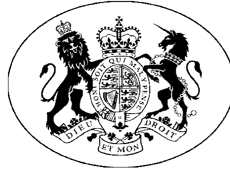

EMPLOYMENT TRIBUNALS

Claimant: **Mr M O'Neill**

Respondent: **Guildowns Group Practice**

Heard at: **Reading**

On: **20 to 22 February 2023, 27 March 2023 (in Chambers 28 March and 11 April 2023)**

Before: **Employment Judge Eeley**
Mrs J Wood
Mrs F Tankard

Representation
Claimant: Mr A Dobbie, solicitor
Respondent: Ms S Wood, solicitor

RESERVED JUDGMENT

1. The claimant's claims of discrimination because of something arising from disability (section 15 Equality Act 2010) fail and are dismissed.

2. The claimant's claims that the respondent breached the duty to make reasonable adjustments (sections 20/21 Equality Act 2010) fail and are dismissed.

3. The claimant's claims of direct discrimination because of religion or belief (section 13 Equality Act 2010) fail and are dismissed.

4. The claimant's claim of wrongful dismissal fails and is dismissed.

REASONS

Background

1. By a claim form presented on 5 June 2021 the claimant brought claims of disability and religion/belief discrimination against his former employer, the respondent. The issues for determination by the tribunal were set out in an agreed list prepared by the parties' representatives.

2. For the purposes of determining the case we heard oral evidence and received written statements from the following witnesses:
   a. The claimant, Mr Mark O'Neill, formerly Deputy Practice Manager at the respondent GP practice.
   b. Mrs Janet O'Neill, the claimant's wife.
   c. Dr Jonathan Holbrook, the claimant's previous employer.
   d. Mrs Camilla Walker, the former Finance and HR officer at the respondent practice (currently Business Manager).
   e. Dr Colin Oh, Senior GP partner.
   f. Dr Desislava Beeharry (referred to as Betty), GP Partner and HR Lead.
   g. Dr Abhijit Hosangady, GP Partner and Covid 19 Clinical Lead.

3. We also received a written statement on behalf of Mr Aaron Evans, Pastor, and witness for the claimant. For family reasons he did not attend to be cross-examined. The respondent agreed his witness statement subject to a signed copy of the statement being provided by the claimant.

4. The tribunal also had regard to an agreed bundle of documents (which contained 629 pages) plus two additional documents. The first additional document was added at pages 648-652 and was a series of printouts from the respondent's computer booking system at the GP practice. We were also referred to a three-page document entitled, *"Press release: disabled people exempt from wearing face coverings under new government guidance. Government has set out a list of face covering exemptions, as they are mandatory in additional enclosed spaces from today*" (Friday 24 July). This document was apparently published on the gov.uk website on 24 July 2020.

5. In these reasons numbers in square brackets are references to pages in the hearing bundle, unless otherwise specified.

6. The joint agreed list of issues set out the matters for determination by the tribunal. The list of issues (as drafted by the parties and unamended) is set out as an Annex to this judgment and reasons.

7. At the beginning of the final hearing the tribunal raised a number of issues with the parties in order to clarify the real issues in dispute and to ensure the issues in the list addressed the correct legal tests and fitted into the appropriate legislative framework. The parties' representatives clarified that the paragraphs set out under the time limits heading were in fact "placeholders" for the issue as a whole. They were no substitute for the tribunal correctly directing itself as to the applicable legislative tests for jurisdiction and time limits in a case of this nature (particularly a complaint of failure to make reasonable adjustments.) The tribunal proposed to make findings of fact and then revisit the issue of time limits once that process had been undertaken.

8. The question of whether the claimant was disabled within the meaning of the Act at the material time and the related issue of whether the respondent had the requisite actual or constructive knowledge of the disability were both matters which remained before the tribunal for determination.

9. The tribunal also sought to clarify with the representatives whether the provision criterion or practices ("PCPs") relied upon by the claimant were actually as set out in the list of issues or whether the claimant sought to make an amendment to the pleaded PCPs. The claimant's representative, on instructions, indicated that the PCPs remained as drafted and no amendment was sought. Likewise, the section 15 claim was not amended. The tribunal questioned Mr Dobbie about the "something arising from disability" as the tribunal noted that the *exemption* from wearing a face mask might be characterised as a separate issue from the claimant's own insistence on his exemption. It was not clear from the drafting whether the claimant sought to make that distinction, or not. Following the discussion with Mr Dobbie, the list of issues was left unamended in this regard.

10. The tribunal noted (more fundamentally) that the direct discrimination claim in relation to religion/belief was set out in the list of issues using the incorrect legal test. It made reference to 'unfavourable treatment.' However, in a section 13 claim the tribunal is not called upon to identify 'unfavourable treatment' (as it would in a section 15 claim.) Rather, a comparative exercise must be undertaken to determine whether there was 'less favourable' treatment. To that end, it was clarified with the parties that we would be looking to identify whether the matters complained of were less favourable treatment of the claimant than of a comparator because of religion/belief. The tribunal sought clarity as to the identity of the relevant comparators. It was apparent to the tribunal that the claimant most likely relied on a hypothetical comparator. However, the claimant's representative took time to consider whether the claimant in fact relied upon any actual, named comparators. If so, an amendment would be required. The respondent had not had notice of the identity of any named, actual comparators and had not prepared to defend the case on such a basis. After an adjournment, during which the tribunal read into the evidence in the case, the claimant's solicitor clarified that the claimant did *not* rely on named or actual comparators, although the evidence we were due to hear would assist the tribunal in identifying the relevant characteristics of the correct hypothetical comparator.

11. An issue relating to disclosure had also been added to the list of issues by the parties. The tribunal queried whether this was an appropriate matter to be added to the list of issues as it was, in essence, a point of evidence and for submissions as to whether the tribunal would draw any inferences from the presence/absence of certain items of evidence. (Disclosure was not, itself, an issue for determination in the substantive legal claims.) Further, there was no extant application for specific disclosure to be determined by the tribunal. In those circumstances, we considered that it was not appropriate for specific insertion in the list of issues as a substantive issue for determination. Rather, we concluded that the presence or absence of certain documents within the evidence bundle might be a relevant part of the judicial decision-making process. The tribunal might be invited to draw adverse inferences from the absence of any such documents and we would consider any such submission on its merits. Any such exercise

would form part of the wider decision-making process rather than being a specific issue for determination included in the list of issues.

Findings of fact

The parties

12. On 16 September 2019 the respondent made the claimant a conditional offer of employment in the role of Deputy Practice Manager. The claimant started work for the respondent on 9 December 2019.

13. The respondent is a GP practice which provides services across a total of four separate locations. The claimant was based (for the most part) at the Wodeland site where he had his primary office. We accept that on occasion he attended at the other surgeries. We also understand that he was provided with a laptop for work purposes. There was no evidence that this laptop was provided to facilitate homeworking. Rather, it was so that he could work at the respondent's different surgery locations.

14. The claimant's direct line manager was a Practice Business Manager by the name of Robin Forward. The claimant reported direct to Mrs Forward who, in turn, reported to the GPs as a collective. There was no Managing GP within the practice structure. There was an administrative and practice management team beneath the claimant in the structure. They reported to the claimant.

15. Within the group of GPs certain individuals took on specific areas of accountability. Thus, Dr Beeharry acted as HR Lead within the practice. In reality, she delegated the majority of the day-to-day HR issues to Mrs Forward as the Practice Manager. Mrs Forward was supported by Camilla Walker, who gave advice in relation to HR matters and who liaised with the respondent's chosen legal adviser, Croner. On occasions, Dr Beeharry would 'sign off' on decisions that had been made by the administrative employees, principally Robin Forward. Dr Beeharry's level of day-to-day involvement in the decision-making process varied dependent on the subject matter and the practical need for her to get involved. She was candid in her evidence to the tribunal that she recognised her own limitations in respect of HR matters. She was clear that she is a clinician first and foremost and therefore relies heavily on others with greater expertise, as she saw it, in the area of human resources. Dr Beeharry also felt that it was important to follow policy and procedure and that she should get involved in any particular matter at an appropriate juncture, as required. This was demonstrated (as we see below) in the fact that she was not involved at the investigation and disciplinary stages of the claimant's disciplinary process. She first became fully involved when she was part of the panel who heard the appeal against dismissal.

16. The claimant did not disclose a mask phobia or similar condition when he applied for his role at the respondent practice. It did not form part of his medical declaration. That declaration did refer to childhood asthma and to childhood surgery on his hip. He signed that declaration on 10 September 2019.

The Covid 19 pandemic

17. On 23 March 2020 the first Covid 19 lockdown was declared in the UK.

18. Dr Hosangady became the respondent's Clinical GP Lead for Covid 19. It was thought that his aptitude for digesting large amounts of information and updating the relevant stakeholders would stand him in good stead to deal with the rapidly evolving Covid 19 situation. We heard from Dr Hosangady that on a weekly basis (sometimes twice a week) Public Health England would send him updates as to the current guidance relating to the pandemic as it applied to GP practice. He would read this information, digest it, and pull out the parts of it which necessitated further action by the respondent. He then forwarded copies of the guidance to the claimant as Deputy Practice Manager. Dr Hosangady would suggest proposals for policy and procedure changes. This was a collaborative process. The claimant, in essence, drafted the documents which were then subject to amendment and approval by Dr Hosangady. Once approved, the documents were disseminated throughout the respondent's workforce.

19. On occasion, such documents disseminated by the respondent would include (at the end) a paragraph referred to by the claimant as the "compliance certification". An example is to be found at the end of the document updated on 16 November 2020 [296]. It recited the following formula: *"The practice hereby confirms the following actions it has taken to comply with the government's guidance:*
    1. *We have carried out a Covid 19 risk assessment and shared the results with staff.*
    2. *We have cleaning, hand washing and hygiene procedures in line with guidance.*
    3. *We have taken all reasonable steps to help people work from home.*
    4. *We have taken all reasonable steps to maintain a 2m distance in the workplace.*
    5. *Where people cannot be 2m apart, we have done everything practical to manage transmission risk."* [300]

20. Running in parallel to the specific government guidance regarding the GP practice as a workplace and clinical setting, there was an evolving set of public guidance of wider and more general application. Such advice was more generic in nature and would, we accept, have to be adapted to apply in specific workplace and business contexts. Hence, a given workplace would take on board the raft of available information, both general and specific, and adapt and apply it to its own specific context. This is the process in which the claimant and Dr Hosangady were engaged for the respondent. We therefore accept Dr Hosangady's evidence that the 24 July 2020 press release (to which we were referred) was one of those documents of more general application as opposed to specific application in a GP setting or, indeed, workplace. We therefore accept what he says about the references within that document to "businesses" being references to the sorts of businesses to which the public had, at that time, unfettered (or relatively unfettered) access. He gave the example of supermarkets which effectively had open doors and were public facing in nature rather than those businesses which controlled access to the business and its workforce by the public. By contrast, GP practices were not open-door organisations. Appointments had to be made by patients

and indeed specific Covid related policies and procedures were implemented to control the access of the public to the clinical setting.

21. The respondent clearly owes a duty of care to patients and staff, whether those staff are "patient facing" or "backroom" staff who only come into contact with other staff members during the course of a working day. The respondent had to come up with a policy which fitted both elements of that duty of care. The respondent needed to take account of general guidance and specific guidance which was relevant to the GP context. Thus, the fact that a general or generic piece of government guidance did not require a particular measure, did not mean that the respondent was not entitled to put it in place to meet specific needs of the respondent's business and its staff. The measures were designed and intended to best protect all staff and patients. The respondent also had to take account of the fact that there was a risk that one case of Covid 19 within the workforce might lead to the shutdown of the whole GP practice. In such circumstances the respondent would be unable to service the needs of its patients at a time of critical importance. All of this is crucial relevant context to the decisions that the respondent was making during this period of time.

22. The tribunal also noted that the claimant was intimately involved in the drafting of the respondent's policies. There is little evidence to suggest that he disagreed with the content of the policies during the period of drafting and implementation. Where the claimant did raise concerns or disagreements, we refer to them specifically within these written reasons.

23. In approximately May 2020 the respondent undertook a series of risk assessments for its employees. The claimant's was at [121]. The pro forma required the employee to tick the relevant applicable factors which might apply to them in order to assist the respondent in planning appropriate safety measures. All answers were to be treated in the strictest confidence. The only Covid 19 risk factors highlighted by the claimant in his copy of this document were that he was from a BAME background and was male. The questionnaire was designed to identify those members of staff at high risk (clinically extremely vulnerable) and those at moderate risk (clinically vulnerable). There were questions regarding emotional well-being and regarding general working conditions. One of the questions regarding working conditions was: "does your workspace either enable you to maintain a 2m distance from co-workers, or are there physical barriers between your workspace and others?" The claimant ticked yes in response to this question. The management comments section of the form indicated that the claimant was at moderate to low risk because of his gender and ethnicity and that the risks were mitigated by 'lone working/non-patient facing.'

24. By 12 June 2020 the claimant had passed his probationary period with the respondent. He had also received a letter of recognition and a discretionary bonus of £500 in recognition of his hard work during the Covid 19 crisis [120].

25. On 16 June 2020 the claimant sent an email to all staff within the respondent entitled "facemasks in nonclinical settings." [127] It read as follows:

"It appears NHS England are now recommending the wearing of facemasks in nonclinical settings where 2m distance between staff is not possible. As a practice we have reviewed our working practice, rotas and use of office space to try to ensure staff are working at 2m distance where possible. However, there may be situations where this is not possible and should that be the case we are advised that it may be appropriate to wear one of the facemasks that clinicians use as part of their PPE attire. For staff seeing patients our advice has been, and continues to be, that a face mask should be worn for a session (morning or afternoon) when within 2m of patients. Our interpretation of the new messages from NHSE is that the same "rule" now applies for staff being in proximity to each other. We are expecting further clarification from the government on this, but until we get this please could all staff take notice of the recommendation. Many thanks [etc]"

26. The content of this email makes it clear that the wearing of masks was just as relevant and important in staff-to-staff interactions as it was in the case of staff interaction with patients. The respondent had to take infection control measures in both scenarios as it had a duty of care not only to its patients but also to its staff.

27. On 16 July the claimant sent an email (inter alia) to Mrs Forward and Dr Hosangady [128] regarding the Covid 19 business continuity plan and office working. Within the body of the email he stated, *"1 metre plus and face coverings-I think we need to say to staff that if 2 metres distance can't be observed at work then we should ensure 1 m plus risk mitigating measures. These include face coverings (visors, masks etc), dividing screens and taking breaks after 15 minutes close working. And perhaps we leave it to the staff then to take measures as they see fit. I think most staff will be observing 2 m, but not all, e.g. SR front desk and in particular new staff who are being trained-this inevitably involves more close quarter working. Perhaps for now we could just give out the message to staff that they can wear a visor or mask if they want to, in circumstances where 2 m distance is not viable. And then could Robin, Tina, Paula and myself have a meeting to try to identify and address specific places where this might be happening. I will follow this up when I get back from leave."*

28. In response to the claimant's email of 16 July Dr Hosangady responded, *"Thanks Mark. I think we should tell staff that they need to wear a face mask if they can't keep 2 m away from one another, including in breaks. Will leave for leads to decide how this is done. Thanks for updating it all, Abi"*

29. The content of this email exchange indicates that before the claimant went away on holiday the requirements and practice within the respondent's organisation were: employees need to wear a mask or they need to keep 2 metres away from others. The natural implication was that employees could not choose to ignore *both* of these measures. It was not acceptable to the respondent for employees to get closer than 2 metres *and* not wear a mask.

30. The actual guidance which the claimant updated and wrote is at page 265. It is marked as having been updated on 16 July 2020. At [266] it stated (under the heading physical measures) that "*1 m +, from July 2020 the*

government announced the 2 m social distance rule may be relaxed in England, to 1 m plus mitigating measures where 2 m distance is not possible. Mitigating measures include wearing of a face covering, e.g. visors or masks, taking breaks after working closely for 15 minutes, use of screens. The practice will carry out a review of current office working in light of 1 m + and communicate to staff regarding the results of this review and any advice on risk mitigating measures." Within the same document it was recorded that for staff who could not work from home two metre distancing had been looked at and was in place. Measures had been taken to facilitate sufficient spacing at all sites. Screens had also been ordered to reduce transmission. The document concluded with a restatement of the compliance certification referred to at paragraph 19 above.

31. In July 2020 the claimant went on holiday to France. It was during that holiday that he had his first known episode of mask anxiety. The tribunal was told that the claimant went into a petrol station to purchase petrol in the usual manner. Whilst in the petrol station he was reminded of the need to put on a mask. When he did so he says that he had a panic attack and had to leave the premises. Apparently, his wife then had to go into the premises to complete the purchase in his stead.

32. The claimant returned to work after his holiday and carried on at work as usual. There is no indication that he recounted his experiences whilst on holiday to anybody within the respondent organisation. He did not mention the panic attack at the petrol station.

33. It appears that in September 2020 some problems arose in relation to the conduct of one of the GP partners at the practice. An investigation was undertaken in relation to the conduct of that GP towards the claimant and his colleague Tina. We heard evidence that the complaints related to the doctor shouting or losing her temper with colleagues. We heard evidence from Dr Beeharry as to how this issue was addressed. She confirmed that, on receipt of the complaint she wrote and responded immediately. There was a partner meeting in the individual GP's absence. She took advice from Croner. The bundle contained notes of meetings between Robin Forward, Dr Oh, Dr Hosangady, the claimant, the other complainant, and a witness to discuss what the allegations against the GP consisted of. Two senior partners spoke to the GP partner in question. The partner was asked to contact her insurer. The partner was in tears and was clearly stressed. She had issues with her workload. After two months Dr Beeharry spoke to the claimant and the other complainant again and asked whether they were happy with the outcome. Dr Beeharry was satisfied that she had managed the HR problem sensitively. Importantly, Dr Beeharry did not accept that this was a complaint of bullying by the doctor towards the claimant or that it was upheld as being such. In light of this, the tribunal's conclusion is that there was a problem between the claimant and this other GP but it was dealt with and resolved at the time. Insofar as the claimant subsequently suggested that he behaved as he did in continuing to have face-to-face meetings with others because of the "bullying", we do not accept that this is accurate. We are not satisfied that this was the reason he acted as he did. In any event, Covid 19 protection measures were at the front of everyone's mind during the period in question. Those measures could and should have been prioritised over any residual impact of the "falling out" between the claimant and the other GP. The tribunal was not

satisfied that the claimant's complaint about the GP's conduct towards him was a material factor leading him to act as he did subsequently in having unnecessary face-to-face meetings with colleagues during the pandemic.

34. The tribunal was taken to a letter within the bundle [132] dated 23 September 2020 from Dr Beeharry to the claimant regarding this issue. The opening paragraph states, *"We recognise that our letter dated 22nd September a response to your complaint, did not address your issues. We would like to apologise to you for this and we understand how this would make you feel. At this moment S… feels strongly about her position therefore we are unable to move forward with an appropriate apology from her. We are hoping with time she will recognise the apology is for her behaviour and not the factors that caused her to lose her temper on the day. We are aware of S's behaviour which we would like to reassure you that we are dealing with. It is a difficult and sensitive issue. However, we do not condone the way she has treated and spoken to you. It is our utmost importance to protect our staff from any workplace bullying and we are grateful that you raised your concerns so we can deal with this matter."* The letter concluded with a paragraph offering further conversations with the claimant regarding his individual issues, if so desired. No evidence was presented to the tribunal that the claimant raised any further issues about this after the event or requested any such further conversations.

35. On 5 November 2020 the second Covid 19 lockdown was declared in the UK.

36. As a result of the new lockdown, further consultation took place in the practice regarding the respondent's approach to Covid 19. The tribunal was referred to an email chain [134-136]. This correspondence was triggered by an email from Ros Lloyd who posed a question regarding masks. She asked whether the respondent needed to start making mask wearing mandatory/highly recommended in all communal areas. She noted that one of her friends who was also a GP had had a few members of staff at her practice test positive for Covid. Public Health apparently did a review and only a few other staff were having to self-isolate as they were mostly wearing masks and social distancing. Ros Lloyd thought that if the respondent had an outbreak, as things stood, they would have to shut down a site, possibly more, because of the need for contacts to self-isolate. In essence she was questioning whether the measures in place were adequate in all the circumstances and in light of the experiences of other GP practices. Dr Hosangady's response to this was to say that he had said that they should wear masks if they could not keep a 2 metre distance from others. He copied Mrs Forward and the claimant into this chain of communication as he thought he should say in his weekly email that masks should be worn in all communal areas-the same mask all morning and then a change for the afternoon, as per PHE guidance. He concluded by noting that he thought most practices were advising this.

37. The claimant responded to this on 6 November [135]. He stated, *"I do understand that it is reasonable to ask staff to wear a mask when in areas where patients could potentially cross our path, and be within 2 m of us. Can I just confirm that is what we mean by communal areas, or are we saying in exclusive staff areas as well? I would not be in favour in forcing all staff to do that if they did not want to. Also would want to consider staff*

who are exempt from wearing a face covering under the existing regulations please. Thanks"

38. Dr Hosangady's response was to add that the respondent would of course make exceptions for those who are exempt. However, he queried whether anyone had actually declared an exemption as he was not aware of anybody at that stage.

39. The tribunal notes that the claimant's response of 6 November effectively fails to take account of the need to protect colleagues from transmission of the disease (and not just members of the public.) Hence, he seeks to differentiate between areas where staff come into contact with patients as opposed to areas where staff come into contact with other staff. His message demonstrates a reluctance to require mask wearing when it is only staff at risk of transmission of the disease rather than patients. This does not take account of the respondent's duty of care to its staff in addition to its duty of care to patients and members of the public. The tone of this email also indicates a reluctance on his part to require a mask or wear a mask when only staff members are present (i.e. no patients/members of the public.)

40. The claimant responded to Dr Hosangady's email [135]. He said, *"OK thanks Abi, I see your reasoning. Could I suggest we check it's actually the case that PHE will shut down a practice if one staff member tests positive unless all staff are wearing masks in communal areas-that doesn't sound quite right to me? I would also like to declare that I am exempt from wearing a face covering. This puts me in a difficult position as I really wouldn't want to be responsible for closing the practice."* This was the first occasion on which the claimant declared that he was exempt from wearing a face covering. He did not explain his exemption or suggest why he was exempt from mask wearing.

41. Dr Hosangady responded to suggest that he thought PHE would review and decide who needed to self-isolate rather than shut down a practice. He went on, *"From her email it sounds like the other practice in question were asking staff to wear masks so PHE felt that was enough to avoid the need for self-isolation of more staff. Appreciate you won't be able to wear a mask and there may be other staff in the same position, but if majority of us wear masks then it will reduce the risk of mass self-isolation. Happy to discuss, Abi."* He subsequently sent a further email to the claimant and Mrs Forward asking whether they would like him to send a further email out to ensure that staff were aware that some people might be exempt. His message included a draft proposed message which stated: *"Dear all, further to my email about wearing masks in communal areas, please remember that some others may be exempt from wearing masks as per the government guidance. If everyone else can wear masks when in communal areas, this will reduce the risk of us being asked to self isolate for 2 weeks, if there was a case within the practice."*

42. The proposed wording of this email was subsequently sent out to all staff in an email of 6 November at 3:48pm [558].

43. The respondent's guidance document for office working during Covid 19 was updated again on 16 November 2020 [296]. Under the heading

"physical measures" the guidance stated, *"From July 2020 the government announced the 2m social distance rule may be relaxed in England, to 1m plus mitigating measures where 2m distance is not possible. Mitigating measures include wearing a face covering, e.g. visors or masks, taking breaks after working closely for 15 minutes, use of screens. However, in November 2020 PHE advised of its criteria for isolation of staff who have had contact with positive cases. The 1m + rule has therefore been reviewed in light of this advice and the 2m rule reinstated. The principles are now stated as follows:*

- *Avoid contact at work which is <1 m, regardless of mask wearing*
- *Avoid spending > 15 mins with anyone at work within 1-2m range, regardless of mask wearing.*
- *Wear a face covering if you can't ensure 2m distance, (although this does not have any bearing on whether nonclinical staff will be required to isolate in the event of contact with a +ve case in either of the above two scenarios)*
- *Avoid car sharing*
- *Hot desking has been minimized. Where it can't be avoided staff must wipe down with Clinell wipes*
- *Windows and doors will be open where possible*
- *Perspex "sneeze screens" have been installed at the reception counters at all sites*
- *Practice meetings are routinely conducted by Zoom or MS teams- face-to-face meeting should be avoided*

For staff who can't work from home, 2m distancing has been reviewed. The admin staff rota is currently organised to avoid handovers and crossover at shift changes and to try to ensure social distancing throughout the working day. Staff are being moved from their usual place of work, where required, to ensure sufficient spacing at all sites. Staff working from home has made this easier to put in place as it obviously creates more office space." The guidance concluded with the compliance certification referred to at paragraph 19 above.

44. On 19 November, about a fortnight after the exchange of emails wherein the claimant declared his exemption, Dr Hosangady sent a further email to Robin Forward and the claimant enquiring about potential wording to colleagues about social distancing. The proposal was that a message to staff would include: *"since last week PHE have provided us with newer guidance and we will be updating our protocols accordingly. Please remember to keep 1 m apart at all times, and if you are within 1-2 m of each other do not spend longer than 15 minutes together and wear face masks. The exceptions to this are if there is a Perspex screen between you or if you are a clinician wearing full PPE. In some areas, there is not enough space to keep 2 m apart or have a Perspex screen between you, and we will aim to limit this to as few people as possible working in those areas. Please let me know if you have any queries or concerns."* This proposed wording was slightly more flexible than previous versions. It was now referring to 1 to 2m rather than 2m. However, given the nature of the respondent as a GP practice the tribunal can understand that the respondent would want all staff to err on the side of caution given the potential consequences.

45. The claimant provided his comments thus: *"The only thing I would add is that the ideal is that we should try to be 2 m apart-where less than that then mitigating measures are required (and you have explained all of those very well in a rational order.) Thanks."* The claimant's response indicates an acknowledgement that where one of the mitigating measures is not possible, it is all the more important that the remaining protective measures are in place.

46. On 6 January 2021 the third Covid 19 national lockdown was declared in the UK.

47. On 14th January Dr Beeharry sent an email to Camilla Walker and Robin Forward which appeared to be a draft of an email to be sent to the claimant [145]. In it she states, *"I'm writing to you following some concerns raised by our members of staff regarding wearing face masks and the Covid policy you kindly wrote and circulated recently about that same effect. I was made aware that you had some medical grounds for not wearing a mask and we respect this reason and would appreciate any supporting evidence you can provide for our records. I wondered if you would meet with myself and Robin on Teams tomorrow 15/1/2020 at 10 am, so that we can try find a solution that will be 1-Health and Safety appropriate 2-Policy abiding. This will then hopefully prevent any misunderstanding and fear in our working environment. As you well know staff and patients are very anxious, worried already about this pandemic and we are aiming to try keep the atmosphere healthy and safe and welcoming at work. Sorry for the inconvenience kind regards [etc]"* The tribunal notes that this email neatly encapsulates the respondent's compassionate response to the situation which was unfolding and the respondent's attempts to balance the needs of the claimant against those of the other members of staff and patients. It demonstrates neatly that the respondent owed a duty of care to a number of different individuals and groups and that sometimes those duties of care would conflict with each other. The respondent had to navigate a course through this and attempt to be fair to all concerned.

48. On 15 January 2021 a meeting was arranged by the respondent with the claimant to discuss masks, visors, and related subjects. The tribunal was referred to the minutes of the meeting [146]. Dr Beeharry explained the reason for the meeting including that there were concerns raised by staff about the claimant not wearing a mask and also there were concerns about health and safety of all staff and patients. She wanted to confirm the grounds on which the claimant was not wearing a mask and following the practice policy which the claimant wrote. She also enquired if he had a badge indicating that he was exempt. At the meeting the claimant confirmed that the reason behind him not wearing a mask was that "he is medically exempt as per government guidelines." He indicated that he had a badge but didn't legally have to wear it. He went on to say that this was a sensitive subject and he didn't want to discuss his condition. He understood why the respondent had to have the meeting and had to address the staff's concerns but he noted that this had not been easy for him as he was being "persecuted outside of the workplace for not wearing a mask."

49. During the course of the meeting the claimant was asked whether he would be prepared to wear a visor when dealing with patients and staff during face-to-face meetings. The notes record that the claimant said he would as a last resort if he was unable to keep the 2 m distance, couldn't conduct discussions outside, by phone or by Teams meeting. He felt that he was currently abiding by those rules. Discussions then centred on a room being provided for the claimant on his own but it was noted that this could not be guaranteed every day and might necessitate the claimant moving between sites so was not a good solution to the problem. A further suggestion was made that a screen be put around the claimant's desk for staff that work in his office or come to see him. It was noted that partners had already agreed to no more face-to-face meetings for the time being. It was also agreed that the respondent would put an email out to all staff regarding the wearing of facemasks, staff that are medically exempt and hand hygiene. The respondent would also write in this email about tolerance and understanding of staff who are medically exempt and to avoid unnecessary gossip and rumours.

50. The tribunal finds that, although the respondent fully intended to send the email in question regarding the wearing of facemasks etc, this did not actually happen. The tribunal accepts that this was an administrative error on the part of the respondent. It was not deliberate. The respondent had no reason to avoid sending the message that it had discussed. The respondent's other conduct on this issue was entirely consistent with them wanting to send the email. Administrative error is the only rational explanation, particularly as the respondent had already sent out a similar email once before [558].

51. During the course of the meeting Mrs Forward raised concerns about the claimant expressing his views about mask wearing and the Covid vaccination. It was noted that staff had interpreted this as his "personal/political views rather than medical reasons." Staff were judging the claimant which in turn caused a lack of respect for his role as Deputy Practice Manager. The claimant agreed that he was getting that feeling from staff. He said that he would limit expressing his views in the future at the workplace. The notes of the meeting do not go into any more detail as to the precise nature of the 'views' that were being discussed by the parties in the meeting.

52. Towards the end of the meeting a number of actions were agreed. These included that the claimant would wear a visor as a last resort when dealing with patients/staff in close proximity. The respondent agreed to send the email with government wording regarding medical exemptions and to include reference to being respectful and understanding. It was agreed that a Perspex screen would be purchased to go around the claimant's desk. There would be no face-to-face meetings unless absolutely necessary. Parties would continue to stay 2 m apart and abide by practice policy. When meeting with staff or patients the participants would ensure that they the staff or patients are comfortable in the distance and environment to have the meeting.

53. The tribunal accepts that this note of the meeting is accurate in relation to how the parties discussed the issue of the claimant expressing his views about wearing masks and the Covid vaccination at work. It was referred to

as "personal/political views" at the meeting. We accept Dr Beeharry's evidence that she first heard any reference to religious beliefs the day before the appeal hearing. She was present at this meeting and so was able to comment on the language which was used. Dr Beeharry confirmed that the beliefs discussed at the meeting were anti-vaccination and comments in relation to the government. There was no mention of the claimant's religion at this meeting. Nor was there reference to ethical or philosophical belief. When the claimant made comments during the course of this meeting the respondent did not know that his views were religious or ethical. There is nothing to suggest that they were expressed in the same (or a similar) way to how they are pleaded in this tribunal case. This is a feature of the case that has developed in the subsequent evidence. The tribunal also finds that Mrs Forward's comments (whether well received by the claimant or not) were designed to help him maintain his authority and working relationships in the practice. In essence, she was counselling the claimant not to bring the issue into work because his direct line reports were judging him and this would cause him problems at work in terms of his line management responsibilities. Mrs Forward's apparent intent was to help the claimant (whether or not he felt that she had, in fact, been helpful.)

54. Following on from the meeting the claimant sent an email on 18 January [147]. He had reviewed the notes from the meeting on the 15 January and he put forward amendments that he wanted to make to those notes. In particular, he wanted to remove the reference to 'medically' exempt and replace it with just "exempt." He stated that, *"If you have a look at the guidance on the government website, it does not use the term "medically exempt", rather just lists the various exemptions which exist, and one of those applies to me."* He further requested *"Please replace "political/personal" views with ethical concerns and personal views. My views on this subject are not really about politics."* He continued, *"In terms of wearing a visor, in our discussion as I recall I agreed to consider this option as a last resort in dealing with patients, not staff."* In relation to the Perspex screen he stated, *"I agreed to this, but I don't think we established when it would be used. Currently anyone coming to talk to me is more than 2 metres away, and Alessandra is at least 3 metres I would say. I imagined a folded screen that could be set up in the event of needing to work with a colleague at less than two metres for any length of time, and then put away again. Rather than being ensconced behind it permanently at my desk, which I wouldn't be too keen on. I know I'm old school, but hopefully not a museum piece yet?"*

55. The tribunal's view is that in this email [147] the claimant was seeking to change the comments he had made and resile from the agreement he had previously reached with the respondent during the meeting on 15 January. The respondent's notes of that meeting were accurate in that they recorded what was actually said. The claimant's email [147] constituted a change in the claimant's position rather than a rectification of the written record of the previous meeting to more accurately reflect what was said.

56. The parties made various submissions about this sequence of events. The tribunal has considered what the respondent was to make of the claimant's email when it received it, based on the surrounding circumstances as they existed at the time. What was the respondent to make of the claimant's

request to remove reference to "medical"? The tribunal concludes that a reasonable person in these circumstances would deduce that the claimant's reason for not wanting to wear a mask is not a medical condition. The claimant has since indicated that his proposed wording change was all about making sure the wording was the same as the government guidance but the tribunal does not consider that that is particularly plausible in the circumstances. The important issue here is what the claimant was saying to the respondent about his reasons for not wearing a mask rather than whether the terminology used precisely matched a government publication. Why, if the claimant has a phobia, would he insist on removing the word 'medical'? This would make the notes more (rather than less) misleading for the respondent. The tribunal finds that on receipt of this email the respondent was entitled to think that, whatever the reason for the claimant's mask exemption, it wasn't a medical reason. Hence, at that stage in the chronology they would have no reason to refer the claimant to occupational health. If it was not a medical exemption then occupational health guidance was not relevant. The tribunal is satisfied that this was how the respondent did, in fact, interpret the claimant's email. This properly explains their subsequent actions.

57. The tribunal also notes that the claimant changed his position in relation to wearing a visor when he wrote this email. During the course of the tribunal hearing the tribunal clarified with the claimant what his difficulties with face coverings actually were. He clarified that, from a health point of view, the concern was that masks would touch his face and could therefore negatively impact on his breathing or trigger a panic attack. His religious/philosophical objection to masks was that they would obscure the face. We also clarified what the claimant understood by "a visor". The claimant confirmed that he was referring to a clear plastic screen attached to a headband and covering the face down to approximately the chin level. The visor itself does not make contact with the wearer's face. Only the headband is in physical contact with the head. No portion of the face is obscured by the visor save, arguably where the headband is positioned on the forehead. The facial features remain clearly visible.

58. In light of this agreement as to what was meant by 'a visor,' the tribunal cannot understand how wearing a visor would be problematic for the claimant. His breathing would not be impacted, there was no physical contact with his nose or mouth, there was no real risk of a panic attack and his face was not obscured.

59. The tribunal also notes that at the meeting the claimant had agreed to wear a visor when dealing with all sorts of people, as a last resort. In his email he limits it to wearing a visor in dealing with patients. The tribunal does not understand his justification for further limiting the circumstances in which he would wear a visor. Given that the respondent was attempting to minimise transmission of Covid between staff members as well as between staff and patients there could be no logical distinction of this sort as to when the claimant would be prepared to wear a visor. The tribunal notes that during the course of the tribunal hearing the claimant explicitly confirmed, in response to questions, that he was not concerned with his colleagues' worries and anxieties relating to Covid. This was not something which played on his mind or which he felt it was important to

address. The claimant was seemingly unconcerned that colleagues were experiencing high levels of stress and anxiety about the pandemic and worrying about the risk of contracting Covid and the implications of infection for the employees and for their loved ones. The claimant demonstrated a lack of empathy and indeed sympathy for his colleagues' position.

60. It is also notable that the claimant's willingness to have a Perspex screen was limited. He clearly did not want one in place as a fixed feature of his working environment. He wanted to be able to remove it and replace it as and when he felt it was necessary. The need to erect and remove the screen might reasonably be expected to limit its efficacy as a mode of infection control. The claimant never clarified what problem he might have had with the Perspex screen being in place all the time. He provided no explanation for his position.

61. The claimant concluded his email [147] by noting that there might be health risks associated with wearing a mask especially for some groups of people and suggested a risk assessment be carried out for health and safety purposes.

62. The tribunal pauses to observe that the respondent's witnesses gave credible evidence about this sequence of events. It is apparent to the tribunal that the respondent was attempting to be very patient in difficult circumstances. The claimant asserts that there was some form of conspiracy or collusion between the respondent's staff but we saw no evidence of that. What the tribunal observed was a GP practice and its witnesses trying their best in very difficult circumstances. They were trying to keep the practice going. They were patient with the claimant. Every time the respondent witnesses thought that they understood the claimant's position, that position changed. The pattern was that the claimant would seem to cooperate, there would be an agreed position but then the claimant would change his mind, finesse it, or resile from it. The evidence heard by the tribunal was more consistent with the respondent wanting him back at work, fully functioning and respected by his direct reports. This is hardly surprising, given that the claimant was engaged in important business surrounding Covid practices during a time where this was of central importance to the respondent.

63. Viewed holistically, the tribunal finds that the claimant was effectively backpedaling/resiling from his previous agreement to wear a visor. This was how the respondent interpreted the communications and this was a reasonable interpretation in all the circumstances. The contents of his email to some extent contradict the way the previous meeting had actually taken place and it raised concerns on the part of the respondent that the claimant would not now abide by agreements that had previously been made. It raised questions as to how far the respondent could rely on any agreements made by the claimant on this subject. The respondent could not understand why the claimant drew a distinction between his willingness to wear a visor when with patients but not with staff. In the email the claimant did not indicate that he was unable to wear a visor or that there would be any particular consequences for him if he were asked to wear a visor. On receipt of this email, therefore, the respondent was aware that the claimant was changing his mind about wearing a visor but was not

aware of the reasons behind this apparent change of position. Likewise, the claimant's commitment to the use of a Perspex screen seems to have evolved. His objections to the Perspex screen seem to have been a matter of personal preference rather than a medical requirement to make a change so that the screen was foldable and could be brought out and put away at will. This email may well have been the beginning of the respondent losing confidence in the claimant's willingness to abide by the arrangements in place at the practice.

64. On 28 January a document called 'Workplace Masks Policy' was sent out [148]. This document had been prepared by Camilla Walker and approved by Dr Beeharry. It was said to be in addition to previous communications regarding preventing the spread of Covid 19. It was said, in terms, that all other advice on remote work and social distancing measures remained in place. It asked staff members to continue to practise social distancing and hand hygiene even when wearing the mask. The first proposition within the document was that all employees (both clinical and ancillary) were required to wear a disposable surgical mask when in communal or shared workplace spaces. It noted that the same mask could be used for the duration of the morning but then should be changed in the afternoon. It made provision for circumstances in which masks could be removed or lowered. Masks could be removed or lowered if the individual worked on their own in an enclosed space (e.g. in their own office); if they were sitting a minimum of 2 m away from others or if there were Perspex barriers in place between the individual and the others. A mask could be removed or lowered if the individual wished to eat, drink, or take medicine, provided the individual was 2 m away from others and performed the necessary hand hygiene and replaced the mask once done. The mask could also be removed to speak to someone who lip reads to communicate as long as there were provisions in place to do this safely. Finally, the mask could be removed to avoid harm or injury or the risk of harm or injury to the wearer or others. There was a specific section within the document entitled "exemptions". It stated, *"Employees whose health or safety is put at risk by wearing a mask are not required to do so, but may be required to take additional alternative measures, and must maintain a strict two metres distance from others at all times. This includes people who cannot put on, wear or remove a face covering because of a physical or mental illness, impairment, disability, or where doing so would cause severe distress."* The document continued, "*It is the responsibility of the employee to share that they may have an exemption and must be able to provide a reasonable justification as to why their disability or condition prevents them from wearing a face mask. If this applies to you, you must discuss this with your line manager or HR adviser, and complete the declaration below. In these instances, the practice may consider the following reasonable adjustments, depending on what condition prevents them from wearing a mask: i. Requiring the employee to wear a different kind of face covering, such as a visor; ii. Remote working (if applicable to job role); iii Redeployment, changes to working location or a reduction in working hours. If an employee cannot wear a face covering and none of the above measures can be offered during this time, the practice may request an occupational health assessment."*

65. The second page of the document included an 'Appendix Declaration' to be completed by individual employees [149]. In the typed portion it stated:

"I hereby confirm that I am exempt from wearing a face mask because one or more of the following criteria apply: I have a physical or mental illness; I have an impairment or disability; wearing a face mask would cause severe anxiety or distress. Accordingly, I will maintain a strict two metres distance from others at all times and agree to the adjustments as outlined below." There then followed a blank box headed "reasonable adjustments agreed with manager/HR" the claimant's copy of this box was left blank. He signed the declaration on 28 January 2021.

66. The tribunal considered the implications of this document for the claimant's case. Clearly the guidance from the respondent was becoming more detailed and prescriptive. The claimant was not involved in writing this document. However, the tribunal does not accept that the authors of this document were getting involved in matters in order to target the claimant because he was the only person with an exemption. The authors of the document were those involved in HR policy namely Camilla Walker and Dr Beeharry. They had responsibility for HR policies and procedures, whereas the claimant's responsibility and that of Dr Hosangady related more specifically to Covid 19. There was clearly an area of overlap between these two areas of responsibility. The fact that the document was not written by Dr Hosangady does not mean that it was not authoritative or applicable within the respondent's organisation. It had been adopted by the respondent as an entity whether it was written by the HR Lead or the Covid Lead. The respondent had to adapt and learn from experience with Covid measures (as did the rest of society during the pandemic.) There was a considerable amount of learning by experience and making amendments to policies and procedures in line with that experience. Furthermore, the respondent had to revisit the measures in light of the claimant changing his mind about what he would agree to after the meeting he had with the respondent on 15 January. Additionally, by this stage the claimant had not said that he had a medical exemption but had said that he wouldn't want to enforce mask wearing on others. This might explain why he was not involved in the writing of this document. He did not want to be involved in enforcing it. The policy itself was of general application and intended to give more guidance. More importantly it clearly makes provisions for exemptions and even refers to "severe distress."

67. Page 148 requires a reasonable justification in relation to mask exemption. The tribunal asked itself whether this was a reasonable position for the respondent to take. The tribunal considered whether the respondent was required to just take the employee's word for it without question when the employee asserted an exemption whilst working in a healthcare setting. The fact that the respondent is an employer in a healthcare setting is of central importance. The situation with the claimant's exemption is not comparable or equivalent to situations where a non-mask wearer might be challenged for not wearing a mask in a supermarket. The distinguishing features are first, the fact that it is a healthcare provider setting and second, that the respondent is the claimant's employer. In a supermarket the respondent would be challenging a customer or member of the public with which it has no prior employment or contractual relationship. The employment relationship may itself make enquiries and questions reasonable which would not otherwise be reasonable. Hence, an employer will often hold information on its employees (such as health information or other personnel matters on the person's personnel file.) It would not be

reasonable or acceptable for a supermarket or other business to make such enquiries of a general member of the public. That is not what was happening in this case. It is also important to realise that an employer has other obligations vis-à-vis its employee. It has a duty to make reasonable adjustments, to protect others, remove any workforce management issues etc. These are some of the reasons why an employer may need to find out the justification for the exemption. In particular, if there is a risk of bad feeling in the workplace and a suspicion on the part of other staff that the Deputy Practice Manager (who is responsible for Covid 19 policies and procedures) is refusing to wear a mask due to personal preference rather than because of a legitimate exemption, then there will be consequences for workforce management. Employees would, quite understandably, be reluctant to take orders from or work for the respondent if they had grounds to believe that the claimant was not truly exempt and that he was putting them at increased risk of Covid 19 as a result of his actions.

68. The tribunal also notes that the claimant signed a declaration [149] but didn't add anything to it in relation to specifying which of the three exemption categories applied in his case or setting out the adjustments which he considered were necessary in his case. This was the claimant's opportunity to give the respondent the knowledge that it needed in order to make reasonable adjustments. He was, of course, within his rights not to give that information but doing so might well limit what the respondent could reasonably do to assist him. Furthermore, it limited the claimant's entitlement to complain after the event that the respondent 'must have known' certain things about his exemption even though he did not take the opportunity to actually communicate those things to the respondent when given the opportunity to do so on this form.

69. Robin Forward sent the claimant an email on 28 January [150). In it she said, *"I had another very angry staff member ask me why you are not wearing a mask or face shield. They said you were putting all staff at risk as you were seen at TIO and UNI recently. You are putting me and the practice in a very difficult position. Please complete the attached declaration ASAP and I am now going to have to insist you wear a face shield whenever you leave your desk. You cannot be seen in communal areas without a shield or visit the other sites without one on. You did agree to wear one when seeing patients therefore this should not be an issue in the workplace to protect your colleagues. Thank you for your co-operation with this matter. Robin."*

70. The document at page 150 was an attachment to pages 148 and 149. The tribunal is not sure whether the claimant had seen these documents before he was sent page 150. If the claimant had not seen them before this point, he may well have felt that the documents at 148-149 were targeted specifically at him. However, the tribunal is satisfied that this was not the case. All of the respondent's staff were required to look at the policy and sign the declaration. The claimant was not singled out in this regard. The element which was individual to the claimant was the fact that he got the covering email asking him to sign the declaration. The contents of that email do show degree of frustration on the part of the respondent. At least part of the reason for that frustration is the fact that the respondent does not know the claimant's reasons for his decisions. The author of the email (Robin Forward) clearly did not understand why the claimant could not

wear a visor in circumstances where he had previously agreed to do so. She was in the unenviable position of trying to manage all the staff at the respondent practice and their potentially competing needs. She had a duty of care to keep other staff safe. The tribunal considers that it was reasonable for her to want to know *why* the claimant could not do what he had previously agreed to do in order to help keep others safe (i.e. wear a visor.) Given the respondent's need to protect the health and safety of all interested parties in circumstances where a life-threatening virus has reached pandemic levels, it is perhaps not unreasonable for her to want to know what reason the individual has for refusing to take steps to keep others safe. In essence it is a question of proportionality. The respondent took the view that it was not asking a great deal by asking for the reason for the exemption, whereas the claimant considered that he was entitled to exercise a veto by asserting an exemption without further explanation.

71. As already stated, the claimant did in fact sign the document at page 149 and agreed to abide by the strict two metre rule.

72. The claimant responded to Robin Forward's email in the following terms [151]: *"Hi Robin, the reason I am not wearing a face covering (and that includes a shield) is that I am exempt from wearing one. Either I am exempt or I am not. Are you saying that exemption no longer applies at Guildowns? I'm sorry this is putting you in a difficult position."* The content of the claimant's email demonstrates his inability or unwillingness to accept the proportionality of the respondent's request. He was satisfied that he had a good reason not to wear a mask and did not think that he was required to elaborate further. On receipt of such an email the respondent may well have queried whether the claimant in fact did have a good justification for his exemption given that he appeared either unwilling or unable to say what it was. The respondent is likely to have questioned why it was so difficult for the claimant to explain what the grounds for exemption were. The terms of his email are likely to have increased the levels of suspicion between the parties. In essence, the respondent was looking to the claimant to provide an explanation for his exemption so that the respondent knew it was a legitimate exemption and the respondent would be able to respond to queries from others confident in the knowledge that it was a genuine exemption, properly exercised (even if they did not provide that information to the third party making the enquiry.) At this stage the claimant had asserted that it was not a medical exemption. Had he provided just a little more information this would have assisted the respondent in considering what further adjustments were necessary and reasonable to keep everyone safe during the pandemic.

73. On 29 January the claimant offered a list of nine measures that he could take [152]. This is something that was subsequently referred to during the tribunal hearing as the 'nine-point plan.' He asserted in his email that Robin's previous email had reneged on the understanding reached at the meeting on 15 January. He asked for this to be acknowledged. He made the following points:

- *"I always keep at least 2m away from other people, as far as I possibly can, and I'm happy to continue to make every effort to do this*
- *I can try to reduce my occupation of communal areas, for example:*

  - *Use the upstairs loo, rather than the downstairs (although I don't use it much anyway!)*
  - *I already take my lunch in my room anyway*
  - *I can reduce the number of drinks I make in the kitchen, e.g. bring a flask*
  - *I can stop saying hello and goodbye to staff downstairs*
- *I can call people instead of talking to them face-to-face*
- *I can stop attending other sites*
- *I have signed the exemption form and returned to you in internal post*
- *A word on Matt's appraisal at the UNI the other day-I asked Matt if we should do this remotely but he was happy to do face-to-face. However, I can make sure all future appraisals are done remotely*
- *I don't want to work from home, but I can do if you insist."*

74. Whilst, on the face of it, the claimant was attempting to resolve the outstanding problems, in fact, this would not have been a particularly reassuring email for the respondent to receive. The tone used by the claimant is that he will comply with requirements where he has to but where there is an element of doubt, he is likely to challenge the measures in place. So, he should already have been avoiding face-to-face contact but had held an appraisal face to face. There was nothing to suggest that this was necessary, even if the other party was comfortable with it. He said he could call people instead of talking to them face to face. This should already have been his general practice. The fact that this is a suggestion in the email indicates that he wasn't already observing this in practice. He demonstrated a marked reluctance to work from home which contrasts with his subsequent submissions to the tribunal that working from home would be an appropriate adjustment in his case. The tribunal considers that the respondent would not have been (and was not) particularly confident that he was going to do as requested once it received this email.

75. The respondent sent the claimant a letter on 10 February 2021 regarding the face covering exemption [153]. The letter was from Dr Beeharry and stated that it was both the practice policy and also a legal requirement that the claimant wear a face covering in work. She continued, *"If you have an exemption, you are required to provide a reasonable justification as to why your disability or condition prevents you from wearing a face mask. Although you have signed the required declaration form, you have so far refused to provide details of the nature of your exemption. Whilst you have the right to refuse to divulge full details of your health status, your decision not to cooperate with requests for further details means we cannot properly assess what other precautions could be taken in lieu of facemasks in order to keep you your colleagues and our patients safe. This means that the Practice has to rely upon the information it does have available. As such, we have tried to consider what reasonable adjustments could be made to your working arrangements. Unfortunately, options such as remote working, redeployment or moving to a room where you can work alone are not applicable to your job role. This means there is only one option left to us; given that you stated in our meeting on 15th January that you would be prepared to wear a visor when dealing with patients and staff during face-to-face meetings, we can make the reasonable assumption that the disability or condition that prevents you from wearing a face mask does not prevent you from wearing a visor. It is on this basis that we have taken*

the decision to require you to wear a visor at all times whilst on practice premises going forward, effective immediately."

76. The claimant has focused on the aspect of this letter that asks him to provide a reasonable justification for his exemption but the tribunal finds that this needs to be read in context. The letter does go on to point out that the claimant has the right to refuse to divulge full details of his health status and it does go on to explain why the respondent needs the information and how it would be used by the respondent. It is evidence that the requirement to wear a visor is being communicated in the absence of further requested information and is the best that the respondent can do on the facts as it understands them at that time.

77. The tribunal finds that this was a reasonable email to write in all the circumstances. It clearly explains the reasons behind the respondent's actions. It raises the same query identified by the tribunal regarding the visor. It is a reasonable point for the respondent to make in the circumstances. The only matter which is not really addressed in detail in this letter is the respondent's detailed explanation as to why the claimant cannot work from home. However, the respondent's witnesses did elaborate upon this during the course of the tribunal hearing. Firstly, the claimant was not asking to work from home and his correspondence indicated a reluctance to do so. There was some question about how workable this would be in practice given the nature of the claimant's role. He had drafted the policy which stated that whoever *could* work from home *should* work from home and that steps were being taken to facilitate this [296-297]. And yet, the claimant had not worked from home. This certainly could be seen as a tacit acceptance by the claimant that home working was not reasonably practicable in his particular job role. The respondent also said that it had GDPR concerns. If the claimant was working from home how could it ensure the security of its data and patient information? In principle this could be a good reason why the claimant would need to work in the office. However, the tribunal did not hear much evidence about the practicalities which would be involved. For example, we were not told whether employees could log onto the system remotely from home or whether their access to the full system was limited unless present on the respondent's premises. What were the IT safeguards and limitations? In closing submissions the claimant suggested that, if there were problems with accessing documents by email, he could have come in to collect paper post to take it home from work. This was not suggested at the time or during cross examination. Indeed, this would have necessitated daily trips to the premises by the claimant and would have had even greater data security implications. We do not know whether the claimant would have been insured for having such documents at home. The respondent also indicated that there might be difficulties rerouting the telephones so that individuals phoning the claimant at work would be put through to him at home. Rerouting phones might, as a matter of principle, be possible but again the tribunal did not hear evidence on the practicalities bearing in mind that this is an NHS setting with security implications and not just a private business phone system. There may well have been problems with rerouting in those circumstances but we really cannot say based on the limited evidence provided to us.

78. More importantly, the tribunal considered the central purpose of the claimant's role as Deputy Practice Manager. There were still employees working from the practice premises who were directly line managed by the claimant. It is unclear how he would effectively manage them if not physically located with them. It was also important to note that a significant part of the claimant's role was dealing with health and safety and drafting Covid 19 policies. How could the claimant draft a policy to be applied in the workplace if he was absent from that workplace and unable to determine what worked in practice? How could the claimant police compliance with those policies by other members of staff if he was not present to monitor it? How could the claimant deal with in person complaints from service users (which was part of his role) if he was not physically present on the premises?

79. The claimant responded by letter of the same date [154). The claimant indicated that on 15 January he had explained that he was exempt from wearing a face covering in accordance with government guidelines, that he would prefer not to disclose the reason for the exemption due to its personal and sensitive nature, and that the respondent could look at the list of exemption reasons on the government website and he confirmed that one of those applied to him. He pointed out that the respondent had accepted that and had confirmed that he did not need to disclose the nature of the exemption. He therefore asserted that it was incorrect and disappointing to say that he had refused to provide details of the nature of the exemption or had decided not to cooperate with requests for further details. He stated, *"If you are now insisting that I disclose the nature of my exemption, I am prepared to do so because I perceive that, given the shift in your position on this matter, not to do so would put my job in jeopardy and I don't want that. Therefore, I can disclose that the nature of my exemption is: "where putting on, wearing or removing a face covering will cause you severe distress," which I have quoted from the government guidance. Please could I also clarify that you have misrepresented the discussion around wearing a visor. In the meeting on 15 January I felt under pressure to agree to consider wearing a visor in extremis, as a last resort when having to deal with the patient in close contact and no other options were available. I explained that I did not know if it would even be possible given the nature of the exemption, but I reluctantly agreed to keep this option open as a gesture in recognition of your supportive approach to my difficulty, and feeling under some pressure to do this. Finally, I have advised you that I always try to keep at least 2 metres away from others during the course of my work and I am very mindful of this. I avoid situations where this rule might be compromised. I am not able to wear any face covering due to my exemption (and this includes a visor.) I hope that this will be acceptable."*

80. In this letter the claimant gives as much of an explanation of his exemption as he is ever going to. He does so somewhat reluctantly. He does not say that he is disabled. He does not say that he has a phobia. He gives the minimum information by quoting the government guidance wording. In this letter he also changes the detail of what he said about visors in the previous discussions. In reference to the earlier discussion about wearing a visor he adds "in extremis" and adds where he is in close contact. He is changing the details and rewriting his account of what was said on 15 January to accord with his position as it stood on 10 February. The tribunal

has concluded that the contemporaneous record of what was said on 15 January is more reliable than the later version set out in this letter. We do not accept that he said on 15 January that he did not even know if wearing a visor would be possible given the nature of the exemption. The material point was that he agreed to wear a visor and gave the respondent the impression that this would be practicable for him.

Complaints, suspension, and investigation

81. On 11 February 2021 the respondent received two staff complaints about the claimant. In the first complaint [155] the author alleges that on 10 February the claimant asked her to go upstairs to the office and speak with him regarding emails from SD regarding specific matters. He said he wanted her advice. The complainant went upstairs as requested and stood with her mask on in front of his desk by the radiator. She says that the claimant then asked her to look at his screen to view both the email and EMIS due to the fact that at that time she had no knowledge of the emails and the situation. She asserts that at no time did the claimant attempt to wear a mask or a visor or even offer to step aside whilst she viewed the screen or ask whether she was comfortable about being in close proximity. She found this strange as during the latest training for the PST staff members he had been very adamant that the complainant should ask other participants if they were comfortable if they had to get close during training and to maintain the social distance rule as well as wearing the masks. The author went on to note that on 11 February the claimant had come into the back office three times to talk with Anthea. Each time she observed that he was not wearing any form of protection mask or visor. He talked from a distance to Anthea but gradually moved closer around the desks towards her.

82. The second complaint was set out at page 156 of the hearing bundle. In it the complainant stated that she was fully aware that some people were exempt but there were some people in the office who do not wear masks, either at all, or in public areas within the Wodeland Avenue site. The author felt that this could be really detrimental to them all, especially with so many of them in one building and using the same communal spaces. She stated, *"Today Mark came down to speak to me a few times and I'm sure you know that he never wears a mask. Once was when I was in the middle of something else, and suddenly I was very aware and uncomfortable that I was not wearing my mask at my desk and immediately had to put it on (and feel that I don't want to offend him either.) Thoughts that went through my mind were that I don't know if he could be a carrier, where could the virus spread to while he was talking to me, clean everything after he leaves, and I became a little agitated. I really don't want to take the virus home, so have been really aware and cautious. It's not just me, but know that other staff are agitated by this at times. I get on well with Mark but I also feel that as deputy practice manager of such a large organisation, he does not lead by example on an issue that is quite important during these times. Some PST staff also sit and chat amongst themselves in the office with no masks on and think that it's fine. The number of daily Covid cases is taking so long to come down that maybe this is actually not that fine and if the manager doesn't follow protocol, other staff may not feel the importance. I obviously don't want my name out there as someone who complains as this is not me, but the fact that Tina was so aware of what*

was going on with Mark this morning, just reiterated to me that there is a problem. Many times we can all say that "it should be fine this time" but there is going to be a time where this fails. There are people out there not knowing at all how they got Covid as they have been so careful. I have heard to how proven the wearing of masks is in preventing the spread of the virus and even essential stores are becoming more strict on a "no mask no entry" policy."

83. On receipt of such written complaints the respondent could not just ignore them. These were unsolicited complaints which the respondent had to look into. The tribunal does not accept that they were some sort of 'set-up'. The claimant had already said what he was prepared to abide by in terms of the rules. These complaints suggest that he was not abiding by the rules that he had previously said he would comply with. In the course of these complaints he is alleged to have been doing several things that he said he wouldn't, such as talking to people face-to-face rather than calling them and failing to check that the other participants in the conversation are comfortable with the distances involved. The complaint also highlights the levels of anxiety that were prevalent at this time amongst other members of staff. This was also a relevant consideration for the respondent.

84. Later on 11 February 2021 the claimant was suspended [157]. The suspension confirmed that due to receipt of a formal complaint the decision had been made to suspend the claimant with immediate effect pending further investigation into a breach of the Practice's Workplace Mask policy. The letter confirmed that alternatives to suspension had been considered but the respondent concluded that suspension was most appropriate at this time. The letter also confirmed that no decisions had been made regarding potential disciplinary action in relation to the issue. The suspension was with pay and the claimant remained in employment. It was confirmed that whilst suspended the claimant should not enter practice premises or make contact with staff, patients, clients, or agents without permission from Mrs Forward or a partner.

85. The claimant attended an investigation meeting on 15 February 2021. The meeting was held remotely. The respondent minutes were at [159]. The claimant provided his own version of the minutes at [162].

86. According to the respondent's notes during the course of the meeting the claimant was questioned about the two allegations where it was said that he breached the two metre rule. The first allegation related to when he was said to have called Tina up to the office in order to ask her to look at his computer screen. The second allegation was when the claimant was alleged to have gone into a communal area and spoken to Anthea at too close a distance. In relation to the incident concerning Anthea the claimant maintained that he did not breach the two metre rule but accepted that he had not asked Anthea or anyone if they were okay with proceeding in this way. In relation to the Tina incident, he accepted that she had got closer than two metres in order to see the screen. He maintained that if she could not see the screen and felt she needed to come closer she should have said something, although he accepted maybe he should have been more proactive. In relation to the Tina incident he was asked why he had asked her to come upstairs in the first place rather than sending an email or discussing the matter by phone. The claimant accepted that he could have

done that but that it was easier for him to do as he did. He felt that sometimes over the phone things did not get resolved. He stated, "*I don't actually recall the incident; sure Tina is right but definitely would not have encouraged her/made her come within 2m. If you're saying I should have checked with her, I can do that. She should have said if she did not feel comfortable. There was no discussion, (it was) not knowingly done."* Robin Forward pointed out the claimant's position of authority as Deputy Practice Manager and suggested it should be up to the claimant to make sure that he kept to the 2 m distance given that he told Tina and Paula to maintain their distance from PST.

87. In relation to the incident concerning Anthea, the claimant maintained that it was a project where he needed to explain to Anthea how she should do something on the computer. He went down to show her. He maintained that he stood at least two metres away and as things came up on the screen, he showed her what to do. When asked why Anthea would say she felt uncomfortable, the claimant was unable to say. He suggested that maybe Anthea did not know what two metres was. He maintained this was something he was conscious of and he had no need or wish to breach two metres.

88. During the course of the meeting Robin Forward also mentioned that in addition to the written complaints there had been a variety of verbal complaints. Several staff had complained that when the claimant was in communal spaces, he was not abiding by the two metre rule. As the claimant was Health and Safety Lead and Covid Lead it appeared to other staff as if it was "one rule for one, another rule for others." The claimant still maintained that he abided by the two metre rule. Mrs Forward asked why the witness said otherwise. He confirmed that he had not knowingly breached the rule. In relation to the verbal complaints the claimant stated that he felt it was not about the two metre rule but more about not wearing a mask. He confirmed he was exempt from mask wearing and that the background was because of distress. Mrs Forward tried to explain the fear factor and the fact that staff were afraid for their health and safety regarding the spread of Covid. She explained that if the claimant was not wearing a mask it made it even more important that he maintained the two metre distance. She reiterated that the respondent had to make sure they were not putting the staff at any risks and needed to come down tough on those not abiding by rules. The claimant focused on the fact that policy confirmed he did not have to wear a mask. Mrs Forward confirmed that the policy notes that where a mask isn't worn the employee may be required to take additional alternative measures and must maintain a strict two metre distance from others at all times. She asserted that the claimant did not do this on at least two occasions. The claimant again said that he had not come within two metres of Anthea and couldn't remember the details with regard to Tina but she came into his space and not the other way round. Mrs Forward made the point that the claimant had asked Tina to come and look at the screen. The claimant reiterated that if the only reason she was prepared to do that was because she was scared of disobeying, then the claimant would tell them not to come within two metres. He hadn't thought to do that. He maintained that if he said to look at the screen, he wouldn't have intended her to come within two metres.

89. The overall flavour of the claimant's response in the meeting was that he accepted that he may have come within two metres of a colleague on at least one occasion. He said that he was committed to the two metre rule except that on occasions it has been more convenient or easier to breach the rule to get the job done effectively. Given that the claimant had indicated that there would be occasions where he considered it more convenient to breach the rule this raised questions about the reliability of any reassurance the claimant gave, certainly from the respondent's point of view.

90. In addition to the respondent's version of the notes we were shown the claimant's version of the notes. We also heard evidence from the claimant in the course of the tribunal hearing. A number of discrepancies arose. In the course of the claimant's minutes he indicated that he had never knowingly or intentionally broken the rule (the two metre rule). However, he had previously stated that he did not recall the encounter(with Tina). His notes were internally inconsistent in this regard. In evidence to the tribunal the claimant said that he had a very clear recollection of the incident in that Tina knelt on the floor and he asked her if she was comfortable in doing this. At the time of the investigation he said she had come near to him and could have said if she was uncomfortable. At the tribunal hearing the claimant maintained that he had asked her if she was comfortable and she maintained that she was. The claimant maintained that it was only for a short time in order to get the work done. It was his job to remind other people if they forgot. In his notes the claimant alleged that he had asked Tina to approach him to look at the screen whereas during the tribunal hearing he said that it was Tina who chose to approach his desk. Whilst the claimant had trained others that they should always check if people are comfortable with the proximity, he maintained in his note that Tina should have/could have mentioned at any point if she was uncomfortable but did not do so.

91. The tribunal heard evidence that further investigation meetings took place with other staff members regarding the allegations against the claimant and that these took place on 16 February. We were referred to a note of those investigation meetings [164]. In that note the colleagues were anonymized and referred to by numbers 1-9. We were told that colleague number one was Ms de Jonge and colleague number two was Tina Smith. The various accounts within these meetings are consistent. The picture painted is that the claimant did not follow the rules as carefully as he assured the respondent that he would. Colleague one indicated that she had seen the claimant wearing a mask when sitting on the front desk welcoming patients. She was surprised that he wore a mask and queried it with him and he responded that of course he had worn a mask in front of patients. She commented that this had not appeared to cause him any distress and he was fine for the rest of the day. She also asserted that in other conversations she had had with the claimant he had made her doubt that there was any real medical justification for him not wearing a mask. She made the point that the claimant had told her often that it was not a medical exemption but a political one which wasn't in line with guidance. She thought that he had also previously referred to a belief that this was related to a government conspiracy. She went on to confirm that the claimant had often come within two metres of her and that this happened all the time. The claimant didn't ask permission or if she was comfortable

with it. She maintained that she didn't feel comfortable in insisting on the gap because he was her line manager and he had made his political views clear so it was an awkward conversation. She commented that it was easier not to confront him on this.

92. Colleague number two showed Robin Forward and Camilla Walker where she stood next to the claimant's desk during their interaction. It was clear that maintaining the two metre distance wasn't physically possible if Tina was being asked to view the screen. It was recorded that the actual distance could not have been more than half a metre. The colleague stated that she felt obligated to come close. She knelt down to look at his computer and he offered her the chair right next to him. She declined that as she was uncomfortable. Tina had also witnessed the claimant's interaction with Anthea. She and Paul saw the claimant sit in Heidi's chair which he then pulled across right next to Anthea. This was less than one metre (circa 30-50 cm?). He didn't ask Anthea if she was comfortable first.

93. Colleague number three demonstrated roughly how far a two metre distance was and confirmed that the claimant came down to her two to three times that day. First, he stood next to her next to the screen but not behind it. The colleague confirmed this was less than one metre. The colleague confirmed that the claimant sat at Heidi's desk (which was not two metres away) and pulled up next to her. He then moved round to another desk which was at a safe distance. She remarked that at another time the claimant came to her to hand her papers. The colleague maintained that the discussion in question could have been done via telephone or email instead. She already knew what the F12 button was on the computer so did not need to be shown. The colleague confirmed that this was not the first time and that this was normal behaviour for the claimant and everybody downstairs had been upset about this. She had not come forward earlier because the claimant was a manager. Colleagues had also commented but didn't want to cause a scene. The colleague indicated that the claimant had been more mindful of distancing lately in general but had still breached the two metre rule on that day.

94. Colleague four confirmed that the claimant was often in communal areas approaching other desks and inviting others to his desk often with less than two metres and without a face covering. Colleague four confirmed that the claimant did try to ask before approaching her workspace. The colleague did not confront him and just wore her own mask.

95. Colleague number five confirmed that the claimant kept his distance. It did bother the employee that the claimant didn't wear a mask. The colleague understood that the claimant was exempt so it was a bit difficult. The colleague didn't like to ask why, so didn't raise concerns.

96. Colleague number six confirmed that they made sure they kept their distance and kept their mask on. This colleague did feel upset at the beginning that the claimant wasn't abiding by rules. The colleague confirmed they knew the claimant had his views on masks, didn't believe in the virus, didn't believe in masks, thought it was a load of rubbish and laughed it off. The colleague commented that all were guilty of not taking it seriously in the beginning but as time went on it became more serious and he (the claimant) really needed to take it seriously too.

97. Colleague number seven didn't think that the claimant followed most of the guidance and confirmed that it made them uncomfortable. This colleague would prefer it if the claimant wore a mask and did not believe that he was medically exempt. The claimant had expressed views that indicated he didn't have an actual exemption but chose not to wear a mask. This colleague could see that the claimant tried to maintain a distance and tried not to get too close. The colleague also confirmed that the claimant did not enforce mask wearing.

98. Colleague number eight confirmed that they were bothered by the claimant not wearing a mask and not following the rules. This colleague confirmed that the claimant showed a lack of consideration for everyone else. The claimant went downstairs all the time to speak to everyone else, less than two metres away, with no mask. When this colleague was downstairs if the claimant needed to speak to them (or Heidi or Anthea) he did not stay either two metres away or wear a mask. This colleague confirmed that the claimant often interacted face-to-face when he could have done the task via phone or email. This colleague had been taken by the claimant to the toilet to demonstrate that there was no toilet roll left. The colleague confirmed that this should have been done by telephone. This colleague commented that the claimant was practice lead for Covid yet didn't follow any of the guidance himself and didn't prevent close interaction.

99. Colleague number nine commented that they all had to obey the rules, the claimant held a senior position and so others would follow him and that this was potentially a big problem. Colleague number nine commented that the claimant hadn't always managed to main attain a two metre distance, he tried to social distance but unless he had a really good reason for not wearing mask the colleague said it was just not acceptable.

100. Having reviewed the contents of the witness evidence the tribunal concludes that the respondent was entitled to believe what the colleague witnesses were saying. There was no particular reason for them to lie to the respondent. Indeed, the claimant actually admits some of the points made by the witnesses. Some of the actual incidents may have been admitted by the claimant but his explanation/justification for the events was subject to change over time. The respondent was entitled to believe what the witnesses said. The fact that the claimant was their manager would also help to explain why they had not made a complaint earlier. The problem from the respondent's perspective is that in each of the incidents complained of the claimant could have taken at least one or more mitigation steps to reduce the risks and yet did not do so. There was reasonable evidence against the claimant and the disciplinary case against him stacked up to the extent that it was reasonable to take it to a disciplinary hearing. It was reasonable to request that the claimant follow the rules, enforce the rules, and abide by his previous agreements with the respondent.

101. The claimant was invited to attend a disciplinary hearing (invitation letter [167]). The letter summarised the essence of the allegations against the claimant. The overall focus was on the fact that the claimant was an infection risk rather than on the specific nature of the breach (whether it be a breach of the two metre rule or a breach of the mask wearing

precautions). The focus was on the fact that the claimant breached the rules thereby increasing the risks. Three specific allegations were set out in the letter. The first allegation was that, *"During your interactions with staff and subordinates you have neither maintained nor enforced the 2 m rule required when not wearing a face covering."* The second allegation was that, "*You were dishonest in your account of events during the investigation meeting on Monday 15th February. Based on discussions with numerous colleagues, we have come to the reasonable assumption that you did not maintain the distances you said that you did, and that events did not unfold quite as you describe.*" The third and final allegation stated, *"Your wilful refusal to abide by regulations and policy with regards to face coverings. You have demonstrated to colleagues that you are at times willing and able to wear face masks/visors, particularly when interacting with patients without causing you any distress. You have provided no substantive information to support your claim to an exemption. Therefore, we have come to the reasonable belief that you have been picking and choosing which rules to follow and misleading the practice about your reason for not wearing face coverings."* The letter enclosed various documents including the minutes of the investigation meeting and the colleagues' statements taken during the investigation, together with a copy of the workplace mask policy and the minutes from the meeting on 15 January. They also included copies of emails from the claimant stating that he would call colleagues rather than interact face-to-face and copies of written complaints about the claimant. The letter notified the claimant that, if proven, the allegations would be considered gross misconduct and his employment might be summarily terminated. The claimant was offered the opportunity to be accompanied by a work colleague or accredited trade union official. The claimant was sent a copy of the disciplinary and dismissal procedure.

102. The claimant drafted a letter dated 16 February in defence to the allegations made against him. The claimant maintained that removing in-person communication completely was very challenging if one wanted to do a good job. He said he had tried to reduce face-to-face communication but there were times when it seemed to be the right thing to do. He said that this was a constant judgement call but, in these encounters, he had been conscious of the need to maintain two metre distance. He stated that the fact that the complainants reported that the claimant did try to maintain the social distance is clear evidence of his intention to maintain the distance in dealings with staff. The claimant reiterated the contents of his "nine-point plan". The claimant also highlighted other areas where he had been proactive in raising awareness of the practice rules. The claimant asserted that the alleged breaches of the two metre rule were contrived in order to justify a punishment for the real source of resentment, namely the fact the claimant did not wear a face covering. He maintained that this would be unlawful on grounds of disability discrimination. The claimant maintained that it was perfectly possible to be exempt under the guidelines and simultaneously hold a belief that enforced mask wearing is unethical. The claimant denied being dishonest in his recollection or account of the events during the investigatory meeting of 15 February. The claimant denied having worn a mask on the day alleged by the colleague when he sat at the front desk. His account was that he was not wearing a mask but realised that he could not do temperature checks without getting close to the patient and that he would not be able to do this. He decided that he

would ask the patient to self-check or try to get a colleague to do it. He maintained that, in any event, the patients who entered were admitted and checked in by the clinician. He denied wearing a mask or a visor on this occasion. He maintained that he had never worn a face covering at work. The claimant asserted that he had never been asked to provide any evidence of his condition which qualified him for exemption. He went on to say that he would be happy to and that this could be provided by the claimant's GP.

103. In relation to the issue of the claimant carrying out temperature checks at the front desk the claimant maintained that he did not do this and that the clinician did it. He maintained that he did not wear a mask. This allegation related to the temperature check protocol used when a patient arrived at the practice. The idea was that patients would come in and would be temperature checked as soon as possible so that if the temperature was too high and there was therefore a risk of Covid, they would not be allowed into the building, thereby avoiding a further infection risk. So, as a matter of principle, the temperature check should take place as soon as possible on arrival. Otherwise this would defeat the object of the exercise. The claimant said that he was on reception but wasn't wearing a mask and that he did not do the temperature check, the nurse did.

104. During the course of the tribunal hearing, the tribunal was taken to the relevant computer logs. These show that the claimant logged that a patient had arrived. There is then a log that the patient was in the waiting room with the temperature checked. The log does not say by whom. Then the nurse asked for the patient to be sent in. The log suggests, therefore, that the nurse stayed in her consultation room and never went into reception to collect the patient. Based on a reasonable interpretation of the electronic logs, the claimant's explanation is not credible. The nurse would not have needed to send a message asking someone to send her patient in to see her if she had already come out and performed the temperature check herself at reception/in the waiting area. She would have collected them in person and there would be no log of them being sent in to see her in those circumstances. If the clinician did not do the temperature check, then either the claimant wore a mask to do it (in which case this suggests he can wear a mask without distress), or he did it without a mask which means that he put a patient at risk. The theory that the nurse carried out the temperature check is the only way the claimant can get around this allegation and even then, it means that the patient was on the premises for longer than intended prior to being temperature checked, thereby increasing the infection risk. It also increased the infection risk by giving a point of contact between the clinician and patient who had not been checked for Covid. That point of contact did not need to occur. The claimant also got mixed up in his oral evidence to the tribunal and did not provide an adequate explanation of how the protocol worked on the day in question even though he had written the temperature checking protocol. There was some suggestion made later in the tribunal hearing that the respondent had interviewed the nurse in question but had not called her as a witness to the tribunal. However, the tribunal notes that it was open to either party to call the witness to give evidence to the tribunal, if required. The tribunal further notes that the nurse was not an essential witness to the central facts in this case. The tribunal has to decide the case based on the evidence that has been presented. On balance, we do not find the

claimant's explanation in relation to this incident credible for the reasons already stated.

105. Leaving aside the evidence given by the colleague that the claimant had worn a mask on the premises, there was further evidence presented by Dr Oh. He said that he had seen the claimant on the premises in December wearing a visor with a red frame without any signs of distress. He thought that this meant that the issue surrounding the claimant wearing a face covering had been resolved. He was not involved in the disciplinary process until the appeal stage when he was appointed as one of the two appeals officers. He confirmed this evidence to the tribunal during the hearing. The tribunal has no reason to disbelieve him in relation to what he says he saw. He was a credible witness. Indeed, Dr Oh's evidence was consistent with what the claimant had previously said about wearing a visor if required (before he subsequently changed his position.) It demonstrated that there was no sign of distress from the claimant if he was wearing a visor.

106. Indeed, there is no contemporaneous evidence of the claimant displaying any distress around wearing a mask or visor himself or indeed in seeing others wearing a mask/visor. The tribunal notes that in the GP surgery masks would have been a regular feature (if not before the pandemic, then certainly as a result of the pandemic.) We would have expected the claimant to show some symptoms of his phobia in the workplace. The claimant's evidence was that his coping mechanism was to look down or look away if he met somebody wearing a mask. However, it seems odd that the claimant then chose to have face-to-face meetings with people in the workplace who would be wearing a mask, thereby causing himself additional distress when he could have conducted the conversation by Teams meeting or telephone and thereby avoid the mask encounter altogether. It seems odd that, given the claimant's work history, he did not realise he had a phobia before July 2020.

107. At page 171 of the defence letter the claimant said that he would have been happy to provide GP evidence regarding the phobia and the exemption but the tribunal notes that he never actually did this. The respondent's advisers (Croner) picked up on this in their log of advice from 18 February [492]. The log noted that the claimant had provided consent to speak with his GP and continued, *" worried this will open up a can of worms. intending to not make a finding in respect of him not wearing a face covering but make a finding in respect of: 1. EE has not been maintaining or enforcing the 2 m with staff believe him not enforcing the 2 m has been wilful and deliberate, in inviting subordinates to sit next to him. fundamental measure as EE is not wearing a face covering due to his exemption - therefore the 2 m role is vital to protect his well-being and that of colleagues. EE has responsibility for health and safety and is the C-19 lead for the partnership-he should know better and lead by example. 2. EE has been dishonest during the IM. EE cites he has never worn a face covering or visor. we have witness testimony from colleagues and a senior GP observing that the employee has on occasions worn a face covering, for prolonged periods, normally when dealing with patients breach of trust and confidence senior position, required to act with integrity. looking to dismiss."* On the one hand it could be suggested that the respondent is trying to find the evidence to justify dismissal and therefore targeting the

claimant on the issue of two metres because the respondent cannot 'get him' on the issue of masks due to the exemption. The alternative point of view is that the respondent decided that they were going to accept that he had the phobia in question and was exempt but that, even so, that did not resolve the situation. The point was that if the claimant was not wearing a mask, then he definitely needed to abide by the two metre rule and apply the other mitigation measures. On this version of events the respondent has decided that the presence or absence of the mask is a red herring. It was compliance with the other mitigation measures (including two metres) which was of crucial importance.

108. On balance the tribunal concludes that the respondent was entitled to accept the claimant's assertion that he had a phobia. The respondent was being pragmatic. The respondent did not need to get into this issue and therefore focused on the other measures etc. On that basis, the respondent would be entitled not to follow up on medical evidence as it would be a side issue. Essentially, they accepted what he said about the existence of the phobia and focused instead on the practicalities. The question also arises as to what a GP's report was going to add to the situation in terms of proving or disproving the claimant's phobia. It was unlikely that any further contemporaneous records would be present.

109. The Tribunal also does not accept that the log of advice from Croner discloses some sort of 'witch hunt' as asserted by the claimant in closing submissions. The respondent had legitimate reasons for accepting the claimant's assertion that he had a phobia and not following up on occupational health or GP evidence. It was entitled to examine the evidence which had been presented to it during the disciplinary process and determine what conclusions could and should be drawn from it. This was not an example of the respondent seeking to 'frame' the claimant for disciplinary misconduct which was not disability related (in attempt to avoid liability for discrimination). Rather, it was the respondent reviewing the evidence in its totality, taking advice, and concluding that some elements of allegations need not be pursued but that evidential developments during the process could be examined. If the claimant's own evidence during the course of the process undermined his credibility as a witness or suggested dishonesty, the respondent was not required to ignore this but could take it into account during the remainder of the process.

110. In fact it was the claimant who was focused on the issue of the mask exemption rather than the respondent. It was the claimant who was not happy to explain why he was exempt from wearing a mask. By contrast, the claimant's colleagues focused on the issue of infection risk, how far they had been exposed to infection risk and how this could be avoided. The respondent asked itself whether it needed to get into this debate. This is corroborated by the note of advice on 18 February [493.] Page 494 also contains a review of the pack of evidence indicating what the respondent was entitled to make of the evidence it had collated by this stage.

<u>Disciplinary stage</u>

111. The respondent held a disciplinary hearing with the claimant on 18 February. The meeting was chaired by Robin Forward. The claimant attended alone. Camilla Walker attended to provide notetaking and HR

services [174]. At the outset of the hearing the claimant read out his defence letter (already referred to above). Mrs Forward asked him to send her a copy of the letter. During the course of the hearing the claimant again asserted that staff were able to see his computer screen from two metres away. Mrs Forward confirmed that that was not possible and that she had measured it. On that basis the claimant confirmed that they could well have been within the two metre distance. In relation to the Tina incident the claimant stated, *"I offered to Tina "would you like to sit", okay may not have been 2 m. But that's one example. It happened innocently. And I asked her she said she was fine then."* The claimant confirmed that he'd maintained distance and done his best and that it was his intention to abide by the distance requirements.

112. Mrs Forward questioned the claimant's assertion that he had never worn a mask on the premises. She referred to the alleged incident with the patient. The claimant denied that this had happened and maintained that the clinician had checked them in. It was put to him that the computer records suggested that he had logged in and put in the temperature. He denied this. He stated, *"they weren't there, no one was there. I've never worn a mask or visor. Didn't happen."* Mrs Forward raised the issue of the reason for his mask exemption and questioned the changing reasons the claimant appeared to have given over time (medical/ethical etc). She put it to him that he had told all staff that it was a political belief and nothing to do with medical exemption. The claimant said, *"I'm not saying they made this up. I have mentioned my beliefs. You can hold the ethical belief and also be exempt under the rules of exemption. And I am both. I know what I know about myself. I gave my response. Clear to me I am exempt. You can speak to my GP."*

113. The meeting was adjourned and resumed the next day, 19 February [178]. Mrs Forward read out a short written statement to the claimant. She confirmed that she had decided not to uphold the third allegation in relation to willful refusal to wear a face mask and she confirmed that she was prepared to accept his claim to a mask exemption. She confirmed that therefore she did not deem it appropriate to contact the claimant's GP at that stage. However, she went on to address the requirement to maintain distancing which was crucial in light of the claimant's seniority and the fact that he did not wear a face covering, unlike others. She noted that the requirement for extra precautions was laid out clearly under the mask exemption section of the policy. She upheld the first allegation that the claimant had not maintained or enforced the two metre rule. She explained that one of the GP partners had confirmed that he had seen the claimant wear a visor and a senior member of staff also confirmed that she saw the claimant wear a mask on 14 December. Mrs Forward highlighted that the claimant had stated both that he remembered the circumstances of the two formal complaints but then that he could not recall them. She highlighted that the claimant had repeatedly claimed it was possible for colleagues to view his computer screen from two metres away even though this was not possible. She had therefore come to the conclusion that the claimant had not been honest in his account of events. On that basis she upheld the second allegation.

114. In response to this the claimant maintained that he had not worn a visor or mask and said that over time he had now recalled that patients were

admitted by the clinician and not by him. When asked who the clinician was, he said he could not remember or did not know. *"Maybe Anne?"* The claimant was given an opportunity to add anything further that he wished to say. Mrs Forward then informed him that she considered that his actions amounted to gross misconduct. She had taken into account mitigation including his hard work over the previous year and the comments from colleagues who had stated he had tried to maintain distance at times. However, she noted that many staff did express distress and confirmed that the respondent had a duty of care to those staff during these unprecedented times. She also noted that as a member of the senior management team it was vital that the respondent was able to trust the claimant. She therefore concluded that this had caused an irretrievable breakdown in the working relationship at several levels and therefore she felt she had no choice but to dismiss the claimant with immediate effect. The claimant's right to appeal was confirmed and the meeting concluded.

115. The dismissal was confirmed in writing [180]. The letter confirmed that the first two allegations were upheld. In relation to the first allegation, that the claimant had not maintained or enforced the two metre rule, the conclusion was based on the evidence, witness statements and physical measurements taken. Mrs Forward concluded that the claimant had not always maintained the two metre distance which was crucial considering the claimant's seniority and the fact that he did not wear a face covering, as required by the mask exemption section of the workplace mask policy. In relation to the second allegation, that the claimant had not been honest with the respondent, Mrs Forward was satisfied this was a reasonable conclusion to draw based on the statements from several colleagues, the fact that a GP partner had confirmed that he had seen the claimant wear a visor, and that a senior member of staff confirmed that she also saw the claimant wear a mask. The claimant stated that he had never done so but was unable to provide witness statements or evidence to the contrary. Mrs Forward also noted that the claimant's accounts of events were inconsistent. The claimant claimed both that he could *not* recall the circumstances of complaints but also that he *could* recall them precisely. The claimant claimed that he was sure the distance the colleague stood from his screen was over two metres whereas it was demonstrated that this was not possible.

116. It is evident from the contents of the disciplinary hearing meeting notes and the dismissal letter that the respondent's decisionmaker based their conclusions on a number of different evidential sources plus the claimant's own inconsistencies. Mrs Forward has explained how she weighed the competing evidence and why she preferred one account to the other. She also explained why it was so important that he comply in the circumstances, given the nature of the job and his Covid responsibilities. The decision was reasoned. The respondent did not choose to uphold all three allegations, just two. They followed up on his assertion that one of the incidents must have taken place at two metres by measuring the area to check whether this was possible. All of this suggests that there was no predetermined decision to find the claimant guilty come what may. His defence was taken on board and examined as part of the decision-making process. It was not a rubberstamping exercise. The claimant's explanations were somewhat unreliable and the respondent was entitled

not to believe him given all the available information. This was not a perverse decision.

<u>The appeal</u>

117. On 24 February the claimant submitted a letter of appeal [182]. In his appeal he set out evidence to show that he took his role in relation to the Covid response seriously. He also referred to his nine-point plan and stated that he acted to implement most of the suggestions proactively despite no request to do so. He focused on the other measures he had taken to mitigate Covid risks (as opposed to maintaining the 2 metre rule). He also suggested that the incidence of any alleged breaches on his part could have occurred (if they did occur, he did not recall) during the period when, as a Practice, they had a less stringent approach on the issue. He maintained that a two metre distance was a subjective perception. He reasserted that he had never worn a mask or visor at work. He went on to state that as he had been thinking about things over the previous few days his memories were coming back about the events of 14 December. He then gave a detailed account of his recollection that he offered to cover the front desk and discussed with a PST what happens when a patient enters. He said that he became aware at that point that if he were to take the patient's temperature, he could not do this without getting close to the patient and this would require a face mask. He decided that he would ask the patient to self-check or try to get a colleague to do it. He then explained that two patients arrived and he marked them as arrived on the system and asked them if they would wait outside until the clinician came to admit them. The clinician brought them in and took their temperature. As far as the claimant could recall the temperature reading was relayed to him verbally and he entered this on the screen. The claimant maintains that he did not wear a mask or visor.

118. The tribunal notes that the claimant had gone from not having a recollection of this incident to having a relatively detailed recollection of it. The respondent was entitled to take this development in his recollection into account in assessing its credibility. The claimant, on the other hand, maintained that this was the way that memories work rather than evidence of dishonesty. He maintained that, in thinking about the events intensely, memories had surfaced.

119. In relation to the incident with Tina looking at his screen he maintained that it was not clear if Tina decided to look at his screen because that was easier for her or if he asked her to but, either way, the claimant maintained that it was Tina's choice to breach the two metre rule by approaching him. The claimant ended his appeal letter by setting out his position in relation to masks and how the respondent's approach to masks had been handled over time.

120. The tribunal notes the claimant's account of how and why his recollection improved over time. The tribunal's view is that the respondent was entitled to view the change in the level of detail which the claimant was able to provide as something which *undermined* his credibility rather than bolstered it. In general, memories do not get better over time and unless there is something very specific to trigger a memory which has remained dormant one would not expect someone who initially could not remember

matters at all to then develop their account and provide significant detail at a later stage. It is more likely to be the case that the later account is an attempt by the person in question to recollect what "must have" happened. This may not be a dishonest approach. The individual may be doing their level best to remember what happened. They may have convinced themselves that their account is true. However, even if the claimant genuinely believes his account to be true that does not mean that it is, or that the respondent is bound to accept this. The respondent was entitled to view the later, detailed accounts as less credible (and somewhat self-serving given the development of the disciplinary case). The tribunal took the same view in assessing the claimant's evidence before the tribunal. The respondent was not required to ignore the developments and inconsistencies in the claimant's account over time. Nor was the tribunal.

121. The claimant wrote a document referred to as a statement of conscientious objection [199]. He says that he wrote in October 2020 when he became concerned that his beliefs might impact on his ability to carry out his manager's role for the respondent. However, he did not share that document with the respondent at any point during the disciplinary and appeal process.

122. Prior to the appeal hearing the claimant did send a further letter dated 2 March dealing with his ethical belief [201]. He asserted that he felt his ethical belief was covered as a protected characteristic by the Equality Act and cited case law in support of his contention. In the letter the claimant stated: *"My ethical belief coalesces around a core conclusion that government actions in relation to the covid 19 crisis are malfeasant and causing significant and enduring harm to the population- harm that is disproportionate to the threat from covid 19. I have reached this conclusion after extensive research and subsequent analysis of the results of the results of this research within the nexus of my existing Christian beliefs and moral worldview. ….My ethical belief as referred to above includes a moral objection to enforced mask wearing. Within the scope of the ethical belief, there is a conviction that wearing a mask is a medical intervention, an imposition of a foreign body to one's own body and an infringement on the act of breathing freely. I believe that any medical intervention should require consent of the patient and therefore enforced mask wearing contravenes that right- it is a medical intervention without consent. (That said the validity of my ethical belief in this regard does not depend on mask wearing being universally accepted as a medical intervention.)…In addition to the objection on grounds of bodily autonomy, I also believe that, as they are generally used in the population, masks are ineffective against transmission of viruses… I also consider masks to be psychologically damaging both on the level of the individual and collective psyche. I feel strongly that masks are dehumanizing and, as such, are anti-Christian and an erosion of the right to believe in the inviolable nature of the body as given by God….There are many more facets to the ethical belief that is being defended here, and this would not be the place to expound them. The above is an outline of the belief and how it has been discriminated against and, as such, gives an indication of the case that will be brought to tribunal."*

123. The appeal hearing took place on 3 March 2021. It was heard by Dr Beeharry and Dr Oh. Up until this point Dr Beeharry had deliberately kept herself out of the process because she was the GP HR lead and needed to be available to hear the appeal. We do not accept that the fact she co-authored the Workplace Mask Policy (referred to above) meant that she was precluded from sitting on the appeal. Her involvement in drafting the document did not mean that she was unable to approach the appeal impartially. The same is true of the fact she authored the letter of 10 February 2021 [153]. The fact that she was involved in asking the claimant to wear a visor in the Practice in the absence of other apparently suitable alternatives does not mean that she was unable to approach the *issues raised by the appeal* with an open mind. It would be unrealistic to expect the appeal to be heard by individuals who have no prior involvement with the claimant or with the Covid measures at the Practice, given the size and nature of the respondent. Furthermore, the contemporaneous documentation (including the minutes of the appeal hearing) does not indicate that the claimant objected to Dr Beeharry hearing his appeal.

124. As already noted, Dr Oh was one of the individuals who gave evidence that he had seen the claimant wearing a visor on the premises. The claimant understandably questions whether he should have been involved at the appeal given that he already had witness evidence to give in relation to one of the matters under consideration. Could he be properly impartial? He would, the claimant says, be unable to find that he had lied or was mistaken about his observation of the claimant wearing a visor on the premises. Dr Oh himself wondered whether he was the right person to sit on the appeal in the circumstances. He says that he raised this query by email prior to the appeal hearing and was reassured that he was appropriately placed to sit on the appeal. That email has never been disclosed by the respondent and we are unsure as to precisely what it said or the details of the response. Dr Oh explained to the tribunal that he went ahead and sat on the appeal because he was the only person available to do it within a reasonable timescale. Bearing in mind that the respondent practice was working through the Covid pandemic and would have been under particular pressure as a healthcare provider, the tribunal is prepared to accept that this is a genuine explanation. Whether the respondent could and should have waited for another partner to become free is another matter. We do not know how long that would have taken and how long the claimant would have had to wait before somebody else became available to deal with the appeal.

125. The tribunal has to ask what would have happened if another GP had heard the appeal instead of Dr Oh. Would any GP partner have disbelieved Dr Oh's testimony that he had seen the claimant wearing a visor? It is unlikely. Dr Oh had no known reason to lie about this and was likely to have been believed by his colleagues. The tribunal also notes that the appeal did not stand or fall on Dr Oh's evidence alone. Even if Dr Oh's evidence was left to one side, there were other witness accounts and other examples of misconduct that the claimant would have to address and disprove. He would not automatically succeed on appeal just because Dr Oh was left out of it. He would have to discredit a number of witness accounts and a number of examples. The Tribunal concludes that the Dr Oh's involvement is unlikely to have made any material difference to the outcome of the appeal.

126. Dr Oh was honest enough to say that he realised the potential conflict-of-interest given his evidence about seeing the claimant wearing a visor. In the tribunal he explained that he had raised this in an email to the partners before he dealt with the appeal. If Dr Oh was intent on ensuring that the claimant's appeal was dismissed then, arguably, he would not have raised the conflict-of-interest issue at all but would have kept quiet so that he could help make the decision to dismiss the appeal. That said, the email Dr Oh alleges he sent was not disclosed in the bundle. The claimant says that this undermines credibility. The claimant says that it should have been disclosed and it wasn't and that reflects badly on Dr Oh. Alternatively, the claimant asserts that it was not disclosed because it was never written and therefore Dr Oh is not to be believed. This, however, fails to acknowledge the intrinsic element of honesty in Dr Oh admitting that he wrote an email when he could have kept quiet about it. The Tribunal concludes that there may be many reasons for failure to disclose a document. Not everything is retained. This does not necessarily mean that Dr Oh is lying. There would be better ways of covering his tracks if he were. Much depends on how an email system is searched/interrogated in order to obtain emails but the tribunal does not have that level of detail before it in this case. On balance, the tribunal is not prepared to accept that Dr Oh has fabricated his account of sending the email prior to the appeal hearing.

127. In any event, the appeal was heard by Dr Beeharry and Dr Oh [205]. The claimant was told at the outset that the hearing was for him to provide any additional information so that they could review the case and come back to him. The claimant referred to his detailed letter of appeal and maintained that this covered most of the points he wished to make. The claimant reiterated his good performance as a manager, the fact that he had received a letter of recognition and a bonus for the work that he had done. He reiterated his involvement in writing and developing Covid policies. The claimant stated that he had been singled out with regards to breaches of the two metre rule. He reiterated that his nine-point plan had not been taken up by members of staff. The claimant maintained that he had been sacked because he wouldn't wear a face covering and that the other reasons given were not the real reasons for the dismissal. Dr Beeharry confirmed that the mask exemption was definitely not the reason for dismissal. The claimant went on to elaborate upon the reasons for appeal as previously set out in his appeal letter. He reiterated his theory about recollections improving over time. After hearing the claimant's representations the respondent drew the hearing to a conclusion so that a decision could be made and sent out in writing.

128. The appeal outcome was set out in a letter dated 4 March [211]. The outcome letter confirmed again that the dismissal was not because of his failure to wear a face covering. He was dismissed for failing to adhere to and to enforce the two metre rule and for a breach of trust and confidence as a result of apparent dishonesty. The respondent referred to the fact that several witnesses corroborated those allegations. Furthermore, it was noted that the claimant had not disclosed details of his philosophical or ethical 'belief' during his employment and had never submitted his statement of conscientious objection to the partnership. The respondent therefore confirmed that this matter had no bearing on the decision to

dismiss. The respondent therefore concluded that the matter was dealt with properly and thoroughly at the disciplinary stage and the correct decision was made. The respondent refused to uphold the claimant's appeal.

129. The claimant's early conciliation certificate was issued by ACAS on 6 May 2021. The claimant presented his claim form to the tribunal on 5 June 2021.

Evidence on the issue of disability

130. The claimant's GP provided a letter dated 1 December 2021 [510]. The letter confirms that the claimant is a patient at the practice and that he consulted the doctor once regarding a phobia of wearing face masks and face screens. The doctor spoke to him on 12 February 2021 about the problem which was causing him severe stress and anxiety at the time. They talked about a referral for cognitive behavioural therapy to improve the symptoms of his phobia.

131. The claimant provided a GP report in relation to his mask phobia and anxiety which was dated 4 April 2022 [511]. In the report the GP stated that the claimant has a phobia and anxiety disorder regarding wearing face masks. He records that the claimant first noticed the severe distress that wearing face mask causes in July 2020. Symptoms after putting on a face mask include a feeling of claustrophobia, lightheadedness, disorientation, inability to focus and extreme anxiety, resulting in an urgent need to remove the facemask and to preferably go outside. The claimant understood that this had caused him some problems with his employment. The doctor notes that it was suggested the claimant have cognitive behavioural therapy in March 2021, although at this time there was a long waiting list and the treatment would have required wearing a face mask. More recently the doctor had referred the claimant to the in-house psychiatry to team to see if there were any treatments which may mitigate the phobia. The doctor notes that the claimant had asked him to comment on whether his phobia and anxiety disorder resulted in a disability. The doctor rightly comments that he is not sure he is qualified to answer this question and that an occupational physician or legal specialist may be able to clarify. In addition, the doctor notes that the claimant had suffered some mild-to-moderate depressive symptoms since becoming unemployed but these have improved and he was working for himself by the date of the report.

132. The claimant apparently had a consultation with a mental health practitioner regarding his mask anxiety on 5 May 2022. A note of the consultation was contained within the bundle [512]. The note records that the claimant reported that he becomes distressed when faced with people wearing a mask. He described getting upset and angry and said his anxiety levels raise when he sees people wearing masks or when in the presence of people wearing masks. He said he does not know why he feels like that. He said that wearing masks is ungodly. He is recorded as saying that being asked to wear masks is an attempt to make people fearful. He reported that he and his family are not vaccinated. There was no history of contact with mental health services but the claimant reported he previously had feelings of despair on a train when the train door wouldn't open and again

when on holiday in Turkey when he was in a cave and felt being closed in. According to the claimant, his mask phobia was not too bad by this time (May 2022) as people were not required to wear masks. He noted that he was now self-employed as a gardener and things were looking up. The action plan section of the report recorded that the claimant agreed to self-refer to talking therapies in future should he wish to do so or if his mental well-being deteriorated. Mental health well-being information was to be sent to him via email and he was to be discharged from GP MHS at this time and no further appointments were required.

133. An excerpt from the claimant's GP records [561] noted a significant past problem with asthma. The date was 21 August 1999

134. A report was obtained from a consultant psychiatrist regarding the claimant's condition. The letter of instruction was included within the bundle [562]. The report itself was dated 31 January 2023 and was written by Dr Wayne Kampers, Consultant Psychiatrist.

135. Dr Kampers included his instructions at the start of his report and noted that he had been provided with the GP letters and reports. He was also provided with "an extended history of childhood medical treatment" in case it was of assistance. Mr Dobbie clarified that this extended history consisted of the medical records relating to the claimant's childhood treatment which were contained within the tribunal hearing bundle.

136. There were a couple of places within the expert's report where it became clear that the report had not been thoroughly proofread. Paragraphs had been inserted by the claimant's legal representatives asking the doctor to comment on particular issues. The tribunal suspects that the claimant had intended to have these paragraphs removed from the final version of the report.

137. Dr Kampers' report was written following an interview with the claimant conducted over the computer. The claimant's camera was not operative during the Zoom call and therefore Dr Kampers was unable to observe his facial expressions during the course of the consultation and interview. Dr Kampers obtained a history of events from the claimant who described the incident in France in the summer of 2020. Dr Kampers records that Mr O'Neill had a phobia of wearing masks and was unable to wear a mask because it makes him feel extremely anxious, claustrophobic, and unable to breathe. Dr Kampers records that the claimant's history of anxiety in relation to masks and face coverings dates back to early childhood. [This is not what the claimant said in his disability impact statement see below. He said he was first aware of the phobia in the summer of 2020. The reference to childhood is a reference to him trying to understand the origins of the condition]. Dr Kampers records the claimant's hip difficulties as a child and the amount of time that he spent in hospital undergoing surgery. Dr Kampers records that the claimant did not recall most of this but his parents had told him that when they came to visit him, he was very subdued and anxious and clingy and appeared to be quite depressed. Dr Kampers records that for long periods of time whilst the claimant was in hospital, all of the nursing staff would have worn masks, although the claimant does not consciously recall this. The claimant explained that during Covid, apart from the phobia of wearing masks, being in an

environment with many other masked people would also trigger the same reaction in him and he would feel quite claustrophobic and anxious even though he was not wearing a mask. He also commented to Dr Kampers that whilst working within the GP practice he would always feel anxious and claustrophobic when patients came into the surgery who had face coverings for cultural or religious reasons. The claimant was otherwise in good medical health although he did suffer from childhood asthma and does recall experiencing asthma attacks with a sensation of being unable to breathe. The claimant commented that although he was clear that this feeling was not the same as the feeling he would have with the prospect of having to wear a mask, the same levels of anxiety would happen, where he would feel like he was unable to breathe, would feel panicky, a sense of impending doom, and the need to immediately escape from whatever environment he was in. The claimant reported that he carried an exemption card in his wallet but did not display it overtly and had never felt it necessary to align himself with the disability charities who sold sunflower lanyards designed to show people that he had a disability that may not be visible. The claimant described that throughout the Covid pandemic (and particularly during the period where wearing a mask in public places was mandatory) despite having medical exemption, he had always felt anxious about wearing a mask and not wearing a mask. The claimant reported to Dr Kampers that the respondent moved from facemasks to demanding that he wear a visor at all times at work. The claimant reported that he did not wear a visor as he felt anxious at the prospect of having to wear a visor, so much so that he did not and subsequently lost his job.

138. Dr Kampers also noted that the claimant reported that being in an environment with other people wearing masks was also a trigger for him. The claimant commented that seeing others wearing masks or face coverings has always been triggering for him, although, as detailed, he has never understood his phobic response to people in masks.

139. Dr Kampers performed a mental state examination during the Zoom consultation. They only observation of note was in relation to thought content where there was a mask phobia as described. Dr Kampers concluded that the claimant did not demonstrate any impaired decision-making ability or any capacity specific issues in relation to instructions regarding the case.

140. Dr Kampers concluded that the claimant meets the ICD-11 and DSM-V diagnostic criteria for specific phobia. His specific phobia is of the situational type and centres on fears triggered by specific situations. His specific phobia is a mask phobia. It is characterised by a marked and excessive fear or anxiety that consistently occurs upon exposure or anticipation of exposure to one or more specific objects or situations that is out of proportion to actual danger. Dr Kampers records that any face covering (including visors) could trigger marked and excessive fear or anxiety. (*This conclusion is apparently based on the claimant's own report to that effect*). The phobic objects or situations are avoided or else endured with intense fear or anxiety, as a result of anticipatory anxiety. Anticipatory anxiety is where a person experiences increased levels of anxiety by thinking about an event or situation in the future. Rather than being a specific disorder in its own right, anticipatory anxiety is a symptom commonly found in a number of anxiety -related conditions, including

phobic anxiety or specific phobias. Dr Kampers records that symptoms persist for at least several months and are sufficiently severe to result in significant distress or significant impairment in personal, family, social, educational, occupational, or other important areas of functioning. Dr Kampers opines that there is little doubt in the claimant's case that traumatic memories of his stay in hospital in the preverbal period of his life have resulted in traumatic memories connected to facemasks, associated with lack of social cues via facial expressions whilst he was in hospital in the early years of his life. Dr Kampers opines further that there is a significant individual trauma history related to his days in hospital, being surrounded by masked nurses, and this would also have forged traumatic memories linked to facemasks, and possibly anxious avoidant attachment from a young age. Being reminded of a traumatic experience like this can trigger emotions or even the re-experiencing of symptoms on a subconscious level. Even though the claimant has never experienced major trauma, the sight of a face mask can be very unsettling and make him feel very uncomfortable for many reasons related to his early experiences. Dr Kampers notes that when one is triggered by trauma one's nervous system goes into fight or flight or freeze mode because one's nervous system does not listen to logical reasoning.

141. At this point in his report Dr Kampers goes beyond the proper scope of his instructions. He opines that the claimant is disabled within the meaning of the Equality Act. This is, of course, not a medical question but is a question for the tribunal to determine based on the available evidence. He goes further and opines that the claimant has been unlawfully discriminated against in the workplace. Again, this is outside the expert's remit and is part of his report which must be disregarded by the tribunal.

142. Dr Kampers then embarks on a discussion in relation to the safety and efficacy of wearing face masks as a preventative intervention for Covid 19. He goes so far at one point as to state *"long-term consequences of wearing face masks can cause health deterioration developing a progression of chronic disease and premature death."* He concludes that facemasks have never been demonstrated to be useful and, on the contrary, are actively damaging to individual health and social well-being. It is not clear to the tribunal why Dr Kampers felt the need to embark on this discussion of the risks and benefits of masks. This was not part of his proper remit as an expert witness. Nor is it a matter for determination by the tribunal. Much as the claimant (and indeed Dr Kampers) may have their own views about the risks and benefits of masks, that is not something which this tribunal is called upon to consider or determine, much as it may be a matter of interest and importance to the claimant. Our remit falls squarely within the four corners of the Equality Act 2010 in order to determine whether the claimant is disabled and also whether the respondent has discriminated against the claimant in one of the prohibited ways. To that extent the tribunal does not propose to engage in a discussion or evaluation of the controversies surrounding differing views of masks and their efficacy.

143. In the course of the tribunal proceedings the claimant produced a disability impact statement which was dated 24 November 2022 [496-498]. In his statement the claimant confirms that he suffers from a phobia and anxiety disorder related to facemasks. He states that he first experienced symptoms of anxiety and severe distress from mask wearing in July 2020

whilst on a family holiday in France. He gave the account of having entered a petrol station to purchase fuel and being told that he had to wear a mask. He says that he put his face mask on and experienced a number of symptoms including claustrophobia, lightheadedness, disorientation, inability to focus, surge of anxiety and an urgent need to get outside and remove the mask. He describes having suffered feelings of panic and dread at the thought of having to wear a face covering since this episode and states that he has avoided wearing a mask. He notes that he also feels anxiety on seeing other people wearing masks and advises that he uses an avoidance strategy of not looking at masked faces where possible. The claimant ponders the aetiology of his condition, which is uncertain. He says it may be related to multiple stays in hospitals as an infant and young child involving multiple major surgical operations and prolonged separation from parents. He suggests that the use of masks by surgical staff may provide a connection between early traumatic experiences of pain and separation anxiety and the current condition of mask related anxiety. He continues that he finds the impediment to breathing freely occasioned by mask wearing very distressing and anxiety provoking.

144. The claimant consulted with his GP on 12 February 2021 about the problem. The GP offered to look for a referral for cognitive behavioural therapy to try and improve the symptoms. The claimant was unable to take that treatment due to long waiting lists and the fact that at this period of time the treatment may have required the wearing of a face mask. The claimant consulted his GP again on 4 April 2022 where the condition was discussed. The claimant was referred to an in-house psychiatry team to explore options for psychological therapy which might mitigate the phobic symptoms.

145. The claimant subsequently attended an appointment with a mental health practitioner on 5 May 2022. The claimant describes this as an unsuccessful consultation. The claimant was suffering from hearing loss due to blocked ears at the time and asked the practitioner to remove his mask because he could not understand what the practitioner was saying. The practitioner asked his manager for permission to remove the mask but this was denied. The consultation could therefore only proceed with the claimant describing his condition and the practitioner silently taking notes. The mental health team followed up with an offer for self-referral for online CBT. The claimant says that he has not taken this up for several reasons including that the therapy is online only, the claimant has been working as a self-employed gardener/labourer (i.e. outdoors where masks are not required) and thirdly the requirement for facemasks was dropped in the UK some time ago. This means that although the condition is still present and enduring, the anxiety is quiescent as the trigger is not activated.

146. The claimant consulted his GP again on 22 November 2022 and the GP agreed to refer the claimant to a psychiatry service for a specialist assessment of his condition.

147. In his statement the claimant describes the impact of his condition on normal day-to-day activities. He describes the difficulties caused by the mask wearing policy at work and the fact that he was not allowed to work from home. In relation to family life the claimant states that during the pandemic he was unable to travel on airlines where mask exemptions were

not accepted or attend public and leisure venues which insisted on mask wearing and refused exemptions. On the family holiday to France in 2020 the claimant was unable to go into supermarkets or shops and had to cancel a family boat trip as masks were compulsory. In April 2021 the claimant was denied permission to attend his aunt's funeral because he was mask exempt. In October 2022 the claimant was told that he could not visit his mother-in-law in her room in a care home without a mask. He therefore waited outside whilst another family member went in to visit. He notes that after a while the manager of the care home allowed the claimant to enter without a mask as the facility decided that the mother-in-law's mental health was the overriding concern and she was asking to see the claimant. In relation to his social life the claimant's perception and experience was that he was subject to persecution and hostility in shops, medical settings, public places and in social and mainstream media. The claimant's mask exemption card was not always respected by staff in venues resulting in tense and sometimes unpleasant interactions. The claimant felt that every trip to the shops or other public place ran the gauntlet of confrontation and abuse and this was highly stressful.

<u>Evidence regarding philosophical belief.</u>

148. Some of the evidence in relation to the content of the claimant's philosophical belief is set out in his "statement of conscientious objection" [199]. This was written in October 2020 but was never disclosed or shared with the respondent. This sets out his beliefs. It does not, however, necessarily match what he said to the respondent about his beliefs during the material chronology of events in this case. At the outset the claimant asserts that he has concluded that the UK government is acting in a way that is causing significant harm to its population. He states that he objects on ethical grounds to any acts or omissions that may contribute to this harm. He then sets out what he considers to be manipulation of the relevant information, such as Covid death figures which he says have been inflated. He concludes that the purpose of over reporting in this way is apparently to heighten fear of death in the population. He queries the reliability of Covid case figures. He queries the accuracy of test and trace and concludes that the purpose of mass testing was simply to ramp up the number of cases for propaganda purposes. He asserts that the "lack of transparency and context in the presentation of data is a strategy to conceal the shocking disproportionality of the government's response to Covid and its failure, or unwillingness to properly assess the balance of risk." He refers to censoring of the media, the arrest of scientists, doctors and opinion formers who challenge the narrative and shutting down social media accounts and posts. He refers to the direct harm caused by this manipulation of information including destruction of livelihoods and jobs, collateral damage to physical health from lockdowns, domestic and child abuse, destruction of the way of life, significant and far-reaching damage to mental health and dehumanisation of the population.

149. The claimant sent a letter dated 2 March 2021 to the respondent [201]. The relevant portions of that letter are cited above as part of the chronology of events in this case.

150. In addition to these documents the claimant presented further documentation to the tribunal within the hearing bundle. In particular, he

referred to the "Frankfurt declaration of Christian and civil liberties" [526]. He also provided documentation referring to the efficacy and safety of Covid masks page 530-552.

151. The claimant elaborated on all these source materials in his witness statement to the tribunal. He stated that his religious and ethical belief is rooted in a traditional interpretation of the Christian faith which takes the Holy Bible and Church teaching as the source of truth. In that context he began to see it as against God's will to force people to cover their faces against their will thus causing distress and doing so as an act of abuse perpetrated by the dominant power in the relationship, whoever that may be. He also concluded that his participation in such an abusive act would endorse it and contribute to further harm and abuse.

152. As a result of his reflection on the point, the claimant draws out two main Christian biblical principles pertaining to the ethical belief that he says are most relevant to the claim of discrimination in this case: firstly that God commanded man to subdue the earth and rule over it, to inhabit it, and to procreate and 2) God made man in his own image, thus privileging man above all other created things and conferring upon human beings, and the human form, a unique sanctity which should not be violated. In relation to principle number one, the contention within the claimant's ethical belief is that excessive disproportionate and coercive responses to Covid 19 remove God-given freedoms and rights- the freedom to work, to raise a family, to breathe freely, to pursue happiness and above all to worship God. Mass mask enforcement creates the conditions which allow these freedoms to be taken away. It creates a climate of fear, takes away our humanity and turns us into faceless vectors of disease. The claimant asserts that it renders everyone a visible subject and so a supporter of the narrative, even if they have been forced, which in turn removes the will to resist what you believe in your heart to be wrong. Masks in this context therefore exert a powerful psychological force which facilitates the removal of God-given inalienable rights in the claimant's view. In respect of the second principle the claimant asserts that his ethical belief holds that God created man in his own image and in doing so granted him sacred rights and freedoms which must not be violated. This belief includes within it an ethical objection to enforced mask wearing, on the basis of the inviolable nature of the body as given by God and the view that enforced mask wearing is dehumanising and anti-Christian. The claimant states, *"When I look at a person's face, I am looking at the person, the soul, not a part of their body like their knee or their shoulder. The face is uniquely reflective of the dignity and worth of every person created by God, in his image; forcing someone to cover their face is dangerous and harmful. My religious belief holds that the desecration of humanity is ungodly, in that it seeks to undo and destroy that which God has ordained and made sacred."* He goes on to refer to the aforementioned Frankfurt Declaration of 2022 and states that the declaration is important because it aligns with the claimant's ethical belief. He says that the declaration therefore substantiates his ethical belief as a cogent body of thought within the modern Christian church he says that it has been signed by significant number of notable Christian leaders worldwide and currently has at least 5000 signatories. He also believes that any attempt to coerce mask wearing contravenes the Nuremberg code 6.1 (the right to refuse medical intervention without disadvantage) and article 6 of the universal declaration of bioethics and

human rights 2005, signed by 191 countries, which says that any preventative diagnostic and therapeutic medical intervention requires freely given prior consent, which can be withdrawn at any time without disadvantage or prejudice.

Government/NHS Covid 19 documents

153. During the course of the hearing the tribunal was presented with various items of government guidance which were made available during the course of the Covid pandemic. The claimant referred to them specifically in closing submissions and it may be relevant to consider what information was available to the respondent during the relevant period of time. The tribunal notes for the purposes of the tribunal claims that the guidance is just that: it is guidance provided by the government to a variety of businesses and groups for the purposes of implementing public health measures and balancing public health needs against those of the wider economy and public bodies. There is no direct cause of action available to the claimant which is based on whether the respondent applied the guidance in the way that the claimant says it should have. However, it may be relevant in terms of how the claims of discrimination are put by the claimant and how the respondent interpreted its health and safety obligations.

154. The claimant argued that the respondent was required to follow the guidance relating to offices in preference to other guidance, for example that referring to clinical settings. As a matter of principle, the tribunal does not agree. All of the published guidance needed to be adapted to each employer's specific circumstances. They were guidance documents and not statutes. The only realistic way of using the documents would be for each employer to read the guidance and adapt it to fit and be workable within their own particular organisation. Hence, it is guidance rather than legislation. Whilst the claimant's job role was an administrative one, the respondent was primarily a clinical setting. So, the NHS and Public Health England guidance (etc) would be of more immediate relevance to this particular respondent. Given the nature of the respondent organisation, it was likely to prioritise guidance aimed at clinical settings over that which was of more general application (such as guidance in relation to office work.) The claimant was not a clinician. He was engaged in ancillary services, namely office and administrative work. However, he was working alongside clinicians in premises which were designed to provide clinical services. Although the claimant's own job was not clinical, the respondent was entitled to design its processes to take account of the fact that a large part of its organisation was engaged in the provision of clinical services. There was no impermeable barrier between the respondent's clinical and non-clinical workforce or the clinical and non-clinical parts of its premises. In order to safeguard the clinical parts of the building and workforce it would be necessary to take steps to prevent the non-clinical parts of the building and workforce from becoming vectors for transmission of the disease to the clinical setting, clinical employees, and patients.

155. The tribunal also notes that whilst much of the guidance focused on face-to-face meetings with the public, the respondent was still entitled to put in place measures where it was just staff to staff contact. There was still a significant risk of transmission between staff members which had to be

mitigated. The risk facing the respondent was that if the virus got into the respondent's workforce, the respondent might have to close one or more of the surgeries. This would have a significant adverse impact on patients in the midst of a pandemic. Furthermore, the respondent is an employer and it therefore has a duty of care to its employees to reduce the risk of virus transmission to them *and* to allay their anxieties regarding the pandemic. It would not matter whether that member of staff was or was not patient-facing, the respondent still owed that employee a duty of care in respect of physical and mental health.

156. The tribunal also notes that the claimant only introduced many of these guidance documents after conclusion of the witness evidence. They were produced for the second part of the (part heard) hearing which was convened solely to hear the parties' closing submissions (rather than witness evidence.) Consequently, the contents of some of this guidance was not put to the relevant witnesses to enable them to comment on its applicability or to its relevance in the circumstances of this case. The tribunal has to be mindful of this in drawing its own conclusions about this evidence. Given that the documents were not put to the witnesses in cross examination, they carry more limited weight and relevance than might otherwise have been the case. We are unable to make findings about any witness's failure to comply with the requirements of documents about which they were not questioned in cross examination.

157. The tribunal was referred to government Covid 19 PPE guidance dated April 2020 [607-616]. This was published by Public Health England. At the outset it referred to the need to stay at home and that people should only go outside for food, health reasons or work (but only if they could not work from home). Individuals were instructed if they went out to stay 2 metres or 6 feet away from other people at all times and to wash their hands as soon as they got home. They were instructed not to meet others, even friends or family. The guidance concerned use of personal protective equipment by health and social care workers in the context of the pandemic. It stated that the guidance relates solely to considerations of PPE, represented one section of infection prevention and control guidance for Covid 19 and should be used in conjunction with local policies. It focused specifically on clinical settings. Section 8.9 referred specifically to primary care and other non-emergency outpatient clinical settings. It stated that the principles described in the guidance applied to all health and social settings. PPE guidance was provided for primary community and social care in table 2.

158. The hearing bundle contained the Secretary of State for Health's announcement of 13 July 2020 [617-619]. The document itself is entitled "Guidance: new recommendations for primary and community healthcare providers in England" and was said to have been updated on 14 April 2022. Further notes indicated that it was withdrawn on 27 May 2022

159. Page 620 of the bundle contained a press release from the government entitled: "Disabled people exempt from wearing face coverings under new government guidance." It continued, "government has set out a list of face covering exemptions, as they are mandatory in additional enclosed spaces from today (Friday 24th July)." The exemptions are said to have included anyone under the age of 11, or those with disabilities, or hidden health

conditions such as breathing difficulties, mental health conditions or autism. It also referred to the fact that exemption cards were available to download on the gov.uk website. The guidance states, *"The public are asked to be mindful of people who are exempt from wearing face coverings. The list of exemptions, which has been in place since face coverings became mandatory on public transport, includes hidden conditions such as anxiety or panic disorders, autism, breathing difficulties, dementia, reduced vision or if you are with someone who relies on lipreading to communicate. Under the regulations, members of the public will need to wear face coverings that cover the nose and mouth in shops, supermarkets, shopping centres and transport hubs, to help curb the spread of the virus. People are not required to prove they are exempt and it is for individuals to choose how they would want to communicate this to others. For those who would feel more comfortable showing something that says they do not have to wear a face covering, exemption cards are available to print or display on mobile phones from gov.uk."* The tribunal notes that this was a general press release, of broad application issued to all members of the public. It did not address the employment relationship context, the extra information which might be obtained or the extra measures which might be taken in a workplace, the clinical setting, or the requirements of a GP practice.

160. The bundle also contained an article from Business Disability Forum on face coverings dated 5 October 2020 [624-629]. At page 625 (under the heading "what does this mean for employers?") the document states: *"It is now the legal duty of employers to ensure that all staff working in environments outlined in law and in public facing roles wear face coverings at all times when doing their job. It is the responsibility of the employee to share that they may have an exemption and must be able to provide a reasonable justification as to why their disability or condition prevents them from wearing the face covering. As this is a legal instruction, employees cannot refuse to wear a face covering other than for the reasons outlined under exemption rules. For example, an employee cannot refuse to wear a face covering due to beliefs or opinions about face coverings. If an employee refuses to wear a face covering when instructed to under reasonable grounds, the employee can be asked to leave the working premises."*

161. There is a further heading within the document, "Making reasonable adjustments for employees who cannot wear face coverings". It states that some employees might be exempt from wearing a face covering or find it hard to do so because of a disability or condition. It states that it is still the duty of the employer to ensure that all adjustments are considered and supportive conversations take place between an employee and their manager. The document goes on to consider various points of guidance when exploring reasonable adjustments. There is also a section dealing with working with the public and with customers which indicates that employers have to consider the impact on not only disabled employees but also disabled customers.

162. The hearing bundle contained government guidance on coronavirus and social distancing dated 6 November 2020 [630-635]. This stated *"It is critical that everybody observes the following key behaviours: hands -wash your hands regularly and for 20 seconds. Face -wear a face covering in*

indoor settings where social distancing may be difficult, and where you will come into contact with people you do not normally meet. Space -stay 2 metres apart from people you do not live with where possible, or 1 metre with extra precautions in place (such as wearing face coverings or increasing ventilation indoors).” It continued, *“Where you cannot stay 2 metres apart you should stay more than 1 metre apart, and take additional steps to stay safe. For example wear a face covering… Move outdoors… If indoors make sure rooms are well ventilated by keeping the windows and doors open.”* Finally, the main hearing bundle contained guidance on face coverings: when to wear one, exemptions and what makes a good one dated 27 January 2022 [636-647]. This was drafted at a time when face coverings were no longer required by law but were suggested in crowded and enclosed spaces where one may come into contact with other people one does not normally meet. This document stated, *“Face coverings and facemasks will continue to be required in health and care settings to comply with infection prevention and control (IPC) and adult social care guidance. This includes hospitals and primary or community care settings, such as GP surgeries. They must also be worn by everyone accessing or visiting care homes. You are required to wear a face covering on entering these healthcare settings and must keep it on until you leave unless you are exempt or have a reasonable excuse for removing it. Examples of what would usually be a reasonable excuse are listed in the “if you are not able to wear a face covering” section below.”* Later sections in the document reiterate the fact that some people are exempt from wearing face coverings including those who cannot wear coverings because of physical or mental illness or impairment or disability. It also reminds the reader that the reasons for the exemption may not be visible to them. In relation to exemption cards, it noted that this was a matter of personal choice. It stated that staff were not legally required to wear face coverings in the workplace but may choose to wear one and that employers can also choose to ask staff or customers to wear a face covering even though they are not legally required. It also stated that when deciding whether to ask workers or customers to wear a face covering an employer would need to consider the reasonable adjustments needed for staff and customers with disability. The employer would also need to consider carefully how this fitted with other obligations to workers and customers arising from the law on employment rights, health and safety and equality legislation. Specific reference to equality legislation is reiterated.

163. During the course of the hearing the claimant submitted a further press release published on 24 July 2020 by The Cabinet Office. It was entitled *“Disabled people exempt from wearing face coverings under new government guidance.”* We were referred to a number of specific passages including: *“The public are asked to be mindful of people who are exempt from wearing a face covering. The list of exemptions which has been in place since face coverings became mandatory on public transport, includes hidden conditions such as anxiety or panic disorders, autism, breathing difficulties, dementia, reduced vision or if you are with someone who relies on lip reading to communicate under the regulations. The public will need to wear face coverings that cover the nose and mouth in shops, supermarkets, shopping centres and transport hubs, to help curb the spread of the virus. People are not required to prove they are exempt and it is for individuals to choose how they would want to communicate this to*

others. For those who would feel more comfortable showing something that says they do not have to wear a face covering exemption cards are available to print or display on mobile phones from gov.uk." The Minister for Disabled People, Health and Work was quoted as saying, *"The new regulations are an important step forward in our efforts to defeat coronavirus but I would urge the public and businesses to be mindful of people who are exempt from wearing face covering-particularly those with disabilities and health conditions. Some disabilities are hidden and not immediately obvious and everyone must play their part and act sensitively towards people who may need additional support."*

164. The claimant included some further documents in his enclosures accompanying his closing submissions. This included a document entitled "Working safely during Covid 19 in offices and call centres," which was published on 5 November 2020 and was subtitled: "Covid 19 secure guidance for employers, employees and the self-employed." As previously noted, this was not sector-specific guidance but of more general application. The document was prepared by the Department for Business Energy and Industrial Strategy. The introduction to the document stated that it was designed to be relevant for people who work in or run offices, contact centres and similar indoor environments. It stated, *"Each business will need to translate this into the specific actions it needs to take, depending on the nature of their business, including the size and type of business, how it is organised, operated, managed, and regulated.… This guidance does not supersede any legal obligations relating to health and safety, employment or equalities and it is important that as a business or employer you continue to comply with your existing obligations, including those relating to people with protected characteristics. It contains non-statutory guidance to take into account when complying with these existing obligations."* The document sets out suggestions for potential measures to take where it is not possible to maintain the required social distancing in the workplace. It reiterates the need to comply with duties towards those with protected characteristics, including the disabled.

<u>Miscellaneous</u>

165. The claimant made various points during the course of the Tribunal hearing about disclosure. Most of the evidence regarding what happened between the parties during the relevant period of time was either agreed or documented. The claimant asserts that some of the oral discussions and decisions taken by the respondent must have been documented but have not been disclosed. The tribunal has considered this point in the context of the case. The events in question took place during the course of the height of the Covid pandemic when developments were frequent and rapid. The respondent GP practice was busy dealing with a moving situation. Whilst they will have had to make decisions, in those circumstances it is perhaps unlikely that they would minute each and every discussion in the way that the claimant suggests. We heard evidence about the way the respondent took legal advice during the process. It appears that the legal advice from Croner was given direct to Camilla Walker. Croner kept a note of that advice. Camilla Walker communicated the advice orally to the decision-makers, whether that was Robin Forward or one of the GPs like Dr Beeharry. The claimant disputes this and says that this cannot be correct. We do not agree. It is perfectly feasible that Camilla Walker would be the

point of contact for legal advice and would pass this on to the GPs who would then be free to focus more of their attention on the substance of their day-to-day role. There is no rule requiring that the communications be in writing. We are unwilling to draw the sort of adverse inferences against the respondent which the claimant suggests due to the absence of documentation. The claimant was looking to find a "smoking gun" to show a conspiracy between the various respondent witnesses and others to dismiss him or push him out of the practice. However, the claimant, although he believes this to be what happened, has no actual evidential basis for concluding that there was such a conspiracy. He has become convinced that there must have been a discussion (separate from the disciplinary hearings and meetings) during which a decision was made that he should be dismissed. He is sure that the decision was taken outside the formal process and that the decision was predetermined. He is sure it must have been minuted or otherwise noted in writing. Genuine as the claimant's belief may be in this regard, there is no evidential basis for asserting that this is what actually happened. On the contrary, the tribunal found that the respondent witnesses who gave evidence to the tribunal on this matter were very credible and we accept that the decision to dismiss was made during the disciplinary process in the way that the respondent says it was. On balance of probabilities there was no dishonesty in relation to this matter and we do not draw an adverse inference from the absence of disclosed documents showing discussions outside the formal disciplinary process.

166. Despite notes in the claimant's closing skeleton argument suggesting otherwise, the claimant did not make and pursue a specific disclosure application in the course of the tribunal hearing. Furthermore, the claimant did not ask to call further witnesses. The claimant did not object to the respondent introducing late documents in relation to temperature checks and the appointment log. The tribunal observes that through his representative he consented to these documents being admitted during the hearing and it does not assist him to attempt to resile from that position after the conclusion of the case.

The law

Disability

167. Disability is defined by section 6 Equality Act 2010 which states:

"*(1) A person (P) has a disability if-*

(a) P has a physical or mental impairment, and

(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities….."

168. According to section 212 "substantial" means more than minor or trivial.

169. Section 6 is further supplemented by the provisions of Schedule 1 to the Equality Act which state that:

"(1) The effect of an impairment is long-term if-

(a) *It has lasted for at least 12 months,*
(b) *It is likely to last for at least 12 months, or*
(c) *It is likely to last for the rest of the life of the person affected.*

(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities it is to be treated as continuing to have that effect if that effect is likely to recur."

And

"*(1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if-*

(a) Measures are being taken to treat or correct it, and
(b) But for that, it would be likely to have that effect."

170. The following portions of the "Guidance on Matters to be taken into account in determining questions relating to the definition of disability (2011)" may also be of relevance in this case.

B7. Account should be taken of how far a person can **reasonably** be expected to modify his or her behaviour, for example by use of a coping or avoidance strategy, to prevent or reduce the effects of an impairment on normal day-to-day activities. In some instances, a coping or avoidance strategy might alter the effects of the impairment to the extent that they are no longer substantial and the person would no longer meet the definition of disability. In other instances, even with the coping or avoidance strategy, there is still an adverse effect on the carrying out of normal day-to-day activities. For example, a person who needs to avoid certain substances because of allergies may find the day-to-day activity of eating substantially affected. Account should be taken of the degree to which a person can reasonably be expected to behave in such a way that the impairment ceases to have the substantial adverse effect on his or her ability to carry out normal day-to-day activities.

B8. Similarly, it would be reasonable to expect a person with a phobia to avoid extreme activities or situations that would aggravate their condition. It would not be reasonable to expect him or her to give up, or modify, normal activities that might exacerbate the symptoms.

C3…"likely" should be interpreted as meaning that it could well happen.

In relation to 'normal day-to-day activities' paragraph D3 gives examples: "In general, day-to-day activities are things people do on a regular or daily basis, and examples include shopping, reading and

writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities. Normal day-to-day activities can include general work-related activities, and study and education related activities, such as interacting with colleagues, following instructions, using a computer, driving, carrying out interviews, preparing written documents, and keeping to a timetable or a shift pattern."

D15 A person with a mental impairment or learning disability may experience difficulty in carrying out normal day-to-day activities that involve physical activity (e.g. a young man with severe anxiety and symptoms of agoraphobia is unable to go out more than a few times a month. This is because he fears being outside in open spaces and gets panic attacks which mean that he cannot remain in places like theatres and restaurants once they become crowded. This has a substantial adverse effect on his ability to carry out normal day-to-day activities such as social activities."

The Appendix to the Guidance also sets out an illustrative and non-exhaustive list of factors which, if they were experienced by a person, it would be reasonable to regard as having a substantial adverse effect on normal day-to-day activities and factors which it would not be reasonable to regard as having a substantial adverse effect on normal day-to-day activities.

Knowledge of disability

171. The issue of knowledge of disability arises in both reasonable adjustment claims and section 15 discrimination arising from disability claims.

172. Paragraph 20(1) of Schedule 8 to the Equality Act 2010 indicates that the employer will only come under the duty to make reasonable adjustments if it knows, not just that the relevant person is disabled, but also that the relevant person's disability is likely to put him or her at a substantial disadvantage in comparison with non-disabled persons. Knowledge is not limited to actual knowledge but extends to constructive knowledge (i.e. what the employer ought reasonably to have known). The EAT has held that a tribunal should approach this aspect of a reasonable adjustments claim by considering two questions:

(1) Did the employer know both that the employee was disabled and that the disability was liable to disadvantage the employee substantially?

(2) If not, ought the employer to have known both that the employee was disabled and that the disability was liable to disadvantage the employee substantially? (Secretary of State for Work and Pensions v Alam [2010] ICR 665, EAT)

It is only if the answer to the second question is 'no' that the employer avoids the duty to make reasonable adjustments.

173. In Wilcox v Birmingham CAB Services Ltd EAT 0293/10, the then President of the EAT, Mr Justice Underhill, took the view that the effect of the knowledge defence in the predecessor Disability Discrimination Act was that an employer will not be liable for a failure to make reasonable adjustments unless it had actual or constructive knowledge both (i) that the employee was disabled, and (ii) that he or she was disadvantaged by the disability in the way set out in section 4A(1) (i.e. by a PCP or physical feature of the workplace). The second element of this test will not come into play if the employer does not know the first element.

174. An employer cannot claim that it did not know about a person's disability if the employer's agent or employee (for example, an occupational health adviser, HR officer or line manager) knows in that capacity of the disability. The EHRC Employment Code makes it clear that such knowledge is imputed to the employer (see paragraph 6.21). The duty to make reasonable adjustments would still apply even if the disabled person asked the agent or employee to keep the information confidential. This means that employers must have a suitable confidential means of collating information about employees to ensure that they adhere to their duty to make reasonable adjustments. However, the Code confirms that information will not be imputed to the employer if it is gained by a person providing services to employees independently of the employer, even if the employer arranged for those services to be provided (see paragraph 6.22). The case law also shows that, depending on the particular circumstances of a given case and the way in which the adviser was instructed, there may be circumstances where the information/knowledge passed to the adviser will not be imputed to the respondent (e.g. In Hammersmith and Fulham London Borough Council v Farnsworth [2000] IRLR 691, EAT and in the EAT in Q v L EAT 0209/18)

175. When considering whether an employer is to be regarded as having constructive knowledge of a worker's disability so as to trigger the duty to make reasonable adjustments, it is irrelevant that a formal diagnosis has yet to be made, so long as there are other circumstances from which a long term and substantial adverse effect of a mental or physical impairment can reasonably be deduced. While knowledge of the disability places a burden on employers to make reasonable enquiries based on the

information given to them, it does not require them to make every possible enquiry, particularly where there is little or no basis for doing so (Ridout v TC Group 1998 IRLR 628, EAT,)

176. A failure by an employee or job applicant to cooperate with an employer's reasonable attempts to find out whether he or she has a disability could lead to a finding that the employer did not know, and could not be expected to know, that the employee or job applicant was disabled.

177. Even where an employer knows that an employee has a disability, it will not be liable for a failure to make adjustments if it 'does not know, and could not reasonably be expected to know' that a PCP, physical feature of the workplace or failure to provide an auxiliary aid would be likely to place that employee at a substantial disadvantage (paragraph 20(1)(b), Schedule 8 Equality Act)

178. In the context of a claim of discrimination because of something arising from disability, section 15(2) means that an employer will not be liable for section 15 discrimination if it did not know and could not reasonably have been expected to know of the employee's 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 (paragraph 5.15). What is reasonable will depend on the circumstances. This is an objective assessment. It suggests that 'Employers 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"' (paragraph 5.14)

179. Failure to enquire into a possible disability is not by itself sufficient to invest an employer with constructive knowledge. It is also necessary to establish what the employer might reasonably have been expected to know if it had made such an enquiry. A Ltd v Z [2020] ICR 199 shows that determining whether an employer had constructive knowledge involves a consideration of whether the employer could, applying a test of reasonableness, have been expected to know, not necessarily the employee's actual diagnosis, but of the facts that would demonstrate that he had a disability, namely that he was suffering a physical or mental impairment that had a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities. In *A Ltd v Z* the tribunal had failed to apply the correct test, asking itself only what more might have been required of the employer in terms of process without asking what it might then reasonably have been expected to know. Given the tribunal's finding that Z would have concealed her disability, if the employer had taken the additional steps that the tribunal considered would have been reasonable, it could not reasonably have known of the employee's disability. The employer's appeal succeeded. The burden is on the respondent to make reasonable enquiries

based on the information given to it. It does not require them to make every possible enquiry even where there is no basis for doing so. The failure by an employee to co-operate with the employer's reasonable attempts to find out whether the employee is disabled could lead to a finding that the employer did not know and 'could not reasonably be expected' to know.

180. The employer must have the requisite knowledge of disability at the time it treats the employee unfavourably. If the treatment complained of is made up of a series of distinct acts occurring over a period, it is necessary to consider not only whether the employer had the requisite knowledge at the outset but also, if it did not, whether it gained that knowledge at any subsequent stage when the treatment was ongoing.

181. While lack of knowledge of the disability itself is a potential defence to a section 15 claim, lack of knowledge that a known disability caused the 'something' in response to which the employer subjected the employee to unfavourable treatment is not (City of York Council v Grosset [2018] ICR 1492, CA).

Section 15: Discrimination arising from disability

182. Section 15 Equality Act 2010 states:

(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.

183. Four elements must be made out in order for the claimant to succeed in a section 15 claim:

(i) There must be unfavourable treatment. No comparison is required.
(ii) There must be something that arises 'in consequence of the claimant's disability'. The consequences of a disability are infinitely varied depending on the particular facts and circumstances of an individual's case and the disability in question. They may include anything that is the result, effect or outcome of a disabled person's disability. Some consequences may be obvious and others less so. It is question of fact for the tribunal to determine whether something does in fact arise in consequence of a claimant's disability.
(iii) The unfavourable treatment must be because of (i.e. caused by) the something that arises in consequence of the disability. This involves

a consideration of the thought processes of the putative discriminator in order to determine whether the something arising in consequence of the disability operated on the mind of the alleged discriminator, whether consciously or subconsciously, at least to a significant extent.

(iv) The alleged discriminator cannot show that the unfavourable treatment is a proportionate means of achieving a legitimate aim.

See Secretary of State for Justice and another v Dunn EAT 0234/16.

184. Treatment cannot be 'unfavourable' merely because it is thought that it could have been more advantageous or is insufficiently advantageous (The Trustees of Swansea University Pension & Assurances Scheme and anor v Williams [2015] IRLR 885; [2017] IRLR 882 and [2019] IRLR 306.)

185. The consequences of a disability 'include anything which is the result, effect or outcome of a disabled person's disability.' Some may be obvious, others may not be obvious (paragraph 5.9 EHRC Employment Code 2011).

186. Following the guidance given in Pnaiser v NHS England [2016] IRLR 170 at paragraph 31 the correct approach to a section 15 claim is:

(a) A tribunal must first identify whether there was unfavourable treatment and by whom. No question of comparison arises.
(b) The tribunal must determine what caused that unfavourable treatment. What was the reason for it? An examination of the conscious or unconscious thought processes of A is likely to be required. There may be more than one reason or cause for impugned treatment. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.
(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is irrelevant
(d) The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability'. That expression 'arising in consequence of' could describe a range of causal links. The causal link between the something that causes unfavourable treatment and the disability may include more than one link. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact. This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.
(e) The knowledge that is required is knowledge of the disability only. There is no requirement of knowledge that the 'something' leading to the unfavourable treatment is a consequence of the disability. (See also City of York Council v Grosset [2018] ICR 1492).
(f) It does not matter precisely in which order these questions are addressed. Depending on the facts, a tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of 'something arising in consequence of the claimant's disability'. Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to 'something' that caused the unfavourable treatment."

187. The first limb of the analysis at section 15(1)(a) is to determine whether the respondent treated the claimant unfavourably "because of something arising in consequence of the claimant's disability". This analysis requires the tribunal to focus on two separate stages: firstly, the "something" and, secondly, the fact that the "something" must be "something arising in consequence of B's disability", which constitutes a second causative (consequential) link. It does not matter in which order the tribunal takes the relevant steps (Basildon & Thurrock NHS Foundation Trust v Weerasinghe [2016] ICR 305 at paras 26-27) also City of York Council v Grosset [2018] IRLR 746 paragraph 36).

188. When considering an employer's defence pursuant to section 15(1)(b) the 'legitimate aim' must be identified. The aim pursued should be legal, should not be discriminatory in itself and must represent a real, objective consideration. The objective of the measure in question must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that end. (Bilka-Kaufhaus GmBH v Weber von Hartz [1986] IRLR 317.)

189. The question as to whether an aim is "legitimate" is a question of fact for the tribunal. The categories are not closed, although cost saving on its own cannot amount to a legitimate aim (Woodcock v Cumbria Primary Care Trust 2012 ICR 1126.)

190. Once the legitimate aim has been identified and established it is for the respondent to show that the means used to achieve it were proportionate. Treatment is proportionate if it is an 'appropriate and necessary' means of achieving a legitimate aim. A three- stage test is applicable to determine whether criteria are proportionate to the aim to be achieved. First, is the objective sufficiently important to justify limiting a fundamental right? Secondly, is the measure rationally connected to the objective? Thirdly, are the means chosen no more than is necessary to accomplish the objective? (R(Elias) v Secretary of State for Defence [2006] IRLR 934).

191. Determining proportionality involves a balancing exercise. An employment tribunal may wish to conduct a proper evaluation of the discriminatory effect of the treatment as against the employer's reasons for acting in this way, taking account of all relevant factors (EHRC Code paragraph 4.30). The measure adopted by the employer does not have to be the only possible way of achieving the legitimate aim, but the treatment will not be proportionate if less discriminatory measures could have been taken to achieve the same objective (see EHRC Code (para 4.31). It will be relevant for the tribunal to consider whether or not any lesser measure might have served the aim.

192. The principle of proportionality requires the tribunal to take into account the reasonable needs of the business but it has to make its own judgment, based upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the proposal is reasonably necessary (Hardy & Hansons Plc v Lax [2005] IRLR 726 and Hensman v Ministry of Defence UKEAT/0067/14/DM). It is not the same test as the 'band of reasonable responses' test in an unfair dismissal claim. However, in Birtenshaw v Oldfield [2019] IRLR 946 (para 38) the EAT highlighted that in considering the objective question of the employer's

justification, the employment tribunal should give a substantial degree of respect to the judgment of the decision maker as to what is reasonably necessary to achieve the legitimate aim provided it has acted rationally and responsibly. However, it does not follow that the tribunal has to be satisfied that any suggested lesser measure would or might have been acceptable to the decision-maker or would otherwise have caused him to take a different course. That approach would be at odds with the objective question which the tribunal has to determine; and would give primacy to the evidence and position of the respondent's decision-maker.

193. It is necessary to weigh the need against the seriousness of the detriment to the disadvantaged person. It is not sufficient that the respondent could reasonably consider the means chosen as suitable for achieving the aim. To be proportionate a measure has to be *both* an appropriate means of achieving the legitimate aim *and* (reasonably) necessary in order to do so (Homer v Chief constable of West Yorkshire Police Authority [2012] IRLR 601.)

Section 20/21: reasonable adjustments.

194. Section 20 (so far as relevant) 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 three requirements.
(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

…

195. Section 21 states:

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.
(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.
(3) …

196. The correct approach to a claim of unlawful discrimination by way of a failure to make reasonable adjustments remains as set out in Environment Agency v Rowan 2008 ICR 218 and is as follows:

(a) Identify the PCP applied by or on behalf of the employer,
(b) Identify comparators (if necessary),
(c) Identify the nature and extent of the substantial disadvantage suffered by the claimant.

197. The identification of the applicable PCP is the first step that the claimant is required to take. If the PCP relates to a procedure, it must apply to others than the claimant. Otherwise, there can be no comparative disadvantage.

198. In Ishola v Transport for London [2020] EWCA Civ 112 it was noted that the phrase PCP should be construed widely but remarks were made about the legislator's choice of language (as opposed to the words "act" or "decision".) Simler LJ stated, *"I find it difficult to see what the word "practice" adds to the words if all one off decisions and acts necessarily qualify as PCPs…. If something is simply done once without more, it is difficult to see on what basis it can be said to be "done in practice." It is just done; and the words "in practice" add nothing….The function of the PCP in a reasonable adjustment context is to identify what it is about the employer's management of the employee or its operation that causes substantial disadvantage to the disabled employee…To test whether the PCP is discriminatory or not it must be capable of being applied to others because the comparison of disadvantage caused by it has to be made by reference to a comparator to whom the alleged PCP would also apply…. In my judgment, however widely and purposively the concept of a PCP is to be interpreted, it does not apply to every act of unfair treatment of a particular employee. That is not the mischief which the concept of indirect discrimination and the duty to make reasonable adjustments are intended to address. …In context and having regard to the function and purpose of the PCP in the Equality Act 2010, all three words carry the connotation of a state of affairs (whether framed positively or negatively and however informal) indicating how similar cases are generally treated or how a similar case would be treated if it occurred again. It seems to me that "practice" here connotes some form of continuum in the sense that it is the way in which things generally are or will be done. That does not mean it is necessary for the PCP of "practice" to have been applied to anyone else in fact. Something may be a practice or done "in practice" if it carries with it an indication that it will or would be done again in future if a hypothetical similar case arises. Like Kerr J, I consider that although a one-off decision or act can be a practice, it is not necessarily one. …in the case of a one-off decision in an individual case where there is nothing to indicate that the decision would apply in future, it seems to me the position is different. It is in that sense that Langstaff J referred to "practice" as having something of an element of repetition about it."*

199. A 'substantial disadvantage' is one which is 'more than minor or trivial'.

200. Only once the employment tribunal has gone through the steps in Rowan will it be in a position to assess whether any adjustment is reasonable in the circumstances of the case, applying the criteria in the EHRC Code of Practice. The test of reasonableness is an objective one. The

effectiveness of the proposed adjustments is of crucial importance. Reasonable adjustments are limited to those that prevent the PCP from placing a disabled person at a substantial disadvantage in comparison with persons who are not disabled. Thus, if the adjustment does not alleviate the disabled person's substantial disadvantage, it is not a reasonable adjustment. (Salford NHS Primary Care Trust v Smith [2011] EqLR 1119) However, the threshold that is required is that the adjustment has 'a prospect' of alleviating the substantial disadvantage. There is no higher requirement. The adjustment does not have to be a complete solution to the disadvantage. There does not have to be a certainty or even a 'good' or 'real' prospect of an adjustment removing a disadvantage in order for that adjustment to be regarded as a reasonable one. Rather it is sufficient that a tribunal concludes on the evidence that there would have been a prospect of the disadvantage being alleviated. (Leeds Teaching Hospital NHS Trust v Foster [2011] EqLR 1075.

201. Where the disability in question means that an employee is unable to work as productively as other colleagues, adjustments to enable her to be more efficient would indeed relate to the substantial disadvantage she would otherwise suffer (Rakova v London Northwest healthcare NHS trust [2020] IRLR 503. It cannot be assumed that a desire to achieve greater efficiency does not reflect the suffering of a substantial disadvantage. The fundamental question is what steps it was reasonable for the respondent to have to take in order to avoid the particular disadvantage not what ought 'reasonably have been offered.'

202. An employer has a defence to a claim for breach of the duty to make reasonable adjustments if it does not know and could not be reasonably be expected to know that the disabled person is disabled and is likely to be placed at a substantial disadvantage by the PCP etc. The question is what objectively the employer could reasonably have known following reasonable enquiry.

Religion or philosophical belief

203. The protected characteristic of religion or belief, as set out in section 10 of the Equality Act 2010, gives effect to the requirement in the EU Equal Treatment Framework Directive (No.2000/78) ('the Framework Directive') for Member States to provide protection in national law to combat discrimination on the ground of, inter alia, religion or belief. The Recitals to the Directive assert that the EU 'respects fundamental human rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms' (ECHR) and state that 'the right of all persons to equality before the law and protection against discrimination constitutes a universal right recognised by the [ECHR], to which all Member States are signatories'. This provides a 'read across' between the EU Directive and the ECHR. The Framework Directive needs to be interpreted consistently with relevant provisions of the ECHR. In turn, the UK's domestic legislative provisions must be interpreted, so far as possible, consistently with both the mandatory provisions of EU law (in so far as preserved following the UK's departure from the EU) and, by virtue of section 3 of the Human Rights Act 1998, European Convention rights.

The jurisprudence of the European Court of Human Rights provides an important framework for establishing what is meant by 'religion' and 'belief' for the purposes of the Equality Act 2010.

204. The Explanatory Notes accompanying the Equality Act specifically refer to Article 9 of the ECHR when giving guidance as to the meaning and scope of the protected characteristic of religion or belief. The Notes state: 'This section defines the protected characteristic of religion or religious or philosophical belief, which is stated to include for this purpose a lack of religion or belief. It is a broad definition in line with the freedom of thought, conscience and religion guaranteed by Article 9 of the [ECHR]' (paragraph 51.)

205. Article 9(1) of the ECHR provides that:

> 'Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.'

Article 9(2), inserts a proviso in respect of the right to manifest the freedoms enshrined in Article 9(1)that:

> 'Freedom to manifest one's religion or beliefs shall be subject only to such limitation as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.'

206. The relationship between these two elements of Article 9 was considered by the European Court of Human Rights in Eweida and ors v United Kingdom 2013 IRLR 231 which described the position in the following terms: 'Religious freedom is primarily a matter of individual thought and conscience. This aspect of the right set out in the first paragraph of Article 9, to hold any religious belief and to change religion or belief, is absolute and unqualified. However, as further set out in Article 9(1), freedom of religion also encompasses the freedom to manifest one's belief, alone and in private but also to practise in community with others and in public… Since the manifestation by one person of his or her religious belief may have an impact on others, the drafters of the Convention qualified this aspect of freedom of religion in the manner set out in Article 9(2). This second paragraph provides that any limitation placed on a person's freedom to manifest religion or belief must be prescribed by law and necessary in a democratic society in pursuit of one or more of the legitimate aims set out therein.'

207. A person's beliefs whether or not religious are protected under Article 9. However, not every belief qualifies for protection. In Campbell and anor v United Kingdom 1982 4 EHRR 293 the European Court of Human Rights established that, to come within the scope of the Article, a person's belief must:

(1) be worthy of respect in a democratic society;
(2) concern a weighty and substantial aspect of human life and behaviour, and
(3) attain a certain level of cogency, seriousness, cohesion and importance.

The Campbell case was mainly concerned with 'the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions'. Interpreting the term 'philosophical convictions' in this context, the European Court held that this 'is not synonymous with the words "opinions" and "ideas", such as are utilised in Article 10 of the Convention guaranteeing freedom of expression; it is more akin to the term "beliefs" (in the French text: "*convictions*") appearing in Article 9'.

208. The European Court of Human Rights has accepted that value systems such as pacifism, atheism and veganism are covered by Article 9, as are political ideologies such as communism but the court hast stopped short of holding that affiliation with a political party is protected by Article 9. Non-belief and scepticism (i.e. atheism and agnosticism) are covered in the same way as positive belief.

209. In R (Williamson and ors) v Secretary of State for Education and Employment 2005 2 AC 246, HL) Lord Nicholls emphasised the broad reach of Article 9(1) by observing that it protects, *'the subjective belief of an individual… [R]eligious belief is intensely personal and can easily vary from one individual to another. Each individual is at liberty to hold his own religious beliefs, however irrational or inconsistent they may seem to some, however surprising.'* Lord Nicholls also set out some basic criteria that any belief (religious or otherwise) must satisfy to be protected under Article 9. The belief must:

(1) be consistent with basic standards of human dignity or integrity;
(2) relate to matters more than merely trivial;
(3) possess an adequate degree of seriousness and importance, and be concerned with a fundamental problem, and
(4) be coherent in the sense of being intelligible and capable of being understood.

He further warned against setting the bar too high when assessing whether a belief satisfies these criteria. Overall, it should not be set at a level that would deprive minority beliefs of the protection they are intended to have under the ECHR.

210. The right to 'freedom of thought, conscience and religion' in Article 9 is expressed to include a freedom to 'manifest' religion or belief. In Kokkinakis v Greece (1994 17 EHRR 397, ECtHR) the Court took the view that the right to adhere to a religion and hold religious beliefs embraces the freedom to bear witness in words and deeds. In Kalac v Turkey 1999 27 EHRR 552, the Court made it clear that, 'while religious freedom is primarily a matter of individual conscience, it also implies, inter alia, freedom to manifest one's religion not only in community with others,

in public and within the circle of those whose faith one shares but also alone and in private.'

211. In Eweida and ors v United Kingdom 2013 IRLR 231 the European Court of Human Rights explained that, even where the belief in question attains the required level of cogency and importance, it cannot be said that every act which is in some way inspired, motivated, or influenced by it constitutes a 'manifestation' of the belief. For example, acts or omissions that do not directly express the belief concerned or which are only remotely connected to a precept of faith are to be regarded as falling outside the protection of Article 9(1). In order to count as a 'manifestation', the act in question must be intimately linked to the religion or belief but there is no requirement on the applicant to establish that he or she acted in fulfilment of a duty mandated by the religion in question.

212. Case law shows that the freedom to *manifest* one's religious or philosophical beliefs at work is considerably more limited than the basic freedom to *hold* such beliefs. A further filter is applied by requiring complainants who bring direct discrimination claims under the Equality Act 2010 to prove that the reason for any less favourable treatment was actually the protected characteristic in question.

213. Section 10 of the Equality Act 2010 defines the protected characteristic of religion or belief for the purposes of the Act. Pursuant to section 10(1), religion means 'any religion and a reference to religion includes a reference to a lack of religion'. Under section 10(2), belief is defined as 'any religious or philosophical belief and a reference to belief includes a reference to a lack of belief'. Any reference in the Act to a person who has the protected characteristic of religion or belief 'is a reference to a person of a particular religion or belief', while a reference to 'persons who share that characteristic' is a reference to persons of the same religion or belief (section 10(3)).The definition therefore encompasses two broad categories of protected belief, one religious and one secular.

214. The protection provided by the Act is not limited to established religions and can extend to adherents of 'new' religions. The common factor that underlies the concept of religion is the existence of a clear structure and system of beliefs*.* The EHRC Code of Practice states that: 'a religion need not be mainstream or well known to gain protection as a religion. However, it must have a clear structure and belief system' (paragraph 2.54.) According to the Code, it is for the courts to determine what constitutes a 'religion' for this purpose, although it includes a list of the most commonly recognised religions in the UK, which would undoubtedly qualify (examples include Buddhism, Christianity, Hinduism, Islam, Judaism, Rastafarianism and Sikhism). The Code also asserts that denominations or sects within religions (such as Methodists within Christianity or Sunnis within Islam) may fall within section 10 (see paragraph 2.54).

215. Section 10 provides protection both on the ground of religion *and* on the ground of religious belief. The EHRC Code suggests that the notion of religious belief *'goes beyond beliefs about and adherence to a religion or its central articles of faith and may vary from person to person within the same religion'* (paragraph 2.56.)

216. In interpreting 'religious belief', tribunals will not normally seek to distinguish between beliefs that are mandatory as part of a religion and those that are based on or derived from cultural practices and tradition within a particular religious creed (see for example, Mba v London Borough of Merton 2014 ICR 357 where the Court of Appeal indicated that in an indirect discrimination case, investigation into whether a claimant's belief is a core belief of the religion to which the claimant adheres forms no part of a tribunal's remit when adjudicating a religion or belief claim.) Given that tribunals will generally be reluctant to rule on the centrality of a particular belief to a particular religion, they will rarely require expert evidence on the religious doctrine in question.

217. Tribunals should not impose too high a hurdle when it comes to the need for proof of actual adherence. In R (Williamson and ors) v Secretary of State for Education and Employment 2005 2 AC 246, Lord Nicholls observed: *'When the genuineness of a claimant's professed belief is an issue in the proceedings, the court will enquire into and decide this issue as a question of fact. This is a limited enquiry. The court is concerned to ensure an assertion of religious belief is made in good faith… But, emphatically, it is not for the court to embark on an enquiry into the asserted belief and judge its "validity" by some objective standard such as the source material upon which the claimant founds his belief or the orthodox teaching of the religion in question or the extent to which the claimant's belief conforms to or differs from the views of others professing the same religion. Freedom of religion protects the subjective belief of an individual.'* While the tribunal can legitimately be concerned with whether or not the claim of religious belief is made in good faith, they should not concern themselves with judging the validity of that faith. A tribunal may inquire into whether the particular manifestation of a religious belief asserted by a claimant is genuine.

218. In relation to philosophical belief, the predecessor 2003 Regulations originally prohibited discriminatory treatment in the workplace on the ground of 'any religion, religious belief, or similar philosophical belief'. This definition limited the kinds of views and opinions for which an employee or worker could claim protection. The word 'similar' protected only those beliefs that could be equated with beliefs based upon a religious creed. There was concern that UK law was not fully compliant with the underlying Directive, in that the inclusion of the word 'similar' implied a narrower approach. Consequently, regulation 2(1) was replaced with a version that dropped the word 'similar', thereby widening the reach of the Regulations to cover any philosophical belief without limitation or qualification. Substantially the same definition has been maintained in section 10(2) Equality Act 2010.

219. Philosophical beliefs attract the same level of protection as religions and religious beliefs (General Municipal and Boilermakers Union v Henderson 2015 IRLR 451, EAT*)*. All qualifying beliefs are equally protected. Philosophical beliefs may be just as fundamental or integral to a person's individuality and daily life as religious beliefs.

220. It has been indicated that it is essential, before considering whether a belief amounts to a 'philosophical belief' protected under the Act, to define exactly what the belief is (Gray v Mulberry Co (Design) Ltd 2020 ICR 715, CA*)* However, in Forstater v CGD Europe and ors 2022 ICR 1 the EAT noted that the *Gray* case was unusual, in that the belief relied on was capable of being summed up in a single sentence. Most philosophical beliefs will not be capable of being summed up in this way. It should not be necessary to set out a detailed treatise of a claimed philosophical belief in every case. A precise definition of those aspects of the belief that are relevant to the claims in question will suffice. Tribunals may therefore seek to identify core elements of a belief to determine whether they fall within section 10.

221. The leading case on the definition of a 'philosophical belief' is Grainger plc and ors v Nicholson 2010 ICR 360, where the EAT provided guidance of general application on the ambit of this category of protected belief. Mr Justice Burton expressed the view that there is nothing in the make-up of a philosophical belief that would disqualify beliefs based on political philosophies. Nor is there any reason to disqualify from the statutory protection a philosophical belief based on science, as opposed to religion. While it is necessary for the belief to have a similar status or cogency to a religious belief, it does not need to constitute or allude to a fully-fledged system of thought.

222. Grainger distilled from ECHR case law the basic criteria that must be met in order for a belief to be protected under section 10 of the Act. A belief can only qualify for protection if it:

a. is genuinely held;
b. is not simply an opinion or viewpoint based on the present state of information available;
c. concerns a weighty and substantial aspect of human life and behaviour
d. attains a certain level of cogency, seriousness, cohesion and importance, and
e. 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.

These criteria are now replicated in the EHRC Code of Practice as official guidance on what comprises a philosophical belief for the purposes of the protected characteristic of religion or belief (see paragraph 2.59).

223. A number of EAT decisions emphasize that the Grainger criteria are modest threshold requirements which should not set the bar too high or demand too much of those professing to have philosophical beliefs.

224. Forstater also made it clear that tribunals should not stray into the territory of adjudicating on the merits and validity of the belief itself. They 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. The interpretation of 'philosophical belief' indicated in

Grainger accepted that a philosophical belief does not need to constitute or allude to a fully-fledged system of thought or be shared by others, and it can relate to a 'one-off' or single issue that does not necessarily govern the entirety of the believer's life.

225. The first criterion laid down in Grainger is that the belief must be genuinely held by the claimant. An employment tribunal should be satisfied that the claimant actually adheres to the belief and that that adherence forms something more than merely the assertion of a view or an opinion. The extent of the tribunal's inquiry may need to be more robust when it comes to establishing whether a claimant subscribes to a philosophical belief. In Grainger, Burton J thought that Lord Nicholls' remarks in Williamson did not apply to the same extent to philosophical beliefs. He observed: 'To establish a religious belief, the claimant may only need to show that he is an adherent to a particular religion. To establish a philosophical belief… it is plain that cross-examination is likely to be needed.'

226. The requirement that the belief must be more than an opinion or viewpoint stems from remarks made by Mr Justice Elias in McClintock v Department of Constitutional Affairs 2008 IRLR 29, EAT. In Grainger Mr Justice Burton rejected the contention that science or evidence-based beliefs are incapable of amounting to a philosophical belief. Burton J thought that nothing in McClintock actually precluded science-based beliefs, so long as they met the criteria set out in his judgment. An ethical stance based on a science-based belief in potentially catastrophic climate change was perfectly capable of amounting to a 'philosophical belief'. Whether or not it actually did so depended on the tribunal being satisfied that the claimant actually lived according to the precepts of such a belief and that the employer's actions were attributable to the fact that the claimant held that belief.

227. In relation to the third Grainger criterion, in R (Williamson and ors) v Secretary of State for Education and Employment Lord Nicholls held that the belief must 'relate to matters more than merely trivial', must 'possess an adequate degree of seriousness and importance' and must be 'a belief on a fundamental problem'. This criterion potentially excludes beliefs that have a very narrow focus. The subject matter of the belief in question must be of some general importance. This criterion will also be satisfied by even rather esoteric views so long as they concern a topic of general public interest.

228. Regarding the fourth Grainger criterion, Burton J explained that, notwithstanding the removal of the requirement for a philosophical belief to be 'similar' to a religious belief, it remains necessary for the belief to have 'a similar status or cogency to a religious belief'. This seems to sum up the general quality of qualifying philosophical beliefs, namely, that they must possess consistent internal logic and structure (i.e. cogency), provide guiding principles for behaviour (i.e. status), and concern fundamental (as opposed to parochial) matters. Burton J stated that even beliefs that do

not govern the entirety of a person's life, such as pacifism and vegetarianism, are potentially covered. As to coherence, Lord Nicholls in R (Williamson and ors) v Secretary of State for Education and Employment stated that, for the purposes of Article 9 ECHR, this means simply that the belief must be 'intelligible and capable of being understood' and that 'too much should not be demanded in this regard'.

229. The fifth criterion in Grainger, that the belief is worthy of respect in a democratic society, is not incompatible with human dignity and does not conflict with the fundamental rights of others derives from two European Court of Human Rights cases, Campbell and anor v United Kingdom, and R (on the application of Williamson) v Secretary of State for Education and Employment, which both concerned support for corporal punishment. Lord Nicholls in Williamson stated that the belief 'must be consistent with basic standards of human dignity or integrity', and indicated that, for example, a belief that involved subjecting others to torture or inhuman punishment would not qualify for protection. In Grainger, Mr Justice Burton suggested that 'a political philosophy which could be characterised as objectionable' (such as concerted racism or homophobia) would also be likely to be excluded from protection on this basis. The EHRC Employment Code states that 'a philosophy of racial superiority for a particular racial group' is an example of a philosophical belief that would be excluded from protection on the basis of the fifth Grainger criterion (see paragraph 2.59).

230. The EAT conducted a detailed consideration of the scope of the limitation imposed by the fifth Grainger criterion in Forstater. The EAT held that the types of beliefs that are excluded by the fifth Grainger criterion must be defined by reference to Article 17 ECHR, which prohibits the use of Convention rights to destroy or limit the Convention rights of others. Thus, the fifth Grainger criterion is apt only to exclude the most extreme beliefs akin to Nazism or totalitarianism or which incite hatred or violence. Beliefs which are offensive, shocking or even disturbing to others, including those that would fall into the less serious category of hate speech, can still qualify for protection. The EAT observed that Forstater's 'gender-critical' beliefs were widely shared in society (including by some trans persons and by a number of respected academics); they were consistent with the common law, under which sex is immutable and binary; and they did not seek to destroy the rights of trans persons. Thus, they clearly did not fall into the category of beliefs excluded from protection by Article 17. The EAT also noted that the fact that the fifth Grainger criterion only excludes the most extreme beliefs means that few cases will fall at this hurdle.

231. A lack of religion or belief falls within the ambit of the protected characteristic of religion or belief. This ensures consistency with the right to freedom of thought, religion and conscience protected under Article 9 of the European Convention on Human Rights, which has been interpreted to encompass not only the right to belong to a religion but also the right 'not to believe' and/or to hold unconventional beliefs not subscribed to by others. The EAT in Grainger explained how the protection from discrimination for lack of belief works: 'If the claimant has his philosophical

belief in climate change, and he were to discriminate against someone else in the work force who does not have that belief, then the latter would be capable of arguing that he was being treated less favourably because of his absence of the belief held by the claimant'. In Forstater, the EAT clarified that a lack of belief does not necessarily denote holding a positive view that is opposed to the belief in question. It may arise from having no view at all on a matter, or from having some views falling short of a developed philosophical belief.

232. Sections 10 and 13 Equality Act read together, provide that a person (A) discriminates against another (B) if, because of religion or belief, A treats B less favourably than A treats or would treat others. This protection extends to treatment meted out because of a religion or belief that B holds, because of B's lack of religion or belief, because of the perception that B holds or does not hold a particular religion or belief, or because of the religion or belief of someone with whom B is associated. However, it does not cover the situation where A treats B less favourably because of A's religion or belief (*Gan Menachem Hendon Ltd v De Groen 2019 ICR 1023, EAT*.)

233. The EHRC's Code of Practice explains that 'manifestations of a religion or belief could include treating certain days as days for worship or rest; following a certain dress code; following a particular diet; or carrying out or avoiding certain practices. There is not always a clear line between holding a religion or belief and the manifestation of that religion or belief. Placing limitations on a person's right to manifest their religion or belief may amount to unlawful discrimination; this would usually amount to indirect discrimination' (paragraph 2.61.)

234. The manifestation of religion or belief does come within the ambit of the rights protected under the Directive and the Equality Act. The European Court of Justice's three judgments on religion or belief discrimination in the workplace (Achbita and anor v G4S Secure Solutions NV 2018 ICR 102, ECJ*;* Bougnaoui and anor v Micropole SA 2018 ICR 139, ECJ*; and* IX v WABE eV and another case 2022 ICR 190, ECJ) all noted that the Recital to the Framework Directive refers to Article 9 ECHR as well as Article 10(1) of the EU Charter of Fundamental Rights, which affirms that the right to freedom of conscience and religion includes the 'right to manifest religion or belief' in public and in private through worship, teaching, practice and observance, either alone or in community with others. The Court also made clear in these cases that the concept of 'religion' should be interpreted as covering both the 'forum internum' (i.e. the fact of having a belief) and the 'forum externum' (i.e. the manifestation of religious faith in public).

235. In some cases the right to manifest religion or belief in the workplace has given rise to particular problems where the expression of an employee's religion clashes with a basic aspect of the job. The problem may be that the religious belief conflicts with the rights of others within the workplace, or within sectors of the wider community, whom the employee is expected

to serve. In Ladele v London Borough of Islington (Liberty intervening) 2010 ICR 532, CA the claimant, who was a registrar, refused to conduct civil partnership services because of her Christian belief that same-sex unions were contrary to God's law. The Court of Appeal concluded that the Council did not directly discriminate against her on the ground of religion when it threatened her with dismissal for refusing to carry out the services. The reason for its treatment was not her religious belief but her refusal to carry out her duties. The Council required all registrars to carry out marriages and civil partnerships, and the claimant was treated no differently in this regard from anyone else. Nor was there unlawful indirect discrimination since the Council had a legitimate aim, which was to provide its services in a non-discriminatory way in accordance with its 'Dignity for All' policy. Requiring the claimant to perform civil partnerships was a proportionate means of achieving that aim. The effect on her of implementing that policy was held not to impinge on her religious beliefs, since she remained free to hold those beliefs and to worship as she wished.

Direct discrimination

236. Section 13 Equality Act 2010 states:

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

237. Section 23 of the Equality Act 2010 provides:

(1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case…

238. In some cases it may be appropriate to postpone consideration of whether there has been less favourable treatment than of a comparator and decide the reason for the treatment first. Was it because of the protected characteristic? *(Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 ICR 337, HL; Stockton on Tees Borough Council v Aylott)*

239. The claimant must show that they received the less favourable treatment 'because of' the protected characteristic. In *Nagarajan v London Regional Transport 1999 ICR 877, HL* *Lord Nicholls stated: "a variety of phrases, with different shades of meaning, have been used to explain how the legislation applies in such cases: discrimination requires that racial grounds were a cause, the activating cause, a substantial and effective cause, a substantial reason, an important factor. No one phrase is obviously preferable to all others, although in the application of this legislation legalistic phrases, as well as subtle distinctions, are better avoided so far as possible. If racial grounds… had a significant influence on the outcome, discrimination is made out'."*

240. The judgment in R (on the application of E) v Governing Body of JFS and the Admissions Appeal Panel of JFS and ors 2010 IRLR 136, SC summarised the principles that apply in cases of direct discrimination and gave guidance on how to determine the reason for the claimant's treatment. Lord Phillips emphasised that in deciding what were the 'grounds' for discrimination, a court or tribunal is simply required to identify the factual criteria applied by the respondent as the basis for the alleged discrimination. Depending on the form of discrimination at issue, there are two different routes by which to arrive at an answer to this factual inquiry. In some cases, there is no dispute at all about the factual criterion applied by the respondent. It will be obvious why the complainant received the less favourable treatment. If the criterion, or reason, is based on a prohibited ground, direct discrimination will be made out. The decision in such a case is taken on a ground which is inherently discriminatory. The second type of case is one where the reason for the decision or act is not immediately apparent and the act complained of is not inherently discriminatory. The reason for the decision/act may be subjectively discriminatory. In such cases it is necessary to explore the mental processes, conscious or subconscious, of the alleged discriminator to discover what facts operated on his or her mind.

241. The relevant comparator must not share the claimant's protected characteristic. There must be no material difference between the circumstances relating to each case. The circumstances of the claimant and the comparator need not be identical in every way. Rather, what matters is that the circumstances which are relevant to the claimant's treatment are the same or nearly the same for the claimant and the comparator (paragraph 3.23 EHRC Employment Code.) With the exception of the prohibited factor (the protected characteristic) all characteristics of the complainant which are relevant to the way his case was dealt with must be found also in the comparator. They do not have to be precisely the same but they must not be materially different. (Macdonald v Ministry of Defence, Pearce v Governing Body of Mayfield Secondary School [2003] ICR 937). Whether the situations are comparable is a matter of fact and degree (Hewage v Grampian Health Board [2012] ICR 1054.)

Burden of Proof

242. Section 136 of the Equality Act 2010 provides that, once there are facts from which an employment tribunal could decide that an unlawful act of discrimination has taken place, the burden of proof "shifts" to the respondent to prove any non-discriminatory explanation. The two-stage shifting burden of proof applies to all forms of discrimination under the Equality Act including direct discrimination, harassment, indirect discrimination, discrimination arising from disability under section 15 and the failure to make reasonable adjustments under section 20. Although similar principles apply, what needs to be proved depends, to a certain extent, on the nature of the legal test set out in the respective statutory sections.

243. The wording of section 136 of the act should remain the touchstone. The relevant principles to be considered have been established in the key cases: Igen Ltd v Wong 2005 ICR 931; Laing v Manchester City Council and another ICR 1519; Madarassy v Nomura International Plc 2007 ICR 867; and Hewage v Grampian Health Board 2012 ICR 1054.

244. The correct approach requires a two-stage analysis. At the first stage the claimant must prove facts from which the tribunal could infer that discrimination has taken place. Only if such facts have been made out on the balance of probabilities is the second stage engaged, whereby the burden then "shifts" to the respondent to prove (on the balance of probabilities) that the treatment in question was "in no sense whatsoever" on the protected ground.

245. The approved guidance in Barton v Investec Henderson Crosthwaite Securities Ltd [2003] ICR 1205 (as adjusted) can be summarised as:

a) It is for the claimant to prove, on the balance of probabilities, facts from which the employment tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination. If the claimant does not prove such facts, the claim will fail.
b) In deciding whether there are such facts it is important to bear in mind that it is unusual to find direct evidence of discrimination. In many cases the discrimination will not be intentional.
c) The outcome at this stage will usually depend on what inferences it is proper to draw from the primary facts found by the tribunal. The tribunal does not have to reach a definitive determination that such facts would lead it to conclude that there was discrimination, it merely has to decide what inferences could be drawn.
d) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts. These inferences could include any that it is just and equitable to draw from an evasive or equivocal reply to a request for information. Inferences may also be drawn from any failure to comply with the relevant Code of Practice.
e) When there are facts from which inferences could be drawn that the respondent has treated the claimant less favourably on a protected ground, the burden of proof moves to the respondent. It is then for the respondent to prove that it did not commit or, as the case may be, is not to be treated as having committed that act. To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that its treatment of the claimant was in no sense whatsoever on the protected ground.
f) Not only must the respondent provide an explanation for the facts proved by the claimant, from which the inferences could be drawn, but that explanation must be adequate to prove, on the balance of probabilities, that the protected characteristic was no part of the reason for the treatment. Since the respondent would generally be in possession of the facts

necessary to provide an explanation, the tribunal would normally expect cogent evidence to discharge that burden.

246. The shifting burden of proof rule only applies to the discriminatory element of any claim. The burden remains on the claimant to prove that the alleged discriminatory treatment actually happened and that the respondent was responsible. It is not for the respondent to prove that the claimant has the particular protected characteristic. The statutory burden of proof provisions only play a role where there is room for doubt as to the facts necessary to establish discrimination. In a case where the tribunal is in a position to make positive findings on the evidence one way or another as to whether the claimant was discriminated against on the alleged protected ground, they have no relevance (Hewage). If a tribunal cannot make a positive finding of fact as to whether or not discrimination has taken place it must apply the shifting burden of proof.

247. Where it is alleged that the treatment is inherently discriminatory, an employment tribunal is simply required to identify the factual criterion applied by the respondent and there is no need to inquire into the employer's mental processes. If the reason is clear or the tribunal is able to identify the criteria or reason on the evidence before it, there will be no question of inferring discrimination and thus no need to apply the burden of proof rule. Where the act complained of is not in itself discriminatory and the reason for the less favourable treatment is not immediately apparent, it is necessary to explore the employer's mental processes (conscious or unconscious) to discover the ground or reason behind the act. In this type of case, the tribunal may well need to have recourse to the shifting burden of proof rules to establish an employer's motivation

248. The claimant bears the initial burden of proving a prima facie case of discrimination on the balance of probabilities. The requirement on the claimant is to prove on the balance of probabilities, facts from which, in the absence of any other explanation, the employment tribunal could infer an unlawful act of discrimination. The employer's explanation (if any) for the alleged discriminatory treatment should be left out of the equation at the first stage. The tribunal must assume that there is no adequate explanation. The tribunal is required to make an assumption at the first stage which may in fact be contrary to reality. In certain circumstances evidence that is material to the question whether or not a prima facie case has been established may also be relevant to the question whether or not the employer has rebutted that prima facie case.

249. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination (see Madarassy).

250. If the claimant establishes a prima facie case of discrimination the second stage of the burden of proof is reached and the burden of proof shifts onto the respondent. The respondent must at this stage prove, on balance of probabilities that its treatment of the claimant was in no sense whatsoever based on the protected characteristic. The employer's reason for the

treatment of the claimant does not need to be laudable or reasonable in order to be non-discriminatory.

251. In some instances, it may be appropriate to dispense with the first stage altogether and proceed straight to the second stage (Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337.) The employment tribunal should examine whether or not the issue of less favourable treatment is inextricably linked with the reason why such treatment has been meted out to the claimant. If such a link is apparent, the tribunal might first consider whether or not it can make a positive finding as to the reason, in which case it will not need to apply the shifting burden of proof rule. If the tribunal is unable to make a positive finding and finds itself in the situation of being unable to decide the issue of less favourable treatment without examining the reason, it must examine the reason (i.e. conduct the two stage inquiry) and it should be for the employer to prove that the reason is not discriminatory, failing which the claimant must succeed in the claim.

252. In the context of a section 15 claim in order to establish a prima facie case of discrimination the claimant must prove that he or she has the disability and has been treated unfavourably by the employer. It is also for the claimant to show that "something" arose as a consequence of his or her disability and that there are facts from which it could be inferred that this "something" was the reason for the unfavourable treatment. Where the prima facie case has been established, the employer will have three possible means of showing that it did not commit the act of discrimination. First, it can rely on section 15(2) and prove that it did not know that the claimant was disabled. Secondly, the employer can prove that the reason for the unfavourable treatment was not the "something" alleged by the claimant. Lastly, it can show that the treatment was a proportionate means of achieving legitimate aim.

253. Where it is alleged that an employer has failed to make reasonable adjustments, the burden of proof only shifts once the claimant has established not only that the duty to make reasonable adjustments had arisen but also that there are facts from which it could reasonably be inferred (absent an explanation) that the duty been breached. Demonstrating that there is an arrangement causing a substantial disadvantage engages the duty, but it provides no basis on which it can be properly inferred that there is a breach of that duty. Rather, there must be evidence of some apparently reasonable adjustment that could have been made. Therefore, the burden is reversed only once a potentially reasonable amendment adjustment has been identified Project Management Institute v Latif [2007] IRLR 579.

Breach of contract

254. An employer is entitled to dismiss an employee summarily where he has committed a fundamental breach of contract. The breach of contract is a repudiatory breach of contract in that it goes to the root of the contractual

relationship and removes the obligation to comply any further with the terms of that contract. In an employment context, such a breach of contract is often an act of gross misconduct. Unlike in claims of unfair dismissal, the Tribunal must make its own finding as to whether the claimant actually committed the breach of contract (on balance of probabilities.) It is not asked to consider whether the respondent had 'reasonable grounds for believing' in the claimant's guilt or 'reasonable evidence' of such guilt.

255. The categories of gross misconduct are not closed. Acts of dishonesty and other acts which poison the employment relationship will often fall into the category. Gross negligence can also constitute a repudiatory breach. (Adesokan v Sainsburys Supermarkets Ltd 2017 EWCA Civ 22).

256. A breach of the implied term of mutual trust and confidence is a fundamental breach of contract as the relationship of mutual trust and confidence is fundamental to the employment relationship.

Time limits

257. Section 123 of the Equality Act 2010 states:

> (1) …a complaint within section 120 may not be brought after the end of—
>
> (a) the period of 3 months starting with the date of the act to which the complaint relates, or
>
> (b) such other period as the employment tribunal thinks just and equitable.
>
> (2) …
>
> (3) For the purposes of this section—
>
> (a) conduct extending over a period is to be treated as done at the end of the period;
>
> (b) failure to do something is to be treated as occurring when the person in question decided on it.
>
> (4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
>
> (a) when P does an act inconsistent with doing it, or
>
> (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

258. In Kingston upon Hull City Council v Matuszowicz [2009] ICR 1170 the Court of Appeal noted that, in claims where the employer was not deliberately failing to comply with the duty to make reasonable adjustments, and the omission was due to lack of diligence or competence or any reason other than conscious refusal, the employer is to be treated as having decided upon the omission at what is in one sense an artificial date. In the absence of evidence as to when the omission was decided upon, the legislation provides two alternatives (see section 123(4)). The second option requires an inquiry that is by no means straightforward. It presupposes that the person in question has carried on for a time without doing anything inconsistent with doing the omitted act, and it then requires consideration of the period within which he or she might reasonably have been expected do the omitted act if it was to be done. In terms of the duty to make reasonable adjustments, that seems to require an inquiry as to when, if the employer had been acting reasonably, it would have made the reasonable adjustments. That is not the same as inquiring whether the employer did in fact decide upon doing it at that time. In determining when the period expired within which the employer might reasonably have been expected to make an adjustment, the tribunal should have regard to the facts as they would reasonably have appeared to the claimant, including what the claimant was told by his or her employer (Abertawe Bro Morgannwg University Local Health Board v Morgan 2018 ICR 1194 *).* Not all time limits are fixed by reference to the date on which a cause of action accrued. In the case of reasonable adjustments, the duty arises as soon as the employer is able to take steps which it is reasonable for it to take to avoid the relevant disadvantage. The Court observed that if time for submitting a claim began to run at that date, the claimant might be unfairly prejudiced. He or she might reasonably believe that the employer was taking steps to address the disadvantage, when in fact the employer was doing nothing. By the time it became (or should have become) apparent to the claimant that the employer was doing nothing, the time limit for bringing proceedings might have expired. Accordingly, for the purposes of the time limit, the period within which the employer might reasonably have been expected to comply had to be determined in the light of what the claimant reasonably knew.

259. A claim may be allowed to proceed outside the time limit where it is just and equitable to do so. The onus is on the claimant to show why the Tribunal should extend time to allow his claims to proceed. It is not a 'given'. There is no presumption in favour of granting an extension of time. The exercise of the discretion is the exception rather than the rule. The time limits are there for a reason and the starting point is that they should be complied with (see Robertson v Bexley Community Care [2003] IRLR 434). The factors set out in in section 33(3) of the Limitation Act 1980 may be of assistance (British Coal v Keeble and ors [1997] IRLR 336). That provides some guidance but is not to be used as a mechanistic 'checklist'. It provides guidance but the Tribunal is not required to adhere to it rigidly or slavishly (Southwark London Borough Council v Afolabi [2003] 800). Section 33(3) of the Limitation Act sets out the following factors:

> "(a) the length of, and the reasons for, the delay on the part of the plaintiff;
> (b) the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought within the time allowed by section 11[,by section 11A][, by section 11B] or (as the case may be) by section 12;
> (c) the conduct of the defendant after the cause of action arose, including the extent (if any) to which he responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant;
> (d) the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action;
> (e) the extent to which the plaintiff acted promptly and reasonably once he knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages;
> (f) the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received."

It is particularly relevant to consider the length of and reasons for the delay and the balance of prejudice to each respective party caused by granting or refusing the extension of time. All the relevant circumstances of the case are to be considered.

Conclusions

Disability

260. The tribunal accepts that the claimant experienced the symptoms of phobia that he alleges and that he had the phobic attack or episode that he described during his holiday in France in July 2020. As described, the tribunal accepts that the impact of the impairment and of the symptoms provoked was 'more than minor or trivial.'

261. The tribunal was somewhat surprised that the existence of the phobia had not been noted before 2020 given the nature of the claimant's job and the fact that he was working within a clinical setting where masks might be encountered on a reasonably frequent basis. However, surprising as this might be, we are unable to say that the claimant was not giving a truthful account of his phobia symptoms, certainly on the balance of probabilities. The respondent points out that the claimant's case is that he has a phobia

both in relation to wearing a mask himself and also in relation to encountering other people wearing masks. The respondent argues that it is not credible for the claimant to suggest that he was able to continue working with such a phobia in an environment where mask wearing was relatively common. If his phobia was triggered by other people wearing masks, the respondent argues that the claimant would have been subject to significant stress and anxiety whilst working at the Practice and/or would have required time off work on sick leave. However, the respondent's argument does not take account of the fact that the claimant says that his more acute symptoms were triggered by having to wear a mask himself (rather than by seeing others in masks) and that he also avoided looking directly at other people when they were wearing masks in order to avoid a panic attack. This combination of avoidance techniques and the differentiation in the severity of symptoms dependent on the nature of the trigger, might help to explain why the claimant was able to work with the respondent without his phobia being obvious. The lack of noted or obvious distress in the workplace does not mean that the symptoms described were not genuinely experienced. Nor does it, in the tribunal's view, indicate that the impairment, once fully triggered, had less than a substantial adverse effect on the claimant's normal day to day activities.

262. The tribunal also notes that there are likely to have been significant differences for the claimant between wearing a face mask and wearing a face visor, given the evidence in the case. As stated above, we accept Dr Oh's evidence that the claimant was seen wearing a visor within the practice without apparent distress. We also find that the claimant had actually volunteered to wear a visor at work during the early stages of the chronology of events (contrary to his later assertions). The obvious differences between a visor and a face mask are that the former is made of clear plastic, does not obscure the facial features, and does not physically touch the face and so does not adversely affect breathing. Hence, during the pandemic, visors were often used by those with breathing difficulties as an alternative to a face mask covering the lower part of the face. It is evident that even with a phobia of the type described, the claimant is likely to have been able to wear a visor without real difficulty, even if only intermittently.

263. The allegation that he was seen wearing a mask when taking patient temperatures at reception was less evidentially clear cut in that we did not hear from the witness who actually observed this. We do not know the length of time for which the claimant wore a mask whilst in reception or the extent to which he struggled with phobic symptoms as a result. Given the lack of detailed evidence, on balance, this particular incident is not sufficiently weighty to undermine the medical evidence in this case which suggests that the claimant does *have* the phobia. This is particularly so in circumstances where the expert's report has not been formally challenged by the respondent. No questions were put to the expert prior to the tribunal hearing and the expert did not attend the hearing for cross examination. The weight to be given to Dr Kampers' report and his conclusions is lessened by the fact that it is largely based on the claimant's self-report. There are no real contemporaneous medical records relating to the relevant period of time on which the conclusions can be, at least partially, based. Furthermore, Dr Kampers only had an interview with the claimant remotely (and audio only). He was not able to assess the claimant's visual

presentation. All these factors mean that less weight can be attached to Dr Kampers' conclusions than might otherwise be the case and the Tribunal is not required to accept his conclusions unquestioningly and in their totality. However, in the absence of questions to the expert and cross examination to suggest the contrary, we have to accept that Dr Kampers has honestly attempted to discharge his so-called 'Part 35' duties to the tribunal. Dr Kampers may well have his own views on the advisability and efficacy of mask wearing (as demonstrated in the discursory parts of his report) but this does not mean that he has set out to give a diagnosis which is at odds with his professional duties and his duties to the tribunal.

264. The respondent also questioned the validity of Dr Kampers' evidence on the basis that it quite clearly retained the solicitor's questions to the expert within the body of the report. However, this was not a report from a joint expert. He was the claimant's expert. It is usual practice within litigation for the instructing party to review a draft report prior to disclosure in order to check its factual accuracy and to check that it covers the relevant issues. The tribunal is prepared to accept that this is what happened here. The problem arises because the report was not sufficiently well proofread prior to disclosure and so the questions are still present in the body of the document. Nevertheless, when an instructing solicitor asks questions in this way an expert has a choice whether to amend the report in line with the instructing party's questions/clarifications or whether to hold to the original content of the report on the basis that the expert is entitled to exercise his own medical expertise and to stand by his own expert opinion. If the report has been disclosed in this format it must be because the expert signed it off in this form and was happy to put his professional name to the contents of the report. Without impugning the integrity of the medical expert, it is difficult for a tribunal to go behind the medical opinion in the report. As stated above, we have already disregarded those elements of the report which go beyond the proper scope of expert medical opinion. Where Dr Kampers seeks to make a legal finding, or to express his own views about the efficacy of mask wearing, for example, we have left this out of account. We have read his evidence with a critical and evaluative eye and have not accepted his evidence unquestioningly. Where there are elements of the report which are contradicted by the factual evidence and our factual findings in the case, we have been prepared to prefer the factual evidence presented to us. Thus, whilst we are prepared to accept Dr Kampers' diagnosis and opinion in relation to the phobia, we are also prepared to accept that the claimant's difficulties with a visor (as opposed to a face mask) have been somewhat overstated by (and to) the expert (given the other, credible witness evidence in the case.)

265. Whilst the tribunal notes that the claimant did not seek medical treatment until after he was suspended from work, this does not automatically mean that he was not suffering from the phobia related symptoms before then. Individuals differ as to their willingness and readiness to obtain medical help for such issues if they feel that they can appropriately self-manage the condition without assistance.

266. It is difficult to assess whether the claimant's mental impairment (i.e. his phobia) had a substantial adverse effect on his ability to carry out normal day-to-day activities given that it would only be triggered in the rather unusual and exceptional circumstances of a pandemic where a

requirement or recommendation to wear a face covering would be of general application. (However, the societal change to generalized mask wearing was not a matter of the claimant's choosing and was effectively 'normal' for the majority of the duration of the pandemic. In any such similar circumstances the tribunal accepts that the claimant would suffer the resurgence of his phobia symptoms.) Thus, once the requirement to wear or encounter those wearing a mask subsided, the claimant was unlikely to suffer from the symptoms of the mask phobia. However, we accept that in the absence of effective treatment, the phobia remains latent within the claimant ready to be triggered by any future occasions where he is asked to wear a mask. It is similar, in that sense, to those cases where an individual has a fluctuating or recurrent condition with periods of remission and periods where symptoms flare up. Should the requirement to wear masks be reintroduced (for whatever reason) or should the claimant find himself in an environment where mask wearing is commonplace, it is likely that he will suffer a recurrence of the anxiety -related symptoms he describes in his evidence.

267. In assessing whether the claimant's impairment had a substantial adverse effect on his ability to carry out normal day-to-day activities we have to assess the adverse effect as it presents during a period of active phobia. We have to take into account the situation when he is actually suffering from the phobia and its symptoms rather than the situation during a period where the phobia lies dormant because of the prevailing social circumstances. The effect of the impairment has to be examined during a period where the symptoms are active.

268. A substantial adverse effect is one which is more than minor or trivial. The tribunal may need to consider the time taken to carry out an activity and the way in which an activity is carried out and indeed the cumulative effects of an impairment. The Act does not give a list of "normal day-to-day activities". However, the 2011 Guidance (cited above) notes that day-to-day activities are things that people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities. Normal day-to-day activities can include general work-related activities, and study and educated education related activities, such as interacting with colleagues, following instructions, using a computer, driving, carrying out interviews, preparing written documents and keeping to a timetable or shift pattern.

269. The tribunal is satisfied that when the claimant was suffering from the symptoms associated with the mask phobia this would have a substantial adverse effect on his ability to carry out normal day-to-day activities such as concentrating, interacting with colleagues, following instructions, preparing written documents, having a conversation or using the telephone, reading or writing. The overriding feeling of panic would interfere with the claimant's ability to carry out these sorts of tasks either in a social or a work-related environment. We have also heard evidence of the impact this would have on his family life and his ability to socialise. In order to avoid the activation of phobia related symptoms the claimant would have to avoid certain social events and gatherings.

270. We are satisfied that the impairment was long-term within the meaning of the Act during the relevant period of time in this case. Evidently the claimant was not suffering from symptoms on a continuous basis. Symptoms would flare up as and when the phobia was triggered by his surroundings. This had not notably happened until 2020. The phobia may have been present and may have lain undetected throughout the claimant's life up until this point in time. Even so, it is difficult to say (in the absence of an active history of attacks) that it meets the statutory definition on the basis of having been an impairment with the necessary adverse effect for more than 12 months by the start of the pandemic. However, this is not the only way in which a case may meet the 'long term' requirement. We have found that the impairment and its substantial adverse effects were likely to recur if left untreated and if the claimant was put in circumstances where the phobia was triggered (e.g. where masks were required.) It was likely to recur for the foreseeable future unless and until it was the subject of effective, curative treatment. Likely here means "could well happen". Given the nature of the condition, from the time when the claimant first manifested symptoms of the phobia they 'could well' recur periodically on an ongoing basis for the foreseeable future extending well beyond 12 months. Only if cured by treatment would this likelihood of recurrence be removed.

271. On the above basis, we find that the claimant meets the definition of disability within section 6 of the Equality Act for the totality of the relevant period of time under examination in this claim.

Reasonable adjustments

Reasonable adjustments complaint number 1

272. The first reasonable adjustments complaint focuses on the alleged PCP of the respondent deciding *"not to or omitting to send a message to all staff on or shortly after the meeting on 15 January 2021 reminding them that some staff were exempt from wearing a face mask and they should be respectful to them."*

273. In line with our findings of fact above it is evident that the respondent did send one message of this nature [558]. However, it did not send the second email in circumstances where it had suggested that it would do so. Was this a provision criterion or practice within the meaning of the Equality Act? In line with the case law guidance such as Ishola we have concluded that it does *not* constitute a PCP within the meaning of the Act. We find that the failure to send this email was an oversight and was a 'one-off' occurrence. It was out of line with the respondent's stated intention (i.e. to send such messages and to seek the claimant's approval for this). If the same circumstances were to happen again it is unlikely that the respondent would make a similar omission. Indeed, it can be said that the respondent's normal *practice* was in fact to send the emails and communications which it indicated it would send. It had done so in relation to this subject matter on at least one prior occasion. This was therefore a one-off omission which would not be repeated if the same circumstances were to be replicated in future. The failure to send the email does not have the element of repetition that is required as per the case law.

274. It was also an administrative error that was specific to this claimant's case and that has no bearing on how any other person would be treated. It shows no practice or criterion on the part of the respondent. Indeed the respondent did send one email about mask exemption just not on this occasion. It is also out of step with the respondent's wider policies and procedures designed to ask staff to notify the respondent of any exemptions so that appropriate adjustments could be made. The respondent evidently made it known amongst the workforce that some employees could have exemptions. Hence even a witness in the disciplinary case states that they are aware that some of the staff are exempt [156].

275. If the tribunal's primary conclusion that this did not constitute a PCP for the purposes of the Equality Act were wrong, we would have gone on to find that the application of the PCP did not place the claimant at a substantial disadvantage in comparison with persons who are not disabled. The claimant alleges that because of his disability and consequent exemption from wearing a face covering, this left him exposed to criticism by colleagues. If the application of the PCP did not put the claimant at the alleged substantial disadvantage than the duty to make reasonable adjustments would not be triggered in this case.

276. Our findings of fact above demonstrate that the claimant had made his views and opinions on the wearing of masks known to staff. His colleagues had this knowledge of his views irrespective of the respondent sending or not sending an email about mask exemptions. As a result of these communications colleagues doubted whether the claimant had a genuine exemption. Even if the proposed email had been sent by the respondent the respondent would not have been able to reveal to the staff which individuals had declared themselves exempt as this was confidential information. Therefore, even if the email had been sent it is likely, on the facts of this case, that the claimant would still have been subject to suspicion and criticism from his colleagues which arose from their knowledge of his beliefs and their suspicion that he did not have a genuine exemption from wearing a mask. Colleagues would continue to have these suspicions and views about the claimant's mask position irrespective of the further email either being sent or not sent. The sending of the email was therefore likely to make no difference to the reaction of his colleagues. The necessary element of causation in this aspect of the case is not made out. The claimant has failed to establish that the application of the asserted PCP put him at a substantial disadvantage as compared to non-disabled colleagues. The email would not explain or demonstrate that the claimant had an exemption as it would not disclose his medical situation. Therefore, the presence or absence of the second email makes no difference to staff attitudes towards the claimant which arose from other causes (such as the claimant's previous actions and comments.) The PCP therefore would not have produced the necessary substantial adverse effect.

277. If the preliminary elements of the legal test had been established, the claimant would have argued that it would have been a reasonable adjustment to have sent the message. However, one of the relevant factors in considering whether an adjustment is reasonable is its likely efficacy in alleviating the substantial disadvantage caused by the PCP. Whilst an

adjustment does not have to be a complete solution to the disadvantage, it does have to have a prospect of alleviating it, at least to some extent. In the circumstances of this case, where a similar email had already been sent to the workforce with no observable benefit, it is not clear to the tribunal whether the sending of the second email would have improved matters at all for the claimant. Would it have even had a prospect of improving the claimant's position? In those circumstances, although it is a step which *could* have been taken by the respondent (and in fact it intended to take), the respondent's failure to take that step may not have been a failure to make necessary reasonable adjustments in any event.

278. We also considered the issue of knowledge (which had not been admitted by the respondent.) The chronology of events in this case discloses that the claimant initially suggested he had a medical exemption. At least, this is what the respondent understood the claimant to be saying. However, he then withdrew that suggestion of a medical exemption (15 January). The respondent was entitled to take the view that the claimant's request to remove the reference to medical exemptions or medical reasons for the exemptions meant that the justification for the exemption was not a medical one. That was a reasonable conclusion for them to draw. It was not immediately apparent why the claimant would have made this change if this were not the case. The respondent cannot reasonably have been expected to understand the reason for this change of position if it did not actually reflect the absence of a medical justification for the exemption.

279. Furthermore, the claimant did not elaborate on the mental distress issue until later. The letter on 10 February 2021 [154] is the first time that the respondent was reasonably on notice of the disability. The respondent was only in a position to obtain the information that the claimant was prepared to permit them to view. If he refused to provide the information regarding his exemption prior to this date then the tribunal is forced to conclude that the respondent could not have either actual or constructive knowledge of the disability. The respondent cannot be accountable for the claimant's failure to disclose this information or cooperate with any requests for further details. As noted at paragraph 5.15 of the EHRC Code of Practice, "an employer must do all they can reasonably be expected to do to find out if a worker has a disability." If the respondent is asking the question as to whether it is a medical exemption and the claimant actively refuses to confirm that it is, what else can the respondent be expected to do at that stage? This is particularly so given the context of the claimant's expressed views on the efficacy of mask wearing. As a consequence, the respondent did not have the necessary knowledge either of the disability or of the substantial disadvantage caused by the PCP in this part of the claim for the duty to make reasonable adjustments to have been triggered.

<u>Reasonable adjustments complaint number 2</u>

280. The second claim for reasonable adjustments is based on the alleged PCP that the respondent informed the claimant on 10 February 2021 that he would have to wear a face mask at work (paragraph 7 list of issues). This refers to the letter from Dr Beeharry [153]. That letter indicated that if the claimant had an exemption, he was required to provide a reasonable justification as to why the disability or condition prevented him from wearing a face mask. It reiterated that he had the right to refuse to divulge

full details of his health status but noted that without further details the respondent was unable to properly assess what other precautions could be taken in lieu of facemasks. The instruction contained at the end of the letter is that the claimant is required to wear a visor at all times whilst on premises. There was no requirement to wear a mask.

281. Did the claimant establish the application of the PCP as set out in the agreed list of issues? Not entirely. The claimant was not informed that he had to wear a face mask, rather that he would be required to wear a visor unless he provided further details to explain his exemption from mask wearing. That is what was applied to the claimant. Paragraph 7 of the list of issues was not amended to specifically include a visor. It says face mask. The PCP was not amended to relate to the visor. A visor and a mask are not the same thing. The claimant had the opportunity to seek to amend the PCP and did not take it. The PCP as pleaded is not what the respondent applied. The respondent said that the claimant must wear a visor or give more information on the exemption so that the respondent could reconsider or revisit it. He was never required to wear a face mask. Any requirement related to a face visor (as he had agreed to wear this at one stage.) Furthermore, aside from stating that the visor was required, in concrete terms the respondent never enforced this requirement. He was not disciplined for failing to wear a mask or visor. That was one of the allegations that was dropped. They accepted his mask exemption [180.]

282. The PCP relied upon by the claimant was therefore not the respondent's PCP in this case.

283. As the respondent did not have the pleaded PCP, it follows that the stated substantial disadvantage that, "because of his disability, he found wearing his face covering extremely distressing" cannot have arisen on the facts of this case. Furthermore, given the evidence that the claimant had previously agreed to wear a face visor and that he had been seen wearing a visor without distress, the tribunal does not accept that he would have been put at the alleged substantial disadvantage even if the relevant PCP had been established.

284. Furthermore, at this point in time the respondent had no actual or constructive knowledge that wearing a visor would put the claimant at a substantial disadvantage given that during one of the earlier meetings he had agreed to wear a visor. The claimant provided no further information despite requests. Based on the information that was available to the respondent there was nothing to indicate or put them on notice that the requirement to wear a visor would put him at a substantial disadvantage compared to non-disabled employees. That element of the knowledge requirement is not made out in this part of the case.

285. In light of our findings above we are not satisfied that the duty to make reasonable adjustments was triggered in this regard as the pleaded PCP was not in fact proven on the facts of this case and, even if it were, the respondent had no actual or constructive knowledge that the PCP would put the claimant at the alleged substantial disadvantage in comparison to the non-disabled given that: the claimant had asked for the reference to <u>medical</u> exemption to be removed, given that he had previously

volunteered to wear a visor, and given that he had been seen wearing a visor and mask without apparent signs of phobic symptoms or anxiety.

286. The claimant contends that one of the reasonable adjustments, given his exemption, would have been to exempt the claimant from the requirement to wear a face covering. If the claimant had properly complied with all the other mitigation measures such as social distancing, then the respondent might well have been in a position to exempt him from the visor as well as from facemasks. (In reality after sending the letter of 10 February the respondent took no steps to enforce the wearing of the visor.) However, those were not the circumstances which obtained in this case. In this case, the claimant was found *not* to have abided by the remaining mitigation measures such as social distancing. It was not reasonable for the respondent to have to the drop face covering requirement in the absence of other protective measures. This would not have been a reasonable adjustment for them to make. It is necessary to look at the relevant circumstances holistically. Removing the requirement for a face covering in the absence of complete compliance with other mitigation measures by the claimant is a step too far. It is not a <u>reasonable</u> adjustment, particularly when viewed in the context of a pandemic involving a deadly disease, at a time before the vaccine had been fully rolled out and where the respondent was a clinical setting which had a duty of care to vulnerable patients and also to staff and the staff's families.

287. The claimant contends that an alternative adjustment would have been to allow him to work from home. However, we note that the claimant himself assessed his job initially as one which could *not* be done from home. He also indicated that he was *reluctant* to work from home. We also accept that there were significant elements of the claimant's job which he would be unable to do effectively from home as he needed to be on the premises and interact with his colleagues and monitor the implementation of the Covid 19 policies that he had written. He could not be an effective non clinical Covid Lead when working from home. We also heard during the course of the evidence that the claimant was responsible for dealing with any complaints from patients which might arise on-site. Evidently, the claimant would need to be working from the premises in order to deal with these.

288. In light of the above this aspect of the claim for reasonable adjustments fails as the requisite knowledge has not been established, the pleaded PCP has not been proven. Further, given that the claimant had been seen wearing a visor and a mask in the premises without visible signs of distress it is questionable whether the application of the PCP did put the claimant at a substantial disadvantage compared to the non-disabled. In any event the adjustments contended for were either effectively made (insofar as he was not dismissed or disciplined for not wearing the visor even though he had been instructed to wear it) or were not reasonable adjustments to require of the respondent on the facts of this case (e.g. because the claimant's job could not be properly and fully done from home).

289. In light of the above, the claimant's reasonable adjustment claims fail and are dismissed.

Section 15

Section 15: complaint number 1

290. The claimant's first allegation of section 15 discrimination centres on the letter sent by the respondent on 10 February. The parties agree that the letter required the claimant to provide the following information: "If you have an exemption, you are required to provide a reasonable justification as to why your disability or condition prevents you from wearing a face mask." The letter also included the following:" Whilst you have the right to refuse to divulge full details of your health status, your decision not to co-operate with requests for further details means we cannot properly assess what other precautions could be taken in lieu of face masks in order to keep you and your colleagues and our patients safe."

291. Subjectively the claimant found this to be unfavourable treatment. The request was relatively innocuous. However, the claimant felt that he was being unfairly challenged and that his genuineness and honesty was being questioned. This fed into his general experience of being a non-mask wearer during the pandemic. The claimant described to us the impact this had on him psychologically and that he felt persecuted. We do not accept that this question from the respondent was, objectively speaking, persecutory (particularly given that the respondent also confirms that he has the right to refuse full details of his health status.) However, given the circumstances and the claimant's subjective experiences, we are prepared to accept, on balance, that this constituted unfavourable treatment within the meaning of section 15 (although it could be considered a borderline case). The claimant clearly felt that, based on the government guidance he had read, the respondent was not entitled to demand that he justify his exemption. In reality what the respondent wanted was the reasons behind the exemption so it could be properly considered and appropriate adjustments made. However, the wording used in the letter could reasonably be interpreted as requiring the claimant to justify his exemption. In those circumstances it could reasonably be seen as unfavourable treatment and going further than required by the government guidance (albeit perhaps at the minor end of any spectrum of unfavourable treatment.)

292. If the respondent's actions constituted unfavourable treatment within the meaning of section 15, then they were clearly because of something arising in consequence of disability. He says that his exemption from mask wearing was significantly linked to his mask phobia. The respondent requested further information because of the claimed exemption which was linked to the disability.

293. However, the respondent asserts that the unfavourable treatment was a proportionate means of achieving a legitimate aim. The respondent contended that its legitimate aim was to comply with Covid 19 regulations and/or government guidelines or guidance. Part of complying with government guidance was to ensure that all staff were adequately protected from Covid 19, which was a deadly disease. At the time that the guidance was being released, in clinical settings all staff were required to wear masks. In addition, the claimant had not abided by the measures

short of a face covering (such as maintaining a two metre distance or avoiding face-to-face meetings except where it was absolutely necessary.) He was reluctant to have a Perspex screen around his desk and went downstairs to interact with staff .

294. The tribunal has concluded that the respondent was only asking the claimant to provide relatively limited information. He was not, for example being required to prove a disability or to send medical records to justify his exemption. He was just being asked to provide further information so that the respondent properly understood his position and could consider what appropriate measures could be taken to assist. So, the level of interference with the claimant's right not to suffer unfavourable treatment was fairly minimal. The unfavourable treatment was itself relatively minimal. Weighed against this, the respondent had to take all proper steps to comply with government guidance and to ensure that the public and staff were protected by the implementation of appropriate measures. Asking the claimant for this information was the least invasive way of ensuring that it discharged those duties. Once it had that information it would be able to revisit the measures applicable to the claimant and determine whether anything further was required or document the reasons for its actions. Furthermore, the claimant was responsible for leading on Covid 19 measures in the workforce and managing a team of staff who had to abide by those measures. It is therefore not unreasonable to expect him to lead by example or explain why he was not able to wear the mask. The letter in question did not require the claimant to prove his entitlement to an exemption per se (for which medical evidence might be needed). Rather, it was requiring him to explain why he had an exemption so that measures could be adjusted to keep everyone safe pursuant to the rules.

295. We also note the contents of the government guidance which states inter alia [623] *"It is now the legal duty of employers to ensure that all staff working in environments outlined in law and in public-facing roles wear a face covering at all times when doing their job. It is the responsibility of the employee to share that they may have an exemption and must be able to provide a reasonable justification as to why their disability or condition prevents them from wearing a face covering. As this is a legal instruction, employees cannot refuse to wear a face covering other than for the reasons outlined under exemption rules. For example, an employee cannot refuse to wear a face covering due to beliefs or opinions about face coverings. If an employee refuses to wear a face covering when instructed to under reasonable grounds, the employee can be asked to leave the working premises."* We were also referred to the guidance for healthcare settings in place from January 2021 *"Face coverings and face masks will continue to be required in health and care settings to comply with infection prevention and control and adult social care guidance. This includes hospitals and primary or community care settings such as GP surgeries….you are required to wear a face covering on entering these healthcare settings and must keep it on until you leave unless you are exempt or have a reasonable excuse for removing it. Examples of what would usually be a reasonable excuse are listed in the "if you are not able to wear a face covering' section below."* [639]. The wording of the guidance shows that the respondent was looking for information about the exemption to ensure that its employees were acting within the spirit and the letter of the guidance. Given that the respondent's practice is a clinical

setting, even though the claimant was not a clinician, the respondent could reasonably wish to comply with the guidance which was said to apply in such clinical settings as a whole (and specifically GP surgeries.) There is no impermeable barrier between the clinical areas and non-clinical areas of a GP practice which would mean that the respondent would be acting unreasonably or disproportionately by applying the clinical setting guidance to the workplace as a whole.

296. The respondent was asking for more information but the claimant was not required to disclose any information that he was not comfortable sharing. This also mirrored the wording of the guidance quoted above. In the event of any uncertainty the claimant could ask for clarity as to what was required. The proportionality of the request coming from the respondent should also be assessed in the context where the claimant was not consistently abiding by the other mitigation measures as an alternative to mask wearing. The absence of other, reliably applied, protection measures meant that it was even more important that the respondent was satisfied as to the reasonable basis of the claimant's mask exemption.

297. In those circumstances this claim of section 15 discrimination fails on the basis that it was a proportionate means of achieving a legitimate aim. The balancing exercise indicates that the respondent had an important legitimate aim and did not take a disproportionate step in achieving it even when weighed against the claimant's individual rights and circumstances.

Section 15: complaint number 2

298. The second complaint of section 15 discrimination focused on the disciplinary process. The parties agreed that the respondent commenced an investigation into the claimant on 11 February, suspended the claimant on 11 February, claimed that the claimant was dishonest and inconsistent during the investigation meeting, called the claimant to a disciplinary hearing, dismissed the claimant, and then rejected his appeal against the dismissal.

299. The tribunal accepts that the acts at paragraph 16 (a)-(f) of the list of issues were unfavourable treatment. We accept that suspension can constitute unfavourable treatment within the meaning of the Equality Act dependent on the facts of the particular case. It is a change in status which was unwelcome to the claimant and put his reputation under something of a cloud until the disciplinary procedure was concluded. It was not "business as usual". The claimant cited various cases in support of his position (Mezey v South West London and St George's Mental Health NHS Trust, Gogay v Hertfordshire County Council, Agoreyo v London Borough of Lambeth, East Berkshire Health Authority v Matadeen). The cases cited do not generally relate to discrimination claims. They concern such matters as injunctions, claims for breach of contract and claims for personal injury. To that extent they are distinguishable. However, we also note that they indicate the fact specific nature of the enquiry in every case. In particular, in determining whether suspension is breach of the implied term of mutual trust and confidence the court will have to examine whether the employer acted without reasonable and proper cause. That is not the task which faces this tribunal. We have to determine whether suspension can be (and in this case was) unfavourable treatment within the meaning of section 15.

To do that there is no real need to refer to the cited case law. It is not wholly on point with the circumstances of the case and does not tie us to one or other conclusion. We just have to look at the facts and circumstances of this particular case.

300. We note that the case law in relation to suspension being a “neutral act” generally relates to claims of breach of contract or unfair dismissal and focuses on whether the imposition of a suspension constitutes a disciplinary sanction. To that extent it is a neutral act as it is a step taken prior to determining whether an employee is guilty of misconduct and, if so, whether he should be subject to disciplinary sanctions. However, this is not the test we have to apply in this case, which is a claim of disability discrimination. We have to consider whether it is ‘unfavourable treatment’ and it is, at least to some extent unfavourable treatment, as it is removing the claimant from his job and his day-to-day work against his will albeit temporarily and with no pre-judgement of guilt.

301. (Nor should the tribunal resort to a comparative exercise in order to determine whether the treatment was unfavourable within the meaning of section 15. The claimant’s closing submissions (page 58) directed us to explore whether he had been less favourably treated than various types of hypothetical comparator. That is not the correct legal exercise for us to embark upon in a section 15 claim.)

302. The unfavourable treatment referred to at subparagraphs (a)-(f) was at least partly because of the ‘something arising’ from disability. It was at least partly because the claimant insisted that he was exempt from wearing a face mask and/or because he did not wear a face mask. All of the disciplinary allegations need to be examined, not just those dealing specifically with the two metre rule. Furthermore, the two metre rule was of specific importance in the claimant’s case because of his claimed exemption from mask wearing. The alleged dishonesty surrounding mask wearing was only an issue because of the claimant’s disability and alleged mask exemption. The mask exemption and the claimant’s representations around mask wearing/exemption did not have to be the sole or principal cause for the unfavourable treatment, rather it had to be an effective cause or material contributory factor. We are satisfied that it passed this threshold at every stage of the disciplinary process.

303. We have therefore considered whether the respondent can establish that the unfavourable treatment was a proportionate means of achieving a legitimate aim. Once again, the respondent asserts that its aim was to comply with Covid 19 Regulations and guidance. It was part and parcel of this that the respondent sought to ensure that the employees and members of the public were kept safe from the disease and that the practice was not required to close thereby denying people access to healthcare.

304. The tribunal concludes that up to the point of dismissal the respondent was going through a process of evidence gathering to establish whether Covid rules and Covid guidance had been complied with, or not. The respondent could not properly investigate and look into potential disciplinary conduct on the part of the claimant without taking steps (a) to (d). These were proportionate steps to take in the circumstances in order to further

compliance with Covid guidance and rules. They required the claimant to go through a process but did not involve the application of a sanction.

305. Dismissal was a significant element of unfavourable treatment which required substantial justification. However, this has to be measured on the facts of the case as found. The respondent, in the tribunal's view, had a reasonable evidential basis to conclude that the claimant had acted dishonestly. (We do not accept the claimant's assertion in submissions that the fact that some of the evidence on which the conclusion of dishonesty was based related to the period after suspension suggests that the claimant was targeted, investigated and the process itself was used to find the grounds for dismissal. Rather, the respondent was entitled to start the investigation and was entitled to take account of the evidence which emerged from it, whether it helped or hindered the claimant's case). He had also proved difficult to engage with insofar as he had reneged on agreements or reinterpreted agreements when the opportunity arose. He was difficult to manage in this regard and it was notable that his position in evidence during the tribunal was similarly difficult to establish consistently. One of the examples of this during his time with the respondent was his preliminary agreement to wear a face visor which he reneged on by the next day. He then sought to rewrite his account of what he had previously agreed to, in order to put limitations on it. Likewise, he was prepared to countenance a Perspex screen and yet started debating whether it should be a foldaway screen or not. He gave inconsistent accounts of what had happened where he was alleged to have broken the two metre rule. The respondent reasonably (in the tribunal's view) came to the conclusion that mutual trust and confidence had been undermined by the claimant's dishonesty and by his tendency to move the goalposts in relation to what he was prepared to agree to and abide by. This also has to be seen in the context of the claimant's job. He was the Covid lead within the practice. He had been responsible for drafting the Covid policies and was responsible for managing a team of employees who were expected to abide by those Covid rules. The respondent needed to have adequate trust in his ability to discharge his duties and to lead by example. The claimant's colleagues clearly had no confidence that the claimant would follow the same rules as others and comply with mitigating measures (quite apart from wearing a face covering). The respondent could have no confidence and trust that he would return to work and follow the rules as agreed. Even during the employment tribunal hearing he maintained that he had done nothing wrong. How could he go back to work and manage other staff in those circumstances?

306. The tribunal considered the possible alternatives to dismissal in order to determine whether a more proportionate route was available to the respondent in all the circumstances. What other alternatives short of dismissal would ensure Covid compliance and the discharge of his duties as an employee. The claimant did not want to work from home. He had said in his own risk assessment of the post that it was not suitable for working from home. There were elements of his job role which required him to be present in the workplace irrespective of the Covid situation. He needed to be present to manage his team, manage issues of health and safety in the workplace, deal with customer complaints, manage the premises, manage his employees. Whilst it might have been possible on a sporadic or short-term basis for the claimant to discharge at least part of

his duties from home it was not sustainable on a long-term basis until the end of the pandemic. At the time that the respondent was making the decision to dismiss, nobody could predict when the pandemic would come to an end. Working from home was therefore not an appropriate alternative. Furthermore, once trust and confidence has been undermined it would be quite difficult for the respondent to let an employee work from home.

307. We also note that the claimant displayed a reluctance to avoid face-to-face meetings during the course of the pandemic. He often chose to go and speak to colleagues face-to-face rather than use Zoom etc. We looked at whether the claimant could be relied upon to return to work in the workplace and abide by the other mitigation measures. Taking the evidence in the round we accept that the respondent could not rely on this. It should be noted that during the course of the disciplinary process the claimant sought to blame colleagues for approaching him and breaching the rules or for not complaining or stopping him before he got too close to them. He was reluctant to acknowledge that his position of seniority as a manager might have undermined their ability or confidence to do this.

308. The claimant was similarly reluctant to have a permanent Perspex screen around him. The respondent tribunal was unsure as to why this was the case.

309. There was a pattern whereby the claimant might start out by abiding by the rules but was unable to do so on a long-term basis. He would either try to renegotiate the rules or would accidentally breach them on occasions. We also note that in the course of the hearing the claimant confirmed to the tribunal that he wasn’t especially concerned about his colleagues’ Covid safety or their concerns. He was quite dismissive of those concerns. The respondent was clearly aware of the claimant’s attitude in this regard. It would be difficult for them to allow him to return to work whilst displaying such an attitude given that they as an employer were obliged to protect all of their employees (not just the claimant) and to have regard to managing levels of anxiety within the workforce as a whole.

310. On the facts as we have found them, we have concluded that the respondent has succeeded in justifying this treatment as a proportionate means of achieving a legitimate aim. This claim is therefore dismissed

Direct discrimination

311. The tribunal accepts that at the material time the claimant believed that enforced mask wearing was de-humanising and anti-Christian because it interfered with the inviolable nature of the human body. This was pleaded belief relied upon by the claimant for the purposes of his claim. For the purposes of the claim we accept that the stated belief fulfills the requirements of section 10 of the Equality Act in line with the case law guidance set out above. As elaborated upon in his evidence to the tribunal, that stated belief met the Grainger criteria to be considered a protected characteristic. It was a genuinely held belief, it was a belief rather than a viewpoint or opinion and it was a belief as to a weighty and substantial aspect of human life and behaviour. The belief had the necessary level of cogency, seriousness, cohesion and importance. The belief was worthy of

respect in a democratic society. It was not incompatible with human dignity and did not conflict with the fundamental rights of others.

312. However, importantly, the respondent did not know that the claimant held the belief, as currently stated *for the purposes of this claim* (as opposed to some other belief about masks), during the relevant period. He only disclosed any such belief at the appeal stage, so, after detriments (a)-(e) had taken place. Any other views the claimant may have held about the efficacy or advisability of mask wearing or the nature and severity of Covid 19 are irrelevant to the direct discrimination claim as pleaded and pursued before the tribunal. They are not the section 10 belief relied upon by the claimant for the purposes of the section 13 claim. So, where reference was made in the meeting on 15 January to the claimant keeping his views out of the workplace, this was not a reference to him keeping his religious/ethical beliefs out of the workplace (as stated and relied upon in the section 13 claim). Rather, this was a reference to him avoiding expressing his views about the pandemic as a whole and his views about the need for masks, any scepticism about the vaccine or the seriousness of the disease etc. It was not a reference to the ethical/religious belief relied on for the purposes of the section 13 claim. Furthermore, the request made by the respondent was understandable given that the claimant was charged with leading on Covid measures and managing the administrative staff. Expressing such views about Covid measures whilst simultaneously telling staff to follow the Practice's Covid protocols would naturally undermine the management message he was trying to give to his direct line reports. This is not to say that the respondent or its witnesses resented the claimant's views about Covid, rather that they could see how open expression of such scepticism would undermine the respondent's efforts to ensure adequate health safeguards for staff and patients. At the appeal outcome it was stated that the claimant's belief was not known to the respondent and had no bearing on the decision to investigate the allegations against him, suspend him, hold a disciplinary hearing, dismiss him and dismissal the appeal.

313. To the extent that the claimant may seek to argue (in closing submissions) that his dismissal was because of the combined/dual protected characteristic of belief and disability, this is not the way in which the direct discrimination case was put during the hearing before the tribunal. Furthermore, section 14 of the Equality Act 2010 (which deals with such combined or dual protected characteristics) has never been brought into force by parliament. Consequently, the claimant cannot rely on it in order to succeed in his direct discrimination claim.

314. The parties have agreed that the detrimental treatment at paragraph 23 sub paragraphs (a)-(f) of the list of issues took place. The tribunal has considered whether an appropriate hypothetical comparator (taking into account the requirements of section 23 Equality Act) would have been treated differently and more favourably than the claimant when faced with the same evidential circumstances. We are unable to accept that a hypothetical comparator would have been treated differently. The decisions to take the claimant through a disciplinary hearing and then dismiss him would have been based on the same evidence. A hypothetical comparator in the same job as the claimant, faced with the same evidence

against them regarding Covid and the same evidence in support of the disciplinary allegations, would also have been investigated, suspended, and dismissed. There would be ample evidence for the respondent to do this in the absence of any element of religious/philosophical belief, particularly taking into account the fact that this was a GP practice operating during a pandemic and the claimant was the employee charged with taking the lead on covid precautions. The comparator would have had the same responsibilities and their continuation in the role would have posed the same difficulties for the respondent as the claimant's did. The comparator would have provided the same information as the claimant and would have refused to provide information in the same way as the claimant. The respondent would similarly have lost trust and confidence in the comparator as it did in the claimant.

315. In those circumstances we are not satisfied that the claimant has shown that he was less favourably treated than a hypothetical comparator. In those circumstances the burden of proof would not shift to the respondent to show that the treatment was 'in no sense whatsoever' because of the protected characteristic. In any event, even if the burden did shift to the respondent, we are satisfied that it has been amply discharged by the respondent's evidence to the tribunal explaining the basis for its decisions.

316. In any event, the claimant never clearly set out his philosophical belief to the respondent during the course of the disciplinary process. His only real statement of belief was made just prior to the appeal decision [201]. The letter he sent on 2 March 2021 set out this statement of belief. However, by this stage the claimant had already been dismissed on the basis of the evidence of misconduct. Having heard the evidence, the tribunal is not satisfied that the declaration of this belief made any difference to the respondent's subsequent decision at all. It was not an effective cause of the decision to dismiss the appeal. It was not a materially contributing factor. They had already made the decision to dismiss without knowledge of the philosophical belief. It had had no causative effect prior to the appeal and we are satisfied on the evidence that it made no difference thereafter. As with the other elements of detrimental treatment, the respondent has demonstrated that the appeal decision had nothing whatsoever to do with the claimant's belief.

317. In light of the above the claimant's claim of direct discrimination must fail and is dismissed.

Wrongful dismissal

318. In order to decide whether the claimant was wrongfully dismissed the tribunal must determine whether, on balance of probabilities, he committed an act of gross misconduct which went to the root of the employment contract thereby entitling the respondent to dismiss him without notice.

319. On balance of probabilities we are satisfied, based on the evidence available to us, that the claimant did in fact breach the two metre rule whilst not properly abiding by the other mitigation measures. Given the Covid context, his seniority within the organisation and his own responsibility as a Covid Lead, this is a serious matter. Furthermore, we are satisfied that the claimant was dishonest in that he said he had never worn a visor or

face covering on the premise but two people gave evidence that they had seen this. One of those people gave evidence to the employment tribunal. We were satisfied that Dr Oh was telling the truth in this regard and he had no particular reason to lie. We were also concerned by the inconsistencies in the claimant's own evidence and his ability to not recall an incident and then subsequently assert that he could recall it. Given the claimant's position in the organisation and the Covid context this dishonesty was particularly serious. We also note that on one occasion when the claimant had said he was more than two metres away this was not physically possible within the dimensions of the room.

320. Taken together there is enough evidence (even taking into account the elements of the evidence which were to be categorised as hearsay) to show that the claimant had committed gross misconduct which went the root of the contract. There was a breach of the mutual trust and confidence and this was a fundamental breach of contract. On balance of probabilities the tribunal is satisfied that the claimant was not wrongfully dismissed and this aspect of his claim is also rejected.

Employment Judge Eeley

____

Date 25 June 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON 26 June 2023

FOR EMPLOYMENT TRIBUNALS

ANNEX

JOINT LIST OF ISSUES AS DRAFTED BY/AGREED BETWEEN THE PARTIES

Time Limits

1. The Claimant was dismissed on 19 February 2021. ACAS was notified of these claims on 20 April 2021 and the Early Conciliation Certificate was issued on 6 May 2021. The Claim Form was presented on 5 June 2021.
2. The Claimant alleges that the Respondent failed to make reasonable adjustments during the period from the dates below until dismissal on 19 February 2021;
    a. From 15 January 2021 until dismissal on 19 February 2021, by deciding not to and/or omitting to send a message to all staff that some members of staff were exempt from wearing a face mask/covering under Government guidance, as was agreed at the meeting on 15 January 2021 and recorded in the minutes of that meeting, continuing that omission until dismissal.
    b. From 10 February 2021 until dismissal on 19 February 2021 by requiring the Claimant to wear a face mask/covering if within 2 metres of staff in circumstances where it was stated in writing by the Respondent that keeping 2 metres distance was not always possible when carrying out required duties in the workplace, and maintaining that requirement until dismissal;
    c. From 10 February 2021 until dismissal on 19 February 2021 by requiring the Claimant to wear a visor at all times whilst on the Respondent's practice premises;
    d. Further or alternatively, for all periods until dismissal on 19 February 2021, not allowing the Claimant to work from home as suggested by the Claimant;
    e. Further or alternatively, for all periods until dismissal on 19 February 2021, not responding to the Claimant's proposal to take other measures to avoid 2 metre contact which were suggested by the Claimant in an email, i.e.;
        a. use of the 'female' toilet;

b. take lunch in his room;
c. avoidance of the kitchen by use of a flask; and
d. ceasing to greet staff in person on arrival and on leaving work.

f. From 10 February 2021 until dismissal on 19 February 2021 by asking the Claimant to provide medical evidence as to his exemption and maintaining that request until dismissal whilst stating that non-disclosure would lead to the Respondent not properly assessing what precautions could be taken in lieu of face masks in order to keep the Claimant and his colleagues safe; and
g. From 11 February 2021 and at various dates thereafter, subjecting the Claimant to investigation, suspension, disciplinary process, dismissal and appeal rejection.

3. Did any of the acts or omissions complained of in 2 cause later acts or omissions by the Respondent or its staff? If so, which, and on what dates?
4. Were the claims of failure to make reasonable adjustments brought in time?
5. Were the claims made within 3 months (plus early conciliation extension) of the acts or omissions complained of?
6. In respect of 2(a) and/or 2(b) and/or 2(c) and any consequent acts or omissions was there conduct extending over a period until dismissal on 19 February 2021?
7. If so, was the claim made within 3 months (plus early conciliation extension) of the end of that period?
8. If not, were the claims made within a further period that the Tribunal thinks is just and equitable?

Disability

1. Was the Claimant at the material times a disabled person for the purposes of s.6 of the Equality Act 2010 ("EqA") by reason of a phobia of wearing face coverings causing severe stress and anxiety. This requires consideration of the following issues:

   a. Whether the Claimant's phobia of wearing face coverings is/was a mental impairment;

b. Whether at the material time the impairment had a substantial adverse effect on the Claimant's ability to carry out normal day to day activities; and,

c. Whether at the material time the substantial effect(s) was long-term in that it has or is likely to last for at least 12 months or it was likely to recur.

2. Did the Respondent know, or ought it reasonably to have known, that, at the material times, the Claimant was disabled by reason of the above condition?

<u>Failure to make reasonable adjustments (s.20 EqA) – not messaging staff to be respectful about exempt employees</u>

3. Did the Respondent decide not to or omit to send a message to all staff on or shortly after the meeting on 15 January 2021 reminding them that some staff were exempt from wearing a face mask and they should be respectful to them?

4. If so, was this a Provision Criterion or Practice ("PCP") which the Respondent applied to the Claimant for the purposes of s.20(3) EqA?

5. If so, did this PCP place the Claimant at a substantial disadvantage in comparison with persons who are not disabled? The Claimant states that, because of his disability and consequent exemption from wearing a face covering, this left him exposed to criticism by colleagues.

6. If so, did the Respondent 'take such steps as it is reasonable to have taken to avoid the disadvantage'? The Claimant contends that a reasonable adjustment would have been to send the message.

<u>Failure to make reasonable adjustments (s.20 EqA) – requirement to wear a face covering</u>

7. Did the Respondent inform the Claimant on 10 February 2021 that he would have to wear a face mask at work?

8. If so, was this a PCP which the Respondent applied to the Claimant for the purposes of s.20(3) EqA?

9. If so, did this PCP place the Claimant at a substantial disadvantage in comparison with persons who are not disabled? The Claimant states that, because of his disability, he found wearing a face covering extremely distressing.

10. If so, did the Respondent 'take such steps as it is reasonable to have taken to avoid the disadvantage'? The Claimant contends that, given his exemption from wearing a face covering, and given the measures he had adopted to mitigate the risk of spreading / contracting the Covid-19 virus, it would have been reasonable for the Respondent to exempt him from this requirement. Further or in the alternative it would have been reasonable for the Claimant to have been permitted to work from home. The Respondent contends that it was not aware of the basis for the medical exemption.

<u>Discrimination arising from disability (s.15 EqA) – requirement to disclose medical details</u>

11. It is agreed that the Respondent in its letter of 10 February 2021, required the Claimant to provide the following information: 'if you have an exemption, you are required to provide a reasonable justification as to why your disability or condition prevents you from wearing a face mask.'

12. If so, was this unfavourable treatment?

13. If so, was this treatment because of the Claimant's insistence that he was exempt from wearing a face mask?

14. If so, was this treatment because of something arising in consequence of the Claimant's disability? The Claimant contends that his exemption arose directly from his disability.

15. If so, can the Respondent show that this treatment was (a) in pursuit of a legitimate aim, namely to comply with COVID 19 Regulations and/or Government Guidelines and Guidance; and, (b) a proportionate means of achieving that aim?

Discrimination arising from disability (s.15 EqA) – investigation, suspension, disciplinary process, dismissal and appeal

16. It is agreed that the Respondent:
    a. Commenced an investigation into the Claimant on 11 February 2021;
    b. Suspended the Claimant on 11 February 2021;
    c. Claimed that the Claimant was dishonest and inconsistent during the investigation meeting held on 15 February 2021;
    d. Called the Claimant to a disciplinary hearing on 18 and 19 February 2021;
    e. Dismissed the Claimant on 19 February 2021;
    f. Rejected his appeal against dismissal on 4 March 2021.

17. Were any of the acts 16 (a) to (f) unfavourable treatment?

18. Was any of the acts in paragraphs 16 (a) to (f) at least in part because of the Claimant's insistence that he was exempt from wearing a face mask and/or his not wearing a face mask?

19. If so, was this treatment because of something arising in consequence of the Claimant's disability? The Claimant contends that his exemption / not wearing a face mask arose directly from his disability.

20. If so, can the Respondent show that this treatment was (a) in pursuit of a legitimate aim namely to comply with COVID 19 Regulations and/or Government Guidelines and Guidance; and, (b) a proportionate means of achieving that aim?

Direct religion or belief discrimination (s.13 EqA) – investigation, suspension, disciplinary process, dismissal and appeal

21. Did the Claimant at the material time believe that enforced mask wearing was dehumanizing and anti-Christian because it interfered with the inviolable nature of the human body?

22. If so, was this a belief protected under s.10(2) EqA?

23. It is agreed that the Respondent:
    a. Commenced an investigation into the Claimant on 11 February 2021;
    b. Suspended the Claimant on 11 February 2021;
    c. Claimed that the Claimant was dishonest and inconsistent during the investigation meeting held on 15 February 2021;
    d. Called the Claimant to a disciplinary hearing on 18 and 19 February 2021;
    e. Dismissed the Claimant on 19 February 2021;
    f. Rejected his appeal against dismissal on 4 March 2021

24. Were any of the acts at 23 (a) to (f) unfavourable treatment?

25. Were any of the acts in paragraphs 23 (a) to (f) at least in part because of the Claimant's belief?

Wrongful dismissal

26. Did the Claimant commit an act of gross misconduct entitling the Respondent to dismiss him without notice?

27. What was the Claimant's notice period?

Disclosure

28. Were Senior Management Team meeting minutes made?

29. If so, were they stored in the Respondent's (staff or central) computer(s) and/or email servers?

30. Is the Tribunal entitled to draw an adverse inference from their non-disclosure?