Neutral Citation Number: [2023] EAT 148

Case No: EA-2022-SCO-000050-SH

EMPLOYMENT APPEAL TRIBUNAL

52 Melville Street
Edinburgh EH3 7HF

Date: 24 November 2023

Before :

THE HONOURABLE LADY HALDANE

- -

Between :

KAREN SHANKS	**Appellant**
- and –	
LOTHIAN HEALTH BOARD	**Respondent**

- -
- -

Mr Marc Horn for the **Appellant**
Mr Rhidian Davies for the **Respondent**

Hearing date: 23 November 2023

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JUDGMENT

THE HONOURABLE LADY HALDANE:

Introduction

1. This matter came before me for a full hearing on 23rd November 2023 on a single ground of appeal which was allowed following a hearing in terms of Rule 3(10) on 26th January 2023. Ms Shanks was represented as she had been before the Tribunal, by Mr Marc Horn, a lay representative, and Mr Davies appeared on behalf of the Respondent.

Background

2. The background to this matter is set out in detail in in the Judgment of the Employment Tribunal dated 29th April 2022 but read very short the relevant aspects are as follows: until May 2021, the appellant was employed by the respondent as a catering assistant at Edinburgh Royal Infirmary. During the period of the Coronavirus pandemic the respondent required its employees to wear facemasks in accordance with the prevailing Scottish Government guidance on that topic, underpinned by Regulations promulgated from time to time under the **Coronavirus Act 2020**. The appellant disagreed with this requirement, querying the scientific basis underlying the guidance, and providing to her employers material she herself had ingathered that pointed against the necessity for, or efficacy of facemasks. She requested the respondent to supply her with the scientific basis upon which it asserted masks ought to be worn.
3. The parties maintained their respective stances on the question of facemasks, with the appellant refusing to comply, or only partially complying with the respondent's policy on mask wearing. The dispute escalated, and ultimately disciplinary proceedings were instituted against the appellant. These resulted initially in her being suspended on 2nd March 2021 and then, after further correspondence and a

conduct hearing, she was summarily dismissed on the basis of gross misconduct with effect from 27 May 2021.

4. The appellant brought claims against the respondent on the basis of unfair dismissal and breach of contract. She also made claims for overtime and holiday pay, but these were settled by the time the case was heard in full before the Employment Tribunal. After hearing evidence, the Tribunal dismissed her claims for unfair dismissal and breach of contract. The appellant appealed that decision.

5. The appellant's appeal was initially sifted out under Rule 3(7), and she then requested an oral hearing under Rule 3(10). The result of that hearing was that the initial 12 grounds of appeal were refined down to a single ground, as set out in the decision of Lord Stuart dated 26th January 2023.

Submissions for the appellant

6. Before me, Mr Horn submitted that the key question in the appeal was whether there was guidance which obliged the respondent to act in the way that it did. In short, if they were not bound by guidance or legislation to enforce mask wearing, then they had not acted reasonably in requiring this to be done. If so, then the Tribunal had reached an erroneous conclusion on the question of the reasonableness of the respondent's actions.

7. Mr Horn developed that submission to contend that the two key pieces of legislation for present purposes were the **Health Protection (Coronavirus) (Restrictions and Requirements) (Scotland) Regulations 2020 (SSI 344)**, which legislated for the requirement to wear face coverings in specified circumstances, and the Act of the UK Parliament conferring the power to make such regulations, namely the **Coronavirus Act 2020**, and in particular, Schedule 19 of that Act. He drew attention to, and founded upon an exception to the general power to make

regulations, set out in paragraph 3 of Schedule 19. Paragraph 3 is in the following terms:-

> *'*Medical *Treatment*
>
> *3(1)* Regulations *under paragraph 1(1) may not include provision requiring a person to undergo medical treatment*
>
> *(2) "*Medical *Treatment" includes vaccination and other prophylactic treatment.*

8. Mr Horn submitted that face masks fell under the definition of prophylactic treatment, that therefore the Scottish Government was not empowered to make regulations requiring their use and any purported attempt to do was *ultra vires*. Accordingly any reliance by the respondent upon those regulations or any associated guidance was not reasonable. Insofar as the proper approach to carrying out risk assessments was concerned, there being no definition in the relevant regulations of what a 'suitable and sufficient' risk assessment should contain, the correct approach was to fall back on the common law and adhere to the principles in **Montgomery v Lanarkshire Health Board** [2015] UKSC 11.
9. Application of those principles to the present case would have caused the respondent to carry out a risk assessment having regard to quantifiable risks, even if infrequent, involved in the imposition of 'medical treatment', ie the requirement to wear a mask, upon the appellant. The respondent was, in short obliged to provide the risks and benefits of the proposed 'treatment' to the appellant, and that was what they had failed to do.
10. When asked whether determination of this appeal hinged on the question of whether or not the requirement to wear a mask fell within the definition of 'medical treatment' in paragraph 3 (as set out above), Mr Horn confirmed that this was so.

He further confirmed that if I was of the view that regulations relating to face coverings did not fall within that definition, and were thus not *ultra vires*, then he could take no issue with the approach adopted by the Employment Tribunal to the law relating to unfair dismissal, in particular that the correct approach was to determine whether the conduct fell within the range of reasonable responses of an employer in this situation. If the conduct was within that range, as the Tribunal had concluded it was, then the dismissal was fair and the Employment Tribunal had correctly concluded it could not intervene. (**Iceland Frozen Foods Ltd v Jones** [1983] ICR 15)

Submissions for the respondent

11. Mr Davies invited me to refuse the appeal. He began by observing that the submissions for the appellant strayed well beyond the single ground of appeal upon which the hearing had been allowed. That said, he responded to what transpired to be the key issue for the appellant, that being the question of whether or not the relevant regulations were applicable, if not *ultra vires*, by rejecting the contention that mask wearing ought properly to be regarded as prophylactic 'medical treatment', that phrase carrying the connotation of something being done by one person to another.

12. In any event, the key question was whether, in relying upon the legislation and guidance as it had, the respondent had acted reasonably. Mr Davies submitted that it had, and that the tribunal had reached a correct conclusion on that point. He also submitted that upon closer inspection the single ground of appeal formulated at the Rule 3(10) hearing did not in fact identify the correct legal test. As encapsulated in the decision from that hearing, the revised ground of appeal suggested the importation of entirely objective test into the task for the Employment Tribunal -

that is not the role of the Tribunal under s 98(4) of the **Employment Rights Act** which involves assessing reasonableness. The approach in the ground of appeal would encourage the Tribunal to substitute what it would have done in the circumstances which is entirely wrong.

Analysis and decision

13. As ultimately presented, the appeal bore only limited relation to the ground of appeal upon which this hearing was allowed. However, I had at the forefront of my mind that neither the appellant nor her lay representative are legally qualified, that in the result Mr Horn was able succinctly to identify and address where he suggested the error of law was to be found, and that Mr Davies did not suggest he or the respondent were in any way prejudiced by allowing the appellant to have her appeal presented on this basis. To do so was entirely consistent with the overriding objective and the interests of justice as a whole.
14. In the result the issue identified was a sharp one – was the requirement to wear a mask legitimately founded in regulations and guidance promulgated by the Scottish Government, or did it fall within the exception in paragraph 3 of schedule 19 to the **2020 Act,** with the effect that regulations could not competently be made in respect thereof? If the latter, then the appellant contended that the Tribunal had proceeded upon an error, in the manner amplified in submissions.
15. The answer to that question depends on whether or not the requirement to wear a mask imposed by the respondent upon the appellant is properly to be regarded as 'medical treatment'. I was not taken to any authority or definition of what that might mean, but in any event the proper approach to statutory construction, as Mr Horn rightly identified, is to give words in statutes their plain meaning (see, by way of

example, Lord Hope in **Imperial Tobacco Ltd v Lord Advocate** [2012] UKSC 61, 2013 SC (UKSC) 153, paragraph 14).

16. Applying that approach, as I must, I cannot conclude that the phrase 'medical treatment' carries the connotation contended for by the appellant. In so concluding I recognise that on its own, the word 'prophylactic' is capable of carrying the connotation of something done or administered to prevent disease, but that word appears in the context of 'medical treatment' which, given its plain and ordinary meaning, suggests treatment prescribed or administered under the guidance or direction of a medical professional. The other cited example of vaccinations being a form of medical treatment supports that conclusion. The intention of the exception in paragraph 3 is clearly to prevent regulations being laid with the purpose of compelling a person or people to submit to medical treatment against their will. The context of the then prevailing pandemic is an important one. The exception is not, read fairly, envisaging health and safety measures directed to minimising the risk of spreading a virus, such as the wearing of a mask. That matter is explicitly covered in Schedule 7 of **SSI 344** (See paragraph 7 above). The applicability or otherwise of the principles enunciated in **Montgomery v Lanarkshire Health Board** does not therefore require to be examined, although for the sake of clarity, I would not have upheld the appellant's submission on that point in any event.

17. That being so, standing the very fair acknowledgment by Mr Horn that absent a conclusion in his favour on the foregoing point, there was otherwise no error of law in the approach of the Tribunal, that is sufficient to dispose of matters. For the avoidance of doubt, I take the view in any event that the approach of the Tribunal to the correct legal test to be applied both in relation to Unfair Dismissal and Breach of Contract is unimpeachable. The Tribunal identified the relevant tests, and entirely

permissibly applied those to the facts it found established. There is no error of law in its approach.

Disposal

18. The Judgment of the Employment Tribunal was that the claims brought by the appellant for unfair dismissal and breach of contract did not succeed. For the foregoing reasons, I can identify no error of law in the reasoning underlying that Judgment. The appeal is accordingly refused