EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102002/2022

Held in Glasgow on 24 – 27 October 2022

Employment Judge P O'Donnell
Members R Taggart and J Lindsay

Ms M King	**Claimant** **In Person**
Partnership in Care Scotland Ltd	**Respondent** **Represented by:** **Dr A Gibson - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is:

1. The Claimant's chronic obstructive pulmonary disease (COPD) was not a disability as defined in s6 of the Equality Act 2010 at the relevant time. The Tribunal does not, therefore, have jurisdiction to hear the claims under the 2010 Act and these are hereby dismissed.

2. The claim for deduction of wages under Part 2 of the Employment Rights Act 1996 is not well-founded and is hereby dismissed.

3. The Claimant was not dismissed as defined in s95(1)(c) of the Employment Rights Act 1996 and so her claim for unfair dismissal is not well-founded. It is hereby dismissed.

REASONS

Introduction

1. The Claimant has brought the following complaints against the Respondent:

    a. Unfair dismissal under s94 of the Employment Rights Act 1996 (ERA) arguing that she was dismissed as defined in s95(1)(c) of the Act (commonly known as "constructive dismissal").

    b. Claims of unlawful discrimination under the Equality Act 2010 relying on the protected characteristic of disability. These are all connected to the Respondent requiring the Claimant to wear a face mask in the workplace. The claims are:-

        i. Discrimination arising from disability under s15.

        ii. A breach of the duty to make reasonable adjustments under s20.

        iii. Harassment under s26.

    c. A claim for deduction of wages under Part 2 ERA.

2. The Respondent resists all the claims. In relation to the claims under the Equality Act, they do not concede that the condition relied on by the Claimant amounts to a "disability" as defined in s6 of the Act.

Preliminary issues

3. At the outset of the hearing, Dr Gibson advised that one of the Respondent's witnesses had contracted Covid and was unfit to attend the hearing. He made an application for the witness to give evidence remotely by Cloud Video Platform (CVP). This was not opposed by the Claimant and the application was granted. Arrangements were made of the witness to attend by CVP. All other witnesses, including the Claimant, gave evidence in person.

4. There was an application by the Respondent to amend the ET3 in the following terms:

    a. To revise the dates at paragraphs 4, 8, 9 and 10 of the Paper Apart so that the year was 2020.

    b. To delete the last sentence of paragraphs 8-10 of the Paper Apart.

5. This was not opposed by the Claimant. The application was granted by the Tribunal.

Evidence

6. The Tribunal heard evidence from the following witnesses:

    a. The Claimant (MK).

    b. Cameron Malone (CM), the charge nurse at the Respondent's Gatehouse facility (where the Claimant worked during the events giving rise to the case) and the Claimant's direct line manager. He gave evidence by CVP.

    c. James Dalrymple (JD), who, at the time, was the Respondent's director of clinical services managing the Gatehouse facility and another rehabilitation facility operated by the Respondent.

    d. Colin Adams (CA), hospital director, who had overall responsibility for the Respondent's Ayr Clinic and the two rehabilitation facilities.

7. There was an agreed bundle of documents prepared by the parties running to 268 pages. A reference to a page number below is a reference to a page in the bundle.

8. The Tribunal considered that all of the witnesses gave their evidence honestly. As is often the case, the passage of time did affect the recollection of the witnesses as to some of the detail of the events giving rise to the case. For example, CM conflated two telephone conversations he had with the Claimant in December 2021 into one discussion but his evidence of the content of the discussions was accurate.

9. This was not a case where the Tribunal had to resolve any significant disputes of fact in reaching its decision. Whilst there were some differences in the recollection of witnesses as to the precise detail of certain conversations, nothing turned on this.

Findings in fact

10. The Tribunal made the following relevant findings in fact.

11. The Claimant was employed by the Respondent as a senior healthcare assistant from 2 March 2018 until she resigned by letter dated 21 December 2021.

12. The Respondent is a UK wide organisation providing mental health services. For the purposes of this case, the Respondent operates a rehabilitation unit in Prestwick known as Gatehouse which is where the Claimant worked at the time of the events giving rise to her claim. This is a residential unit where service users who have been treated at the Respondent's clinic in Ayr stay before returning to live in the community. There is another rehabilitation unit connected to the Ayr clinic at which the Claimant had worked previously.

13. The purpose of a stay at Gatehouse is for service users to get ready for living in their own home. They are assisted with the various tasks involved in running their own house by the healthcare assistants. These including cooking, cleaning, shopping and paying bills. These are all tasks with which the Claimant would assist service users.

14. A copy of the Claimant's contract of employment was produced at pp87-93. Under the terms of the contract, she was paid an annual salary. The hours of work were 37.5 hours a week exclusive of meal breaks which were unpaid. These hours would be worked on a shift pattern. Employees could be asked to work overtime and would be entitled to be paid for any overtime worked over 37.5 hours where this was authorised by management.

15. The staff at Gatehouse worked 12.25 hour shifts, either 8am to 8.15pm or 8pm to 8.15am. Staff were entitled to 1.5 hours breaks a day and would take

2 breaks of 30 minutes each to take meals during their shifts with the rest of the time being taken as tea breaks or smoking breaks.

16. At Gatehouse, there was no space that was specifically designated as a staff room or break area. Staff would take their meals in the dining room where service users also ate. There were rooms which were used as offices by management which were not always in use.

17. In some instances, staff were unable to take their break either in whole or in part. This could be, for example, because there was an emergency with a service user which needed to be dealt with. In such circumstances, staff could make a claim for additional pay by completing and submitting a time sheet seeking such a payment. At pp203-218, timesheets completed by the Claimant seeking such payments for the period from March 2020 to October 2021 were produced.

18. There were four staff on each shift: two nurses and two healthcare assistants. There was also a housekeeper and a chef. However, during the covid pandemic staff shortages meant that the housekeeper and chef were not always present. This meant that healthcare assistants, including the Claimant, would require to carry out the duties of these staff. This could require them to cook a meal that would feed all the service users and staff present at Gatehouse on a particular day or carry out cleaning tasks in common areas.

19. The Claimant was diagnosed with chronic obstructive pulmonary disease (COPD) in 2019. She has had issues with her breathing since childhood; she had asthma and was prone to chest infections. In the summer of 2021, the Claimant began to get chest infections more frequently which she attributed to her COPD worsening.

20. The Claimant also has peripheral vascular disease (PVD) which causes a pain in her left leg. She had an angioplasty operation in February 2019. A letter from the Claimant's GP dated 21 April 2022 (pp184-185) states that this condition prevents the Claimant from walking more than 20 metres. In

evidence, the Claimant confirmed that she was restricted in her walking due to her PVD rather than COPD.

21. The same letter describes the Claimant's COPD as causing a cough, breathlessness and a tendency to catch chest infections. It does not describe any effects on the Claimant's day-to-day activities.

22. The Claimant also had an abdominal aorta aneurysm which she disclosed to the Respondent in an email dated 25 July 2020 (pp265-266) explaining that this would not affect her duties.

23. The Claimant's evidence did not describe any effect on her day-to-day activities prior to the summer of 2021. In relation to the period from the summer of 2021 to the end of the Claimant's employment, the evidence before the Tribunal was that the Claimant could do housework such as hoovering and cleaning at both home and at work. She could also cook meals both at home and at work (when this was required due to staff shortages). She could not do any ironing where there was any steam from the iron as this would affect her breathing. The Claimant's son does her shopping for her but she did not explain why she could not do any shopping. The Claimant's son also walks her dog given the Claimant's restricted ability to walk due to her PVD.

24. The Claimant describes her COPD as a potentially progressive disease and an occupational health (OH) report obtained by the Respondent (pp157-158) notes that COPD can worsen over time but can also remain stable. No evidence was led in relation to the specific prognosis of the Claimant's COPD.

25. In early 2020, the covid pandemic affected the entire world. Various laws and guidance were introduced by both the Scottish and UK governments to protect the health of their citizens as well as restrict the spread and effect of the pandemic.

26. One of the laws introduced was to make the wearing of fluid resistant masks mandatory in hospital settings. The Respondent's facilities, including the Gatehouse, were classed as hospitals. There were no exemptions to this

requirement unless someone was working in what was described as a "covid free zone" which was somewhere with no contact with patients such as a reception area.

27. This requirement is different from later guidance for members of the public to wear face coverings on public transport or in enclosed public spaces. For example, the term "face coverings" covered a broader range of coverings that those required in hospitals which were restricted to specific types of fluid resistant face masks. The most important difference is that there were no exemptions from wearing a mask in hospital settings in the same way that there were for wearing face coverings in shops or on public transport for people with health conditions which meant that they could not wear face coverings.

28. To assist people who were potentially exempt from the wearing of face coverings in enclosed spaces, the Scottish Government produced what was described as an "exemption card" which could be downloaded from its website or requested from the Scottish Government. People could then wear it when in shops or other enclosed spaces to indicate that they were potentially exempt from wearing a face covering.

29. The process for obtaining the card did not involve any medical or legal assessment of whether the person requesting it had a condition which made them exempt. It was self-declaration process and the card was intended to be something which people could display to avoid, or reduce the number of, questions why they were not wearing a mask.

30. Up to August 2021, the Claimant had worn a face mask when at work and carrying out her duties. As noted above, the Claimant had more frequent chest infections in the summer of 2021 and attended with a nurse at her GP practice for an assessment. During the course of this assessment, the nurse informed the Claimant of the existence of the Scottish Government exemption card and suggested that the Claimant could obtain one. This arose in the context of a discussion that wearing face masks or face coverings could be affecting the Claimant's COPD.

31. The Claimant obtained the card from the Scottish Government and showed it to CM on 18 August 2021. On the same day, the Claimant emailed JD and CM explaining that she had attended her practice nurse for a breathing assessment and that she was advised to apply for an exemption card to refrain from wearing a mask. JD replied the same day stating "OK. Just keep the card with you" and asking someone from HR, who he had copied into the reply, to put this in the Claimant's HR file. The email exchange is at p101.

32. From that date until 4 November 2021, the Claimant attended work without wearing a face mask. This was because both she and her managers, particularly JD, had mistakenly believed that the card which the Claimant had obtained provided an exemption from wearing a face mask in a hospital setting. This was wrong as there were no exemptions to the legal requirement to wear a fluid resistant face mask in a hospital.

33. Also in or around August 2021, the Claimant became involved in a collective grievance regarding breaks. A copy of the grievance is at p100 and it sets out the following relevant matters:

    a. It is said that 1.5 hours is deducted from the daily hours to accommodate breaks but no breaks were being taken because there was no dedicated staff room or place where staff could take a break uninterrupted.

    b. Reference was made to the statutory right to breaks under the Working Time Regulations.

    c. Staff were said to be unable to take undisturbed breaks because the areas where they took their meals were open to staff and patients.

    d. As a result, staff were working a 12.25 hour shift but only being paid for 10.75 hours and they wished to raise a complaint about the lack of facilities for taking a break.

e. Reference was made to meals being provided and being taken in the patient dining area which is said to mean that staff are continually on duty.

34. There was some question as to when the grievance was submitted; it was not submitted by the Claimant and was sent by another employee when the Claimant was on leave. The letter at p100 has a handwritten date at the top of "11.8.21" but in the notes of the subsequent grievance meeting (p103) the date is given as 17 September 2021 and the Claimant's resignation letter (p159) states that the grievance was submitted on 14 September 2021. The Tribunal considers that the grievance was submitted around 14-17 September 2021.

35. There was some discussion during the hearing about which employees had put their names to the grievance and which of them subsequently asked for their names to be removed but the Tribunal considers nothing turns on this.

36. A meeting to discuss the grievance was held on 14 October 2021. CA chaired the hearing with the Claimant and another employee in attendance on behalf of the staff who had raised the grievance. A note of the meeting (pp103-104) was prepared and received by the Claimant on 2 November 2021.

37. At the meeting, the Claimant and the other employee presented a number of issues around breaks; being unable to take breaks when the unit is short-staffed; the fact that timesheets which had been submitted for additional payments when breaks could not be taken had been rejected; a lack of a separate staff room which meant there was no place away from the patients to take an uninterrupted break; issues around the lack of housekeeping hours.

38. CA asked if there was somewhere which could be locked off for staff to take breaks. The Claimant replied that locking off the dining room would prevent patients having access to snacks or the smoking areas and the upstairs room normally had meetings. She went on to ask why timesheets for additional payments were being queried when they had not been in the past. She indicated that she considered that staff should be paid for the whole 12.25 hours as they wore an alarm and had to be available at all times. The Tribunal

notes that the alarm was not some form of pager which would summon an employee but rather something they could use to summon assistance if they required it.

39. Both employees indicated a reluctance to locking off an area as they considered that patients would simply knock on the door and there was no space for a designated area. The Claimant went on to state that all the staff were looking to be paid for their breaks because they do not get these.

40. After the meeting, CA spoke to JD and advised him that the solution for the grievance was for staff to have staggered breaks so that there was someone available to deal with patients whilst others took their breaks undisturbed. There was also to be a designated part of the dining room for staff to take their break. He asked JD to put these changes into operation.

41. CA did not issue a formal written response to the Claimant or any of the other employees who were part of the grievance. He considered that the issue had been resolved and it was not raised any further by any of the employees at the Gatehouse.

42. A copy of the note of the grievance meeting was issued to the Claimant on 2 November 2021. She did not dispute the content of the notes.

43. In October 2022, JD was dealing with a potential return to work for another employee who had been absent with covid. This employee reported difficulties breathing when wearing a face mask and JD indicated to HR that part of the plan was to review the situation with mask wearing. In reply, HR explained that it was mandatory in all hospitals for medical grade face masks to be worn. A copy of the email exchange regarding this (with the other employee's name redacted) is at pp106-107. The email exchange took place over 21-25 October 2021.

44. It was at this point that JD realised that he had made an error in allowing the Claimant to attend work without wearing a mask and assuming that the card she had produced exempted her from this requirement.

45. JD was in attendance at the Gatehouse on 4 November 2021 because there was a regulatory inspection that day. The Claimant was not originally intended to be working that day but had been asked to come in. This was the first time that JD had seen the Claimant since realising his error due to shift patterns.

46. JD spoke to the Claimant on 4 November to explain that he had become aware of the need to wear a mask, asked if she could wear a mask that day and they would then review the position to find a way forward. He did not go into the detail of the rules around mask wearing as he was focussed on the inspection.

47. The Claimant was initially willing to wear a mask that day but, on reflection, felt this was unfair as she considered that she had an exemption as proved by the card she had obtained from the Scottish Government. JD explained that the Claimant would need to go home if she was not willing to wear a mask. The Claimant was upset by these matters and felt unwell. She left work that day and remained absent on sick leave from then up to her resignation. The reason given for her absence was stress.

48. CM contacted the Claimant by telephone later on 4 November 2021. He had been asked to do so by JD who had spoken to HR and had been advised to get the Claimant's authority to obtain an occupational health (OH) report. There were multiple calls during which CM explained to the Claimant that she could not return to work unless she could wear a mask and he also confirmed with her that she agreed to an OH report being obtained.

49. During the course of these conversations, CM made a comment to the Claimant that she would *"not win".* He considered that he had a good relationship with the Claimant and was seeking to persuade her that, even if she did not agree with the rules, they would not be changed just for her. He accepted that this was a flippant comment but thought he could speak openly with her given their working relationship. The Tribunal accepts his evidence that he made this comment of his own accord and not, as alleged by the Claimant, had been told to say this by JD. It was the case that he had been

asked to contact the Claimant by JD and the Tribunal considers that the Claimant has mistakenly conflated this fact with what was specifically said during the telephone calls.

50. CM remained in contact with the Claimant during her absence to keep in touch with her.

51. The Claimant had a telephone assessment with OH on 9 December 2021 and a report was produced on the same date (pp157-158). The report noted that the Claimant had COPD and this can cause people to become breathless when exerting themselves. It was also noted that the condition can stay stable or worsen. The report records the Claimant having recurring chest infections and that it had been suggested to her that this could be caused by wearing masks. It was noted that the Claimant had obtained an exemption card and was unwilling to wear a mask at work.

52. The OH report went on to state that the adviser was not aware of any clinical evidence that someone with COPD could not wear a mask and that the opinion from experts was that almost everybody could wear a face mask even those with lung conditions such as COPD. There was no evidence that face masks, hygienically maintained and changed frequently, would cause recurring chest infections. In terms of alternatives, the OH adviser considered that this was a corporate decision but noted that the current government policy obligated the wearing of face masks in care settings.

53. When the OH report had been received, CM was asked by JD to arrange a meeting with the Claimant to discuss this. A meeting was arranged for 23 December 2021. In the discussions between CM and the Claimant to arrange the meetings, he mentioned that he had thought of an alternative that the Claimant could wear a mask for a period of time, he suggested an hour, and then take a break with the mask off. He suggested that this could be discussed at the meeting. CM did explain to the Claimant that she would require to wear a mask when attending the meeting as it would be held in the Gatehouse.

54. The meeting scheduled for 23 December 2021 did not go ahead as the Claimant resigned by letter dated 21 December 2021 (pp159-162). The Claimant gave two reasons for her resignation.

55. First, was what she alleged was a complete disregard for the grievance procedure in respect of the collective grievance. She alleged that it was not acknowledged and she had to ask for this as well as for the minutes of the meeting with CA. She alleged that she had heard nothing further about this and that the timetable for dealing with the grievance had not been met.

56. Second, related to the requirement to wear a mask. She alleged that her mask exemption had been accepted in August and then JD had disregarded this when the inspection took place in November. She asserted that her mask exemption was for health reasons and that this fell under the Equality Act. She made reference to the telephone calls with CM on 4 November and the comment that she would not win. She stated that, after receiving the OH report, she had asked CM whether her mask exemption was now being accepted and she was told that policy was being adhered to. She made reference to her COPD and asserted that wearing a mask made her breathless. She felt that she was being discriminated against due to her disability and was resigning.

57. In reply to the resignation letter, CA wrote to the Claimant by letter dated 14 January 2022 asking her to reconsider and discuss the issues being raised. A copy of this letter was not produced to the Tribunal but was referenced in an email from the Claimant to CA dated 14 January 2022 (pp164-165) in which she declined his offer.

Claimant's submissions

58. The Claimant handed up written submissions which she relied on.

59. She submitted that her evidence should be accepted as credible and reliable. She made comments about the recollection of events by the Respondent's witnesses.

60. The written submissions go on to set out the key findings in fact which the Claimant asked the Tribunal to make. For the sake of brevity, the Tribunal has not set these out in details but have noted them.

61. The Claimant then went on to set out what she considered to be the relevant statutory provisions and, again, for the sake of brevity, the Tribunal have noted these but have not set them out in detail.

62. In relation to the constructive unfair dismissal claim, the Claimant made the following submissions:

    a. There was a grievance outstanding at the time of her resignation relating to breaks which had been submitted in August 2021 and not been resolved.

    b. The Claimant had been informed on 16 December 2021 that she could return to work if she was willing to wear a mask for an hour at a time with a 15 minute break and was called to a meeting to discuss this. The meeting was to be socially distanced but then she was told she had to wear a mask. There was no attempt to understand why the Claimant was exempt from wearing a mask and there had been a threat to her job.

63. Turning to the disability discrimination claims, the Claimant submitted that she had a disability; she had been living with COPD since 2019; she struggles with breathing, exertion and chest infections. It was submitted that she had explained how this affected her day-to-day activities and that this was long-term and substantial.

64. In respect of the claim of discrimination arising from disability, it was submitted that the Claimant was excluded from the workplace because she could not wear a mask and that this was because of her underlying health condition. She had to resign in response to this and had been treated unfavourably as a result. Referring to the issue of reasonable adjustments, it was submitted that the Respondent could not justify this treatment in light of what was said about that issue.

65. As regards the breach of the duty to make reasonable adjustments, it was submitted that the Respondent had applied a policy, criterion or practice that she had to wear a mask to attend work and that this substantially disadvantaged her as a disabled person. In terms of adjustments, the Claimant submitted that she should have been exempted from wearing a mask and that this should have been discussed.

66. In relation to the harassment claim, the Claimant submitted that the comment made to her by CM relaying what JD had said (that is, "you'll not win") amounted to harassment.

67. Finally, in relation to the claim for wages, it was submitted that she was contractually entitled to 90 minutes of unpaid break each day but that these were often interrupted or shortened. There had been a practice of staff submitting claims for additional pay when they could not take breaks but this stopped or became sporadic. There was a contractual right to be paid for extra time worked and there was an unlawful deduction of wages or breach of contract when the practice of claiming for additional time stopped. No other compensation for the lack of breaks was provided and the Claimant believes that she was entitled to be paid for the time worked.

Respondent's submissions

68. The Respondent's agent also produced written submissions and supplemented these orally.

69. The written submissions start by addressing the question of whether the Claimant was disabled as defined in s6 of the Equality Act. It was submitted that the relevant time for assessing this was November 2021 to January 2022 and that the Claimant had not proved that she was disabled at this time.

70. The Claimant had never informed the Respondent that she had been diagnosed with COPD in 2019; there had been no change to her duties during her employment nor had this been requested; there were no notable absences caused by her COPD.

71. Reference was made to the evidence of CM who worked closely with the Claimant and provided reliable evidence of her ability to perform her duties which she did without any restrictions. Reference was made to the types of duties carried out by the Claimant. The submissions also drew attention to the contents of the Occupational Health report.

72. The submissions set out the test for disability under the 2010 Act and accepts that COPD was a physical impairment. However, it is denied that this had an adverse effect on the Claimant's day-to-day living activities. A submission is made that the disability impact statement must be exaggerated to a degree given that this did not tally with the evidence she gave regarding the duties she was carrying out at the time.

73. The written submissions make reference to caselaw and the Appendix to the 2010 Act. It is submitted that, in light of these, any effect on the Claimant's day-to-day activities is not substantial.

74. Turning to the substantive issues, the submissions address the constructive dismissal claim first. It is noted that the Claimant relies on two matters which she says entitled her to terminate her contract of employment.

75. The first is the collective grievance and reference to made to the sequence of events in the grievance process. It was submitted that given the fact that a meeting was held and a solution put in place, it cannot be said that the grievance had not been addressed and the Claimant was not entitled to rely on this as entitling her to resign.

76. The second issue is the requirement to wear a mask and it is noted that the Claimant was advised of this on 4 November 2021 but did not resign until 21 December 2021. It is submitted that the Claimant resigned because she had seen the OH report and knew that her position was untenable with no reason why she could not wear a mask.

77. It was submitted that, in any event, the Respondent cannot be criticised for seeking to follow the law. They had made an error in allowing the Claimant to attend work for a period of time without wearing a mask but once the error

was realised then it had to be addressed. In doing so, the Respondent has not conducted itself in a way which entitled the Claimant to resign.

78. In relation to the claim of discrimination arising from disability, it is submitted that the Claimant's refusal to wear a mask was not something arising from her COPD in light of the evidence from the OH report and that excluding the Claimant was not unfavourable treatment as it was necessary to comply with the law and ensure the health and safety of staff and service users. In any event, it was submitted that the requirement to wear a mask was objectively justified.

79. Turning to the duty to make reasonable adjustments, it was submitted that the Respondent was not applying a provision, criterion or practice but, rather, the requirement to wear a mask was a requirement of the Scottish Government and not a PCP of the Respondent. In any event, it was submitted that this did not place the Claimant at a substantial disadvantage in light of the evidence from the OH report. Further, exempting the Claimant from wearing a mask was not reasonable as it would break the law.

80. In relation to the harassment claim, it was submitted that the version of events described by CM and JD should be preferred to that of the Claimant in terms of the phone calls giving rise to this claim.

81. Finally, in relation to the deduction of wages claim, it was submitted that the answer was simple; the contract of employment stated breaks were unpaid.

82. In response to the Claimant's submissions, Dr Gibson pointed out that certain of the submissions made by the Claimant were not supported by any evidence. Further, being required to wear a mask at the proposed meeting in December 2021 was not given as a reason for the Claimant's resignation at the time.

Relevant Law

83. Disability is one of the protected characteristics covered by the Equality Act 2010 and s6 of the Act defines disability as a physical or mental impairment

which has long-term, substantial adverse effects on a person's day-to-day living activities.

84. Schedule 1 of the 2010 Act sets out further provisions in relation to the definition of "disability":

Paragraph 2

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

(a) it has lasted for at least 12 months,

(b) it is likely to last for at least 12 months, or

(c) it is likely to last for the rest of the life of the person affected.

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

(3) For the purposes of sub-paragraph (2), the likelihood of an effect recurring is to be disregarded in such circumstances as may be prescribed.

(4) Regulations may prescribe circumstances in which, despite sub-paragraph (1), an effect is to be treated as being, or as not being, long-term.

Paragraph 5

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

(a) measures are being taken to treat or correct it, and

(b) but for that, it would be likely to have that effect.

(2) 'Measures' includes, in particular, medical treatment and the use of a prosthesis or other aid.

Paragraph 8

This paragraph applies to a person (P) if—

(a) P has a progressive condition,

(b) as a result of that condition P has an impairment which has (or had) an effect on P's ability to carry out normal day-to-day activities, but

(c) the effect is not (or was not) a substantial adverse effect.

(2) P is to be taken to have an impairment which has a substantial adverse effect if the condition is likely to result in P having such an impairment.

85. In *Goodwin v Patent Office* 1999 ICR 302, the Employment Appeal Tribunal gave guidance as to how the Tribunal should approach the issue of disability by addressing the following questions:-

a. did the claimant have a mental and/or physical impairment? (the 'impairment condition')

b. did the impairment affect the claimant's ability to carry out normal day-today activities? (the 'adverse effect condition')

c. was the adverse condition substantial? (the 'substantial condition'), and

d. was the adverse condition long term? (the 'long-term condition').

86. However, in *J v DLA Piper UK LLP* 2010 ICR 1052, it was said that the Tribunal did not have to rigidly adhere to answering these questions consecutively although it is good practice for the Tribunal to set out its findings on these issues separately. In particular, if the issue of impairment is in dispute then it may assist for the Tribunal to set out its findings on the long term, substantial and adverse effect conditions first then address the issue of impairment in light of its findings.

87. The term "impairment" is to be given it ordinary and natural meaning and has broad application (*McNicol v Balfour Beatty Rail Maintenance Ltd* 2002 ICR 1498).

88. In considering whether there is an impairment, it is the effect and not the cause of any impairment which is of importance to the Tribunal's determination of whether a claimant is disabled (*Walker v Sita Information Networking Computing Ltd* UKEAT/0097/12).

89. There can be a distinction between what may be considered to be a normal reaction to adverse events and something which develops into an impairment (*Igweike v TSB Bank Plc* [2020] IRLR 267).

90. The Government Guidance on the definition of disability addresses the issue of what can be considered "normal, day-to-day" activities at D2-7.

91. Section 212(2) of the 2010 Act states that the word "substantial" means more than minor or trivial.

92. The word *"likely"* appears in a number of contexts in the provisions relating to the definition of disability. The House of Lords in *SCA Packaging Ltd v Boyle* [2009] IRLR 746 held that this should be interpreted as meaning "could well happen".

93. The Tribunal must assess the issues relevant to disability status (for example, whether there are substantial adverse effects, whether the effects are long-term, the likelihood of recurrence) as at the date of the alleged discrimination (*McDougall v Richmond Adult Community College* [2008] IRLR 227).

94. Where a claimant has a number of different conditions and there is a question as to which of these has led to any adverse effects than the Tribunal has to make clear findings as to the nature of any disability and the symptoms attributable to each condition (*Morgan Stanley International v Posavec* EAT 0209/13).

95. The definition of discrimination arising from disability in the 2010 Act is as follows:-

15 Discrimination arising from disability

(1) A person (A) discriminates against a disabled person (B) if—

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

96. In terms of justification, the EAT in *MacCulloch v ICI* [2008] IRLR 846 set out four principles to be applied by the Tribunal. These have since been approved by the Court of Appeal in *Lockwood v DWP* [2013] IRLR 941:

"(1) The burden of proof is on the respondent to establish justification: see Starmer v British Airways [2005] IRLR 862 at [31].

(2) The classic test was set out in Bilka-Kaufhaus GmbH v Weber Von Hartz (case 170/84) [1984] IRLR 317 in the context of indirect sex discrimination. The ECJ said that the court or tribunal must be satisfied that the measures must "correspond to a real need … are appropriate with a view to achieving the objectives pursued and are necessary to that end" (paragraph 36). This involves the application of the proportionality principle, which is the language used in reg. 3 itself. It has subsequently been emphasised that the reference to "necessary" means "reasonably necessary": see Rainey v Greater Glasgow Health Board (HL) [1987] IRLR 26 per Lord Keith of Kinkel at pp.30–31.

(3) The principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the needs of the undertaking. The more serious the disparate adverse impact, the more cogent must be the justification for it: Hardys & Hansons plc v Lax [2005] IRLR 726 per Pill LJ at paragraphs [19]–[34], Thomas LJ at [54]–[55] and Gage LJ at [60].

(4) It is for the employment tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own assessment of whether the former outweigh the latter. There is no "range of reasonable response" test in this context: Hardys & Hansons plc v Lax [2005] IRLR 726, CA."

97. The duty to make reasonable adjustments is set out in s20 of the Equality Act with s21 making a breach of the duty an unlawful act. The relevant provisions of s20 are:

20 Duty to make adjustments

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice (PCP) of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(4) …

(5) …

98. In relation to the duty to make adjustments, the degree to which any adjustment would overcome the disadvantage to the claimant is relevant to whether the adjustment is reasonable (*HM Prison Service v Johnson* [2007] IRLR 951). Further, the duty is intended to integrate disabled people into the workplace and this is also relevant to whether any adjustment is reasonable (*O'Hanlon v Revenue and Customs Comrs* [2007] IRLR 404).

99. In the case of *Tarbuck v Sainsbury Supermarkets Ltd* [2006] IRLR 644, EAT it was held that carrying out a risk assessment was not a *"step"* for the

purposes of complying with the duty because it would not, in itself, avoid the disadvantage to the worker.

100. Harassment is defined in s26 of the Equality Act 2010:

> ***26 Harassment***
>
> *(1) A person (A) harasses another (B) if—*
>
> *(a) A engages in unwanted conduct related to a relevant protected characteristic, and*
>
> *(b) the conduct has the purpose or effect of—*
>
> *(i) violating B's dignity, or*
>
> *(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.*
>
> *(2) …*
>
> *(3) …*
>
> *(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—*
>
> *(a) the perception of B;*
>
> *(b) the other circumstances of the case;*
>
> *(c) whether it is reasonable for the conduct to have that effect.*

101. In *Hartley v Foreign and Commonwealth Office* UKEAT/0033/15 (27 May 2016, unreported) it was held that the question whether there is harassment must be considered in the light of all the circumstances of the case. Where the claim is based on things said it is not enough only to look at what the speaker may or may not have meant by the wording.

102. Section 94 of the Employment Rights Act 1996 makes it unlawful for an employer to unfairly dismiss an employee.

103. Section 95(1) of the 1996 Act states that dismissal can arise where:

"the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

104. The circumstances in which an employee is entitled to terminate their contract by reason of the employer's conduct is set out in the case of *Western Excavating v Sharp* [1978] ICR 221. The Court of Appeal held that there required to be more than simply unreasonable conduct by the employer and that had to be a repudiation of the contract by the employer. They laid down a three stage test:-

a. There must be a fundamental breach of contract by the employer

b. The employer's breach caused the employee to resign

c. The employee did not delay too long before resigning thus affirming the contract

105. A breach of contract can arise from an express term of the contract or an implied term. For the purposes of this case, the relevant term was the implied term of mutual trust and confidence.

106. The test for a breach of the duty of trust and confidence has been set in a number of cases but the authoritative definition was given by the House of Lords in *Malik v Bank of Credit and Commerce International SA* [1997] IRLR 462 that an employer would not, without reasonable or proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee.

107. The "last straw" principle has been set out in a range of cases with the leading case being *Lewis v Motorworld Garages Ltd* [1985] IRLR 465. The principle is that the conduct which is said to breach trust and confidence may consist of a series of acts or incidents, even if those individual incidents are quite trivial, which taken together amount to a repudiatory breach of the implied term of trust and confidence.

108. The "last straw" itself had to contribute something to the breach even if that is relatively minor or insignificant (*Kaur v Leeds Teaching Hospitals NHS Trust* [2018] IRLR 833).

109. The Kaur case also set out practical guidance for the Employment Tribunal in addressing the issue of whether a claimant had affirmed the contract in the context of a "last straw" case:

> *"(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?*
>
> *(2) Has he or she affirmed the contract since that act?*
>
> *(3) If not, was that act (or omission) by itself a repudiatory breach of contract?*
>
> *(4) If not, was it nevertheless a part (applying the approach explained in Omilaju v Waltham Forest LBC [2005] IRLR 35) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the Malik term? (If it was, there is no need for any separate consideration of a possible previous affirmation ….)*
>
> *(5) Did the employee resign in response (or partly in response) to that breach?"*

110. The test for unfair dismissal can be found in s98 of the Employment Rights Act 1996 (ERA). The initial burden of proof in such a claim is placed on the respondent under s98(1) to show that there is a potentially fair reason for dismissal.

111. In a constructive dismissal case, the reason for dismissal is the reason for the breach of contract by the employer (*Berriman v Delabole Slate Ltd* [1985] ICR 546, CA).

112. The test then turns to the requirements of s98(4) for the Tribunal to consider whether dismissal was fair in all the circumstances of the case. There is a neutral burden of proof in relation to this part of the test.

113. In considering s98(4), the Tribunal should take into account all relevant factors such as the size and administrative resources of the employer. There are two matters which have generated considerable case law and which are worth highlighting

114. First, there is the question of whether an employer has followed a fair procedure in dismissing the employee. The well-known case of *Polkey v AE Dayton Services Ltd* [1987] IRLR 503 it was held that a failure to follow a fair procedure was sufficient to render a dismissal unfair in itself (although the compensation to be awarded in such cases may fall to be reduce to reflect the degree to which the employee would have been fairly dismissed if the procedural errors had not been made – the so-called "Polkey" reduction).

115. Second, the Tribunal needs to consider whether the dismissal was a fair sanction applying the "band of reasonable responses" test. The Tribunal must not substitute its own decision as to what sanction it would have applied and, rather, it must assess whether the sanction applied by the employer fell within a reasonable band of options available to the employer.

116. Section 13 of the Employment Rights Act 1996 (ERA) provides that an employer shall not make a deduction from a worker's wages unless this is authorised by statute, a provision in the worker's contract or by the previous written consent of the worker.

117. In terms of s13(3) ERA, a deduction of wages arises in circumstances where the total amount of wages paid by an employer to a worker on any occasion is less than the total amount of wages properly payable on that occasion.

118. The question of what is "properly payable" requires the worker to show some legal entitlement to the sum in question; this can be payable under the worker's contract but does not have to be so long as there is some legal entitlement, for example, the statutory right to be paid the national minimum wage (*New Century Cleaning Co Ltd v Church* [2000] IRLR 27).

119. Section 27 of the ERA defines "wages" which include any fee, bonus, commission, holiday pay or other emolument referable to a worker's

employment whether payable under the contract or otherwise. Section 27(2)(b) excludes the payment of expenses from the definition of "wages".

Decision - general

120. Before turning to the specific issues for determination, the Tribunal considers that it would be helpful if it commented on an issue which was a central feature of the case and which cuts across all the issues to be determined, that is, the exemption card obtained by the Claimant in August 2021.

121. It is quite clear that much of the case hinges on the Claimant's genuine but mistaken belief that this card carried some sort of legal or medical weight in establishing that she was exempt from wearing a face mask in her workplace. This was compounded by the fact that her managers, particularly JD, were also mistaken about the effect of this card and allowed the Claimant to attend work without a mask for a number of months until the correct position became known to them. The Tribunal considers that, had all parties correctly understood the position from the outset, many of the matters giving rise to the case would have been avoided.

122. The Scottish Government exemption card was created to allow those people who could not wear a face covering for some reason to have something they could display confirming this and avoid constant challenge when entering shops, public transport or other places where the wearing of face coverings was required.

123. It was, however, no more than a self-declaration of the individual's belief that they were exempt. It did not involve any form of medical or legal assessment as to whether an individual should be exempt. Indeed, it could be downloaded from the internet without any interaction with the Scottish Government or any other public body.

124. The card did not, as the Claimant clearly believed at the time and, on the face of it, continues to believe, carry any legal or medical weight. It was certainly not a form of Scottish Government authorisation or permission to not wear a face covering or face mask. Neither was it determinative in relation to any

legal questions. For example, in the context of this case, the fact that the Claimant had obtained the card does not mean that she is "disabled" for the purposes of the Equality Act which is entirely a question for this Tribunal nor does it mean that the Respondent requiring her to wear a face mask was inherently unlawful.

125. It is also important to note that the card was created in the context of the rules relating to the wearing of face coverings in enclosed public spaces and not in relation to the more stringent requirements regarding the wearing of fluid resistant face masks in hospital settings. These requirements did not allow for exemptions in the same way as the rules relating to face coverings.

126. This is not to say that the Claimant was, in any way, seeking to misuse the exemption card. She clearly had genuine concerns about the effect that wearing a mask was having on her health and sought to obtain the card in the mistaken belief that this would mean that she could attend work without wearing a face mask. Unfortunately, the Claimant had fallen into error in relation to that latter matter (compounded by the fact that the Respondent did not initially correct her) and this mistaken belief clearly informed her reaction to the Respondent applying the correct position.

127. With that being said regarding the status of the exemption card, the Tribunal turns to the issues to be determined.

Decision – disability status

128. The first question for the Tribunal in assessing whether the Claimant is "disabled" as defined in s6 of the Equality Act 2010 is to determine the "relevant period" for making the assessment.

129. In this case, the Claimant alleges that she was subject to discrimination on 4 November 2021 and that this continued up to her resignation on 21 December 2021 (which she alleges was a constructive dismissal). The Tribunal, therefore, considers that the relevant period is 4 November to 21 December 2021 and the Tribunal requires to assess whether the Claimant met the definition in s6 of the Act during this period.

130. This is important because the Claimant relied on some evidence which was not clearly addressed to this period. For example, she produced a letter from her GP (pp184-185) which was dated 21 April 2022 and the stated purpose was to confirm the Claimant's *"recent"* health problems. The letter does not clearly describe the Claimant's health issues as at the relevant time and there are references to certain of her conditions worsening after the end of the relevant period.

131. There is no dispute that the Claimant has Chronic Obstructive Pulmonary Disease (COPD) which is clearly capable of amounting to a physical impairment. The question is whether this condition, at the relevant time, had long-term and substantial adverse effect on her day-to-day living activities.

132. The Tribunal is conscious of the fact that the Claimant has multiple health conditions which impact on her and bears in mind what was said by the EAT in *Posavec* (above) regarding the need to make clear findings about the symptoms of each condition.

133. This is particularly important in this case where the Claimant's other health conditions (that is, peripheral vascular disease, "PVD", which particularly affects her use of her left leg and an abdominal aorta aneurysm) which impact on her day-to-day living activities but which are not relied upon by the Claimant in founding her claims of disability discrimination. The claims are all based on the Claimant allegedly being unable to wear a face mask due to her COPD and so the Tribunal require to be satisfied that COPD is a disability. It may be the case that the other conditions amount to disabilities in terms of s6 of the Act but this does not assist the Claimant for the purposes of this case.

134. For example, the Claimant gave evidence that she could not walk more than 20 yards but, in answer to a question from the Judge, she clarified that this was due to the effect of her PVD on her leg rather than her COPD.

135. The Claimant did assert that the various conditions impacted on each other (for example, the effect of her PVD impacted on the circulation of oxygen through her bloodstream which could worsen any breathing difficulties caused

by COPD). However, there was no evidence led before the Tribunal about the extent to which COPD worsened the effects of the other conditions. There was, for example, no evidence about the degree to which the Claimant's ability to walk, which was already adversely affected by PVD, was worsened or exacerbated by COPD.

136. The Tribunal did not consider that much weight could be placed on the fact that the Claimant had not had any absences due to COPD, a factor advanced by the Respondent. It is perfectly possible for someone's attendance at work to be unaffected by any disability and to argue that this is evidence that someone is not disabled is, to some extent, to perpetuate unhelpful stereotypes of disabled people.

137. The Tribunal did consider that it was relevant to take into account the fact that the Claimant was able to carry out the duties of her job without any apparent difficulty. The Claimant's job was to assist service users with their day-to-day activities which would include tasks such as cleaning and cooking. The Claimant also described, in the context of the claim relating to breaks, that she and other healthcare staff were required to cook meals for service users or carry out housekeeping work when staff shortages meant there was no chef or housekeeper available.

138. The Tribunal agrees with the submissions on behalf of the Respondent that this evidence is difficult to reconcile with any evidence from the Claimant that, at the same time, she was unable to carry out similar tasks at home.

139. The Tribunal does bear in mind that it should focus on what the Claimant cannot do (or struggles to do) and that the bar is relatively low in terms of being more than minor or trivial.

140. It is also important to bear in mind that the burden of proof in relation to disability status lies with the Claimant and the Tribunal is not persuaded that the Claimant has led adequate evidence to establish that, at the relevant time, her COPD had a substantial adverse effect on her day-to-day living activities. She does not describe any adverse effects on her day-to-day living activities arising from her COPD that could be said to be substantial; the difficulties

which the Claimant has with walking arise from her PVD; she does not describe any difficulty with cooking and cleaning either at home or at work; she describes being unable to use a steam iron due to the effects of the steam but did say that she could not do ironing at all; the Claimant did not describe effects on any other day-to-day activities beyond these matters.

141. The Claimant was also clearly influenced by the fact that COPD made her more susceptible to chest infections but this is not, in itself, an adverse effect on day-to-day living activities. Similarly, the Tribunal does not doubt that COPD could affect the Claimant's breathing but there was simply no evidence that such effects substantially affected any of her day-to-day activities.

142. The Tribunal does bear in mind that the Claimant did give evidence that without her inhalers she would *"be in an ambulance"* but there was no explanation as to whether this was due to a serious chest infection or whether some sort of day-to-day activity would hospitalise her.

143. There are also difficulties for the Claimant in relation to the adequacy of the evidence presented in relation to the "long-term" element of the definition. The Claimant certainly did not seek to argue that any adverse effects had existed since the diagnosis of COPD in 2019 or earlier. She described her COPD worsening from the summer of 2021 but her evidence was that this related to chest infections and her oxygen levels rather than any effect on her day-to-day living activities. There is, therefore, no evidence that any adverse effects during the relevant period had lasted for more than 12 months.

144. Similarly, there was no evidence about how long any adverse effects were likely to last. The only comment on this was in the Occupation Health report at p157 to the effect that COPD can remain stable or deteriorate over time. However, it does not give any specific prognosis for the Claimant. There is, therefore, no evidence that any adverse effects during the relevant period was likely to last for more than 12 months.

145. The same also applies in relation to any consideration of whether paragraph 8 of Schedule 1 of the Equality Act assists the Claimant. There was no evidence presented to the Tribunal that would allow it to determine whether

the Claimant's COPD would be likely to have substantial adverse effect in the future so as to deem it to have such an effect at the relevant time.

146. In these circumstances, the Tribunal does not consider that the Claimant has led sufficient evidence to discharge the burden of proving that, at the relevant time, her COPD had a long-term, substantial adverse effects on her day-to-day living activities. She has, therefore, not proved that she meets the definition of disability in s6 of the Equality Act and the Tribunal does not have jurisdiction to hear any of the claims brought under that Act.

147. Although this renders any finding in relation to the substantive discrimination claims academic, the Tribunal does consider that it would assist the parties to confirm that, for the reasons set out below, it would not have upheld those claims even if the Claimant had proved that she was disabled for the purposes of the Equality Act.

148. Assuming that the Tribunal found that the acts by the Respondent which the Claimant alleges amount to discrimination arising from disability did amount to such discrimination then the Tribunal would have held that these were objectively justified. The Respondent clearly had a legitimate aim in seeking to obey the law in relation to wearing masks in a hospital setting and protect the health and safety of staff and service users during the pandemic.

149. Requiring the Claimant to wear a mask if she was to attend the workplace was a proportionate means of achieving that aim. It is difficult to see any other means of achieving the Respondent's aim in circumstances where the wearing of a mask was mandatory as a matter of law. The Claimant certainly did not advance any other means of achieving the legitimate aim and her only alternative was to exempt her from mask wearing which would not achieve the Respondent's aim.

150. The only other option which the Tribunal could envisage would be to redeploy the Claimant to a covid secure area but that was never explored because the Claimant resigned rather than meeting with the Respondent to discuss the issue of mask wearing.

151. In terms of the duty to make reasonable adjustments, taking the Claimant's case at the highest and assuming that the duty was engaged, there was no evidence before the Tribunal that there was any adjustment which would have avoided any disadvantage to the Claimant which it was reasonable for the Respondent to make.

152. The Claimant only advances two adjustments in her pleadings. First, that she should be exempted from wearing a mask. The Tribunal does not consider that this would be reasonable as it would mean that the Respondent would be breaking the law and exposing service users and other staff to the risk of catching covid. Second, she argues that a risk assessment should have been conducted into the risk associated with her not wearing a mask. The Tarbuck case (above) highlights that a risk assessment is not an adjustment where it does not, in itself, avoid any disadvantage and that would certainly be the case here. In particular, when the Claimant's position on the risk assessment is examined, it is clear that this is a variation on the first adjustment; the Claimant is arguing that the Respondent should have balanced up the risks and exempted her from wearing a mask which completely ignores the fact that the law made it mandatory for masks to be worn in a hospital setting.

153. For these reasons, the Tribunal would have dismissed the claim for breach of the duty to make reasonable adjustments.

154. Finally, in relation to the harassment claim, the Tribunal considers that it would not be reasonable for the comments relied upon by the Claimant to have the prohibited effect in terms of s26. In the telephone conversations between the Claimant and CM on 4 November 2021, CM was doing nothing more than informing the Claimant of the factual position that she could not enter the workplace without wearing a mask. Whilst the Tribunal has no doubt that the Claimant found this position to be upsetting, a manager must be able to communicate factual positions to an employee without it being unlawful.

155. In relation to the comment that the Claimant *"would not win",* the Tribunal accepts the evidence of CM that he was making this comment to the Claimant

in circumstances where he considered that they had a good relationship and that he could speak openly to her. He was not seeking to upset her but, rather, to persuade her that they all had to abide by the rules and that these would not be changed for her. The Tribunal does not consider that, in this context, it is reasonable for this comment to have the prohibited effect.

156. For these reasons, the Tribunal would not have upheld the harassment claim.

Decision – wages

157. The claim for deduction of wages can be dealt with in relatively straightforward terms. The Claimant seeks payment for breaks which she says she had been unable to take and to succeed in such a claim then she needs to show that she has some form of legal entitlement to be paid for such breaks.

158. The difficulty for the Claimant is that she has no legal entitlement to any such payment. Under the terms of her contract, she is entitled to be paid her annual salary and to be paid for overtime where that is authorised by the Respondent. Other than that, there is no entitlement in her contract for her to be paid in circumstances where she did not take her breaks. Breaks are expressly said to be unpaid and the contract is silent on the question of what happens if these cannot be taken.

159. Neither is there evidence of any other legal entitlement. For example, there was no evidence led by the Claimant to show that, as a result of not taking breaks, she was paid less than the National Minimum Wage.

160. The Respondent would, in fact, pay employees for overtime if they had been unable to take breaks due to staff shortages or if something prevented them from doing so (for example, an emergency with a service user). However, the Tribunal does not consider that this created any form of legal entitlement for payment to be made automatically; the evidence was that such payments were only made when staff submitted timesheets claiming a payment and this was authorised by management.

161. For these reasons, the claim for deduction of wages under Part 2 of the Employment Rights Act 1996 is not well founded and is hereby dismissed.

Decision – unfair dismissal

162. The claim for unfair dismissal turns on the question of whether or not the Claimant was dismissed as defined in s95(1)(c) ERA, the Respondent having not sought to advance a potentially fair reason for dismissal.

163. The Claimant argues that the actions of the Respondent breached the duty of trust and confidence and so the Tribunal has to apply the test set out in Malik (above). In this judgment will use the phrase "destroy the employment relationship" as shorthand to describe the Malik test but it has borne in mind that there can be a breach where the employment relationship has been seriously damaged.

164. The Tribunal does bear in mind that it needs to look at matters as a whole whether there has been a fundamental breach of contract but it is also conscious that the matters relied on by the Claimant (that is, the requirement to wear a face mask in the workplace and the handling of the grievance regarding breaks) arise from very different and separate factual matrices with no real connection between them. There are different considerations to take into account in relation to each of these.

165. There was no evidence that the Respondent was seeking to destroy the employment relationship. The clear evidence of all three of the Respondent's witnesses, which the Tribunal accepted, was that they wanted to retain the Claimant as an employee and find a way to get her back to work. The Tribunal does not, therefore, find that the actions of the Respondent was "calculated" to destroy the employment relationship. If the Claimant is to succeed then she will have to establish the "likely" arm of the *Malik* test.

166. In relation to the wearing of a mask, the Tribunal considers that the Respondent did have reasonable and proper cause for their actions both in relation to the requirement to wear a face mask in the workplace itself and in the apparent change in the position from August 2018 to November 2021.

167. In relation to the requirement to wear a face mask in the workplace, as set out above in relation to the discrimination claims, the Respondent was seeking to

comply with the law and to protect the health and safety of staff and service users. The Tribunal considers that there is no basis on which it can be said that these were not reasonable and proper causes for the requirement to wear a mask.

168. The apparent change in position regarding the requirement to wear a mask arose from the error made by JD in August 2021 in allowing the Claimant to attend work without a mask when she provided the exemption card. The fact of the matter is that there had been no change in the position, either in relation to the law or the Respondent's policy, which had always been that wearing a mask was mandatory.

169. The error by JD was regrettable but it does provide an explanation for the apparent change from the Claimant's perspective. Further, the Respondent had to correct this error, to not do so would mean that they would continue to act against the law and put staff and service users at risk. There is, therefore, reasonable and proper cause for the Respondent's actions in that a genuine error had been made and needed to be corrected.

170. The Tribunal considers that the position could have been better communicated to the Claimant. Ideally, the correct position should have been explained from the point the Claimant asserted an exemption but, even then, a clearer explanation of what had happened could have been given on 4 November. However, the Tribunal does recognise that this arose in the context of a regulatory inspection where there may have been other priorities pressing on JD that day.

171. In these circumstances, the Tribunal does not consider that the issues relating to the requirement to wear face masks are capable of amounting, or contributing, to a breach of the *Malik* term where the Respondent's actions had reasonable or proper causes.

172. Turning to the handling of the grievance, the Tribunal considers that the terms of the Respondent's grievance procedure are something of a red herring. The question of whether the procedure applied to the grievance in question (it being a collective grievance) arose during the hearing but the Tribunal does

not consider that this is particularly relevant; the procedure itself is described as non-contractual and so a breach of the procedure, in itself, cannot amount to a breach of contract; the Tribunal is concerned with a breach of trust and confidence not with a breach of the procedure; it is perfectly possible for the employment relationship to be destroyed by the way in which a grievance was handled even if the procedure does not apply.

173. It is not the case that the grievance was not addressed; CA met with the Claimant and another employee to discuss the issue and presented a number of options to resolve the issue; he subsequently put those in place in terms of having places for staff to take a break and the staggering of breaks so that there was someone to deal with service users rather than disturbing those on a break.

174. What he did not do was issue a formal written response to the grievance. The Tribunal does consider that it would be good practice to have done so and this was another instance of poor communication; a formal response would have made it clear to the employees involved in the grievance that the Respondent considered the matter at an end and could also have explained how the employees could appeal if they were not satisfied.

175. However, the Tribunal considers that the lack of a formal outcome letter (or similar communication) does not, in itself, destroy or seriously damage the employment relationship in circumstances where solutions to the issues raised in the grievance had been put in place. There may have been a lack of awareness of these by the Claimant given that she was off sick when the solutions were put in place and did not return to the workplace but, equally, there was no evidence that she specifically queried this before she resigned.

176. The Tribunal also notes that CA did not receive any further communication from any employee regarding the grievance after he put the solutions in place. There was nothing to suggest to him that staff were expecting some further communication from him regarding the outcome of the grievance or that they did not consider the grievance to have been resolved.

177. In these circumstances, the Tribunal does not consider that the failure to communicate a formal outcome to the grievance was sufficient to amount to a fundamental breach of trust and confidence.

178. For all the reasons set out above, the Tribunal does not consider that the Claimant has satisfied the *Malik* test and there was no fundamental breach of contract by the Respondent. The Claimant was not, therefore, dismissed as defined in s95(1)(c) of the Employment Rights Act and for this reason her claim for unfair dismissal is not well-founded. The claim is, therefore, dismissed.

Employment Judge: **P O'Donnell**
Date of Judgment: **17 November 2022**
Entered in register: **18 November 2022**
and copied to parties