EMPLOYMENT TRIBUNALS

Claimant:	Mr K Pringle
Respondent:	Community Integrated Care
Heard at:	Newcastle in person
On:	27, 28, 29, 30 November 2023
	1 December 2023
	7, 8, 9 February 2024
Before:	Employment Judge Loy Mrs C Hunter Mr S Lie

Representation

Claimant:	In person
Respondent:	Mr P Kerfoot of counsel

REASONS UNDER RULE 62(3)

JUDGMENT having been sent to the parties on 8 March 2024 and the claimant having made a request for written reasons under rule 62(3) of The Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013, the following reasons are provided.

REASONS

Background

1. By a claim form presented on 15 September 2022, the claimant claimed unfair dismissal, holiday pay and arrears of pay. The claimant was employed by the respondent as a Support Worker. In his claim form the claimant said he was

employed from 9 June 2020 until his dismissal with effect from 28 June 2022. In its response form the respondent says that the claimant was employed from 8 July 2022 28 June 2022.

2. The respondent is a national social care charity. It provides community based support for a range of care needs, including learning disabilities, mental health concerns, autism, acquired brain injury, age related needs and dementia.

3. The respondent denies all liability.

4. The respondent says that the claimant does not have the 2 years' service required to present a claim for 'ordinary' unfair dismissal. The respondent says that the claimant has given the date of his offer letter (9 June 2020) as the start of his employment whereas the date he started work was 8 July 2020. It was common ground that the claimant's employment terminated on 28 June 2022. In the alternative, the respondent says that any dismissal was fair.

5. The respondent also says that the only reasons for the claimant's dismissal were the the reasons set out in its letter of summary dismissal dated 28 June 2022. Those reasons relate to the conduct of the claimant, in particular his failure to attend work and his having been absent without pmission for some considerable time; the claimant's failure to follow a reasonable management instructions to return to work; and the breach of the trust and confidence placed in the claimant as an employee of the charity.

6. The respondent says that this amounts to gross misconduct as a result of which he was not entitled to notice or a payment in lieu of notice. The respondent also denies that it owes the claimant any other monetary payment either in respect of the period before the contract of employment was terminated, on termination or at all. The respondent says that the claimant was on unauthorised leave from 19 January 2022 to 28 June 2022 and as a result of withholding his labour the claimant was not entitled to be paid during that period.

The claims

7. The claimant brought the following complaints:

   7.1. "Ordinary" unfair dismissal contrary to sections 94 and 98 Employment Rights Act 1996 (ERA);

   7.2. "Automatic" unfair dismissal on the basis that the reason or principal reason for his dismissal was that he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful to health and safety contrary to section100(1)(c) ERA;

   7.3. Subjection to detriment on the grounds that he brought to his employer's attention, by reasonable means, circumstances connected with his work which

he reasonably believed were harmful to health and safety contrary to section 44(1)(c) ERA;

7.4. Breach of contract/unlawful deduction from wages for unpaid wages for the period 19 January 2022 to 28 June 2022. That is the period over which the claimant remained absent from work without permission prior to his dismissal.

Evidence

8. The tribunal was provided with an agreed bundle of documents. It consisted of two lever arch files running to 815 pages.

9. The claimant produced his own 'research bundle' consisting of 405 pages. The claimant also produced a document containing what he described as 'maxims'. That document was produced at the close of evidence immediately before submissions. Both sides made oral submissions at the end of the hearing.

10. The claimant gave evidence on his own behalf. He produced a written witness statement of 154 paragraphs over 19 pages. The claimant was cross-examined by Mr Kerfoot.

11. The respondent called five witnesses:

- Shelley McPhee, Regional Manager at the time of giving her evidence and Service Leader at the time of the claimant's employment. Ms McPhee was the claimant's line manager throughout the period of his employment. Ms McPhee was the manager who investigated the claimant's conduct in December 2021 when he was observed by Ms McPhee not wearing appropriate PPE i.e. a face mask. Ms McPhee produced a written witness statement of 69 paragraphs over 10 pages. Ms McPhee was cross-examined by the claimant.

- Matthew Berry, Service Leader in respect of five services supporting adults at locations not including the one at which the claimant worked. Mr Berry was the manager who gave the claimant a written warning on 13 January 2022. Mr Berry produced a written witness statement of 35 paragraphs over 6 pages. Mr Berry was cross-examined by the claimant.

- Rachel Firth, Regional Manager of an area which included the location at which the claimant worked. Miss Firth was Shelley McPhee's line manager. Miss Firth was the manager who took the decision to dismiss the claimant on 28 June 2022. Miss Firth produced a written witness statement of 34 paragraphs over 6 pages. Miss Firth was cross-examined by the claimant.

- Abigail Batey, an employee relations adviser in the respondent's Regional HR team for the North East Region in which the claimant worked. Miss Batey supported Ellen Moore at the claimant's appeal/grievance hearing in April 2022 and was also present at the claimant's dismissal hearing supporting Rachel Firth.

- Holly MacKay, Head of People (Support Services and Projects). Ms McKay gave evidence about the recruitment process leading to the appointment of the claimant and about the date the claimant started work for the respondent. Ms McKay produced a written witness statement of 20 paragraphs over 5 pages. Ms McKay was cross-examined by the claimant.

12. The respondent also produced a witness statement for Ellen Moore. Ms Moore dealt with the claimant's appeal/grievance in relation to the written warning he received on 13 January 2022. Ms Moore was not called to give evidence at the hearing. Ms Moore left the respondent's employment in September 2022. The tribunal considered Ms Moore's witness statement and gave appropriate weight to it bearing in mind that her evidence was not tested in cross-examination. Ms Moore's statement largely reflected documents in the bundle the accuracy of which was not materially contested by the claimant.

The approach to the evidence

2. Before moving to the findings of fact, the tribunal sets out a number of points of general approach, some of them commonplace in our work.

3. In this case, as in many others, evidence and submission touched on a wide range of issues. Where the tribunal makes no finding on a point about which it heard, or where the tribunal does make a finding, but not to the depth with which the point was discussed, that is not oversight or omission. It reflects the extent to which the point was truly of assistance to the tribunal.

4. While that observation is made in many cases, it is particularly important in this one, where the claimant felt very strongly about a number of issues, and was inexperienced in the law and procedure of this tribunal.

5. The tribunal's approach also included an understanding of proportionality. In the artificial setting of tribunal litigation, the focus is on how the individual claimant was managed. The tribunal must not lose sight of the fact that at the time that the events in question occurred, nobody may have given these events the importance which the artificiality of the tribunal process requires.

6. All of the tribunal's findings of fact were made on the balance of probability.

7. All references in these reasons to pages in the bundle are marked in square brackets as follows: [ ]. References to witness statements are directly referred to.

Findings of fact

13. In mid-February 2020, the respondent set up a covid-hub which operated as a think-tank to enable the respondent to provide a safe and secure environment for the people it supported and for colleagues. The respondent is a provider of social care. It provides community based support for a range of care needs, including learning

disabilities, mental health concerns, autism, acquired brain injury, age related needs and dementia.

14. Among the people supported were many extremely vulnerable individuals. The need to have a strategy to ensure as far as possible the ongoing health and safety of the people supported by the respondent and of its many colleagues during the pandemic is obvious as are the challenges that the respondent faced to pursue this objective during the entire period of the claimant's employment and beyond. That included the dynamic of the ever-changing governmental and regulatory guidance in response to the many challenges posed by the Covid-19 pandemic generally.

15. In March 2020, the respondent began the setup of Ridgewood Close. Ridgewood Close is a cluster of bungalows operated by the respondent for 6 supported adults each of whom lives individually. Ridgewood Close supports adults with complex learning disabilities and autism. In the region of 35 of the respondent's employees provide the support required at Ridgewood Close. This was the location where the claimant worked during the period that he was present in the workplace. The claimant supported a person known for the purposes of these proceedings as CS.

The claimant's recruitment, appointment and start date

16. Ms McKay gave evidence about the process that led to the claimant's appointment as a Support Worker at Ridgewood Close. The tribunal accepted all of her evidence not least because it was backed up by all of the contemporaneous documents which had been produced by the respondent's Eploy Applicant Tracking System which had been in operation since 2018. This tracking system also helps the respondent's risk management in that it is essential for such matters as DBS checks to be completed before a Support Worker is allowed to start providing care to supported adults.

17. Before becoming Head of People, Ms McKay was employed by the respondent as HR Business Partner for Projects. One of the projects for she which was responsible was the introduction of the Eploy Applicant Tracking System. The applicant tracking system is a computer programme doing exactly what its name suggests: tracking the process of application for each potential employee at each of the stages of the respondent's recruitment processes. Ms McKay was also the line manager for the respondent's Recruitment Systems and Administration Team. The tribunal accepted that she was ideally placed to give evidence on the timeline of the claimant's recruitment, appointment and the date the claimant started work for the respondent.

18. The Eploy system monitors all application activity and records the date and time of all actions taken in the process. The respondent follows a clearly defined system in its process of recruitment. Applicants who are successful at interview receive conditional offers of employment. For Support Workers, those conditions reflect the legal and regulatory requirements of the care sector within which the respondent operates. There are three such conditions:

    18.1. Successful references;

    18.2. Suitable disclosure checks with DBS; and

18.3. confirmation of eligibility to work in the UK.

19. At the point at which a conditional offer of employment is made to a successful candidate, the candidate also receives a provisional start date. In the case of the claimant, his provisional start date identified in his conditional offer of employment was 6 July 2020 [335].

20. The respondent provides access to the employment documentation, including the conditional offer of employment and the contract of employment, through its onboarding portal located within the Eploy tracking system.

21. The tribunal accepted and finds as a fact that in the case of the claimant there is a difference between the provisional start date and his actual start date. The potential for such a difference is the reason why the provisional start date is described as provisional: it assumes the successful completion of the conditions prior to the provisional start date. The actual start date is then set out in a confirmation letter that successful candidates receive once the conditions to the offer of employment have all been satisfied. The confirmation letter is then treated as an appendix to the original contract of employment. One of the purposes of so doing is to ensure that there is an accurate record of the date upon which the successful candidate starts work.

22. On 5 August 2020, the claimant was sent a confirmation letter which identifies his actual start date as 8 July 2020. That letter is at [366].

23. That letter makes the position unequivocally clear by adopting the following terms:

'Further to my recent offer letter, I am delighted to confirm that we have received satisfactory clearances and can confirm your employment of Support Worker at Ridgewood Close 1-7 on the terms set out in my earlier letter and your written statement of terms and conditions.

Your start date is confirmed as 08 July 2020.

…'

24. Ms Mackay explained that during the early days of the pandemic there were delays in receiving the necessary confirmations to satisfy the conditions of the offer of employment.

25. The tribunal also accepted Ms Mackay's evidence that the date stamps on Eploy cannot be edited and if there are any modifications they are auditable.

26. The claimant's Eploy tracking system dates are at [362-365]. They are as follows:

27. On 29 May 2020 the claimant was interviewed.

28. On 9 June 2020 at 15:31 the claimant's conditional offer of employment was generated on Eploy. This gave the claimant a provisional start date of 6 July 2020.

There are no modifications to this letter. At 15:34 on 9 June 2020, the claimant's conditional offer of employment was given the status 'Ready to Sign'. At 16:37 on 9 June 2020, the claimant's offer letter and contract of employment was uploaded to the candidate's portal allowing the claimant access to that documentation. At 19:38 on 9 June 2020, the claimant signed his contract digitally. Once signed, the documentation is converted to PDF format and records the IP address of the signatory.

29. On 6 July 2020, the claimant's DBS checks were authorised. At 15:33 on 6 July 2020, the claimant's DBS risk assessment document was uploaded to Eploy. There were no subsequent modifications to that document.

30. On 9 July 2020 at 14:15, an email was sent to the claimant confirming that his vetting had been completed and confirmed his start date as 8 July 2020. That email also asked the claimant to sign his confirmation letter with the start date of 8 July 2020.

31. On 17 July 2020, the claimant's confirmation letter was given the status 'Ready to Sign'. Also on 17 July 2020, the email of 9 July 2020 was re-sent to the claimant.

32. On 5 August 2020 at 22:30, the claimant signed his confirmation letter. That signed copy also contains his start date as 8 July 2020 [366].

33. The respondent operates a master system containing all of the respondents records. That system is called Agresso. Agresso records the claimant's start date as 8 July 2020.

34. The respondent operates a rostering platform called Maxtime. Maxtime allocates shiftwork to individual Support Workers. Maxtime interconnects with Agresso. Once a Support Worker attends work they log in and out by a thumbprint device. If an employee logs on by thumbprint to start a shift before the start date entered in Agresso, then an error is generated. No error was generated in respect of the claimant. No payments are allowed in respect of any work undertaken before the start date entered in Agresso unless IT change the start date in the Agresso system. There was no change to the claimant's start date in Agresso.

35. Miss Mackay also give evidence about the claimant's training records. Training is also regulated by an IT platform: Dare to Learn. This platform creates a personalised learner journey for each employee. The claimant's Dare to Learn training records are as follows.

36. The claimant's learner journey started on 8 July 2020.

37. The claimant's training records start on 8 July 2020.

38. Any pre-employment learning would be shown on Dare to Learn. There is no backdated learning prior to 8 July 2020 in the claimant's personalised learner journey in the Dare to Learn records.

39. The first entry on Dare to Learn in respect of the claimant is on 8 July 2020. On 8 July 2020, Dare to Learn records that the claimant undertook the respondent's core

training requirements of fire safety, introduction to health and safety, infection prevention and control, slips and trips and COSH essentials. This is mandatory training which each worker must completed before starting work.

40. Miss McKay also gave evidence about the claimant's payslips. The claimant's first payslip is dated 15 August 2020 [754]. The respondent's payroll operates on the basis that work done in a particular month is paid on the monthly payment date of the 15th of that month. Since the claimant's first payslip was 15 August 2020, it follows that he did no remunerated work in July 2020.

41. Looking at this evidence as a whole, it is both wholly and only consistent with the claimant starting work on 8 July 2020. The respondent's processes are meticulous and highly organised. That is to be expected in a heavily regulated environment such as the care sector. The overwhelming effect of the evidence, taken from Eploy, Dare to Learn and the pay records is that the claimant started work for the respondent on 8 July 2020 and no earlier. The tribunal therefore finds as a fact that the claimant started work on 8 July 2020.

42. For the avoidance of doubt, the tribunal reject the claimant's attempts to persuade it that he started work on the date he put in his claim form: 9 June 2020. That was the date of his offer letter which self-evidently is not the same as the date he started work.

The claimant's employment

43. The first 18 months of the claimant's employment were successful both from the claimant's point of view and that of the respondent. It was common ground that the claimant was a good Support Worker and that he had a very good relationship with the person he supported (CS) and with his colleagues.

44. Throughout the first 18 months, and indeed all of the claimant's employment, the country was affected by the covid- 19 pandemic. As a charity working in the social care sector, the respondent was regulated by CQC. It was also subject to sector specific government guidance which was subject to very frequent change.

45. The respondent's policy in relation to PPE included an instruction that facemasks had to be worn at all times other than when a Support Worker was alone, eating, taking a break outside or walking outside between premises. This reflected the government guidance for the sector as a whole. In the context of the claimant's work, this was plainly of fundamental importance given the highly vulnerable status of his supported person CS.

46. Throughout the first 18 months of the claimant's employment he complied with the respondent's requirement for facemasks to be worn 'at all times' within the meaning of that instruction at paragraph 45 above.

47. Things changed on 7 December 2021.

48. The claimant had not approached Ms McPhee, his line manager, to explain that he had any difficulty for whatever reason (medical or otherwise) for not wearing a facemask. On 7 December 2021, Ms McPhee happened to be in the bungalow where the claimant worked and saw that he was not wearing a face mask. The claimant was bringing CS a cup of tea and had previously been in the kitchen. Ms McPhee assumed that the claimant had simply forgotten to put his face mask on. Ms McPhee therefore pointed out to the claimant that he should be wearing a facemask. The claimant raised no objection to the point raised by Ms McPhee.

49. Pausing there, the claimant had not informed Ms McPhee of any reason that he should not be wearing a facemask, the claimant had been wearing a facemask for 18 months and the claimant raised no objection to wearing a facemask when Ms McPhee pointed out that he was not wearing one on 7 December 2021.

50. It was common ground that the claimant did not have a medical exemption from the requirement to wear a facemask.

51. On 8 December 2021, Ms McPhee again saw the claimant not wearing a facemask. At this point, Ms McPhee realised that it had not been forgetfulness on the part of the claimant the previous day. In the circumstances, Ms McPhee realised that the claimant was deliberately not wearing a facemask despite the respondent's requirement that he should do so based on government guidance rendering it mandatory for facemasks to be worn in social care settings.

52. Ms McPhee therefore asked the claimant to meet her in her office to discuss the situation. A meeting then took place of 1 hour and 30 minutes. For the first time it became clear to Ms McPhee that the claimant's position was that he was not prepared to wear a facemask other than when he was providing personal care to CS. That position was contrary to government guidance and the respondent's instructions. The tribunal repeats that CS was an extremely vulnerable adult.

53. Ms McPhee was obviously aware that the claimant's position was not consistent with the government guidance or the respondent's management instructions on the PPE that must be worn at that stage of the pandemic. The respondent's position was that PPE (including facemasks) need to be worn at all times when a Support Worker was in the home of the person supported and that this guidance was applicable to the entirety of the care sector including all care providers and the NHS.

54. The claimant then gave a number of reasons why he was not prepared to wear a facemask except when he was providing personal care to CS. First, he said that masks were not designed to prevent aerial filtration. Secondly, he said he not been provided with any information or any risk assessment about the short or long term effects of being required to wear facemasks for long shifts.

55. Ms McPhee then gave the claimant an opportunity to access the computer system to familiarise himself with the respondent's position on its health and safety measures during the pandemic. This was accessible at all times to the claimant on CLICK which was the respondent's platform providing access to all colleagues to help them to learn and understand what the respondent required and why.

56. At the end of the meeting, the claimant confirmed that his position remained that he would only wear a facemask when providing personal care. Ms McPhee therefore asked of the claimant to leave work and to return for a meeting the next day. Ms McPhee then sent an email to the claimant attaching the respondent's Service Contingency Plan. This was in order to ensure the claimant understood the respondent's position on wearing masks.

57. The claimant was suspended on full pay on 9 December 2021 for his failure to wear appropriate PPE.

58. On 10 December 2021, Ms McPhee attempted to contact the claimant by phone. The claimant neither answered nor returned her call. This became a pattern of Ms McPhee's attempts to engage the claimant in discourse about the issue that was causing problems for the respondent in the context of the safe and responsible care of CS.

59. On 13 December 2021, the claimant was sent a letter of suspension on full pay [402] and an invitation to an investigation meeting into potential misconduct [404].

60. On 15 December 2021, respondent held an investigatory meeting which was conducted by Ms McPhee. At that meeting it was established that the claimant was not medically exempt from wearing a facemask. The claimant's position was that he wanted a case-by-case review of the requirement for facemasks to be worn. The claimant said he disagreed with the government's position as imposed by the respondent. The claimant claimed that there had been no risk assessment by the respondent about the short and/or long-term effects of wearing facemasks on the wearer.

61. On 16 December 2021, Ms McPhee informed the claimant that the matter would be proceeding to a disciplinary hearing. She also confirmed that the claimant would continue to be suspended on full pay. The respondent appointed Matthew Berry, Service Leader, as the disciplinary manager to provide independence from the investigation.

62. Mr Berry initially formed the view that the conduct identified in the investigation was potentially gross misconduct. Mr Berry's initial letter inviting the claimant to a disciplinary hearing on 5 January 2022 reflected the seriousness with which he viewed the matter [422-423].

63. For technical reasons the hearing could not proceed on 5 January 2022 and took place on 7 January 2022. The claimant was offered the opportunity to be accompanied by a union representative or a colleague. His preference was not to have a representative.

64. At the disciplinary hearing the claimant reaffirmed his position that he was not prepared to wear a facemask as required by the respondent. Mr Berry explained to the claimant that the respondent was working within the UK government and sector guidelines for social care and that mask wearing is considered to be necessary for everyone's safety.

65. The claimant referred to research being done in Japan around facemasks. Mr Berry explained that the respondent operated in the UK and was mandated to follow UK government and sector guidelines. Mr Berry pointed out to the claimant that all organisations within the sector including the NHS were following the same procedure that had been mandated and adopted by the respondent.

66. Mr Berry also pointed out that there were plenty of opportunities during shiftwork for the claimant to take a break from wearing a facemask, for example during rest breaks. It was common ground at the disciplinary hearing (and throughout the management phase of this case) that the claimant did not have a medical exemption from wearing a facemask.

67. It was also common ground that the claimant was from time to time a smoker of cigarettes and that he vaped. The claimant took exception to this being raised in cross examination. The tribunal found it was a highly significant factor in the case given that it showed that the claimant was prepared to accept the known short and long term risks, including respiratory risks, of smoking/vaping whereas at the same time his rationale for refusing to wear a facemask was because there had been no risk assessment to show the short and long-term risks of wearing a facemask. The tribunal found this to be one of a number of areas in which the claimant's position was internally inconsistent.

68. The tribunal also noted in this respect the claimant was at times (his position was prone to change) requiring confirmation that there was zero risk in the short or long term of wearing a facemask for sustained periods. It is obvious that reducing risks to zero is an unattainable objective. Risk assessment is about risk management recognising that it is essentially a question of balancing risk in an uncertain world.

69. Importantly, during the disciplinary hearing the claimant said he was happy to wear a mask when he was in service. On that basis, Mr Berry decided not to take any more serious disciplinary action than a first written warning. This was on the strict understanding that the claimant had agreed to comply with the respondent's requirement to wear facemasks at all times.

70. The tribunal finds as a matter of fact that the reason why the claimant was issued with a written warning by Mr Berry was because he had refused to comply with the respondent's PPE requirements and for no other reason.

71. Mr Berry confirmed the outcome of the disciplinary hearing in a letter of 13 January 2022 [436-437]. The claimant was informed of his right of appeal which at that stage he did not exercise. The claimant was told to report back to work on 15 January 2022.

72. Mr Berry then confirmed to Ms McPhee and Ms Firth the decision he had made including that it was made on the basis that the claimant had agreed to comply with the respondent's requirement to wear facemasks.

73. In an exchange of emails between Mr Berry and the claimant on 19 January 2022, the claimant started to change his position. In his email of 19 January 2022 [442] the claimant said he had done his research, and that it is …

'Up to the company that I'm employed with to reassure me with evidence all the risks with universal mask wearing are complicate (sic) with zero risk to my health and others.

So with regards to this serious matter until the time that this could be properly dealt with, I wish to use my employment rights and have the right to remuneration. (Employment Rights Act 1996) Section 64.

Kind regards,

Kenneth Pringle.

74. There are a number of things which arise out of that change position.

75. First, the claimant has reneged on his commitment to Mr Berry that he would comply in future with the respondent's requirements to wear facemasks. The claimant had been given a lesser disciplinary sanction precisely because of the commitment he had made.

76. Secondly, it is plainly unrealistic in very many circumstances for any employer to give to an employee evidence that there will be zero risk to health and safety. An obvious example, is anyone involved in driving activities in connection with their work. It is plainly impossible for the employer to give any sort of assurance that there is zero risk of a road traffic accident. No doubt this is why the process of identifying ways to reduce risk is known as risk management not risk elimination.

77. Thirdly, the illogical conclusion of the claimant's position applied across the workforce (as the claimant invites Mr Berry to do in his reference to 'and others') would be that none of it support workers could be required to wear facemasks while carrying out their duties during the covid pandemic. Those duties are carried out in the pursuit of caring for extremely vulnerable supported persons. The claimant appeared to have lost sight of the fact that the very rationale for PPE (including facemasks to be worn) was to protect the health and safety of vulnerable adults in the respondent's care as well as the health and safety of colleagues.

78. It goes without saying that it would be an extremely irresponsible position for the respondent to adopt and would put it in immediate breach of the guidance provided by the government and CQC. It would be inevitable that the regulator would become involved to regularise the position back to the guidance.

79. Fourthly, it demonstrates a consistent theme of the claimant's evidence that it was up to the respondent to give the claimant the guarantees and assurances he sought as a precondition of issuing the instruction that facemasks must be worn at all times. As the tribunal attempted on many occasions throughout the hearing to explain to the claimant, it is the employer who sets the policies and terms and conditions of employment and it is the employer who is entitled to (and indeed must) provide instructions to the employees about how the work should be carried out. That obviously extends during the pandemic to what PPE needs to be worn and when.

80. The claimant made a related point in which he sought to suggest that unless there was some form of legislative provision permitting the respondent to require him to wear a facemask, it was not lawful for him to be so required. The tribunal did its best to explain to the claimant why that is simply not the case. The tribunal gave the example of sickness absence management policies for which there is no specific legislative permission. The tribunal explained that proceeding on the basis that anything that is not permitted under legislation is unlawful is to look at matters down the wrong end of the telescope. The tribunal understood the claimant to be making a point about civil liberties without properly understanding how such civil liberties translate into a managed and highly regulated working environment.

81. Fifthly, the claimant was asking his employer to continue to pay him during the period that he remained capable but unwilling to carry out his duties until the respondent had worked with him until he was happy to comply and fully understand the short and long-term risks associated with universal mask wearing. In other words, the claimant's position was that he should remain at home in receipt of his pay and benefits until such time that the respondent had to the claimant's own satisfaction demonstrated something that that was in all likelihood incapable of being achieved i.e. it would have been impossible to satisfy the claimant on his own terms to the standard of zero risk that he required. The claimant remained adamant throughout this hearing that there were (albeit unidentified) short and long-term risks to continuous what facemask wearing.

82. The tribunal also notes that this was one of very many examples in which the claimant inverted the relationship between employer and employee. The claimant continued to make statements throughout the hearing about what he required his employer to do. The tribunal will come to this below, but just to emphasise this point as matters played out from February onwards, the claimant was writing to very many people within the respondent organisation including those at the highest levels demanding that they undertook work that he thought should be undertaken. The high watermark of this was a 75 slide PowerPoint style presentation the claimant not only demanded the respondent reply to but did so while giving the respondent tight timescales within which to respond to him.

83. The tribunal put to the claimant that at the time he was demanding answers to his various questions he had been on unauthorised absence from work for many months and yet it was he who was giving the respondent work to do and setting the timescales for its completion. The claimant appeared to acknowledge the point. This was a time when the respondent, like everyone else, was having to work the health risks, challenges and restrictions placed on the care sector.

84. This was also not a respondent who was blindly applying PPE guidance. The respondent, as the tribunal has already noted, had set up a task force whose specific function it was to continuously reappraise the situation and make adjustments to its covid management practices. The respondent had established a covid hub to provide access to all of its colleagues through its CLICK online tool for the very purpose of ensuring care colleagues were as up-to-date as possible with the organisations thinking and position.

85. On very many occasions during the hearing, the tribunal attempted to explain to the claimant the fundamental difficulties and in some cases total impracticability of his position. Sadly without any success.

86. Lastly, the claimant's reference to section 64 Employment Rights Act 1996 has no foundation. That applies to periods of suspension under specific regulations for health reasons, none of which had anything remotely to do with the claimant's position. Indeed, earlier in this litigation the claimant's claim for remuneration under section 64 was struck out as having no reasonable prospect of success.

87. On 21 January 2022, Ms McPhee met with the claimant in order to agree his return to work shifts in Maxtime, the respondent's electronic shift organisation system. At his stage, Ms McPhee had been given to understand that the claimant had agreed to comply with the respondent's PPE requirements.

88. Pausing there, this was the first attempt by the respondent to get the claimant back to work. The only reason the claimant was not at work was because of his own decision not to comply with the PPE requirements of the respondent. It is part of the claimant's case that he was unfairly dismissed because the reason for his dismissal was that he had brought to his employer's attention matters he reasonably believed were harmful or potentially harmful to health and safety. It is a theme of this case that the respondent's position was precisely the opposite over many months: it tried its very hardest to persuade the claimant to come back to work. This was the first example of that. Ms McPhee was very keen to get the claimant back to work and made repeated attempts to do so.

89. Returning to the meeting on 21 January 2022, Ms McPhee agreed shifts with the claimant and those shifts were planned into Maxtime. Ms McPhee also planned the claimant's return and risk assessment to move into another team. At the end of the meeting, the claimant said that it would weaken his case if he were to return to work by which Ms McPhee understood the claimant to mean the challenge he had made to mask wearing. Ms McPhee told the claimant that he should return to work and continue to do his researce in his own time. Ms McPhee again re-emphasised the PPE requirements. At no point during that meeting did the claimant tell Ms McPhee that he was not intending to return to work if he was to be required to wear a face mask in accordance with the respondent's PPE requirements. Ms McPhee email a summary of the conversation to the claimant [446].

90. On 25 January 2022, the claimant emailed Ms McPhee to say that he would not be available for the shifts that he had planned with Ms McPhee until he had spoken to Mr Berry [455].

91. On 27 January 2022, Ms McPhee wrote to the claimant in relation to his failure to attend work as planned. Ms McPhee confirmed the claimant's absence was unauthorised and asked him to make immediate contact with her [466]. It therefore could not have been any clearer to the claimant that the respondent considered him to be absent from work without satisfactory reason. This is a further example of Ms McPhee trying to get the claimant back to work.

92. On 14 February 2022, Ms McPhee wrote to the claimant in a letter incorrectly dated 14 January 2022 in terms which include the following:

Dear Kenneth

Unauthorised absence – continued

I'm writing to confirm that your absence from work continues to be deemed as an unauthorised absence with no acceptable reason given. Absence from work without permission and without just cause is regarded as a serious disciplinary matter constituting gross misconduct, which could result in disciplinary action up to and including dismissal.

…

However, I was able to listen to your concerns and offer an alternative to allow you to work under appropriate risk assessment, to transfer you to work with an individual at Ridgewood, and join their support team. The reasons you would not be expected to wear a mask whilst supporting the person was because they won't tolerate their support staff wearing masks, as mentioned appropriate risk assessments are in place. This was the only alternative offered to you.

…

I appreciate your personal views based on the research you have undertaken, however we are a regulated social care charity and in turn our adherence to the requirements are inspected by respective regulators and by local health protection teams.

I am concerned that you have chosen not to attend work without appropriate reason and therefore your absence has remained unauthorised and you have not taken up the alternative solution I presented as detailed in our conversation.

Therefore, on receipt of this letter please make immediate contact with me, stating a date when you intend to return to work.

…

If contact is not made by 18 February 2022, to arrange a date for you to return to work please be advised disciplinary action is likely to be taken and you shall receive further correspondence accordingly,

….

93. Pausing again, this is a further attempt by Ms McPhee to get the claimant back to work. This letter is not consistent with an employer seeking to dismiss or otherwise treat detrimentally an employee for having raised any health and safety matters. It is an employer doing its very best to persuade an employee to return to work and warning that employee that disciplinary action may follow if they do not return to work. The tribunal came to the conclusion that the claimant was confusing his own

reason for not attending work for his employer's reason for giving him a written warning and ultimately for dismissing him. The focus in section 100/44 ERA is on the employer's reason for its actions and not the employee's reasons for his or her actions. This meant that the focus is on the reason(s) for the respondent's management of the claimant not on the reason(s) for the claimant's own decision not to attend work. Again, the tribunal tried on very many occasions to explain this to the claimant. The claimant was plainly a person of intelligence and appeared to accept the point when it was explained to him but then go on to ignore it for the purposes of the proceedings afterwards.

94. There is another very important aspect to Ms McPhee's letter of 14 April 2022. Ms McPhee refers to the alternative offer that was made to the claimant. The respondent was not issuing the claimant with a fait accompli, that he return to his role as support worker supporting CS while wearing a mask at all times or otherwise face disciplinary action. The respondent was giving the claimant a choice: either

    94.1. return to work supporting CS and comply with the PPE requirements; or

    94.2. transfer within the Ridgewood bungalows and support a person whose particular clinical needs contraindicated his support workers wearing a face mask i.e. where there would be no requirement for the support worker to wear a face mask.

95. The claimant's position was to refuse to do either. Instead, the claimant chose not to attend work at all and instead asked the respondent to continue his remuneration for so long as the respondent was unable to satisfy the claimant to his own standards of the safety in the short and long-term prolonged wearing of facemasks. The tribunal frankly concluded that this was a wholly unreasonable position for the claimant to maintain. After all, the respondent was giving the claimant an opportunity to return to work in a role which for clinical reasons to do with the supported person's needs did not require a facemask to be worn. The claimant never gave any satisfactory explanation as to why an offer of an alternative assignment which met all of his objections was not acceptable to him.

96. For completeness, the claimant accepted after several minutes of questioning from the tribunal that the respondent had the lawful contractual authority to require the claimant to work elsewhere in Ridgewood including on the assignment that he was given to alleviate impasse that had arisen. The claimant was employed as a support worker. He was not employed as a support worker solely to CS.

97. In short, the claimant was given an alternative role that met all of his concerns and yet choose to decline it. This left the tribunal in a position where it was unable to accept that the real reason that the claimant did not want to wear a face mask was its potential for short or long-term harm. The tribunal will return to this point below.

98. The tribunal has also concluded that at this stage it is abundantly clear that it is the respondent who is trying its best to get the claimant back to work and it is the claimant who despite being given an alternative offer that met his objections continued to refuse to do so. It is again difficult to reconcile that position with the assertion that

the respondent was acting for anything whatsoever to do with the claimant's objections to face mask wearing on health and safety grounds.

99. On 18 February 2022, the claimant sent a large document entitled 'all proceedings to date' to a number of people including Ms McPhee that the respondent. That document is 78 pages long [491-569]. It is also a very densely packed document containing mainly slides in PowerPoint style which also have hyperlinks to a very large number of other documents.

100. The respondent did not ignore this document, far from it. It appointed Ellen Moore to address it. Although Ms Moore was not called as a witness to give evidence wand was not cross examined, her witness statement together with the contemporary documentation makes abundantly clear her role and what she did in that role. Ms Moore offered to treat this lengthy document as either an appeal against the written warning given to the claimant the previous January or as a grievance. Again, the respondent took a very conciliatory and constructive position.

101. On 28 March 2022, the claimant emails a further document entitled 'Time Sensitive Document Estoppel Conditions Apply' [573-579]. The document is in a number of sections. The first section is entitled Claims and Counter Claims. The second section is entitled Redress Needed. The last section is entitled Deadline to Respond. The document ends with a signature section. In short, this document sets out the claimant's complaints and seeks his return to work on his own terms.

102. The document was sent to Mark Adams, the respondent's Chief Executive Officer; David Headley, Company Secretary and Legal Counsel, and Karen Sheridan, Chief Operating Officer.

103. In cross-examination, the claimant denied that the purpose of this document was to intimidate the respondent. The tribunal concluded that did not reflect well on the claimant's credibility. This is a document which is mocked up in a legal style. is peremptory in its terms and demanding redress. Plainly, it was an attempt to intimidate the respondent into acceding to the claimant's position.

104. On 21 April 2022, the claimant met with Ellen Moore to discuss his 78 page document. Abigail Batey, an employee relations adviser from the regional HR team, attended the meeting to take notes. The meeting lasted several hours. The claimant's main issues at this appeal/grievance were as follows:

    104.1. what are the short and long-term effects of prolonged mask wearing?

    104.2. how long will the requirement to wear PPE be part of company policy?

    104.3. can the claimant have confirmation that universal mask wearing will cause zero risk to mental or physical health?

    104.4. does the current climate regarding Macron warrant continuous use of universal mask wearing?

104.5. has CIC considered vitamin D3 and Zinc as a first line of defence for people?

104.6. has CIC considered people's support and natural immunity?

105. On 5 May 2022, the claimant sent an email [585] to Ellen Moore in the following terms:

'Hi Ellen,

I hope you have had enough time to go over things that were said and the things I presented to date. Because of the nature of this and the massive impact on my household income, I cannot wait for your decision.

So with that in mind, I will have to seek other methods of mediation from outside of this matter and will hopefully bring closure to this and help remedy my loss in income and new agreements can be agreed for my return to work in a timely manner.

Thanks,

Kenneth Pringle'

106. It is an obvious point that the claimant could have prevented any of his financial problems by returning to work at the Ridgewood bungalow that did not require him to wear a mask. Again, this fortified the tribunal's view that the claimant's real objection to wearing a mask had nothing whatsoever to do with its short and/or long-term unknown health implications. Put together with the fact that the claimant accepted that he both smoked cigarettes and vaped during this same period the claimant's contention that unknown respiratory risks were his genuine reason for not wishing to wear a mask was simply not credible.

107. The tribunal found that Ellen Moore summed up at paragraph 40 of her witness statement where things had arrived at very well. In that paragraph she says as follows:

'Following the meeting [of 21 April 2022] I needed to gather my thoughts. On the one hand I have the Charity that had put the requirement in following guidance, sector knowledge, and the safety of the people supported and colleagues, and I knew from working through the pandemic that mask wearing, and PPE were safety matters. On the other hand, the claimant was saying he wanted to return to work but because of the studies he had read did not want to follow the Charity's rule on mask wearing. He seemed to believe that the Charity was not able to put rules in place that he did not agree with, and seemed not to be listening to the position that the Charity was at liberty to follow the government and sector rules and guidance on mask wearing. I saw he was passionate but the overall feeling I was left with was that it was all very much about the claimant, and he was not able to view it in relation to the protection of the people supported, his colleagues and other visitors.'

108. Suffice to say, that this sums up extremely well the position of the tribunal having heard all the evidence.

109. On 6 May 2022, the day after the email referred to above, the claimant sent another email to Ellen Moore [633-634]. That email is in the following terms:

'Hi Ellen

I don't know if you have seen my last message sent to you.

I wish you to confirm that you have had reasonable time to look at what was said and what was presented and can offer me remedy to everything that has gone on to date.

As time passed it is becoming harder for me to remain professional and honourable.

I would like to receive a response from yourself to show you are ready to get things moving, if not I will seek outside mediation to help resolve this matter.

So I would like to offer you time to respond to help resolve this without intervention but at this stage I think too much time has passed any more can be costly to both parties, I am trying my hardest to mitigate any losses to myself and to you as a company.

I would really appreciate a response before the weekend is to put my mind at ease.

Thanks for your time,

Kenneth Pringle'

110. On 20 May 2022, Ellen Moore responded to the questions posed by the claimant and informed the claimant of her decision following the meeting. Ellen Moore therefore wrote to the claimant in both regards by a letter dated 24 May 2022 [660-664]. The upshot of that letter was the none of the claimant's appeal/grievance grounds were upheld. Ellen Moore then received three emails from the claimant querying her decision which she passed to employee relations on the basis that she considered her role in the matter to have reached finality.

111. On 24 May 2022, the claimant emailed to arrange his return to work [665]. The tribunal accepted Ms McPhee's evidence set out at paragraph 63 of her witness statement in which she says as follows:

'I assumed the appeal/grievance process had been successful and was delighted to hear that the claimant would be returning to us and the person supported would also be delighted. I responded asking if [the claimant] had time tomorrow.'

112. Pausing then again, this is a yet further example of Ms McPhee showing her enthusiasm for returning the claimant to work and setting up a meeting for that purpose as soon as she got any positive indication from the claimant that he was willing to return. This is again wholly inconsistent with an employer who has adopted any form of negative attitude towards the claimant relating to his views on mask wearing or otherwise. On the contrary, this is only consistent with an employer who wants to get back to work one of their employees who, by common consent, was good at his job, had good relationships with colleagues and a good relationship with the person he supported.

113. On 25 May 2022, the claimant had a conversation with Ms McPhee [667]. The purpose of the call was to discuss the claimant's return to work. A plan for the claimant's return to work was discussed and Ms McPhee offered a referral to occupational health to support that return. Ms McPhee also explained that the respondent's position on PPE including facemasks remained unaltered.

114. The claimant responded by saying that he felt he was not breaching policy by not wearing masks at all times and said that he wanted the rule to be reviewed on a person by person basis. Given that the claimant was again refusing to return to work without agreeing to comply with respondent's requirements on PPE, Ms McPhee emailed Ellen Moore and employee relations to confirm that the claimant had not changed his position on mask wearing and noting that the claimant was still under two years' service in case that was relevant [668]. Thereafter the matter was dealt with by Miss Rachel Firth, Regional Manager.

115. Before turning to Miss Firth's involvement in this matter, the tribunal again notes that Ms McPhee was yet again trying to get the claimant to return to work. It was the claimant who was refusing to return to work for his own reasons. That is of course his own decision to make, but it also does not detract from the reality of the situation that the claimant had rendered no service under his contract of employment since December 2021, some five months ago.

116. Miss Firth gave candid evidence which the tribunal accepted. Miss Firth was the Regional Manager for this particular region. She has a responsibility to manage what is after all charitable funds. The matter with the claimant had been ongoing for many months and it was no nearer a satisfactory conclusion at the start of June 2022 than it had been in December 2021. There had been a couple of suggestions that the claimant might return to work neither of which ended with that happening.

117. Miss Firth became aware that the claimant did not have 2 years' continuous employment. She was also aware that the claimant's employment had reached an impasse. Miss Firth decided therefore to undertake what she described as an 'abbreviated process' by which she meant giving a fair opportunity to the claimant to put his case why he should not be dismissed while at the same time protecting the charity from allowing the claimant to accrue the general right not to be unfairly dismissed. The tribunal has no criticism whatsoever of Miss Firth or the respondent more broadly for taking that decision. The respondent is perfectly entitled to manage its legal risk in the same way it manages its other risks

commensurate with protecting charitable funds alongside its organisational obligations.

118. Pausing once again, the purpose of bringing matters to a head was not for any other reason than to resolve this ongoing problem once and for all. In particular, the tribunal find as a fact that if the claimant had said in writing or at the disciplinary hearing that he was prepared to return to work and comply with the respondent's PPE requirements he would not have been dismissed. The overarching theme of this matter is that the claimant had his own reasons not to wear PPE including facemasks from which he would not budge.

119. Having been given the opportunity to return to work at a different Ridgewood bungalow without the need to wear a face mask due to the clinical requirements of the person supported in that different bungalow, the claimant was in very great difficulty in persuading the tribunal that his objection had anything to do with harm to health and safety. Put differently, the claimant could have returned to work at the alternative Ridgewood bungalow without experiencing any of the harm to health and safety that he says that he was concerned about. For reasons he never adequately explained to the tribunal despite direct questions to that effect, he decided not to do so.

120. On 22 June 2022, Miss Firth invited the claimant to a disciplinary hearing [700-701]. The disciplinary matters to be considered were twofold. They were as follows:

120.1. for authorised absence; and

120.2. for failing to comply with a reasonable management instructions to return to work.

121. In Miss Firth's letter she referenced Ms McPhee's letter of 14 February 2022. The following is an extract from Miss Firth's letter convening the disciplinary hearing.

'You are aware, your absence from work since 22 January 2022 continues to be deemed as an authorised absence with no acceptable reason given. Absence from work without permission and without just cause is regarded as a serious disciplinary matter constituting gross misconduct, which could result in disciplinary action up to and including dismissal.

It was confirmed that your current absence is indeed unauthorised in the letter, which was sent to you on 14 February 2022. Within this letter you were asked to communicate a return to work date with Shelley McPhee and were informed that a failure to do so would result in progressing to stage 2 of the Unauthorised Absence Policy. You have yet to agree a return to work date and remain absent from work no acceptable reason given.

Additionally, a reasonable management instructions listed within your appeal outcome letter dated 24 May 2022 was to 'make contact with Shelley McPhee by 30 May 2022 to discuss your return to work.' Your return to work meeting took place on 25 May 2022 where still no return to work date was agreed.'

122. It is abundantly clear from that letter that the reason for which the disciplinary hearing is being convened relates to the claimant's ongoing unauthorised absence and his failure to comply with a reasonable management instructions to agree a date to return to work.

123. In the context of a claim that the claimant was dismissed for raising the matter of harm to health and safety, it is noteworthy that neither of the matters set out in Miss Firth's letter have anything whatsoever to do with the claimant's concerns relating to health and safety. This tribunal is not naïve about employers sometimes giving ostensible reasons which do not reflect the actual reasons. This is a rather different case. It is clear beyond any question that the respondent was trying very hard to get the claimant back to work. The respondent was not trying to engineer the claimant's dismissal.

124. The tribunal has accepted as a fact that the respondent through Ms McPhee and Miss Firth would have welcomed the claimant back to work if he had just agreed to the respondent's PPE requirements, including the offer to return to a different Ridgewood bungalow at which he would not be required to wear a mask on account of the clinical needs of the person supported. To repeat the point, the tribunal set out earlier, the claimant's reason for not attending work is not the same thing as the reason for the management action in response to that situation.

125. On 23 June 2022, the claimant said in an email [696-697] that he was stressed and that he would be taking leave due to stress. The claimant also asked for Miss Firth to cease all communications with him. The claimant sent a further email later that day [702-703] saying that he would not be attending the disciplinary hearing and would regard any other correspondence as intimidation.

126. In the circumstances, Miss Firth decided to proceed with the disciplinary hearing. The hearing therefore proceeded on 28 June 2022. Miss Firth undertook a review of matters to date. She considered the following principal matters;

- The claimant had been absent without authorisation since January 2022 when his suspension had ended. That was a period of over five months
- the claimant had received a lesser disciplinary sanction for his refusal to wear PPE as requested because he had assured Mr Berry that he would return to work on the respondent's terms
- Ms McPhee had made at least monthly attempts to get the claimant back to work
- The claimant had been offered alternative work at a nearby bungalow where he would not be required to wear a face mask but had for undisclosed reasons declined that alternative offer
- The claimant had been offered an occupational health to facilitate his return to work but declined that offer

- There was no medical reason why the claimant was unable to wear a face mask in accordance with the respondent's requirements

- The claimant was able but unwilling to attend work

- It was extremely unlikely in all of the circumstances that the claimant would change his position

- The covid hub was available to the claimant as it was to all colleagues and that explained why it was both reasonable and fair in the interests of safety to everybody for facemasks to be worn as required

127. In all the circumstances, Miss Firth decided that the claimant should be summarily dismissed from his employment because of his own authorised absence and failure to follow a reasonable management instruction to return to work.

128. In paragraph 30 of Miss Firth's witness statement she made the following Comment:

'I considered whether the Charity was just blindly following rules and guidance, and my decision was that the Charity was proactively making decisions based on the changing situation. Having seen, both professionally and personally, people suffering and dying from Covid 19 our leadership actively encouraged the Charities adherence to requiring PPE and masks as Covid suffering and deaths were horrific. That had to be the priority. I am confident that if our decision-makers on this point felt it was in any way unsafe, they would have challenged the requirement. I believe the Charity made the decision based on the safety of all concerned (underlining added).

129. The tribunal respectfully agrees.

130. The letter of dismissal [719-720] was emailed and hand delivered to the claimant on 28 June 2022.

131. The letter of dismissal was hand-delivered by Abigail Batey to the claimant's home address.

132. The tribunal was satisfied that the letter of dismissal was communicated to the claimant on 28 June 2022

133. The claimant did not appeal against his dismissal.

The relevant law

Section 94 The right.

(1) An employee has the right not to be unfairly dismissed by his employer.

Section 108 Qualifying period of employment.

(1) Section 94 does not apply to the dismissal of an employee unless he has been continuously employed for a period of not less than two years ending with the effective date of termination.

Section 211 Period of continuous employment.

(1) An employee's period of continuous employment for the purposes of any *provision of this Act—*

(a) ….begins with the day on which the employee starts work, and

(b) ends with the day by reference to which the length of the employee's period of continuous employment is to be ascertained for the purposes of the provision.

Section 212 Weeks counting in computing period.

(1) Any week during the whole or part of which an employee's relations with his employer are governed by a contract of employment counts in computing the employee's period of employment.

(2). . . . . .

(3) Subject to subsection (4), any week (not within subsection (1)) during the whole or part of which an employee is—

(a) incapable of work in consequence of sickness or injury,

(b) absent from work on account of a temporary cessation of work,

(c) absent from work in circumstances such that, by arrangement or custom, he is regarded as continuing in the employment of his employer for any purpose, . . .

(d). . . . . .

counts in computing the employee's period of employment.

(4) Not more than twenty-six weeks count under subsection (3)(a). . . between any periods falling under subsection (1)

Section 86 Rights of employer and employee to minimum notice.

(1) The notice required to be given by an employer to terminate the contract of employment of a person who has been continuously employed for one month or more—

(a) is not less than one week's notice if his period of continuous employment is less than two years,

(b) is not less than one week's notice for each year of continuous employment if his period of continuous employment is two years or more but less than twelve years, and

(c) is not less than twelve weeks' notice if his period of continuous employment is twelve years or more.

Section 97 Effective date of termination

(1) Subject to the following provisions of this section, in this Part "the effective date of termination"—

…

(b) in relation to an employee whose contract of employment is terminated without notice, means the date on which the termination takes effect….

(2) Where—

(a) the contract of employment is terminated by the employer, and

(b) the notice required by section 86 to be given by an employer would, if duly given on the material date, expire on a date later than the effective date of termination (as defined by subsection (1)),

for the purposes of sections 108(1), 119(1) and 227(3) the later date is the effective date of termination.

(3) In subsection (2)(b) "the material date" means—

(a) the date when notice of termination was given by the employer, or

(b) where no notice was given, the date when the contract of employment was terminated by the employer.

Section 100 Health and safety cases.

(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that—

…

(c) being an employee at a place where—

(i) there was no such representative or safety committee, or

(ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,

he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety.

Conclusions

Qualifying service: section 108 Employment Rights Act 1996

The beginning of the period of continuous employment

134. The tribunal has found as a matter of fact that the date upon which the claimant started work for the respondent was 8 July 2020.

135. Applying section 211(1)(a) ERA, the date on which the claimant's period of continuous employment began was therefore 8 July 2024. This was the date on which the claimant started work. Section 211(1) ERA expressly provides that it applies for the purposes of any provision of the ERA. That includes the right under section 94 not to be unfairly dismissed.

136. Section 211(1)(b) ERA provides that the end of the period of continuous employment will depend on which right under the ERA is relied upon. In other word, the start of the period of continuous employment remains the same whatever right is being asserted but the end of the period will depend on what particular right is being asserted.

137. The tribunal has expressly rejected the claimant's argument that anything that happened between 9 June 2020 when the claimant was offered employment and 8 July 2020 meant that the claimant started work any earlier than 8 July 2020.

138. The claimant tried to persuade the tribunal that one or more matters preceding 8 July 2020 should be taken as the start of the period his continuous employment. The

claimant's initial position was to contend that his continuous employment started on the date he accepted the offer of employment from the respondent: 6 June 2020. That was his position in the claim form. However, Section 211(1) is in very clear terms. The period of continuous employment begins on date is when the employee starts work. It does not begin on any earlier date, specifically it does not begin on the date of acceptance of the offer of a contract of employment.

139. The respondent operates in a regulated sector. A number of pre-employment steps need to be taken such as DBS checks. Those were done, and had of necessity to be done, before the claimant could start work.

140. The claimant referred to training records. The training records demonstrated that the claimant started completing typical compulsory induction training courses on 8 July 2020. The training records therefore do not help the claimant at all.

141. The claimant also placed reliance on section 212 ERA. However, as a matter of law section 212 does not assist the claimant. Section 212 only applies to the computation of the qualifying weeks of continuous employment after the beginning of the period of continuous employment. Section 211(1)(a) ERA not section 212 ERA is the relevant statutory provision to be used to identify the beginning of an employee's period of continuous employment.

142. It was accepted by the respondent that all of the weeks on and after 8 July 2020 that the claimant worked for the respondent were weeks governed by a contract of employment within the terms of section 212 ERA. All of those weeks therefore need to be computed.

143. The next part of the analysis is to identify the end of the period of continuous employment for the purposes of the right to claim unfair dismissal under section 94 ERA.

144. Section 108(1) ERA provides that the end of the period of continuous employment for the purpose of unfair dismissal is an employee's effective date of termination.

145. The claimant was dismissed without notice on 28 June 2022. Section 97(1)(b) ERA stipulates that in those circumstances the effective date of termination is the date upon which the termination took effect. There was no dispute that the date the termination took effect was 28 June 2022. The tribunal therefore has concluded that 28 June 2022 was the claimant's effective date of termination.

146. It is then a question of simple arithmetic as to whether the claimant had an overall period of two years' continuous employment in the period beginning with 8 July 2020 and ending on 28 June 2022. The inescapable conclusion is that he did not. It follows that the claimant could not satisfy the statutory qualifying condition in section 108(1) ERA that an employee must have been continuously employed for a period of not less than two years ending with his effective date of termination. Section 94 ERA

therefore does not apply to the claimant and the claimant therefore does not have right to claim 'ordinary' unfair dismissal.

147. What this means is the tribunal has no jurisdiction to consider a claim by the claimant under section 94. The tribunal is a creature of statute and as such has no discretion whatsoever to disapply or otherwise ignore the clear statutory requirement of a minimum of two years' service as set out in section 108(1) ERA. The tribunal makes this particular point to help the claimant to understand that matters of equity, fairness and justice (concepts to which he frequently referred) are simply not a basis on which an Employment Judge can ignore the clear terms of statutory provisions. It is a duty of an Employment Judge so to do and them to apply those terms to the facts as found by the tribunal.

The lawfulness of the summary dismissal

148. The tribunal also concludes that it does not matter for the purposes of section 108(1) ERA whether or not the claimant was in fundamental breach of contract entitling the respondent to terminate his contract of employment with immediate effect.

149. Even if the respondent was not entitled to summarily dismiss the claimant (contrary to the tribunal's findings below) that would only allow the claimant to add on his 1 week's statutory notice period under section 86(1)(a) ERA. One further week would still not take the claimant's period of continuous employment to the 2 years required by section 108(1) ERA.

150. In conclusion:

150.1. the claimant did not have two years' continuous employment as at the effective date of termination;

150.2. the claimant does not have the right under section 94 ERA not to be unfairly dismissed;

150.3. the tribunal has no jurisdiction to consider the claimant's claim of unfair dismissal;

150.4. the claimant's claim of 'ordinary' unfair dismissal contrary to section 94 ERA must fail.

Wrongful dismissal

151. The claim for wrongful dismissal is a matter to be determined by common law principles applied to findings of fact.

152. In simple terms, a dispute arose between the claimant and the respondent about whether or not the claimant could lawfully be required to wear a face mask in the context of providing care services in an independent assisted learning environment.

153. The claimant was required to attend work after his suspension was lifted with effect from 15 January 2022. By the time the claimant was dismissed, the claimant had been absent from work over five months during which he provided no services at all for the respondent. The respondent was the claimant's employer. The claimant entered into a written contract of employment under the terms of which he was obliged to carry out his duties as a support worker. It is important not to lose sight in this particular case of the fundamental requirements of the contract of employment. In a contract of employment, the employer is normally under a duty to provide work to the employee and to pay the agreed rate of remuneration for that work. The employee is normally under a duty to do the work provided by the employer. The variety of human circumstance and activity has led to these basics becoming nuanced and refined. However, in this case the basics of the work-pay bargain can usefully be borne in mind

154. As matters stood on 28 June 2022, the claimant had not provided any services for some five months, despite the fact that the respondent was in a position to provide ongoing work to him and had been in such a position throughout the claimant's period of unauthorised absence.

155. The respondent had already reached the point in January 2022 at which it was no longer prepared to pay the claimant's wages when the claimant was not prepared to do the work he was employed to do. The tribunal concludes that the respondent was perfectly entitled to take that position in the circumstances which prevailed in January 2022. In simple, but highly relevant terms, the claimant was refusing to do his job.

156. The background circumstances are that the claimant had been employed as a support worker by the respondent. The claimant commenced work during the covid 19 pandemic. Throughout the employment the pandemic prevailed including the Omicron and Delta variants.

157. The claimant had been prepared to comply with the respondent's PPE requirements including as regards facemasks for some 18 months before he was observed in December 2021 not wearing a face mask in the home of a service user who was extremely vulnerable.

158. When considering whether or not the claimant was in fundamental breach of his contract of employment at the point at which he was dismissed, the tribunal does not need to get into the granular detail of the claimant's belief that the requirement to wear masks was either ineffective as a means of protecting service users or whether the requirement posed a danger to the health and safety of the claimant or to any other employee or worker of the respondent.

159. This is because the respondent took a considered approach to handling the problems that arose from the claimant's decision not to wear a mask at work unless he was carrying out personal care. The respondent did not simply fall back on the lawfulness of its position. It did not simply point to government guidance and issue a fait accompli to the claimant to wear a mask while taking care of CS or face dismissal.

160. On the contrary, the respondent put in place alternative employment the claimant could take which did not require him to wear a face mask when carrying out his duties. Accordingly, at the point of dismissal, the claimant had been given an opportunity to carry out alternative support work which fully met any concerns whether legitimate, reasonable or otherwise) but which the claimant declined to accept.

161. The bottom line was that the claimant wanted to be allowed to provide care to CS without wearing a mask and there was simply no other circumstances in which he would agree to return to work. By 28 June 2022, the claimant had been absent from work without permission for five months during which time he performed no services for the respondent's contract of employment.

162. Against that background, the respondent terminated the claimant's contract of employment summarily with effect from 28 June 2022. The tribunal must look at this matter objectively and ask itself the question whether or not the respondent was entitled to terminate the contract of employment because the claimant was in repudiatory breach of his own obligations under the contract. The tribunal has concluded that the respondent was entitled to treat the contract as fundamentally broken. The fundamental breaches of contract on the part of the claimant were at least threefold: the claimant was not prepared to attend work and carry out his duties as a carer (whether in respect of CS or the alternative service user); the claimant had been absent from work without permission after suspension was lifted with effect from 15 January 2022; and the claimant had failed to follow a reasonable management instruction to agree a return to work date.

163. In those circumstances, the tribunal has concluded that the claimant was lawfully summarily dismissed with effect from 28 June 2022 and it follows from that that he was not entitled to receive notice or any payment in lieu of notice.

Automatic unfair dismissal – section 100 (1) (c) Employment Rights Act 1996

164. This right does not require any qualifying service.

165. The tribunal has directed itself to the well-known case of Abernethy. The tribunal has carefully considered what was operative in the mind of Miss Firth when dismissing the claimant. The tribunal has already made the findings of fact that what was operative on Miss Firth's mind was that the claimant had been absent without permission for no acceptable reason and had failed to comply with a reasonable management instructions to agree a date to return to work.

166. The claimant had been given the opportunity to return to work wearing a mask or not wearing a mask. The respondent was respectful of the claimant's belief in relation to not wearing masks. Nevertheless, the respondent had to provide services to its supported persons.

167. The tribunal has referred on several occasions to the difference between on the one hand the reason in the claimant's mind why he should not attend work (which

may potentially be related to his belief about wearing masks for prolonged periods) and on the other hand the respondent's reason for dismissing the claimant.

168. There were innumerable occasions when the respondent tried its very hardest to get the claimant back to work. That is not the action of an employer who is looking to dismiss the claimant at all, let alone for the specific reasons under section 100(1)(c) ERA. This point appeared to be lost on the claimant because he was so focused on his own position that he was unable even to acknowledge that the respondent might have its own reasons for its own actions. Having found that the reason for the claimant's dismissal was for the two reasons it relied upon: unauthorised absence from work and a failure to comply with a reasonable instruction to return to work, it follows that the reason for dismissal was not the reason contemplated by section 100(1)(c).

169. In the light of these findings, the claimant's claim to be unfairly dismissed under section 100 (1)(c) ERA must fail.

170. That is that is the end of that particular claim.

171. However, the tribunal has gone on to consider whether the claimant would in fact have been able to sustain the requirements of that subsection. The tribunal was satisfied that the claimant had a strongly held conviction that he should not be required by his employer (and perhaps any wider authority) to wear a face mask. However, this was not a claim based on philosophical belief as a protected characteristic. It was a claim based on health and safety.

172. The tribunal was not satisfied that the claimant had neither a genuine nor a reasonable belief that wearing a face mask for prolonged periods raised any issue of health and safety. When asked about the perceived risks the claimants gave a very unsatisfactory response. He referred to tonsil sores as the high point of his explanation. At the same time, the claimant accepted that during the period in question he had been both a smoker of cigarettes and that he vaped. The tribunal concluded that the claimant was really making a civil liberties point but not one he did properly understood which was why he had been unable to articulate it.

173. In July 2021, the claimant attended outside parliament as part of a group of people who were challenging the legitimacy of the government policy to impose restrictions such as compulsory facemasks. The fact that the claimant declined an opportunity to return to work in a nearby bungalow at Ridgewood where he did not need to wear a mask told the tribunal enough to conclude that the claimant's real concern was not about any harm to health and safety at all. Otherwise, he would have returned to work not wearing a mask.

174. In that regard, the tribunal also took into account the following factors:

174.1. The claimant had been content to wear a face mask for some 18 months before he stopped wearing one.

174.2. The claimant's belief that there was any harm was in the face of the government guidance which plainly covered the claimant's duties not just in respect of personal care of CS but more generally.

174.3. The claimant was not in fact required to wear a mask on a full-time basis. He was entitled to take breaks during which he did not need to wear a mask; he was entitled not required to wear a mask when moving between buildings; and there was no restriction on the claimant in terms of taking a break during which he would be mask free.

175. In the circumstances, the tribunal has called pleaded that the claimant did not have either a genuine or reasonable belief that the respondents requirement to wear a mask at all times posed any harm or potential harm to health and safety.

Detriment related to health and safety disclosure

176. It follows from the tribunal's findings above that the claimant had neither a genuine or reasonable belief in the matters required by section 100(1)(c) that the claimant's claims under section 44(1)(c) ERA must also fail. That is because the same gateway requirements apply under section 44(1)(c) as they do under section 100(1)(c) ERA.

Summary of conclusions

177. The claimant did not have two years' service at the effective date of termination and his claim for ordinary unfair dismissal fails.

178. The reason for the claimant's dismissal was for matters wholly unrelated to anything the claimant said to the respondent about harm to health and safety. The claimant's claim for automatic unfair dismissal contrary to section 100(1)(c) ERA fails.

179. The claimant had neither a genuine or reasonable belief that wearing face masks over a prolonged period was either harmful or potentially harmful to health and safety. For that alternative reason, the claimant's claim of automatic unfair dismissal must also fail.

180. For both of the reasons referred to at paragraphs 178 and 179 and above the claimant's claim for subjection to detriment contrary to section 44(1)(c) must fail.

181. The claimant's claim for wrongful dismissal fails on the basis that the claimant was in fundamental breach of his contract of employment which breach the respondent accepted when dismissing him with effect from 28 June 2022.

182. The claimant's claim for unpaid wages between 15 January 2022 and 28 June 2022 fails because the claimant was absent without authorisation and without proper reason during that period. Whilst not the sole basis on which the tribunal has come to that conclusion, the claimant's refusal to attend work without wearing a mask in an alternative bungalow at Ridgewood while being under a contractual obligation to

do so was in the tribunal's view entirely fatal to any claim to be remunerated during a period in which he was able but not willing to perform his contractual obligations.

Employment Judge Loy

12 August 2024

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