EMPLOYMENT TRIBUNALS

Claimant: Mrs L B Hayes

Respondent: Equilibrium Healthcare Limited

Heard at: Manchester **On:** 6 and 7 June 2023
6 and 7 December 2023

Before: Employment Judge Cookson
Ms L Atkinson
Ms C Titherington

REPRESENTATION:

Claimant: Mr Green of Counsel
Respondent: Mr Williams of Counsel

RESERVED JUDGMENT

It is the unanimous decision of the Tribunal that:

1. The complaint of unfair dismissal is not well-founded. The claimant was fairly dismissed.

2. The complaint of unfavourable treatment because of something arising in consequence of disability in accordance with s15 of the Equality Act 2010 ("EqA") is not well-founded and is dismissed.

3. The complaint of indirect discrimination in accordance with s19 EqA on the grounds of religion or philosophical belief is not well-founded and is dismissed.

REASONS

Introduction

1. The claimant in this case, Mrs Lorraine Bernadette Hayes, referred to as "the claimant" throughout, was employed by the respondent as a Registered Nurse at the respondent's care home. She was employed from 10 July 2018 until 10

November 2021. Following early conciliation between 2 December 2021 and 8 December 2021 the claimant lodged a claim on 14 December 2021 bringing claims that she had been unfairly dismissed, discriminated against because of something arising from her disability and that she had been subject to indirect discrimination because of a philosophical belief, that is a belief in "my body, my choice".

2. This case concerns the regulations introduced in the summer of 2021 requiring care home staff to be vaccinated against the coronavirus which causes covid-19. The claimant refused to be vaccinated and was dismissed as a result. The respondent says that it required the claimant to be vaccinated in light of that legislation and taking into account CQC guidance about how it should be applied, that it warned the claimant about the requirements, gave her the opportunity to change her mind and offered her redeployment when she refused to be vaccinated, and that in the circumstances it had no alternative but to terminate her employment.

The Issues and background to this hearing

3. The issues which we had to determine in this case were initially set out by Employment Judge Dunlop in the Annex to the Case Management Summary and Orders from the hearing on 12 September 2022 as subsequently amended, refined and agreed by counsel.

4. The respondent has not contested that the claimant is disabled by a number of physical conditions including stenosis of the spine lumbar 4 and 5 with a bulging disc, osteoarthritis of both knees, type 2 diabetes, underactive thyroid (hypothyroidism) and macular vein occlusion in the claimant's left eye. Knowledge of disability at the relevant time was contested.

5. The claimant says that because of her disabilities and, in particular, the macular vein occlusion, she had reasonable and significant concerns about receiving the covid vaccine and that was something arising in consequence of her disability.

6. The claimant also says that requiring her to be vaccinated was a provision criteria or practice which put her and others who share are belief in "my body, my choice" to substantial disadvantage and that is a protected belief. The respondent disputed the claimant had a protected philosophical belief.

7. In relation to both complaints of discrimination the respondent claims that it has a defence – that it had a legitimate aim that is to comply with statutory obligations and that it had acted proportionately.

8. This case was originally listed for a three-day final hearing on 6, 7 and 8 June 2023. Unfortunately, the Employment Judge became unwell during the course of 7 June forcing the final day of the final hearing to be postponed. Then, in light of the availability of the Employment Tribunal and the respective counsel in this case it was not possible to re-list the hearing until 6 and 7 December 2023. Submissions were received from counsel on 6 December after the panel had taken the benefit of some time to re-read documents and notes from the June hearing. The panel then took time to deliberate. Recognising the significant passage of time since we had received evidence in this case, we took care to review our notes of evidence and the documents, and it was in recognition of the fact that our deliberations were

likely to take longer than usual which led to our decision to reserve our judgment in this case.

Evidence

9. In reaching our judgment the Tribunal considered:

   9.1. A joint bundle of documents which ran to 543 pages;

   9.2. The evidence in witness statements and given orally by the claimant and by her witnesses Mrs Woodall, Ms Oatway and Ms Lewis;

   9.3. The evidence in witness statements and given orally for the respondent by Helen Alexander and Lisa Clayton;

   9.4. Written and oral submissions from both counsel on the question of liability.

The Relevant Law

Unfair dismissal

10. Section 94 of the Employment Rights Act 1996 confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the Tribunal under section 111. The employee must show that she was dismissed by the respondent under section 95, but in this case the respondent admits that it dismissed the claimant on 10 November 2021.

11. Section 98 of the 1996 Act deals with the fairness of dismissals. There are two stages within section 98. First the employer must show that it had a potentially fair reason for dismissal within section 98(2). Second, if the respondent shows that it had a potentially fair reason for the dismissal, the tribunal must consider whether the respondent acted fairly or unfairly in dismissing for that reason.

12. The respondent relies on two potentially fair reasons for dismissal:

   12.1. Section 98 (2) (d) .. that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment, and

   12.2. S98(1)(b) which provides that if a reason is not one which falls within s98(2), the reason for dismissal may be fair if it is “some other substantial reason of a kind such as to justify the dismissal of an employee holding the position”.

13. Section 98(4) then deals with fairness generally and provides that the determination of the question whether the dismissal was fair or unfair, (having regard to the reason shown by the employer) shall depend on whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and shall be determined in accordance with equity and the substantial merits of the case.

"Statutory ban" dismissals

14. The potentially fair reason in s98(2)(d) is referred to in this judgment as "statutory ban reason" for ease. It is for the employer to show that there is a statutory prohibition which makes it impossible for the employee to continue in the same job. As with the other reasons in s98(2), even if that reason is shown, the tribunal must still consider whether the employer acted reasonably in dismissing under S.98(4). In such cases this will often involve considering if the employer could have changed the employee's job so that it could be done legally and if so examining if the employer's reasons for not doing that are reasonable.

15. To establish this potentially fair reason, the employer must show that continued employment of the employee does in fact contravene a statutory enactment. It is not enough to show that the employer had a genuine belief that a statutory ban applies on reasonable grounds and after reasonable investigation that there would be such a contravention.

16. A genuine belief, reached on reasonable grounds and after reasonable investigation, that an employee's continued employment would be unlawful may amount to 'some other substantial reason' (SOSR) for dismissal under S.98(1)(b) (*Bouchaala v Trusthouse Forte Hotels Ltd* 1980 ICR 721, EAT). This is how the respondent in this case argues, in the alternative, that the claimant's dismissal was fair.

17. In terms of fairness under s98(4), a tribunal must then decide whether it was reasonable to dismiss for the respondent's reason(s) under S.98(4) ERA. This will involve consideration of such matters as the likely duration of the ban (if relevant), whether it affects the whole or only part of the employee's work, and whether the employee can readily be retrained or redeployed.

18. Furthermore, the employer should adopt a fair dismissal procedure and give the employee a proper opportunity to be heard. The ACAS Code of Practice on Disciplinary and Grievance Procedures will be taken into account if the reason for dismissal is related to conduct or capability.

The relevant statutory enactment

19. The statutory enactment relied on by the respondent is The Health and Social Care Act 2008 (Regulated Activities) (Amendment) (Coronavirus) Regulations 2021[1] (the Regulations). The Regulations applied in England only and were made on 22 July 2021, coming into force 16 weeks later on 11 November 2021. They have since been repealed but that was after the claimant's dismissal and appeal.

20. The regulations provided as follows at regulation 5:

    5. In regulation 12, after paragraph (2), insert—

    "(3) For the purposes of paragraph (2)(h), a registered person ("A") in respect of a regulated activity specified in paragraph 2 of Schedule 1 (accommodation for

[1] These regulations amend The Health and Social Care Act 2008 (Regulated Activities) Regulations 2014

persons who require nursing or personal care) in a care home must secure that a person ("B") does not enter the premises used by A unless—

…

(b) B has provided A with evidence that satisfies A that either—

(i)B has been vaccinated with the complete course of doses of an authorised vaccine; or

(ii)that for clinical reasons B should not be vaccinated with any authorised vaccine;

…

Disability Discrimination

"Discrimination arising from disability"[2]

21. Discrimination arising from disability – s15 EqA

(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 a disability.

22. Section 15 EqA addresses the need to protect disabled people against discrimination arising from or inconsequence of the disability, rather than the discrimination occurring because of the disability itself (which is covered under direct discrimination). The term "unfavourably" rather than the usual discrimination term of "less favourably" means that no comparator is required for this form of alleged discrimination.

23. Employers are only liable in a claim of discrimination arising from disability if they did not know and could not reasonably have been expected to know that the claimant had a disability – S.15(2) EqA. There is no statutory duty on them to make enquiries, but an employer cannot close its eyes to disability or ignore evidence of disability. The EHRC Employment Code states that an employer must do all it can reasonably be expected to do to find out whether a person has a disability (see para 5.15). It suggests that *'[e]mployers should consider whether a worker has a disability even where one has not been formally disclosed, as, for example, not all workers who meet the definition of disability may think of themselves as a "disabled person*"' – para 5.14. Knowledge of a disability held by an employer's agent or employee, such as an occupational health adviser, personnel officer or recruitment agent, will usually be imputed to the employer (see para 5.17).

[2] To adopt the heading in the EqA itself

24. The burden on a claimant to establish causation under s15 reflects the general burden of proof in discrimination claims, set out s136 of the EqA.

    S136 Burden of proof

    (1)This section applies to any proceedings relating to a contravention of this Act.

    (2)If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

25. It will be sufficient for the claimant to show facts from which the tribunal could reasonably conclude that there is some causal link, and that the unfavourable treatment has been caused by an outcome or consequence of the disability. The employer's motivation is irrelevant. s15 EqA requires unfavourable treatment to be because of something arising in consequence of the disabled person's disability. If the something is an effective cause – an influence or cause that operated on the mind of the alleged discriminator to a sufficient extent (whether consciously or unconsciously), the causal test will be satisfied.

26. There is guidance for tribunals about how to approach s15 claims in the case of ***Pnaiser v NHS England and anor*** 2016 IRLR 170, EAT. Mrs Justice Simler summarised the proper approach to establishing causation under S.15 is as follows:

    26.1. First, we must identify whether the claimant was treated unfavourably and by whom.

    26.2. Next we must determine what caused that treatment — focusing on the reason in the mind of the alleged discriminator, possibly requiring examination of the conscious or unconscious thought processes of that person but keeping in mind that the actual motive of the alleged discriminator in acting as he or she did is irrelevant.

    26.3. We must then establish whether the reason was 'something arising in consequence of the claimant's disability,' which could describe a range of causal links. This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

27. Unfavourable treatment because of something arising in consequence of disability is capable of justification by an employer, unlike direct discrimination. The employer must show that it has a legitimate aim and that the treatment in question was a proportionate means of achieving that aim. The involves the tribunal engaging in an objective assessment, balancing the needs of the employer, as represented by the legitimate aims pursued, against the discriminatory effect of the unfavourable treatment, for example the decision to dismiss.

Philosophical belief discrimination

28. S.10 EqA protects two broad categories of belief: religion and religious belief on the one hand, and philosophical belief on the other. It is the latter we were concerned with in this case. Philosophical belief is not defined more precisely in

the legislation and it is no longer required to be "similar" to a religious belief as it was under the Employment Equality (Religion or Belief) Regulations 2003.

29. The leading case on the definition of a 'philosophical belief' is ***Grainger plc and ors v Nicholson*** 2010 ICR 360, EAT, a case concerning the belief that human beings all come under a moral duty to lead a life that could help to mitigate or avoid catastrophic climate change. The EAT held that this was capable of constituting a protected 'philosophical belief' under what is now S.10 EqA. In his judgment, Mr Justice Burton drew on case law decided under Article 9 of the European Convention on Human Rights to identify the basic criteria that must be met in order for a belief to be protected under S.10 EqA.

30. A belief can only qualify for protection if it:

    30.1. is genuinely held

    30.2. is not simply an opinion or viewpoint based on the present state of information available

    30.3. concerns a weighty and substantial aspect of human life and behaviour

    30.4. attains a certain level of cogency, seriousness, cohesion and importance, and

    30.5. is worthy of respect in a democratic society, is not incompatible with human dignity, and is not in conflict with the fundamental rights of others.

31. These criteria are now set in the Equality and Human Rights Commission's (EHRC) Code of Practice on Employment (January 2011) ('the EHRC Employment Code') as official guidance on what comprises a philosophical belief for the purposes of the protected characteristic of religion or belief.

32. In **Forstater v CGD Europe and ors** 2022 ICR 1, EAT, a case concerning "gender critical" beliefs, it was emphasised it is not for tribunals to adjudicate on the merits and validity of the belief itself. We must remain neutral and abide by the cardinal principle that everyone is entitled to believe whatever they wish, subject only to a few modest, minimum requirements.

33. Given that the majority of people subscribe to similar rules of social conduct, beliefs founded on generalised notions of morality and ethics may not qualify for protection, and tribunals must dismiss claims where the claimant is insufficiently clear and precise about the content of his or her belief.

Indirect Discrimination s19 EqA

34. Section 19 Equality Act 19 provides

    (1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's *[the list of relevant protected characteristics includes philosophical belief]*.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

Our Findings of Fact

35. We made our findings of fact in this case on the basis of the material before us taking into account contemporaneous documents where relevant. We resolved conflicts of evidence on the balance of probabilities and taking into account our assessment of the credibility of witnesses and the consistency of their evidence. We have not made findings of fact about every contested matter of evidence before us, but only those which we considered to be relevant and necessary for us to determine the legal claims.

36. The respondent in this case is a healthcare provider within the Greater Manchester area which operates three care homes, a supported living service and an independent hospital. It employs around 350 employees. The claimant worked as a registered mental health nurse at one of the care homes. The respondent provides care for adults under the age of 65 with mental health conditions and is regulated by the Care Quality Commission ("CQC").

37. No criticism of the claimant's conduct or capability has been made in the course of these legal proceedings. The claimant was clearly well thought of as a nurse.

38. In June 2021, the then Secretary of State for Health, Matt Hancock, announced that it was to become compulsory for staff in care homes to have the covid vaccine. The respondent highlighted the announcement to its staff and encouraged care workers to take the vaccine. The respondent was liaising with Manchester City Council as the proposals were formulated into legislation. In July 2021 the UK Government laid the statutory instrument before Parliament. The requirement for vaccination applied from 11 November 2021.

39. On 11 August 2021 the claimant had a discussion with her line manager about her vaccination status. We have her notes of the meeting. The claimant was warned that if she did not have the vaccination she would be dismissed. At that time, the claimant told her manager that she thought that she should not be forced to have the covid vaccine to stay in her job. The claimant expressed the view that the vaccination was a trial vaccination "at best" and she raised concerns about other adverse effects from the vaccine and its efficacy. She did not refer to a philosophical belief in "my body my choice" or bodily autonomy as such as the reason for her objection, but she did say she was not prepared to take an intervention that "was a trial" and she did not need and that this was a breach of

her human rights. Her reasons could best be described as what is commonly called vaccine hesitancy.

40. The claimant told us that on or around 4 September 2021 she had a telephone consultation with her GP. The claimant asked her GP if she could obtain a medical exemption from the vaccine, and she told us that he had told her that told her that he was not allowed to issue one. She did not go back to her GP to check the position when the process for obtaining a medical exemption certificate was announced.

41. On 2 September 2021 the claimant submitted a formal grievance to Ms Alexander, the respondent's HR director by email. It raises 5 grounds of grievance – that the Regulations requiring vaccination are invalid because they go beyond the powers of Parliament, that the registered person may be guilty of the criminal offence of intimidation under the Trade Union and Labour Relations (Consolidation) Act, that the registered person has failed to perform a risk assessment and there is in breach of health and safety obligations for both employees and others and that the registered person must include in the vaccine risk assessment evidence that the virus has been isolated.

42. On 5 October 2021 the claimant raised a further grievance with Ms Alexander again by email. The cover email is dated 5 October although somewhat confusing the grievance document itself shows the date of 6 October, but the email sent on 5 October shows an attachment called "Lorraine grievance 21.9.21". Despite this confusion there appears to be no dispute that it is the document dated 6 October which was attached which raised the following issues:

    42.1. that requiring the claimant to have a vaccination is a unilateral change to her contract of employment;

    42.2. that the employer has failed to comply with the requirements of the Health and Safety at Work Act 1974;

    42.3. that the claimant doubts the efficacy of the vaccination on the basis that the covid vaccine did not stop individuals catching or transmitting the virus; and

    42.4. that requiring the claimant to have the vaccine would be a breach of her human rights and employment rights, including a suggestion that requiring her to have the vaccine may mean the employer was committing a criminal offence.

43. On 5 October 2021 the claimant also sent her employer a document which purports to be certificate of clinical exemption from vaccination prepared by the Workers of England, Scotland and Wales Unions. It is signed by a Regional Coordinator, although it is impossible to know from the signature which particular trade union official signed the document. The certificate states that the claimant has provided a statement of truth to the union on 24 September 2021 confirming that she is exempt from requiring vaccination and stating that the certificate satisfies the requirements of regulation 12(3)(b) of the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014. It says that the reasons for clinical exemption are private and medical and that these are confidential and protected

under Data Protection Act 2018 and goes on to assert *"Hindering the person named in this certificate or treating this person in any way less favourably than any other person may be found to be discrimination under regulation 6 of the Equality Act 2010. Personal liability for compensation from a breach of the Equality Act 2010 is up to £5,000 and corporate £9,000*".

44. Coincidentally on 5 October 2021 the department at Manchester City Council dealing with care homes and the covid vaccine, emailed some guidance in relation to how to apply for a covid medical exemption to various interested organisations. The circulation list including the director of adult services at the respondent.

45. The guidance explained that to obtain medical exemption it was necessary to phone a particular NHS number and ask for an exemption application form. Information would be obtained by the call handler and then an application sent through the post. The form says this: *"You should not ask your GP for an application form. If you do go to your GP before you get your application form you will be asked to call the NHS Covid Pass Service on 119."*

46. The guidance goes on to explain that the application form is then processed by the GP and will be clinically reviewed and the person applying should receive the results of their application by post. If eligible they would receive a medical exemption. Shortly after the respondent received the information from Manchester City Council which was forwarded on to staff, including the claimant.

47. The claimant acknowledged that she had received the email but said she had "*not read all of it".* The Employment Tribunal concluded that by this stage the claimant believed she should be treated as exempt from the vaccine on the basis of the exemption certificate she had been provided with by her trade union so did not feel the need to find out about the NHS process.

48. On 6 October 2021 there was a meeting to discuss the claimant's grievance attended by Nicky Vaughan, the director of adult services, Ms Alexander, the claimant and her trade union representative, Tim O'Brien. At the hearing concerns were raised about the pressure it was said the claimant was being subjected to in relation to the vaccine, the claimant explained her health conditions and expressed her concerns about the impact of the vaccine might have on those and reported that her GP had told the claimant that he could not give medical exemptions. Ms Vaughan reminded the claimant about the information circulated the day before about the process for applying for exemption. The claimant also said that she felt discriminated against compared to NHS staff.

49. On 11 October 2021 there was a meeting between the claimant, Nicky Vaughan and Shere Bruce (Clinical Lead of the respondent). This was described as an informal discussion about the vaccination. The notes record that Ms Vaughan explained that the decision to impose the vaccination was not the company's choice, but it had to follow the legislation. The claimant informed the company that she did not have a medical exemption, but she did not wish to receive the vaccine, and she also told the company that she did not want to work at Jigsaw (the respondent's hospital which would not be subject to the requirement to have a vaccination) due to her personal health and the physical demands of working in that environment.

50. On 13 October 2021 the company wrote to the claimant. This does not appear to be a response to the 6 October grievance, although it attaches minutes for the meeting.

51. The letter notes that the claimant had informed the respondent that she had made the personal decision not to have the vaccination and that she did not anticipate being medically exempt. It records that it had been discussed that due to the change in legislation the claimant would be unable to continue work in her current role after 11 November 2021, the date when the legislation was to come into effect. The letter also explained that the respondent would look at redeployment as the first option, but if there were no redeployment options it may be necessary to terminate the claimant's employment. It identified possible redeployment to Jigsaw Hospital and invited the claimant to a further meeting.

52. The claimant responded to the invite on 14 October 2021. She pointed out the confusion in the process and that the minutes related to an earlier meeting. She also expressed concerns about the accuracy of the minutes and that the company were treating the grievance and vaccination/termination issues as separate, but the correspondence suggested the matter had already been decided. The claimant also makes clear that she did not consider the possible redeployment to Jigsaw to be suitable.

53. The claimant was invited to a further meeting on 19 October 2021. The invitation letter warned her that in the absence of possible suitable alternative employment and without a medical exemption or being vaccinated the claimant might face dismissal.

54. On 22 October 2021 the claimant wrote to Ms Alexander to raise a formal grievance objecting to the respondent's refusal to accept the union exemption certificate. In that letter the claimant objected to the respondent insisting that she comply with the Government exemption process on the basis that that was not a legal requirement and asserting that her certificate satisfied statutory requirements.

55. There was a meeting on 29 October 2021 between the claimant, Ms Vaughan, Ms Alexander and Mr O'Brien from the trade union. The confusion of the grievance and the process regarding the vaccine was acknowledged. In terms of the substance of the meeting, the claimant was told that although she had submitted a union exemption form, the respondent was seeking guidance but had the view that it could only accept the Government exemption form. The claimant expressed the view again that she felt the current situation was not fair. The claimant told the respondent that she had never said that she would not have the vaccine, just that she felt it was not right for her in light of her health. She was encouraged to reconsider her decision about redeployment, perhaps even on a temporary basis, but the claimant explained that she did not feel that Jigsaw was somewhere she would be able to work in light of differences with the client group being treated there.

56. The managers explained that if the claimant did not provide the company with a medical exemption from the Government the company considered that it would be in breach of the statutory requirements regarding the mandatory vaccine legislation

but emphasised that if she does not fall into the category of the exemption they would welcome and encourage her to consider redeployment.

57. Ms Alexander sent the claimant a letter on 2 November following that meeting. The letter confirmed that due to the pending change in legislation the company was required to comply with legal requirements, and it would be in breach of a statutory requirement if it continued to employ the claimant after 11 November 2021 because the claimant had informed the respondent that she did not wish to receive the vaccination for personal reasons relating to her health.

58. The letter acknowledged that the claimant had submitted an exemption form supplied by the trade union, but the company had the view that it could only accept standard Government exemptions and emphasised that the claimant had been encouraged to submit that form if she felt she met the criteria of the Government guidance for exemption. The letter also confirmed the position in relation to redeployment, which is that that was available as an option, but the claimant did not consider that this would be suitable for her.

59. The letter then explained that in the circumstances the respondent had no alternative but to dismiss the claimant from employment and that her final day of employment would be 10 November 2021, the letter then set out the sums that the claimant will be paid and explained her right of appeal.

60. A formal response to the claimant's grievances were sent to the claimant on 5 November 2021. That letter acknowledged the claimant's personal circumstances and how difficult she was finding the situation but explained that in the respondent's view it would be committing a statutory and regulatory breach if it did not comply with the pending change in legislation. For that reason, the grievance was not upheld.

61. The claimant appealed against her dismissal on 6 November 2021. The grounds for appeal are similar to the grievance in that the claimant asserted that the company had no right to mandate a vaccine and made various allegations about breaching human rights and other legislation. The claimant also objected to the refusal by the company to accept the trade union certificate and says that the refusal to accept "my self-declared medical exemption" was in breach of her rights under the Equality Act 2010.

62. The appeal hearing was held on 13 January 2022. The claimant's appeal was considered by Clinical and Commissioning Director. At that hearing the claimant confirmed that she had never tried to obtain a Government exemption from vaccination, and she said this: *"I didn't do it because the union had already given me their exemption and I followed that and went through their questionnaire and submitted that one, but I was only made aware of the Government exemption after I submitted the union one, which is a legal document which has been recognised by CQC and the Government*."

63. The claimant was sent an outcome on 21 January 2022. The outcome letter is detailed, which addressed each specific ground of appeal in turn. The appeal upheld dismissal.

64. In the course of the appeal hearing the trade union representative draw Lisa Clayton's attention to CQC guidance which made been made available in November and we were provided with a letter setting out their position.

65. The letter from the CQC says this:

"On 15 September 2021, the Department of Health and Social Care ("DHSC") announced a temporary self-certification process that people could use if they believed they were medically exempt from the covid-19 vaccination as a condition of redeployment duty or had already been vaccinated abroad. This self-certification process was put in place while the new, formal process was being developed.

The formal process for having a medical exemption agreed or declined went live on 1 October 2021 and details the steps people must follow to evidence their exemption, if it was agreed. People can still use self-certification or exemption whilst they wait for a decision, however, if their exemption is declined they have until 24 December 2021 to be fully vaccinated or to make other arrangements with their employer.

The criteria for medical exemption is based on advice from the Joint Committee of Vaccination and Immunisation ("JCVI") and the Green Book, alongside wider consultation with senior clinicians. Examples include, but are not limited to, people with medical conditions including those who cannot have any of the vaccinations because of severe allergies to them or their ingredients and people who have had an adverse reaction to their first dose, such as myocarditis. The exemption also includes people with a learning disability or autistic people who find vaccinations distressing because of their conditions, alongside people who are receiving end of life care where vaccination would not be in the individual's best interest. There are also some time limited exemptions available to people with certain short-term conditions and pregnancy. Personal choice to not have the covid-19 vaccination is not considered an exemption.

Although there is no legal requirement for care workers to only use the letters and forms provided on the DHSC website, it remains the most straightforward way of providing evidence of temporary self-certification of exemption. If however people use alternatives, such as those issued by the Workers of England, Scotland and Wales Union, it should be noted that it will only be applicable until 24 December 2021, unless they apply and receive confirmation of formal medical exemption through the Government process.

It is the responsibility of the registered person (or those acting on behalf of the registered person) at the care home to satisfy themselves of the identity of the person entering the care home and their proof of vaccination or exemption status. The DHSC operational guidance provides further information for employers and staff members around the duty.

Anyone who believes they are medically exempt should follow the agreed process set out on the DHSC website as soon as possible."

66. Our attention was also drawn to a Government letter "Vaccination as a condition of redeployment, extension to self-certification cut-off," which was sent to Local

Authority Chief Executives, Directors of Adult Social Care Services, Adult Social Care Providers and Agencies on 8 December 2021. The letter explained that the Government had introduced a formal process to enable people to apply for proof of medical exemption. Before that formal process was launched staff were able to self-certify that they met the medical exemption criteria. The letter explained that the Government had extended the cut-off date for self-certification to anyone who has registered a self-certification before 24 December 2021. It stated that self-certification forms would continue to be valid until 31 March 2022 as long as they have been received before 24 December 2021.

67. The letter explained that the reason for this extension is that the Government was aware that some people who had applied for a formal exemption had experienced a delay in the outcome to their application being notified, and extending the period of self-certification was to allow sufficient time for individuals whose formal exemption was unsuccessful, to be fully vaccinated before 31 March 2022. The letter stated that everyone who self-certified as exempt from vaccination before 24 December 2021 would have until 31 March 2022 to secure formal proof of their medical exemption status.

68. The Tribunal had no evidence before us to explain the legal status of this letter and the statements made in it. It was not suggested that the Regulations had been revoked or amended by that stage or by the time the claimant's appeal was heard.

Submissions

69. We received both written and oral submissions from both counsel. We have not sought to summarise those here but instead refer to the arguments put to us, in brief terms, in explaining our decision below.

Discussion and conclusions

The unfair dismissal complaint

70. In terms of how we should apply the principles of fairness in terms of a "statutory ban" under s98(2)(d) (see above on terms of the law), we accept the claimant's submission that the employer must show that continued employment of the employee does in fact contravene a statutory enactment. Unsurprisingly both counsel emphasised that we must approach the issue of fairness in two stages, looking first at the reason and then at the respondent's response to the reason.

71. Mr Williams for the respondent suggested that we should readily find the respondent had a fair reason with s98(2)(d) in light of the legislation and argued that the focus of our considerations should be on the second stage in terms of fairness of the response to the reason. On the basis of the evidence of Ms Alexander we accept that this certificate did not satisfy her, as a matter of fact, that the claimant had clinical reasons not to be vaccinated. If we accept Mr Williams' arguments our consideration of the respondent's reason would end there.

72. However, we accepted that the test is whether, objectively, continued employment contravened a statutory enactment. This meant it was not relevant to consider what was in Ms Alexander's mind, but whether the respondent had shown that the

continued employment of the claimant past 10 November 2021 would breach the relevant provision in the Regulations.

73. Mr Green argued that the respondent had failed to properly apply the Regulations and had improperly insisted that the NHS exemption from process be used which was described as "the government recommended approach." He suggests there was a lack of clarity around the respondent's policy and decision making. He argued that because the respondent had misunderstood the Regulations and that as self-certification was acceptable, as confirmed by the CQC, the respondent could not argue its reason falls within s98(2)(d).

74. The provision in the Regulations we had to consider in this case in relation to vaccination is referred to in the section on the law above. It is fair to say the wording is perhaps rather unusual and we have not been referred to any authorities about how we should interpret those particular provision. What is curious is that notwithstanding the government and CQC guidance about self-certification which we were taken to, the issue of self-certification simply does not feature in the legislation. On the face of the statutory wording there is a prohibition on employment if the employer, as a simple matter of fact, is not satisfied with the evidence presented by the employee. That appears to give the employers a very broad discretion to decide if the statutory ban applied or not and whether or not to accept any self-certification, although we consider that in assessing the exercise of that discretion we should apply a test of *Wednesbury unreasonableness*, in other words the employer's discretion would be improperly exercised if no reasonable employer could have exercised the discretion in that way.

75. None of the guidance that was issued by the Government, Manchester City Council, and the CQC appears to have any statutory status. We accepted Mr Green's arguments that the respondent had misrepresented the legislative position to the claimant. Indeed, it seemed likely it had been rather misunderstood by Ms Alexander. Staff including the claimant were told that the respondent *could* only accept NHS exemption certificates and plainly that is not what the legislation says. The respondent had a broader discretion than that to exercise if it chose.

76. Mr Green also argued that self-certification was allowed until 31 March 2022 and the claimant had done what was required by self-certifying through her trade union certificate. She had provided medical reasons for not being vaccinated and therefore had complied with the legislation. In essence Mr Green argued that because the claimant had done that, the respondent's reason for dismissal because of statutory enactment cannot be relied upon.

77. In oral submissions Mr Williams described the issue of the self-certificate as something of a red herring. However, given the importance the respondent itself placed on the issue of self-certification we do not accept that is right – we could not simply disregard what was said to the claimant about this issue. It is relevant to how the respondent exercised its discretion under the legislation.

78. The claimant relied in her arguments on the letter from the CQC. However we accepted the evidence of Ms Clayton in particular, that this letter does no more than confirm that care homes could choose, if they wished, to rely on a trade union or individual "self-certificate" without potentially being subject to criticism from the

CQC that in doing so they had failed to act appropriately in light of the statutory obligation. We found that Ms Clayton's evidence was consistent with the wording of the Regulations. The statutory obligation is on the employer to be "satisfied of the employee's clinical reasons" for not having the vaccine. We accept Mr Williams'' submission that insisting on the NHS self-certification process was not simply an insistence on a particular form being completed. The NHS self-certification process meant that the respondent had an assurance that an assessment by someone with appropriate medical qualifications would follow in due course if applicable, which would enable the respondent to be satisfied of the clinical reasons for not having the vaccine.

79. In light of the broad discretion given to the respondent under Regulations, we could not accept Mr Green's argument that because the respondent had limited itself to only accepting the NHS self-certificate it could not rely on the statutory ban justification. We accept that the respondent was entitled to conclude that the only self-certificate evidence that would satisfy it was the NHS certificate, because that would be backed by a clinical opinion, in due course. We do not accept that this is so unreasonable no reasonable employer would adopt that approach.

80. Mr Green argued that the claimant had provided medical information to the respondent in the meetings about the vaccination and her concerns and therefore she had complied with the need to provide clinical reasons for not being vaccinated. However, if individuals who did not want the vaccine could simply self-certify that they had a medical reason and should be exempt, the Regulations would essentially become a nullity. The Regulations require that it is the employer who must be satisfied of the employee's clinical reasons not to be vaccinated.

81. The claimant had not only declined to apply for an NHS exemption certificate, the wording of the trade union certificate appeared to the panel to suggest that the employer could not seek further information.

82. We concluded that the respondent acted reasonably within the statutory discretion when it concluded that the claimant had not satisfied it that she had clinical reasons not to be vaccinated. Indeed, the claimant herself accepted in cross examination that she was not clinically exempt from having the vaccine. That meant it would be unlawful for the employer to continue employment beyond 11 November 2021. In other words the respondent had shown that the reason for the claimant's dismissal was that it would contravene The Health and Social Care Act 2008 (Regulated Activities) (Amendment) (Coronavirus) Regulations 2021 for the claimant to continue to work in her position as a registered nurse in a regulated care home after 11 November 2021 because the claimant had not satisfied that the respondent that there were clinical reasons why she should not be vaccinated against covid 19.

83. It was also a curious feature of this case that although the statutory prohibition applied from 11 November 2021, employers were told they could accept self-certification until 31 March 2022. There was no suggestion to us that Regulations were amended to reflect this (or at least not at the relevant time) and therefore we accept that the position under "the statutory enactment" was as set out on the face of the Regulations at the time the claimant was dismissed.

Some other substantial reason

84. Although we found that the respondent had shown that s98(2)(d) had been engaged, in light the somewhat unusual circumstances surrounding the statutory provisions, we went on to consider in the alternative whether the respondent had shown it had some other substantial reason for dismissal.

85. Relying on the issues referred to above, we accept that in light of the statutory wording requiring clinical reasons for someone not being vaccinated, the respondent had a reasonable belief that the claimant had not produced any evidence that satisfied it that she had clinical reasons that she should be exemption from receiving the covid vaccine. The respondent reasonably believed it was obliged to ensure its staff were vaccinated from 11 November 2021 unless there was a medical reason for them not to be.

86. We did not accept that the document prepared by a trade union asserting that there are clinical reasons why someone should not have the vaccine without any explanation either as to what those clinical reasons or on what basis the person preparing that certificate is able to assess a "clinical reasons", can reasonably be rejected as not amounting to evidence of a clinical reason.

87. Accordingly, we found that the employer had a some other substantially fair reason for dismissal.

The question of fairness

88. We asked ourselves if the respondent had approached the reason for why whether the claimant's vaccination status meant she had to be dismissed in a reasonable way.

89. In cases of a statutory enactment, if an employer has concluded that it is unlawful to continue employment there may be few alternatives to dismissal and although employer must still act fairly, we accept that we have to recognise the difficulty an employer if believes it must end employment by law (whether objectively in term of the legislation or because the employer reasonably believes that this the effect of the legislation as an SOSR).

90. We considered that the issue of self-certification was primarily relevant to the issue of the reason. If the self-certificate should have satisfied the respondent that the claimant had clinical reasons not to be vaccinated the respondent could not have a reason under s98(2)(d) to fairly dismiss or some substantial reason because it reasonably believed the claimant did not fall with the vaccination exemption.

91. However, in terms of fairness we did consider whether the respondent had acted in a reasonable way in explaining and applying its requirements to the claimant,

especially when how it approached the issue of self-certification was something over which it had a discretion.

92. The respondent adopted a particular approach to the question of self-certification when it decided that it would only accept the forms under the NHS process. It was not required to do that, and we remained unclear why the respondent had insisted that it had no choice. This was clearly wrong. However, we accept that the respondent did make clear to the claimant what its requirements were. We concluded that claimant could have no doubt that the only document the respondent considered to be sufficient to satisfy it of exemption for clinical reasons was the NHS form. Despite that the claimant took no steps to seek NHS exemption.

93. The claimant had sought to insist that the respondent should accept her trade union certificate. We concluded that whether it would be reasonable for an employer to accept a self-generated or trade union certificate would depend on the circumstances. For example, the CQC letter refers to pregnant employees. If an employer knows that an employee is pregnant, it is unlikely that it would have been reasonable for an employer to reject a trade union "self-certificate" simply because the NHS form has not been used, because the respondent could be reasonably satisfied of clinical reasons for exemption simply through knowledge of that pregnancy and that is (or was at the relevant time) a contraindication for the covid vaccination. We concluded that does not mean that a reasonable employer had to accept a trade union or other self-certification certificate because it was offered, which was essentially the claimant's position.

94. The claimant had explained to the respondent that she had medical conditions which made her nervous about taking the vaccine she did nothing to get any medical evidence to support her concerns and we accept that the respondent both explained this and tried to persuade the claimant to think again. The claimant was given several opportunities to change her mind and warned about the consequences of not doing so and we accepted that the respondent acted reasonably in this regard.

95. We accept that in terms of the claimant's other objections to the vaccine, the respondent had followed a fair process and had spent some considerable time seeking to understand the claimant's objections, including trying to encourage her to apply for exemption via the NHS scheme. It had allowed the claimant to have her say and allowed her a right of appeal which had genuinely considered the points raised in detail.

96. In terms of alternatives to dismissal, we accept that the respondent had considered the only realistic redeployment option available. The claimant had good reasons to reject the redeployment offer made and we make no criticism of her for turning it down, but it was right of the respondent to offer that alternative role.

97. There was no suggestion that there was any other redeployment or alterative employment available and, in those circumstances, given the reason for dismissal and the fact that either there was a statutory ban on the claimant being employed, or the respondent reasonably believed there was such a statutory ban, we accept that the respondent accepted reasonably and acted fairly in dismissing the claimant.

98. Overall, we accepted that the respondent had acted reasonably taking into account all of the circumstances (including the size and administrative resources of the employer's undertaking).

99. The claim of unfair dismissal is not well-founded and is dismissed.

Disability discrimination

The issues

100. The complaint was that the claimant was dismissed because of something arising in consequence of her disability. The "something arising" was that the claimant was unable (alternatively unwilling) to be vaccinated against covid-19 due to concerns about the vaccine potentially causing her medical problems including the exacerbation of existing medical conditions, increased neurological pain and/or inflammation which would prevent her from receiving eye injections (which are part of on-going treatment for her eye condition.

101. The respondent conceded that the claimant was disabled at the relevant time but denied that it knew or could reasonably be expected to know that the claimant was disabled.

102. The respondent also relied on the statutory defence, that it had a legitimate aim being compliance with a legal obligation. Essentially it said the legislation gives us no choice if the claimant will not take steps to obtain clinical evidence to confirm her objections.

Knowledge of disability

103. Mr Williams submitted that the claimant had failed to show that the respondent knew or could not reasonably know that the claimant was disabled. The tribunal does not accept that submission. The claimant's return to work interviews demonstrate that she had told the respondent about her medical conditions, and she also referred to these in the course of the dismissal and grievance process. The claimant referred to her medical conditions as being the reason why the redeployment to Jigsaw was unsuitable because of her mobility and eyesight issues. The respondent was clearly on notice that the claimant had significant medical issues which were affecting her mobility and eyesight. The respondent should have recognised that from this information that the claimant was disabled. It could have investigated matters further if it needed to. Accordingly, we find the respondent either knew or could be expected to know that the claimant was disabled at the time of her dismissal.

Unfavourable treatment because of something arising in consequence of disability - submissions

104. We then had to determine if by dismissing her, the respondent treated the claimant unfavourably because of something arising in consequence of disability, the "something" being that the claimant was unable (alternatively, unwilling) to be vaccinated against covid19 due to concerns about the vaccine potentially causing her medical problems including the exacerbation of existing medical conditions, increased neurological pain and/or inflammation which would prevent her from

receiving eye injections (which are part of on-going treatment for her eye condition).

105. Mr Williams argued that the reason the claimant was not vaccinated arose from her unwillingness to be vaccinated, on her case because of her philosophical belief. In the alternative he argued that even if her unwillingness to have the vaccine arose as a consequence of her disability, the claimant's dismissal was not because of this but because the law required either a vaccine or an exemption. The claimant was dismissed for not having a valid clinical exemption and that did not arise as a consequence of her disability.

106. Mr Green argued that the claimant had legitimate concerns relating to her macular vein occlusion in particular, and that in the absence of appropriate reassurances from her consultants and GPs about the possible effect of the vaccine, she had decided not to take any risk and that is why she had not had the vaccine. That has to be seen in combination with the claimant's belief in my body my choice belief and meant that the insistence of the respondent on vaccination or government exemption, meant the claimant was bound to be dismissed and this amounted to unlawful discrimination.

Our decision

107. We accept that the claimant's dismissal was unfavourable treatment.

108. The panel had no evidence that there is any medical contraindication for someone with the claimant's medical conditions, including her eye condition, receiving the covid vaccine. On that basis we could not accept that she was "unable" to have the vaccine.

109. In terms of the claimant being unwilling to have the vaccine, we accept that the claimant had genuine concerns although it was unclear to us whether the doctors had in any way suggested to her that the vaccine presented any more of a risk to her because of her medical conditions than for someone without them. It seemed to the panel that the claimant may have sought reassurances that no doctor was ever likely to be able to give for the vaccine or any other treatment. Without clearer medical evidence we could not find that her concerns were reasonable or legitimate.

110. Applying the test in ***Pnsaiser***:

110.1. First, we must identify whether the claimant was treated unfavourably and by whom: we find there was unfavourable treatment, by dismissal, of the claimant by Ms Alexander who took the decision to dismiss.

110.2. Next we must determine what caused that treatment — focusing on the reason in the mind of the alleged discriminator, possibly requiring examination of the conscious or unconscious thought processes of that person but keeping in mind that the actual motive of the alleged discriminator in acting as he or she did is irrelevant.

110.3. The reason for the dismissal was the statutory ban referred to above and the fact that the claimant was not willing to be vaccinated or to provide the

respondent with appropriate medical evidence that it had determined that it would require to be satisfied of exemption status, by going through the NHS self-certification process which meant that appropriate medical evidence would be provided in due course.

110.4. We must then establish whether the reason was 'something arising in consequence of the claimant's disability,' which could describe a range of causal links. This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

110.5. The claimant told us that her unwillingness to have the vaccine was linked to her concerns about her health conditions, but she did not attempt to offer the respondent any medical evidence in support of what she said. In fact, the certificate which the trade union submitted purports to suggest that the respondent is not entitled to see any such evidence. If the claimant had applied for an NHS exemption she would not have been dismissed when she was (and indeed although no-one involved in the case could know this at the time, she would never have been dismissed). The panel could not see how the claimant's failure to seek NHS exemption was sufficiently linked to her health condition, it was her belief that the respondent had no right to refuse to accept the trade union certificate which was the link.

111. Accordingly, we found that the claimant had not shown that her complaint under s15 was well founded, but in case we are wrong about that we also considered the respondent's justification defence.

Justification

112. We concluded that the respondent reasonably believed that the terms of the statutory instrument meant that it could not lawfully continue the claimant's employment. We accept that it is a legitimate aim for any employer to consider itself compelled to comply with its reasonable understanding of a statutory enactment.

113. In terms of proportionality, clearly dismissal is a significant detriment to the claimant, but we accept that the respondent's choice about that had been taken out of its hands by the legislation (or the respondent reasonably believed that it had). The respondent could not decide that it considered dismissal to be disproportionate if it determined that the claimant had not shown that she was exempt from the vaccine requirement. It is clear that the claimant and the trade union lobbied the respondent hard that the legislation was improper or unlawful, but that could not justify the respondent acting unlawfully.

114. We accept that the respondent had approached the consequences of the requirement in a proportionate way in the claimant's case, by offering the only alternative vacancy it could to the claimant, which is by offering the position at the Jigsaw hospital. We understand and accept why the claimant refused that, but the respondent had done what it could. Accordingly, even if we had found that the unfavourable treatment was linked to the something arising in consequence of the claimant's disability, we would have found that the s15 was not well founded

because the respondent had shown that dismissal in the circumstances was a proportionate means of achieving a legitimate aim.

Philosophical belief – indirect discrimination

115. Mr Williams argued that this complaint must fail because although the PCP, that the requirement for staff working in the same/location as the claimant to be vaccinated against Covid-19 was accepted, he argued the claimant had failed to show that she had a protected belief and had failed to show any group disadvantage. In any event he submitted that that the respondent could rely on the statutory defence. It was also suggested that reliance on "my body my choice" in this case is the application of hindsight because it was not referred to by the claimant as the reason for refusing the vaccine.

116. The PCP was accepted we accepted Mr Williams' argument that the PCP must be tweaked to reflect the fact the PCP was the claimant be vaccinated against Covid-19 or have an NHS self-certificate exemption.

117. In terms of group disadvantage he pointed out to us that in evidence the claimant had referred to three other members of staff with the same belief who were unvaccinated, two of whom we are told have left the respondent's employment to work elsewhere.

118. Mr Green drew our attention to the decision of the Leeds Employment Tribunal in the case of ***Dimitrova, Chadwick, Hussain, Masiero and Motiejuniene vs. Barchester Healthcare*** (**Case Nos 1803315/2021;1803339/2021;2601442/2021 3207353/2021 and 3205334/2021)** which includes reference by some of the claimants in that case to a belief in "my body my choice". The Leeds tribunal had considered their philosophical belief claims. The respondent in that case had conceded that "my body my choice" is a protected belief but we agreed with the respondent counsel that because a respondent had chosen to concede that in one case that did not mean we should simply accept it is a protected belief in this case.

119. Mr Green made submissions about each of the Grainger criteria and drew our attention to the claimant's statement about her beliefs and what she had said in evidence about her belief.

120. Mr Green argued that the respondent could not justify discrimination because the use of the NHS exemption could not be said to be proportionate means of achieving a legitimate need because it could have used a system of self-certification for those with "my body my choice" beliefs because it is likely that they would also object to disclosing their medical conditions.

121. We first considered whether the claimant had a protected belief, applying each of the Grainger criteria in turn. We accept that the claimant had the beliefs set out in her statement. The claimant seemed to us to be sincere in what she told us and we have no reason to doubt that she genuinely held the beliefs set out in her statement. Although the statement is somewhat brief, applying the principles in ***Grainger*** we accept that the claimant genuinely held this belief and that is not simply an opinion or viewpoint based on the present state of information available,

it is belief in something which goes beyond that, that individuals have a right of autonomy over the bodies which governments and others cannot seek to control.

122. When the claimant was asked to give an example of the manifestation of her beliefs, she gave us an example of having spoken out for and lobbied for an ill man in her care to continue receiving cancer treatment when a doctor had said his treatment should been discontinued and as result treatment had continued and the individual had survived. It is fair to say the panel were not convinced that this was really a manifestation of a belief in "my body, my choice". Lobbying for someone to continue to receive treatment when it is what they want and it appears to their only chance of surviving a serious illness (which is how this was described to us) is not so much about a manifestation of a belief in bodily autonomy, as an expression of empathy and beliefs that is likely to fall within the generalised notions of morality and ethics which may not qualify for protection. However, we do not think our conclusion about that meant the claimant does not have a belief in my body my choice nor that it should not be protected.

123. We accept that the principles which the expression my body my choice seeks to encompass concern weighty and substantial aspect of human life and behaviour which can be linked to human rights affecting how someone lives their life. There was nothing in the evidence before to suggest that the belief was not cogent or important and we accept that it is worthy of respect in a democratic society, is not incompatible with human dignity, and is not in conflict with the fundamental rights of others.

124. On balance we accepted that the claimant's belief in "my body my choice" was a protected philosophical belief.

Indirect discrimination

125. The respondent pointed to the fact that the claimant had not told the respondent that her reason for refusing the vaccine was her protected belief. We accept that is true in the sense it does not appear that the claimant ever said in terms that she believed "in my body my choice" before her dismissal (although she did at appeal) and that was why she would not have the vaccine. However, we accept that the claimant's belief in "my body, my choice" was a factor in her not receiving the vaccine. She did not consent to receive it because she believed she had, and had to have, a completely free choice as to what she put into her body. We accept that these views are reflected in the claimant's repeated insistence to the respondent that she should be forced to have the vaccine when she did not want it.

126. We then had to consider whether the claimant had shown, on the balance of probabilities, that she had been subject to indirect discrimination.

127. It was accepted that the respondent had the claimed PCP, that is a requirement that employees had to have evidence of having had the vaccine or an exemption which was applied to the claimant and the rest of the regulated care home workforce. We did agree with Mr Williams that the claimant's formulation of the PCP ignored the requirement in the Regulation to show clinical reasons why the employee should not be vaccinated. The PCP applied can most correctly be formulated as "a requirement that all the of regulated care home workforce have

evidence of having had the vaccine or that the employee had an NHS exemption certificate which showed they had applied for a doctor or other medical professional to confirm that there were clinical reasons for that individual not to be vaccinated".

128. Next we had to consider group disadvantage. We received little evidence about that. We were told that others had left the respondent's employment rather than be vaccinated, but we found that limited evidence to be insufficient to enable us to conclude group disadvantage. The claimant asserts that a small number of people who share her beliefs have left employment, but we had very little evidence of the beliefs of the people referred to and we do not know how many people who shared the claimant's belief in "my body, my choice" within the workforce had exercised a choice to be vaccinated without any objection. We could not accept that "my body choice" is synonymous with vaccine hesitancy. We also had no evidence to justify Mr Green's assertion that those with a belief in bodily autonomy would be less willing to disclose medical information about. It was for the claimant to show group disadvantage and the tribunal concluded that she has been unable to do so. We did accept that the claimant had shown that her claimant's belief in "my body, my choice" was a factor in her not receiving the vaccine, but an individual disadvantage is not sufficient for an indirect discrimination claim to succeed.

129. Even if the claimant had been able to surmount all of the hurdles necessary in a complaint of indirect discrimination, it is open to the respondent to show that it has acted proportionately in pursuit of a legitimate aim as a defence to such a claim. We repeat our conclusions in relation to the section 15 complaint here because our considerations were the same. The respondent had a legitimate aim, that is compliance with legislation, and the legislation required the respondent to be satisfied of vaccination or of clinical reasons for not having the covid vaccine, not simply a requirement that the individual claimed to have had the vaccine or to have an exemption.

130. Further we accepted that the respondent had taken a proportionate approach notwithstanding the severe impact of dismissal on the claimant, which we accept was significant. We accept that the respondent did what it could believing continuing employment would be unlawful, which was to offer redeployment to the Jigsaw hospital.

131. The complaint of indirect philosophical belief discrimination fails and is dismissed.

Employment Judge Cookson

Date: 26 January 2024

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

2 February 2024

FOR THE TRIBUNAL OFFICE

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/