consultation on 16 June 2021 with his GP, which was recorded as follows:

> Stress. Struggling with PPE in work. Makes breathing difficult. Finds it distracting & worries re this leading to error.

101. The next relevant entry is for a consultation on 27 September 2021:

> Stress at work. Long chat re ongoing stress at work. GP. Substantial [increase] in work load over past 18 months. Low in mood, irritable, feelings of apathy. No [deliberate self-harm/suicidal ideation]. Compounded by father being unwell and being unable to visit him in Australia. In recent months [symptoms] pervasive across other aspects of life. Has made adjustments to lifestyle, counselling but [symptoms] ongoing. Discussed trial of [selective serotonin reuptake inhibitors]…

102. The Claimant was prescribed Sertraline on 27 September 2021, which he was taking at a dose of 150mg per day by the date of his next consultation, on 12 November 2021:

> Patient reviewed. Chat re progress – feeling better. No issues taking 150mg at present, keen to continue. Added to repeat.

103. There is nothing in the contemporaneous medical records which record the Claimant's GP expressing the opinion that the Claimant was medically exempt from wearing a face mask. The only reference of note

was where the Claimant complained on 16 June 2021 that he was struggling with PPE at work because it was making breathing difficult, he found it distracting and he worried that it might impact upon his ability to do his job effectively.

104. In the letter of 1 November 2022, the Claimant's GP confirmed that the continuing prescription Sertraline (albeit at 200mg per day) and provided details of the Claimant presenting symptoms and subsequent treatment. Nowhere did the GP state that the Claimant was medically exempt from wearing a face mask. Indeed, the letter did not even refer to any issues the Claimant claimed to have wearing a mask.

105. The letter from the counsellor explained that he engaged with the Claimant from September 2020 (having assisted him in the past), by way of talking therapy sessions. Whilst the counsellor recounted the Claimant sharing his views, feelings and thoughts on numerous aspects of the pandemic and the associated lockdowns and restrictions, there was no reference to the wearing of face masks in particular nor to the Claimant talking about being granted a medical exemption from wearing them.

106. Dr Mackintosh recalled that the Claimant told him that he found wearing a face mask was causing him anxiety. Although in his written evidence, Dr Mackintosh recalled that this in the summer of 2021 (at Paragraph 8 of his statement), he accepted in his oral evidence that, given his recollection that the Claimant also told him that he had been prescribed medication and was struggling with his father being ill in Australia, that in light of the contemporaneous medical records detailed above, this conversation could not have taken place before 27 September 2021. However, it was not Dr Mackintosh's evidence that the Claimant also told him at that time that he was medically exempt from wearing a mask.

107. That did not occur until the meeting between the Claimant and Dr Mackintosh on 5 January 2022 (per Paragraph 12 of his statement). Dr Mackintosh also formed the view, after that meeting, that, in his opinion, the Claimant was medically exempt from wearing a face mask, a view he shared with Ms Swinfield by email on 6 January 2022, as follows (at [188] of the Bundle);

> Following my conversation with [the Claimant] on 05/01/22 I feel that it will adversely affect his health if he has to wear a mask whilst working. Daily lateral flow tests should give the reassurance that he is not infected with Covid whilst working in Tenby.

108. However, other than the opinion of Dr Mackintosh in early January 2022 and the Claimant's own assertions, there was little other supporting medical evidence that the Claimant was deemed medically exempt from wearing a mask. As noted above, there was no reference to the effects of mask wearing in the GP's letter of 1 November 2022, still less his opinion that the Claimant was, as a result, exempt on medical grounds.

109. In the Tribunal's view, if the Claimant's GP had been of view that the Claimant was exempt for medical reasons, it was reasonable to expect that to be in his letter of 1 November 2022 and also to be in the Claimant's contemporaneous medical records (or, if not, for the GP to explain why in his letter). Presumedly such an exemption would have extended beyond the workplace and would have needed to be clearly evidenced given the lockdown rules at large in the wider community. Again, the absence of a clear, unambiguous statement of medical opinion from the Claimant's GP confirming the same was significant.

110. Similarly, there was no reference to mask wearing in the counsellor's letter (save for an oblique reference to the Claimant providing examples of "*bureaucratic protocols hindering his ability to provide the best possible medical care to patients*"). Again, given the reason the counsellor's letter was provided, if the Claimant had talked about his anxieties over wearing a face mask and the fact that, as a result, he had been deemed medically exempt from wearing one, it was reasonable to expect the counsellor to have referred to that in his letter.

111. In his oral evidence, the Claimant sought to rely in particular upon the entry in his records for the consultation on 16 June 2021 (reproduced above) and believed that that was his GP stating that he was exempt. On the evidence produced, if that was the Claimant's case, he was, in our judgment, mistaken. He was not issued with a medical exemption by his treating GP on 16 June 2021.

112. The Claimant may well have been of the view that he was medically exempt from wearing a face mask but there was insufficient evidence that that was the conclusion or opinion of his own treating GP.

113. Indeed, whether or not the Claimant was medically exempt from wearing a face mask was a question posed by the Claimant to the OH as part of the referral process (by way of amendments made by the Claimant, at [241] of the Bundle). As a result, the following was included in the referral document to OH (at [247]):

> Are there any specific areas you wish to receive information on or questions you wish to include in this referral?
>
> Is the medical exemption from wearing a mask as described by [the Claimant] valid and does it warrant him not seeing patients F2F? If not, in what circumstances could he see patients F2F please? Are there any other forms of face covering that would be suitable?

114. The Claimant also referred to wearing a lanyard around his neck confirming that he was medical exempt from wearing a face mask but there was no evidence of where that came from, who issued it or why it was not in evidence (it was not suggested by the Claimant that he no

longer had it). Prior to 5 January 2022, none of the Respondent's witnesses recalled seeing the Claimant wearing such a lanyard (Ms Morgan and Ms Swinfield said they never saw the Claimant wearing one, the other witnesses were silent on the issue). The Claimant accepted in his oral evidence that he did not wear it to his meeting with Ms Swinfield on 27 September 2021. Only Dr Mackintosh recalled that the Claimant "*did subsequently start wearing [a lanyard]"* after their meeting on 5 January 2022 (at paragraph 13 of Dr Mackintosh's statement).

115. At most, the Claimant's own opinion was that he fulfilled the criteria for a medical exemption from wearing a mask. Much was made by the Claimant of the fact that Dr Mackintosh shared his view in January 2022. However, the Tribunal reminded itself that Dr Mackintosh was not the Claimant's treating GP and that he did not express that view until January 2022, some six months after the Claimant had first told the Respondent (in the form of Ms Morgan) that he was medically exempt from wearing a face mask.

116. We can only consider the evidence before us and as such, we found that the Claimant was not issued with any formal medical exemption, in the sense that it was the professional objective opinion of his treating GP. There was simply insufficient evidence and no reasonable explanation for the lack of corroboration from the Claimant's GP, his counsellor or from his medical records.

<u>The meeting of 22 September 2021 & subsequent events</u>

117. It was not in dispute that the Claimant and Ms Swinfield met at the Tenby surgery on 22 September 2021 (referred to as "*early September 2021*" in the List of Issues). What allegedly took place in the course of that meeting formed part of the Claimant's allegations of disability discrimination.

118. Ms Swinfield and the Claimant had very different recollections of the meeting. The Claimant said that it lasted a matter of minutes and that Ms Swinfield asked him two questions – "*are you really exempt*" and "*what's wrong with you*" (per Paragraph 28 of the Claimant's statement).

119. Ms Swinfield said that the meeting lasted between 20 to 30 minutes, that the Claimant disclosed a lot of personal information to her and informed her that he was medically exempt from wearing a mask but did not explain the basis for it (at Paragraphs 21 to 26 of her statement).

120. We preferred Ms Swinfield's recollection for the following reasons.

    120.1. It was plausible that Ms Swinfield would only know such personal details about the Claimant's life because he had told her about them. The Claimant said that he had provided such information to Dr Mackintosh but Dr Mackintosh confirmed that he would not

have disclosed such personal information to anyone else (and as found above, the Claimant did not confide in Dr Mackintosh until sometime after 27 September 2021). The Claimant also claimed that Ms Swinfield could have obtained his personal information from others in the surgery. However, that was never put to Ms Swinfield and there was no evidence that she did get such information for any source other than the Claimant himself.

120.2. The Claimant's evidence changed under cross-examination, with him conceding that "*there may have been a discussion about other things but I can't remember*," that those two questions cited above were the only things he remembered before saying that it was "*possible*" that he alluded to the detail contained at Para 24 of Ms Swinfield's statement (regarding the personal information she recalled him sharing with her in the meeting).

121. We therefore found that there was a 20-to-30-minute conversation between the Claimant and Ms Swinfield on 22 September 2021 where the Claimant said he was not wearing a mask because he was medically exempt but did not provide any further details. He did not make reference to any mental health issues (which he confirmed in his oral evidence) but he did divulge personal information about his private and family life.

122. In addition, we did not find that Ms Swinfield spoke to the Claimant in the manner characterised by him in his recollection. Such short, direct and accusatory questions were inconsistent with our finding that the meeting was lengthy and held in an environment and spirit wherein the Claimant felt able to confide in such a personal way with Ms Swinfield.

123. By her own account, Ms Swinfield came away from that meeting with concerns surrounding the Claimant's claimed medical exemption, not least because he had not evidenced the same or provided details of the basis upon which it had been granted (per Paragraph 27 of her statement). This, in part, was the reason for Ms Swinfield emailing all the managers of the managed practices on 15 November 2021 (which included Ms Morgan at the Tenby surgery) in the following terms (at [178] – [179] of the Bundle):

> PPE compliance is an area we need to maintain – if you have any practice staff, other [health board] staff using your premises or locums who have face mask/visor medical exemptions, please make sure that you have copies of these exemptions on file so we can evidence.

124. Ms Morgan forwarded the above email on to the staff at the Tenby surgery, including the Claimant (at Paragraph 20 of her statement). The Claimant did not, in response, provide any evidence to support his claimed medical exemption to Ms Morgan, Ms Swinfield or anyone else.

125. Thereafter, Ms Swinfield contacted Ms Rees of the IP&C team, whose response of 21 December 2021 is reproduced above and which Ms Swinfield forward to Ms Morgan and Dr Mackintosh (per Paragraph 28 of Ms Swinfield statement). Thereafter, it was arranged for Dr Mackintosh, in light of the advice from Ms Rees, to meet with the Claimant (see, for example Paragraph 10 of Dr Mackintosh's statement and [186] of the Bundle).

The meeting on 5 January 2022

126. That meeting took place on 5 January 2022, at the Tenby surgery.

127. In addition to the concerns raised by the IP&C team, Dr Mackintosh was also aware by the time of that meeting that the surgery's newly appointed salaried GP (Dr Hanna) was "*incredibly Covid phobic"* as her partner "*was in the extremely clinically vulnerable group*" (per Paragraph 11 of Dr Mackintosh's statement).

128. Dr Mackintosh's recollection of the meeting of 5 January 2022 was at Paragraphs 12 to 16 of his statement. The Claimant's recollection was at Paragraphs 31 & 32 of his statement.

129. It was not in issue that Dr Mackintosh asked the Claimant to reconsider wearing a mask or consider wearing a visor. This was the first time the Claimant explained to anyone working for the Respondent the basis of his claimed medical exemption (namely, that it was related to his mental health). As noted above, Dr Mackintosh recalled that he discussed the Respondent's policy on face masks with the Claimant (at Paragraph 12 of his statement). That was denied by the Claimant in his oral evidence but Dr Mackintosh was not cross-examined on that aspect of his written evidence. In addition, there was a consistency between why Dr Mackintosh was meeting with the Claimant (namely, concerns that his failure to wear a face mask was in breach of the Respondent's policy, per the email from Ms Rees) and his recollection that he did indeed reiterate the guidance from the IP&C team to the Claimant.

130. On that basis, we preferred Dr Mackintosh's recollection that he explained the guidance from the IP&C team about wearing a mask. As he had agreed to do following the email correspondence with Ms Swinfield, Dr Mackintosh raised with the Claimant both the guidance requirements and the concerns of Dr Hanna.

131. As already recorded above, Dr Mackintosh also formed view that, had he been the Claimant's GP, he would have said that he was exempt from wearing a mask for medical reasons (per Paragraph 13 of his statement). He also recalled that the Claimant started wearing a lanyard confirming his exemption after the 5 January 2022 meeting.

132. It was alleged by the Claimant that at their meeting on 5 January 2022, Dr Mackintosh verbally told him to wear a face mask. Dr Mackintosh's evidence was that he did not tell the Claimant to wear a mask but asked him to reconsider his decision not to. Further, Dr Mackintosh was making that request on the instruction of Ms Swinfield, to which Dr Mackintosh told Ms Swinfield that he would seek clarification from the Claimant (at [186] of the Bundle). However, after the meeting on 5 January 2022, Dr Mackintosh informed Ms Swinfield that he believed:

    132.1. That the Claimant was medically exempt from wearing a face mask; and

    132.2. That the mitigations proposed and in place were sufficient.

133. Having regard to Dr Mackintosh's largely unchallenged evidence and the context in which the meeting of 5 January 2022 was convened, the Tribunal found that Dr Mackintosh did not tell the Claimant to wear a face mask but explained the Respondent's policy, asked the Claimant to reconsider, suggested that the Claimant consider wearing a visor but then, upon discussing matters further with the Claimant, concluded that the Claimant should be considered exempt on medical grounds and that mitigations in place would suffice.

134. In Dr Mackintosh's opinion, those proposed mitigations (of daily lateral flow tests, being double vaccinated and seeking patient consent) weighed the balance in the Claimant's favour (at Paragraph 15 of Dr Mackintosh's statement).

135. Dr Mackintosh communicated his views and opinions to Ms Swinfield on 6 January 2022, although the only mitigation he referred to were daily later flow tests (at [188] of the Bundle). However, Ms Swinfield spoke further with Dr Mackintosh, who confirmed that the Claimant was fully vaccinated (at [195]). Dr Mackintosh did not disclose the claimed basis for the medical exemption (namely, the Claimant's anxiety and depression).

136. Later the same day, Ms Swinfield referred the issue to Ms Bond (the Respondent's Assistant Director of Primary Care) in the following terms (at [196] of the Bundle):

> [The Claimant] started off wearing a mask/visor. He is no longer doing so, picked-up in the PPE audits done by the nurses. He's never been the most compliant of our GPs.
>
> I spoke to him about this and he says he has a medical exemption. Martin [Mackintosh] has also spoken to him on this, doesn't want to disclose the medical details but supports this.
>
> Sue Rees has advised that we need to mitigate through another mask (don't think this is going to make any difference), daily LFDs (doing) and risk

> assessing patient contacts. If we stop him seeing patients, that changes how we operate and potentially we lose him. Can we discuss please?

137. Also on 6 January 2022, Ms Bond sought the opinion of Dr Sion James, the Respondent's Deputy Medical Director. Dr James provided his opinion on the same day as follows (at [194] – [195] of the Bundle):

> That is not acceptable I'm afraid.
>
> Mask wearing is mandatory in healthcare premises.
>
> Pragmatically whilst triaging on his own he does not need to continuously wear a mask in own room.
>
> He does however need to wear one whilst F2F with a patient and within 2m of staff. A referral to Occ Health is needed and he needs to stick to triage until then if he can't wear a mask in front of patients. A patient he sees face-to-face would need to be consented for non-mask wearing and the risk associated with it. Should a vulnerable patient contract COVID from him then it would open us up to litigation.
>
> I would refer this to the PPE cell for a decision about our continuing to employ him as well as asking Legal and Risk about the risk to the organisation.
> …

138. On 7 January 2022, Ms Swinfield forwarded the email from Dr James to Dr Mackintosh and Ms Morgan, with the following action points (at [194] of the Bundle):

> …
> Make [the Claimant] aware that this issue has been escalated (Martin [Mackintosh], I think you may have already done this) and the determination below based on mask wearing being mandatory in the circumstances outlined below (F2F and within 2m of staff). This is an opportunity for [the Claimant] to comply. If he does not, please do the following:
>
> Debbie - with [the Claimant's] consent, please make a referral to OH. Please let me know if he consents to this or not.
>
> Job plan - with immediate effect (unless we have compliance), [The Claimant] cannot see patients F2F. Please do not book any further locum sessions until we have some clarity going forward. I can see bookings on the rota until 3rd Feb, nothing further please.
>
> I will refer the matter to the PPE cell and L&R

139. It was agreed that Dr Mackintosh would meet with the Claimant at the Tenby surgery on 12 January 2022 (which was the Claimant's next booked session).

The meeting on 12 January 2022 & the aftermath

140. During the meeting on 12 January 2022, Dr Mackintosh told the Claimant that he would be suspended from further face-to-face consultations with patients if he did not wear a mask, that it was proposed to refer him to OH and, subject to the outcome of that referral, there would be no sessions booked beyond 3 February 2022.

141. The Claimant's account of the meeting accorded in part with that of Dr Mackintosh. In his written evidence, the Claimant recalled being told that, if he did not wear a mask, he would be suspended from face-to-face consultations and there would be no bookings beyond 3 February 2022 (at Paragraph 33 of his statement). However, the Claimant did not refer to the proposed OH referral in his statement and he also believed that the decision not to book in any further sessions beyond 3 February 2022 was an effective termination of his employment (at Paragraphs 33 & 34). In addition, the Claimant alleged that "*no alternative courses of action were proposed nor any accommodations despite my disability"* (at Paragraph 33).

142. However, in his oral evidence, the Claimant accepted that Dr Mackintosh had told him in the 12 January 2022 meeting about the proposed referral to OH. The Claimant became upset in the course of the meeting, left to compose himself but returned soon after. He believed that Dr Mackintosh did not tell him about the OH referral until he had returned to the meeting (per his oral evidence). It follows that on the Claimant's own case, he was told that he was suspended from face-to-face meetings and would not be booked beyond 3 February 2022 but still returned to the meeting thereafter. On that basis, it was reasonable to conclude that the Claimant believed there was more to discuss.

143. In any event, the Claimant's view that "*no alternative courses of action were proposed"* was at odds with his behaviour after the meeting, wherein he consented to and engaged with the OH referral. Indeed, he had indicated that he was happy to be referred as early as 1pm on 12 January 2022 (per the email from Ms Morgan to Ms Swinfield on 12 January 2022, at [197] of the Bundle). Thereafter, as noted above, the Claimant reviewed and amended the OH referral documentation.

144. The Claimant's actions were consistent with the stated purpose of the OH referral and the interaction between the referral, the suspension on face-to-face consultations and the decision not to book the Claimant beyond 3 February 2022. As instructed by Dr James on 7 January 2022, the Respondent was seeking "*some clarity going forward".* Until it had that clarity, the measures set out in the meeting of 12 January 2022 would take effect. The Respondent was, in effect, putting in place temporary restrictions whilst enquiries were made of its own PPE cell and Legal & Risk department and pending the advice of the OH in respect of the Claimant.

145. That much was evidently clear from Dr James' emails of 6 and 7 January 2022 (set out above). It was also understood by Ms Swinfield and Ms Morgan. In her email to Ms Morgan on 12 January 2022, Ms Swinfield stated as follows (at [197] of the Bundle):

> How we phrase this is important – please just let [the Claimant] know that we are unable to book him beyond 3/2 until we get some clarification. He may feel similarly.

146. This was also consistent with Dr Mackintosh's oral evidence that the decision to stop booking the Claimant from 3 February 2022 was pending the outcome of the OH referral. Dr Mackintosh recalled discussing with the Claimant on 12 January 2022 how the process could be moved forward with OH and he was hopeful that a solution could be found to enable the Claimant to continue providing sessions for the Tenby surgery.

147. Contrary to the Claimant's view, the decision to suspend bookings beyond 3 February 2022 was not a dismissal or even a permanent state of affairs. It was a precautionary measure pending not only the OH referral but the Respondent's own internal enquiries. Indeed, if, as contended by the Claimant, his working relationship with the Respondent was terminated with effect from 3 February 2022, why would the Respondent bother to refer him to OH and why would the Claimant agree to be referred (and, at least initially, co-operate and engage with the process)? The actions of both parties were inconsistent with dismissal.

148. That conclusion was further reinforced by the parties' respective communications following the meeting on 12 January 2022.

149. On 18 January 2022, Ms Swinfield emailed the Claimant as follows (at [261] of the Bundle, emphasis added):

> Further to your conversation with Debbie [Morgan] last week, you will be aware that <u>adjustments have been put in place on a temporary basis to reduce the risks to patients, staff and yourself associated with you not wearing PPE.</u> These include no F2F with patients and minimal contact with staff, while observing strict social distancing. I understand that you are doing LFDs daily for your Tenby days.
>
> <u>We won't know the longer-term position until we have had sight of the OH report,</u> and we are attempting to get your appointment expedited so <u>we can get some clarity going forward asap</u>. I will arrange a meeting when this report has been received, however in the interim you must avoid F2F contact as outlined above. <u>I hope that we will be able to clarify the position shortly.</u>

150. The Claimant responded on the same day (at [260] – [261] of the Bundle). The Claimant questioned a number of Ms Swinfield's assertions and reported that, contrary to her belief, he had not in fact held a meeting with Ms Morgan the previous week. Importantly, the Claimant stated the following (emphasis added):

> I am pleased however that you are offering me a review with Occupational Health and that you consider me to be in employed, as it will enable me to raise a formal grievance against Hywell Dda Health Board, for whom iI [sic] have been employed since August 2018.

151. The Claimant went on to set out the grounds for his grievance and stated that one of his desired outcomes was for the Respondent "*to allow me to continue my clinical practice"*

152. The position was put beyond any reasonable doubt by Ms Swinfield's reply of 19 January 2022 (at [259] of the Bundle), which included the following (emphasis added):

> The purpose of the referral to Occupational Health is to seek their professional view and to help inform the longer-term position. We have put temporary adjustments in place to reduce the risks to you, your colleagues and patients associated with you not wearing a face mask. Once we have received advice from Occupational Health, we will assess the position and discuss further with you. As a result, I can also confirm that no decision has been made regarding any future work you are offered with the Health Board. As such, you are not summarily dismissed and no decisions have been made at this point.

153. In his written evidence, Dr Mackintosh said the following (at Paragraph 19):

> …I felt that the message I had been asked to convey to [the Claimant] had a degree of finality at this point, despite the intention of a referral to OH.

154. Dr Mackintosh was asked in cross-examination about this passage in his statement. Dr Mackintosh said that that related to the fact that the Claimant "*could not see patients from that moment on until we clarified the situation*." Again, this was consistent with what Dr Mackintosh recalled saying to the Claimant at the meeting on 12 January 2022, consistent with what the Respondent then communicated to the Claimant and consistent with the Claimant's own understanding at the time.

155. In our judgment, the actions of the Claimant and the Respondent in the immediate aftermath of the meeting on 12 January 2022 were more consistent with what was directed by Dr James on 6 and 7 January 2022, namely that:

155.1. There would be a temporary suspension of the Claimant's bookings pending the OH referral and enquiries of the PPE cell and Legal & Risk department;

155.2. The Claimant would be permitted to complete his existing bookings (which were up until 3 February 2022) but on the basis that he did not conduct face-to-face consultations (unless wearing a mask);

155.3. The Respondent would review the position, in discussion with the Claimant, upon receipt of the OH report and make decisions thereafter about the future relationship with the Claimant.

156. The Claimant's OH appointment was arranged for 27 January 2022. On 19 January 2022 (whilst working at the Trenby surgery), the Claimant's father-in-law was taken seriously ill and he returned to Cardiff. Sadly, the Claimant's father-in-law passed away that evening. On 20 January 2022, Ms Swinfield took HR advice and the following actions were agreed and communicated to the Claimant over the following days:

156.1. The OH appointment was cancelled and rearranged for 16 February 2022;

156.2. The Respondent agreed to offer locum sessions to the Claimant up to 28 February 2022 (extended from 3 February 2022), to reflect the delay in the OH process.

157. In addition, on 2 February 2022, Dr James asked to meet with the Claimant, along with Ms Bond and a HR representative. The Claimant agreed and a meeting was scheduled for 17 February 2022 (at [285] of the Bundle). However, on 5 February 2022, the Claimant indicated that he was unsure if he would in fact attend the meeting, pending advice (at [288]), before withdrawing from both the scheduled meeting and the OH appointment on 12 February 2022 (at [290]). The Claimant again reiterated his view that he had been verbally dismissed by Dr Mackintosh at the meeting on 12 January 2022.

158. On 16 February 2022, Ms Swinfield responded to the Claimant, reminded him of her email of 19 January 2022, reiterated that he had not been dismissed, that no decisions had been made about the future and urged the Claimant to engage with OH "*to assess how we can work with you to facilitate your return to clinical work as soon as possible. If this is not possible, then we would assess whether there are any alternative duties that are required which you could undertake, at least until such time as the PPE requirements are lifted"* (at [301] of the Bundle).

159. Ms Swinfield concluded the email in the following terms (at [301] of the Bundle):

> We wish to resolve this matter constructively and quickly, therefore kindly request that you allow us to reschedule your Occupational Health appointment. Once we have received the appropriate advice, we will then assess the position and discuss further with you without delay. In the meantime, you can continue to work under the temporary adjustments we have put in place to reduce the risks to you, your colleagues and patients associated with you not wearing a face mask.
>
> To be clear, you are not summarily dismissed and no decisions have been made at this point regarding any future work you are offered with the Health Board. Should you wish to discuss your concerns with me, Dr James and/or Rhian Bond, we would welcome the opportunity to meet with you.

160. The Claimant responded later the same day (at [300] of the Bundle). He did not accept Ms Swinfield's position or her proposals. He maintained that he had been summarily dismissed on 12 January 2022 and that there had been "*an irrevocable loss of trust secondary to your persistent hectoring regarding my exemption and evident refusal to recognise my medical condition consequently this renders any future employment by [the Respondent] under your watch untenable".*

Holiday Pay

161. The Respondent accepts that the Claimant was a worker. As a result, he was entitled to holiday pay under the Working Time Regulations 1998.

162. The Respondent's position was that holiday pay was incorporated into the Claimant's hourly rate. From February 2021 (at [519] of the Bundle), as detailed above, the payslips issued to the Claimant changed to expressly refer to that element within the hourly rate which pertained to holiday pay.

163. The Claimant alleged that he was never paid holiday pay (at Paragraph 12 of his statement) and that the change to his hourly rate from February 2021 constituted an unauthorised deduction from his wages.

164. The Claimant never raised any issue with the Respondent about holiday pay during the entirety of their working relationship. He provided no evidence to challenge the Respondent's assertions that his hourly rate always included a holiday pay element and that all that happened in February 2021 was that the holiday pay element was specifically set out in his payslip.

165. If the Claimant believed either that he was not getting holiday pay prior to February 2021 or that from February 2021, his hourly rate was being reduced, he did not say so to the Respondent or, as far as the evidence was concerned, anyone else.

166. On that basis and in the absence of any written agreement between the parties as to what the Claimant's hourly rate included, we were unable to

find on balance that the Claimant's pay for the duration of his working relationship with the Respondent rate did not include an element for holiday pay.

167. In addition, there was a logic to including holiday pay as an element of the hourly rate of pay, aligned with fact that the Claimant was able to refuse assignments for any reason, including being on holiday. Unlike salaried GPs, the Claimant was not required to book annual leave in advance. The Claimant did not have to give a reason for why he was refusing a session and there was no obligation on the Respondent to offer sessions.

168. It therefore made sense to include an annual leave element into the hourly rate, which was only paid to the Claimant when he worked, in circumstances where there was no certainty as when or for how long the Claimant would be working.

169. For those reasons, we found that the Claimant was paid holiday pay throughout his working relationship with the Respondent, as an element of his hourly rate.

Written statement of particulars of employment

170. It was not in dispute that the Respondent did not give the Claimant a written statement of particulars of employment at any stage of their working relationship.

Application of the Findings of Fact to the Law

Disability Discrimination

171. We found that the Claimant was disabled by reason of depression at relevant time (for the reasons set out, above).

Discrimination arising from disability (s. 15 Equality Act 2010)

172. The Claimant relied upon three alleged incidences of unfavourable treatment.

173. First, that at the meeting on 22 September 2021, Ms Swinfield asked the Claimant if he was "*genuinely exempt*" from wearing a face mask.

174. For the reasons set out above, we found that Ms Swinfield did not ask the Claimant if he was "*genuinely exempt"* (or, for that matter. "*what's wrong with you").* As we have explained, the nature, length and content of the meeting was inconsistent with such a conclusion.

175. Second, that on 12 January 2022, Dr Mackintosh told the Claimant that his employment would be terminated on 3 February 2022 if he did not wear a face mask in face-to-face consultations.

176. Again, as explained above, we found that Dr Mackintosh told the Claimant, on behalf of and as instructed by the Respondent, that there would be no more bookings after 3 February 2022. He did not say tell the Claimant that his employment was terminated, as that was not the Respondent's intention or position. Ms Swinfield thereafter categorically reinforced and clarified the Respondent's position. Importantly, both Dr Mackintosh and Ms Swinfield consistently informed the Claimant that the suspension of bookings was pending the proposed referral to OH, with which, initially, the Claimant agreed to.

177. Third, as of 12 January 2022, the Claimant was prevented from carrying out face-to-face consultations with patients and required to have minimal contact with staff.

178. The Tribunal found that was what happened, on the basis that the Claimant was not prepared to wear a mask in face-to-face consultations with patients or more generally around the Tenby surgery. We also concluded that this was unfavourable treatment.

179. As regards the "something" arising in consequence of the Claimant's disability, reliance was placed on the Claimant not feeling able to wear a face mask and being medically exempt from wearing a face mask.

180. For the reasons set out above, the Tribunal found that the Claimant was not medically exempt, as claimed. However, the existence of a formal medical exemption is not necessary for being able to show that something arose from the Claimant's disability. We reminded ourselves that whether something arose as a consequence of disability is a matter of objective fact in light of the evidence before us (per City of York v Grosset [2018] EWCA Civ 1105).

181. The record of the Claimant's GP consultation on 16 June 2021 (at [324] of the Bundle) referred to "*stress"* and "*struggling with PPE"* (which the parties agreed was a reference to a face mask, as the entry goes on to refer to issues with breathing).

182. At Paragraph 14 of his Impact statement, the Claimant said this (at [320] of the Bundle):

> I was having particular difficulty with wearing face masks due to the impact of the mental health. In addition to the significant personal stress I was experiencing at the time, wearing a mask led me to feel restricted and distracted, which made me panic about making a mistake whilst at work. My GP advised that wearing a face mask was having a detrimental effect on my already struggling and deteriorating mental health.

183. The Claimant was not challenged on this in his oral evidence. In contrast, there was nothing in the letters from the Claimant's GP or his counsellor (letters which were prepared for this litigation) that wearing a masks had an adverse impact on the Claimant or that it was something arising from his disability. When the Claimant was cross-examined on the GP's letter and the absence of any reference to mask wearing to mask, his only response was that it was not a legal requirement to wear a mask.

184. The Claimant also told Dr Mackintosh that wearing a mask was causing him anxiety. For the sake of completeness, the Tribunal accepted that stress and anxiety were symptoms of the Claimant's depression (per his medical records and the letters from his GP and his counsellor).

185. There was also evidence of the Claimant not wearing his mask properly around the Tenby surgery prior to seeing his GP and prior to first claiming that he had a medical exemption. We had evidence of the Claimant's own views about the whole conduct of the Covid restrictions and lockdown (see, for example, the counsellor's letter at [323] of the Bundle, the evidence of Ms Morgan at Paragraph 15 of her statement and the Wales Online article at [128] – [135]).

186. The Tribunal found that whilst not wearing a face mask was informed by a number of factors not related to the Claimant's disability, there was sufficient evidence from the GP consultation of 16 June 2021 and the Claimant's impact statement that his depression did play a role in him not feeling able to wear a mask. Viewed objectively, not feeling able to wear a mask was something which arose in consequence of that disability.

187. Was the reason for the unfavourable treatment the 'something arising' in consequence of the Claimant's disability?

188. The 'something arising' was the Claimant not feeling able to wear a mask. It was clear that the unfavourable treatment of not booking him beyond 3 February 2022 (subject to the OH referral), stopping him conducting face-to-face consultations and requiring minimal contact with staff was because the Claimant did not feel able to wear a face mask. It therefore arose because of the 'something arising.'

189. The Tribunal did not understand it to be in issue that by the time of the unfavourable treatment on 12 January 2022, the Respondent had knowledge that the Claimant was suffering with anxiety and had been prescribed medication (per Paragraph 13 of Dr Mackintosh's statement).

190. Could the Respondent show that the unfavourable treatment was a proportionate means of achieving a legitimate aim? The Respondent

relied on the following (per Paragraph 7.1 of the List of Issues at Annex 1):

> The legitimate aim relied upon was the requirement to protect the health and safety of patients and colleagues in accordance with Welsh Government Guidance for health and care sector staff in place at the material time. The treatment was proportionate in order to achieve the said aim in the circumstances since many of the patients with whom the Claimant would have close contact were vulnerable and the Respondent was under a duty to ensure that there was adherence to infection, prevention and control obligations whilst in the midst of a global pandemic.

191. Viewed objectively, the Tribunal had little difficulty in accepting that protecting the health and safety of patients and colleagues was a legitimate aim. That was all the more so given that the Respondent is a health authority and at a time of the Covid pandemic.

192. Did the unfavourable treatment achieve that legitimate aim? The Claimant suggested that he was already taking sufficient measures in mitigation by being vaccinated, taking daily lateral flow tests and seeking patient consent. However, all staff at the Tenby surgery were taking daily lateral flow tests and all were being temperature checked (including the Claimant). HCPs were also vaccinated. In reality, save for seeking patient consent to conduct the consultation without wearing a mask, the Claimant's mitigations were no different to what other members of the Tenby surgery staff were also doing.

193. Dr Mackintosh was comfortable with the Claimant's proposed mitigations (as he communicated to Ms Swinfield following his meeting with the Claimant on 5 January 2022). However, and with respect, that was not his decision to make. It was a decision for the Respondent, specifically the IP&C team, who were clearly of the view that the proposed mitigations were not sufficient. The Respondent was quite entitled to be led by its specialist team in that regard. Indeed, Dr Mackintosh agreed in his oral evidence that, as a managed practice, the Tenby surgery had to follow guidance from the IP&C team.

194. For those reasons, the Tribunal was of the view that stopping the Claimant seeing patients face-to-face and requiring minimal contact with staff whilst not wearing a face mask did achieve the legitimate aim of protecting the health and safety of patients and colleagues. The Respondent was entitled to conclude that the mitigations proposed by the Claimant were insufficient to address the risks posed by him (and to him) of working in a clinical environment during the pandemic without wearing an appropriate face mask.

195. Similarly, suspending further bookings of the Claimant pending further enquiries (of OH, the PPE cell and the Legal & Risk team) also achieved the legitimate aim by ensuring that any future bookings were undertaken

in a manner that was consistent with protecting the health and safety of patients and staff or, if that was not possible, cease offering sessions to the Claimant until such time as risks to patients and staff subsided.

196. The Tribunal went on to consider whether the unfavourable treatment achieved the legitimate aim in a proportionate manner. In our judgment, it did. The unfavourable treatment was temporary, pending the outcome in particular of the OH referral, which the Claimant initially actively engaged in. Such was the importance of the OH referral to the Respondent, it was rearranged when the Claimant was unable to attend due to bereavement and the Respondent also extended his booking period to end of February 2022 (the implication being that by then, the parties would have had a response from OH and could plan the future accordingly).

197. Time and again, the Claimant was told that the measures being implemented were temporary and designed to be in place pending the outcome of the OH referral. That was also explicitly stated in the OH referral document, to which the Claimant contributed (see [281] of the Bundle). The purpose of the OH referral was to establish whether it was possible for the Claimant's aversion to wearing a mask to be accommodated within his duties as a locum GP at the Tenby surgery, as reflected in the following request from the OH referral (at [281]):

> Are there any specific areas you wish to receive information on or questions you wish to include in this referral?
>
> Is the medical exemption from wearing a mask as described by [the Claimant] valid and does it warrant him not seeing patients F2F? If not, in what circumstances could he see patients F2F please? Are there any other forms of face covering that would be suitable?

198. In addition, from 12 January to 3 February 2022, the Claimant was offered non-public facing work (including telephone consultations and triage).

199. As detailed above, the Tribunal found that there was a policy in place at the relevant time that HCPs wear face masks (usually a FRSM) in the surgery. We were also of the view that having such a policy in place was a proportionate means of achieving the legitimate aim, at the time of national lockdown measures and a global pandemic, mindful of the clinical environment and the inherent vulnerabilities of those attending the surgery throughout this period.

200. For all those reasons, the Respondent proved that the unfavourable treatment was a proportionate means of achieving a legitimate aim. It follows that there was no discrimination arising from the Claimant's disability and the complaint is dismissed.

Harassment related to disability (s. 26 Equality Act 2010)

201. The Claimant alleged that the Respondent engaged in unwanted conduct related to his disability and that the conduct had the effect of violating the Claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for him

202. First, it was alleged that at the meeting on 22 September 2021, Ms Swinfield asked the Claimant if he was "*genuinely exempt*" from wearing a face mask.

203. We repeat the reasoning set out above. Ms Swinfield did not ask the Claimant if he was "*genuinely exempt"* (or, for that matter. "*what's wrong with you").* As we have explained, the nature, length and content of the meeting was inconsistent with such a conclusion. It follows that this alleged conduct did not happen and there was no act of harassment.

204. Second, it was alleged that the Respondent repeatedly asked the Claimant to wear a face mask or provide evidence of his medical exemption, despite the Respondent being aware that the reason he did not wear one was his disability. The Claimant relied on three specific factual allegations in support:

    204.1. At their meeting on 5 January 2022, Dr Mackintosh verbally told the Claimant to wear a face mask;

    204.2. At their meeting on 12 January 2022, Dr Mackintosh verbally told the Claimant to wear a face mask and if he did not he was to be suspended from patient facing duties and would no longer be offered shifts with effect from 3rd February 2022; and

    204.3. On 19 January 2022, Ms Swinfield (via email) told the Claimant that his medical exemption to mask-wearing would not apply to situations where he was seeing patients face-to-face.

205. For the reasons explained above, the Tribunal found that at their meeting on 5 January 2022, Dr Mackintosh did not tell the Claimant to wear a face mask but explained the Respondent's policy, asked the Claimant to reconsider, suggested that the Claimant consider wearing a visor but then, upon discussing matters further with the Claimant, concluded that the Claimant should be considered exempt on medical grounds and that mitigations in place would suffice.

206. As such, that conduct complained of did not occur and there was no harassment.

207. As regards the 12 January 2022 meeting, it was not in dispute that Dr Mackintosh told the Claimant what the consequences would be if he did not wear a face mask (rather than telling the Claimant that he must wear

a mask, which was ultimately a decision for the Claimant). More importantly, the allegation relied upon by the Claimant ignores that he was also told in that meeting that the proposed consequences of him not wearing a face mask were temporary pending a referral to OH, which the Claimant agreed with and actively participated in.

208. Similarly, it was also right that Ms Swinfield told the Claimant in her email of 19 January 2022 that it was her understanding that "*this [medical] exemption does not extend to face-to-face clinical consultations where social distancing is not possible and without other mitigations*" (at [259] of the Bundle). However, Ms Swinfield went on to state the following:

> Where [wearing a face mask] is not possible, then the [Respondent] must consider putting other reasonably practicable control measures in place, such as remote working, powered hood/visor etc.

209. As already detailed above, Ms Swinfield also went on to explain the purpose of the OH referral and the temporary adjustments to the Claimant's working practices "*to reduce the risks to you, your colleagues and patients associated with you not wearing a face mask*" (at [259] of the Bundle).

210. The Claimant also alleged that on 12 January 2022, Dr Mackintosh told him that he would be suspended from face-to-face consultations and his employment would be terminated on 3 February 2022 if he did not wear a face mask in face-to- face consultations.

211. As detailed earlier, the Tribunal found that Dr Mackintosh did not say that the Claimant's employment would be terminated. Dr Mackintosh did explain to the Claimant that he would be suspended from face-to-face consultations but all of this was pending the OH referral, as confirmed by Ms Swinfield in her email of 19 January 2022.

212. Finally, the Claimant alleged that as of 12 January 2022, he was prevented from carrying out face-to-face consultations with patients and required to have minimal contact with staff because he was not wearing a face mask at work.

213. Again, this is what the Tribunal found happened, on the basis that the Claimant was not prepared to wear a mask in face-to-face consultations or around the surgery. However, we again reiterate the importance of the wider context, which included the referral to OH, the temporary nature of the changes to the Claimant's working practices, the Respondent's intentions to review matters in light of OH advice and the prevailing Covid pandemic.

214. It was not in issue that the Claimant did not want to stop seeing patients face-to-face or have his bookings stopped beyond 3 February 2022. He

also did not want to wear a face mask because of impact on his stress and anxiety, which were symptoms of hid depression.

215. However, the conduct of Dr Mackintosh on 12 January 2022 and Ms Swinfield in her email of 19 January 2022 did not come close to having the effect of violating the Claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for him

216. The Claimant's perception at the time was at odds with what was alleged for the purposes of this claim. Whilst the Claimant was upset by the decision to temporarily change his working practices and did not agree with them or the rationale for them, he actively engaged in the OH referral which he described as being pleased with (at [260] of the Bundle). He also reviewed and amended the referral document, at the Respondent's instigation. Whilst the Claimant used the words harassment and victimisation in his grievance of 18 January 2022, his actions were not consistent with the legal test set out above.

217. Indeed, in his oral evidence, the Claimant indicated that he did not feel intimidated by Ms Swinfield and did not believe that Dr Mackintosh had harassed him.

218. In any event, when the conduct complained of was considered in its proper context (as found above), it was simply not reasonable for it to have had that effect on the Claimant.

219. For all those reasons, the complaint of harassment by reason of disability was not made out and is dismissed.

<u>Failure to make reasonable adjustments (s. 20 and 21 Equality Act 2010)</u>

220. The Claimant relied upon the Respondent's provision, criteria and/or practice ("PCP") of the requirement to wear a face mask at work.

221. It was not in issue that the Respondent required the Claimant (and all other staff) to wear a face mask at the Tenby surgery during the period relevant to this claim. The only issue was where that requirement came from (which, as we found, was a policy requirement of the Respondent's). Both parties finessed the PCP in their written submissions to the requirement to wear a face mask in face-to-face patient consultations.

222. In our judgment, the application of the PCP put the Claimant at a substantial disadvantage compared to those who were not disabled and able to wear a face mask. The substantial disadvantage was that from 12 January 2022, the Claimant was not able to conduct face-to-face consultations with patients and was told that he would not be booked for

any sessions beyond 3 February 2022. Those disadvantages were more than minor or trivial.

223. There was no substantial disadvantage prior to 12 January 2022, notwithstanding the existence of the PCP. The Claimant was not wearing a mask from at least June 2021 (when he first informed Ms Morgan that he was medically exempt). However, no restrictions were placed on his work at that time. Similarly, even after the Claimant's meeting with Dr Mackintosh of 5 January 2022, there was no substantial disadvantage because Dr Mackintosh supported the Claimant's claimed medical exemption and believed that the proposed mitigations would be sufficient (a position which was not accepted by the Respondent and led to the meeting of 12 January 2022).

224. However, we also concluded that the Respondent's response to try and avoid the disadvantage was reasonable. They temporarily suspended the Claimant from face-to-face consultations in order to protect patients, staff and the Claimant himself and referred him to OH. The Respondent was quite properly acting on the advice of its deputy medical director and applying its policy on face masks (with guidance from the IP&C team) which was reasonable for them to do, in the midst of a global pandemic.

225. Indeed, the Claimant's response at the time was to agree with the referral to OH and actively engage in it. The Respondent did properly consider the Claimant's proposed mitigations but they were rejected (per [194] – [195] of the Bundle). At that point, the Respondent did not disengage with the Claimant. Instead, Dr Mackintosh met with him again on 12 January 2022 and the OH referral as proposed as a way forward, which was confirmed on 19 January 2022 by Ms Swinfield.

226. In our judgment, the Respondent's actions were reasonable and it made the following adjustments to the PCP:

    226.1. Temporarily suspended the Claimant from face-to-face consultations, pending the OH referral (that the Claimant was actively involved in);

    226.2. Permitted the Claimant to continue with those sessions already booked up to 3 February 2022 and allowed him to undertake non-face-to-face tasks;

    226.3. Rearranged the OH referral and extended bookings to end of February 2022, when the Claimant was unable to attend the original OH appointment because of bereavement.

227. The Claimant, in the course of these proceedings, suggested that the Respondent should have allowed him not to wear a face mask during face-to-face consultations with patients, as long as the patient had been notified that he would not be wearing a mask due to a medical

exemption and the patient was comfortable with that, and as long as the Claimant was vaccinated against Covid- 19 and undertook daily lateral flow tests.

228. These were, in effect, the mitigations which were put to the Respondent following the Claimant's meeting with Dr Mackintosh on 5 January 2022. As explained above, these were properly considered by the Respondent, with Ms Swinfield seeking advice. However, as also detailed above, those mitigations were rejected on the basis that they were not compliant with the Respondent's own guidance on the wearing of face masks, as developed by its IP&C team.

229. For all those reasons, the Respondent complied with its duty to make reasonable adjustments and the complaint that it breached that duty fails.

Jurisdiction

230. For the sake of completeness regarding the complaints of disability discrimination, the allegations of discrimination which occurred during the meeting of 22 September 2021 between the Claimant and Ms Swinfield were, on their face, presented out of time. This issue is somewhat redundant, as we have found that there were no acts of discrimination on 22 September 2021 or at all.

231. Had we been required to do so, we would have found that the alleged discrimination in the meeting of 22 September 2021 and the meetings and events of January 2022 were part of a continuing act, given the temporal connection regarding the subject matter (the Claimant not wearing face mask) and Ms Swinfield's role role in what occurred in both September 2021 and January 2022.

232. On that basis, we would have found that the complaints arising from the meeting of 22 September 2021 would have been presented in time (since the last of the continuing acts occurred in time).

Unauthorised deduction from wages (holiday pay)

233. There were no unauthorised deductions from the Claimant's wages.

234. As found above, the Respondent included an element for holiday pay in the hourly rate paid to the Claimant and we found on balance that it had been paid to the Claimant throughout his working relationship with the Respondent.

235. As such, the complaint is not made out and is dismissed.

Unfair dismissal

236. The Claimant was a worker, not an employee. He therefore was not entitled to any protection against unfair dismissal. On that basis alone, his complaint of unfair dismissal is not well-founded and must be dismissed.

237. However, for sake of completeness and as we made findings on the issue, we set out below our conclusions of whether the Claimant was dismissed in any event.

238. As we have found, Dr Mackintosh did not tell the Claimant at the meeting on 12 January 2022 that he was dismissed. Instead, the Claimant was told that, subject to the outcome of the proposed OH referral, there would be no bookings beyond 3 February 2022 (which was subsequently extended to end of February 2022, which in itself was inconsistent with the Claimant's claim that he was told that he was being dismissed with effect from 3 February 2022). There was no finality in the decision to cease his bookings. It was temporary position, always contingent upon outcome of the OH referral.

239. As such, the Respondent did not dismiss the Claimant on 12 January 2022 or at all.

240. Indeed, by 18 January 2022, the Claimant was clearly aware that his working relationship with the Respondent was continuing (given the email exchange between Ms Swinfield and the Claimant, at [259] – [261] of the Bundle). If the Claimant had believed that he had been dismissed, he was mistaken and any misunderstanding had been removed by virtue of Ms Swinfield's email of 18 January 2022 (which she restated on 16 February, at [301] of the Bundle).

241. The Claimant pleaded in the alternative that if the Respondent did not dismiss him, then he resigned in response to fundamental breaches of his employment contract (paragraph 30 of the Amended Particulars of Claim, at [58] of the Bundle), by not presenting himself for work after 3 February 2022.

242. The difficulty with this proposition was that it was wholly at odds with what the Claimant was saying to the Respondent at the time. In his email to Ms Swinfield on 12 February 2022, the Claimant was categoric (at [302] of the Bundle):

> I have no doubt whatsoever that I was verbally dismissed by Dr Mackintosh acting for and on behalf of the [Respondent] on the 12th of January.

243. The Claimant maintained this belief even after Ms Swinfield had told him on 16 February 2022 that he had not been dismissed, responding on 20

February 2022 with the following re-statement of his belief (at [304] of the Bundle, emphasis added):

> In conclusion, I believe that there has been an irrevocable loss of trust secondary to your persistent hectoring regarding my exemption and evident refusal to recognise my medical condition consequently this renders any future employment by [the Respondent] under your watch untenable.
>
> Accordingly I maintain my position whereby I consider myself to have been dismissed by Dr Mackintosh on behalf of [the Respondent], effective from 3rd February.

244. As such, we concluded that, even on his own case at the time, the Claimant did not resign. He always maintained that he had been dismissed and never claimed at the time that he was tendering his resignation.

245. In effect, and in reality, what the Claimant did was refuse to accept any further offers of work from the Respondent, as he was entitled to in the absence of any obligation on him to do so and in the absence of any obligation on the Respondent to offer him any work.

Wrongful dismissal (notice pay)

246. The Claimant alleged that he was entitled to three months' notice (or payment in lieu). That was based upon the notice period contained within Clause 37 of the British Medical Association's '*Salaried GP model contract and model offer letter guidance'* at [492] of the Bundle ('the BMA model contract').

247. However, as explained above, the Claimant was not dismissed. There was no obligation on the Respondent to offer work to the Claimant. It was not suggested (nor were we taken to any evidence) that the parties agreed to be bound by the terms of the BMA model contract or any term as to notice periods (whether in writing or verbally).

248. At most, the BMA model contract was highlighted as the equivalent notice period afforded to salaried GPs, if we found that the Claimant was an employee.

249. In the absence of any contractual arrangement on notice, the reality of the relationship between the parties did not assist the Claimant. There was no requirement for the Respondent to give the Claimant any notice because the Respondent was under no obligation to offer work to the Claimant. In the same way, there was no requirement on the Claimant to give any notice to the Respondent as he was under no obligation to accept work or make himself available for work from the Respondent..

250. It follows that there was no contractual or other entitlement to notice, whether three months or otherwise and this complaint fails.

Failure to provide a written statement of particulars

251. The Respondent admits that it did not provide the Claimant with a written statement of particulars. However, at the time that the Claimant began working for the Respondent (April 2018), the duty on employers to provide a written statement of particulars under section 1 of the ERA 1996 only applied to employees.

252. The Claimant was a worker throughout the entirety of his working relationship with the Respondent. As such, there was no duty on the Respondent to provide him with a written statement of particulars.

253. When the law was changed with effect from 6 April 2020 and the duty under section 1 of the ERA 1996 was extended to workers, the change only applied to workers whose employment began on or after 6 April 2020. As such, the Claimant remained out of scope and the Respondent continued to be under no statutory duty.

254. As the Respondent was under no duty to provide written particulars of employment, there was no breach of duty arising from its failure to do so. On that basis, this complaint was not made out and is dismissed.

EMPLOYMENT JUDGE S POVEY

Dated: 10 November 2023

Order posted to the parties on 13 November 2023

For Secretary of the Tribunals Mr N Roche

ANNEX 1

List of Issues

Disability (s. 6 Equality Act 2020)

1. Did the Claimant have a mental impairment at the material time? The Claimant relies on depression.

2. If so, did the impairment have a substantial adverse effect on the Claimant's ability to carry out normal day-to-day activities?

3. If so, was that effect long-term?

Discrimination arising from disability (s. 15 Equality Act 2010)

4. Did the Respondent subject the Claimant to the following unfavourable treatment?

    4.1. In early September 2021, Anna Swinfield asking the Claimant if he was "genuinely exempt" from wearing a face mask.

    4.2. On 12 January 2022, Dr Martin Mackintosh told the Claimant that his employment would be terminated on 3 February 2022 if he did not wear a face mask in face-to-face consultations.

    4.3. As of 12 January 2022, the Claimant was prevented from carrying out face-to-face consultations with patients and required to have minimal contact with staff. (This was communicated to the Claimant by Anna Swinfield).

5. What was the "something" arising in consequence of the Claimant's disability? The Claimant relies on not feeling able to wear a face mask and being medically exempt from wearing a face mask.

6. Was the reason for the unfavourable treatment the "something" arising in consequence of the Claimant's disability?

7. Can the Respondent show that the unfavourable treatment was a proportionate means of achieving a legitimate aim? The Respondent relies on the following:

    7.1 The legitimate aim relied upon was the requirement to protect the health and safety of patients and colleagues in accordance with Welsh Government Guidance for health and care sector staff in place at the material time. The treatment was proportionate in order to achieve the said aim in the circumstances since many of

the patients with whom the Claimant would have close contact were vulnerable and the Respondent was under a duty to ensure that there was adherence to infection, prevention and control obligations whilst in the midst of a global pandemic.

8. Did the Respondent know, or could the Respondent be reasonably expected to know, that the Claimant had a disability?

Harassment related to disability (s. 26 Equality Act 2010)

9. Did the Respondent engage in the following conduct?

    9.1. In early September 2021, Anna Swinfield asking the Claimant if he was "genuinely exempt" from wearing a face mask.

    9.2. The Claimant was repeatedly asked to wear a face mask or provide evidence of his medical exemption despite the Respondent being aware that the reason he did not wear one was his disability. The Claimant relies on the following occasions:

        a) On 5 January 2022, Dr Martin Mackintosh (verbally) told the Claimant to wear a face mask.

        b) On 12 January 2022, Dr Martin Mackintosh (verbally) told the Claimant to wear a face mask and if he did not he was to be suspended from patient facing duties and would no longer be offered shifts with effect from 3rd February 2022.

        c) On 19 January 2022, Ms Swinfield (via email) told the Claimant that his medical exemption to mask-wearing would not apply to situations where he was seeing patients face-to-face.

    9.3. On 12 January 2022, Dr Martin Mackintosh told the Claimant that he would be suspended form face-to-face consultations and his employment would be terminated on 3 February 2022 if he did not wear a face mask in face-to- face consultations.

    9.4. As of 12 January 2022, the Claimant was prevented from carrying out face-to-face consultations with patients and required to have minimal contact with staff because he was not wearing a face mask at work. (This was communicated to the Claimant by Anna Swinfield).

10. Was the conduct unwanted?

11. Did the unwanted conduct relate to the protected characteristic of disability?

12. Did the conduct have the effect of violating the Claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for him?

    12.1. In considering whether the conduct had that effect, the Tribunal will take into account the Claimant's perception, the other circumstances of the case, and whether it is reasonable for the conduct to have that effect.

Failure to make reasonable adjustments (s. 20 and 21 Equality Act 2010)

13. Did the Respondent apply the following provision, criteria and/or practice ("PCP"): The requirement to wear a face mask at work.

14. Did the application of any such PCP put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled in that he felt unable to wear a face mask due to his disability.

15. Did the Respondent take such steps as were reasonable to avoid the disadvantage? The burden of proof does not lie with the Claimant however it is helpful to know the adjustments asserted as reasonably required and they are identified as follows:

    15.1. Allowing the Claimant not to wear a face mask during face-to-face consultations with patients as long as the patient had been notified that he would not be wearing a mask due to a medical exemption and the patient was comfortable with him not wearing a mask, and as long as the Claimant was vaccinated against Covid-19 and undertook daily lateral flow tests.

16. Did the Respondent know, or could the Respondent be reasonably expected to know, that the Claimant had a disability or was likely to be placed at the disadvantage set out above?

Employment status

17. Was the Claimant an 'employee' within the meaning set out in s. 230(1) of the Employment Rights Act 1996? The Respondent's position is that the Claimant was a worker within the meaning in s. 23(3)(b) ERA 1996 as he was a sessional ad hoc locum GP.

Unfair dismissal

18. Did the Claimant resign or was he dismissed? The Claimant says he was dismissed by Dr Mackintosh on 12 January 2022 with effect on 3 February 2022, and alternatively that he resigned on 3 February 2022 being his last day working for the Respondent.

19. If he was expressly dismissed:

19.1. Was there a "potentially fair" reason for dismissal? The Respondent relies upon "SOSR," namely "its health and safety obligations."

19.2. Was the decision to dismiss the Claimant fair, that is, was it within the range of reasonable responses open to a reasonable employer?

19.3. Did the Respondent adopt a fair procedure?

19.4. If the Respondent did not use a fair procedure, would the Claimant have been fairly dismissed in any event and/or to what extent and when? (Polkey)

20. If he resigned:

20.1. The Claimant claims that he resigned because of a fundamental breach of contract by the Respondent in respect of the implied term of mutual trust and confidence. The Claimant relies on the following individual breaches of the implied term of mutual trust and confidence, and/or, relies on the following course of conduct which taken cumulatively amounts to a breach of the implied term under the 'last straw' doctrine:

a) At a meeting in early September 2021, Anna Swinfield asked the Claimant whether he was "genuinely exempt" when he told her that he was exempt from wearing a face mask for medical reasons.

b) The Claimant was repeatedly asked to wear a face mask or provide evidence of his medical exemption despite the Respondent being aware that the reason he did not wear one was his disability. The Claimant relies on the following occasions:

i. On 5 January 2022, Dr Martin Mackintosh (verbally) told the Claimant to wear a face mask.

ii. On 12 January 2022, Dr Martin Mackintosh (verbally) told the Claimant to wear a face mask and if he did not he was to be suspended from patient facing duties and would no longer be offered shifts with effect from 3rd February 2022.

iii. On 19 January 2022, Ms Swinfield (via email) told the Claimant that his medical exemption to mask-wearing

would not apply to situations where he was seeing patients face-to-face.

c) On 12 January 2022, Dr Martin Mackintosh told the Claimant that that he would be suspended from face-to-face consultations and his employment would be terminated on 3 February 2022 if he did not wear a face mask in face-to-face consultations.

d) As of 18 January 2022, the Claimant was prevented from carrying out face-to-face consultations with patients and required to have minimal contact with staff because he was not wearing a face mask at work. (This was communicated to the Claimant by Anna Swinfield).

20.2. Did the Claimant resign because of the breach?

20.3. Did the Claimant affirm the contract?

20.4. In the event that there was a constructive dismissal was it otherwise fair within the meaning of s. 98(4) ERA 1996?

Jurisdiction (discrimination claims brought under the Equality Act 2010)

21. Were all of the Claimant's complaints presented within the time limits set out in s. 123(1)(a) and (b) EqA 2010? Dealing with this issue may involve consideration of subsidiary issues including: whether there was an act and/or conduct extending over a period; whether the time limit should be extended on a "just and equitable" basis; when the treatment complained about occurred?

Wrongful dismissal (notice pay)

22. To how much notice was the Claimant entitled? The Claimant says he was entitled to 3 months' notice.

Failure to provide a written statement of particulars

23. The Respondent admits that it did not provide the Claimant with a written statement of particulars. Was the Clamant entitled to a written statement of particulars under s. 1 of the Employment Rights Act 1996?

Unlawful deduction from wages (holiday pay)

24. Did the Respondent fail to pay the Claimant holiday pay throughout his employment/engagement? The Claimant will say that he never received Holiday Pay from the Respondent. The Respondent will say that it paid the Claimant Holiday Pay as a separate sum on his payslips.

25. If the Respondent failed to pay the Claimant holiday pay, how much is he owed?

26. Can the Respondent ‘set off’ any entitlement with sums already paid?