



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100547/2022

**Held in Edinburgh on 28, 29, 30, 31 August, 1, 20, 21 September, 1 December 2022
(and Members' meeting on 2 December 2022)**

**Employment Judge: M Sutherland
Members: A Grant
S Gray**

Michal Baczak

**Claimant
In person**

Care UK Community Partnership Limited

**Respondent
Represented by:
Mr G Cunningham
(Counsel instructed
by J Shuster, Solicitor)**

**Interpreters
Mr Skocylas
Ms Kubikowska**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Tribunal is that the complaints of direct race discrimination, direct and indirect religious discrimination, and unfair dismissal do not succeed and the claim is accordingly dismissed.

REASONS

Introduction

1. The Claimant presented complaints of unfair dismissal, direct race discrimination, and direct and indirect religious discrimination.
2. The Claimant relies upon the racial group of being of Polish nationality and upon a Christian beliefs that the covid-19 ('covid') vaccine is morally wrong, and being forced to have a vaccine is ethically wrong.
3. The Claimant appeared on his own behalf. The Respondent was represented by Mr Cunningham, Counsel.
4. The Claimant's first language is not English and the services of an interpreter were provided.
5. The difference between direct and indirect discrimination was explained to the Claimant at a prior Case Management Preliminary Hearing and again at the final hearing. The Claimant confirmed that he was making a claim of direct race discrimination and not of indirect race discrimination.
6. Following discussion it was agreed having regard to time limitations that the final hearing would consider the issue of liability only with the issue of remedy being considered at a later date (if required).
7. The Claimant gave evidence on his own behalf. The Respondent led evidence from Suzanne Mumford (Lead Quality Development Manager), Leah Queripel (Director of HR), Gillian Goodall (Care Home Manager), and Nicola Ferguson (Operations Support Manager).
8. The parties lodged a joint set of documents. Additional documents were also lodged.
9. The parties made written and oral closing submissions.

List of Issues

10. The issues to be determined were as follows –

Religious belief

- a. Did the Claimant hold a religious belief that the covid vaccine was morally wrong because it may be based on the cells taken from aborted fetus used to develop or test the pathology of the vaccines, and/or that being forced (i.e. economically coerced) to have a vaccine is ethically wrong?

Direct Race Discrimination (Section 13 Equality Act 2010)

- b. Did the Respondent treat the Claimant less favourably than it treats or would treat others in the same circumstances by refusing to provide translation services because of his race (Polish)?
- c. Was this complaint made within 3 months of the refusal or such other period as the tribunal thinks just and equitable?

Direct Religious Discrimination (Section 13 Equality Act 2010)

- d. Did the Respondent treat the Claimant less favourably than it treats or would treat others in the same circumstances by dismissing him because of his religious belief?
- e. Was this complaint made within 3 months of the refusal or such other period as the tribunal thinks just and equitable?

Indirect Religious Discrimination (Section 19 Equality Act 2010)

- f. Did the requirement to be vaccinated against covid by 11 November 2021 in order to continue working (the 'Mandatory Vaccination Policy') amount to a provision, criterion or practice? Did the Respondent apply that Policy to the Claimant?
- g. Did or would the Respondent apply the Policy to persons who do not share the Claimant's religious belief?
- h. Did or would the application of the Policy put persons who share the Claimant's religious belief to a particular disadvantage in comparison with persons who do not share it?
- i. Did or would the application of the Policy put the Claimant to that disadvantage?
- j. Was a legitimate aim of the policy the health and wellbeing of its vulnerable residents? Was the application of the Policy a proportionate means of achieving that aim?

- k. Was this complaint made within 3 months of the refusal or such other period as the tribunal thinks just and equitable?

Unfair dismissal

- l. What was the reason (or, if more than one reason, the principal reason) for the Claimant's dismissal?
 - m. Was the reason for dismissal potentially fair being for some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held?
 - n. Was the dismissal fair having regard to Section 98(4) of the Employment Rights Act 1996 including whether in the circumstances the Respondent acted reasonably in treating it as a sufficient reason for dismissing the Claimant, taking into account the size and administrative resources, equity and the substantial merits of the case? Did the decision to dismiss (and the procedure adopted) fall within the 'range of reasonable responses' open to a reasonable employer? *Iceland Frozen Foods Ltd v Jones* 1983 ICR 17
11. The List of Issues previously agreed by the parties described that his belief is that "the bible is incompatible with the process of vaccination". In his further particulars the Claimant quoted passages from the bible about not consuming anything that causes you to stumble or fall, that he believed that you should not be "forced to take something or absorb anything into your body – which is against God's law"; that he had a "right not take anything into my body that was against the doctrine of my religion (vaccines may be based on the cells taken from aborted fetus used to develop or test the pathology of the vaccines)". It was confirmed with the Claimant at the start of the hearing that the Claimant considered the vaccine itself to be morally wrong and also he considered it to be ethically wrong to be forced (i.e. economically coerced) to have the vaccine. Having regard to the pleadings it is considered that a more accurate statement of his belief based upon his pleadings is that his Christian belief is that the covid vaccine is morally wrong, and being forced to have it is ethically wrong.

Findings in fact

12. The Respondent operated around 125 care homes in the UK (including 7 in Scotland) providing residential, nursing, day, respite, and end-of-life care. It

employed over 12,500 staff. Each care home had a care home manager who reported to an executive management team.

13. The Claimant was employed by the Respondent as a Care Assistant at a care home in Scotland from 9 July 2017 to 12 November 2021. His duties included providing daily personal care to residents in accordance with agreed programmes of care. The Claimant was regarded by the Respondent as a good employee.
14. The Claimant is a Christian who believes that the body is a temple and therefore a sin to harm it.

Managing covid in care homes

15. The health and safety of the residents and staff was of paramount importance to the Respondent including its executive management team and the wider staff. Their aim was to provide as much protection as reasonably possible particularly to their highly vulnerable residents during the covid pandemic.
16. Significant measures were taken by the Respondent to provide that protection through their infection prevention and control policy. Staff were required to wear PPE (including plastic aprons, visors, masks and goggles), to follow strict handwashing and distancing protocols, and to engage in daily LFT and twice weekly PCR testing. High touch points were cleaned frequently. Agency workers were block booked to avoid cross contamination from other homes. At times residents were confined to their rooms and visits from friends and family were prevented or restricted. These social isolation measures reduced risk to their physical health but significantly increased risk to their mental wellbeing.
17. The executive management team held lengthy conference calls each day to discuss and plan their response to the covid pandemic. They would consider and implement current guidance. The number of cases within the homes was tracked and monitored (including resident and staff infections and outcomes). The team would communicate their covid plans to staff through an online portal (which could be accessed from a work computer station or a personal device) and through the relevant Care Home Manager (who would disseminate information to staff at their daily meetings). Updates were issued regarding best practice on a weekly basis by the executive management team. Staff received regular

training and were supported, encouraged and supervised by the Care Home Managers.

18. Despite these protection measures there were around 1,000 excess deaths (either confirmed or inferred to be covid related) out of a resident population of around 7,500 within the Respondent care homes. The majority of their residents have dementia and are therefore more susceptible to catching covid and becoming seriously ill. In addition, around 13 staff were seriously ill or died as a result of covid. The majority of the covid related deaths occurred during the period March 2020 to April 2021. The number of covid cases within the care homes (resident and staff) reduced significantly in the period January to March 2021. Covid related deaths in the UK occurred disproportionately within care homes and these patterns reflected the position nationally.
19. Residents and staff working in a care home for older adults were eligible for the covid vaccine from December 2020. The Respondent and its managers informed, supported and encouraged staff and residents to take up the vaccine. The Respondent arranged a series of video seminars from medical experts (including a virologist) and faith leaders from the main religions to inform and encourage uptake. The vaccination uptake amongst residents and staff was tracked and its effect monitored. The executive management team held regular meetings with care home managers to discuss vaccine uptake and any staff reservations which centred around health concerns. The Respondent took steps to try to address staff concerns.
20. There was a noticeable correlation between administration of the first and second doses of the vaccine and a reduction in the number of covid transmissions and related deaths within the care homes. From 1 February 2021 the covid vaccination was a condition of employment for all new staff. The Respondent management team began to consider whether to make vaccination a condition of employment for existing staff. By mid 2021 around 60% of their staff had been vaccinated.

Vaccination as a condition of employment in English care homes

21. The UK Government hosted a public consultation from 14 April 2021 to 26 May 2021 on a proposal to make covid vaccination a condition of employment in care

homes with older adults in England. The Respondent provided a response to that consultation and participated in government consultation meetings. The UK Government produced impact assessments on their proposal in light of that consultation exercise. The Respondent's executive management team was aware of those impact assessments.

22. In their impact assessments the UK Government noted that: Residents in care homes are particularly vulnerable to severe illness and death from covid; care home staff are already subject to a regular testing regime and clinicians have advised that testing alone is not an effective mitigation; those who have the vaccine are much less likely to transmit covid; vaccine immunity is more effective than natural immunity; the vaccine has been approved as being safe and effective by the UK Medicines Regulatory Authority; around 84.1% of care home staff have already been vaccinated; the greater the vaccine uptake the greater the level of protection; making vaccination a condition of deployment in care homes is crucial to reduce risk of transmission, outbreaks, severe illness and deaths; under their proposals around 1% of staff would be eligible for medical exemption; and around 7% of staff would choose for various reasons to remain unvaccinated and would require to leave their employment.

23. The UK Government Equality Impact on the proposal noted:

"We have identified that this policy is likely to have a significant impact based on religion or belief. A number of people may be opposed to vaccination in principle due to their beliefs, either religious or nonreligious...People who hold these beliefs may therefore be likely to feel compelled to have a vaccine they do not want, or to lose their jobs, as a result of this policy. Staff may also face a situation in which they have to reveal their religion or beliefs to employers against their will, potentially exposing themselves to stigma or harassment from employers and colleagues who do not hold the same beliefs. The Muslim Council of Britain has shared information from the British Islamic Medical Association recommending that Muslims can take the Oxford/AstraZeneca vaccine. The Vatican has also announced that Catholics may use vaccines derived from foetal cell lines where alternatives are not available".

24. The UK Government considered whether to have exemptions for those who hold, and refuse the vaccine due to, religious beliefs but opted not to provide this exemption on the basis that:
- “Such an exemption would be difficult to implement and prove and would likely significantly reduce the impact of the policy in achieving its aims of increasing levels of protection for both residents and staff. It may also cause tension between those who have been exempted, and other staff who have received the vaccine, as a condition of deployment”*
25. The UK Government instead advised of their intention to proceed as follows -
- “We are mitigating opposition to the vaccine by ensuring that information regarding the ingredients of the vaccines is readily available to staff in care homes, as well as amplifying the voices of trusted community leaders and religious figures who can assuage concerns. We are also ensuring safety or efficacy concerns about the covid-19 vaccination are addressed through access to information, through projects such as the Community Champions scheme so that communities can look to trusted local leaders to answer questions about the vaccine and work locally with the NHS and public health teams”.*
26. The UK Government announced its intention to mandate vaccines for care home workers in June 2020. The Health and Social Care Act 2008 (Regulated Activities) (Amendment) (Coronavirus) Regulations 2021 were made on 22 July 2022 and came into force from 11 November 2021 (‘the English Mandatory Vaccine Regulations’). They required all care home registered in England to ensure that from 11 November 2021 only employees who were fully vaccinated be permitted to enter care home premises unless exempt. The exemptions were restricted to age (being under 18) and limited medical grounds. There was no religious exemption. There was no equivalent legislation in Scotland requiring care home staff to be vaccinated.
27. The English Mandatory Vaccination Regulations were ultimately revoked with effect from 15 March 2022.

Vaccination as a condition of employment in Scottish care homes

28. Prior to the UK Government consultation in April 2021 the Respondent had been considering making vaccination a condition of employment in all care homes. When the UK Government announced its intention to mandate this for care homes in England, the Respondent considered whether to extend this approach to Scotland. The Scottish Government had not made vaccines mandatory in care homes. The Claimant was not vaccinated and on or before May 2021 he swore to his mother he would not get vaccinated.
29. In June 2021 the Senior Management team considered whether to extend the mandatory vaccination policy to Scotland and decided to consult with Scottish staff about this. The main aim of the policy was to ensure the health and safety of staff and residents during the covid pandemic and also to ensure consistency of approach within all of its care homes.
30. The Respondent did not recognise a union and they did not consult with any union. There was no formal equality impact assessment of the policy. The Respondent took legal advice on their approach.
31. In August 2021 the Respondent sent a consultation document to all Scottish staff who had provided mobile numbers (92% of staff). The consultation document was not also sent to staff by email to avoid multiple responses. Around half of the Scottish staff completed the survey. At the time of the survey 87% of Scottish staff had been vaccinated and 13% of staff had not. According to the survey: around 72% of staff were in favour of making it mandatory (28% of staff were against); of those against some considered making it mandatory was contrary to their right of free choice, some had health concerns about the vaccine, and some believed that the vaccine did not provide protection; of those against mandatory vaccines 70% had already been vaccinated.
32. The staff were asked specific questions in the survey and given scope to comment. All the staff responses were anonymised. The questions and the Claimant's responses (which were disclosed on request during the final hearing) were as follows: Do you think the vaccine should not be made mandatory? "Do I think fascism is good? No I don't"; If we do not make the vaccine mandatory how will we make sure the care home is safe? "Nonsense"; What are the reasons you have not had the vaccine? The options available for selection were:

faith/belief; individual value; allergies, distrust in clinical data; underlying health condition; pregnancy/ breastfeeding; fertility concerns; negative reaction in others; lack of information; uncertainty of side effects; vaccine choice; pre-existing covid antibodies; other reasons. Four members of staff (including the Claimant) ticked all of the options. In relation to other reasons the Claimant stated “waste of time”. When providing written comment on the proposed policy of mandatory vaccines no member of staff mentioned religion or religious belief. Staff comments instead centred upon having the right to choose and health concerns.

33. The Respondent SMT considered the survey responses. A significant majority of staff were in favour of mandatory vaccination. The responses did not identify the need for an exception on grounds of religious belief. The Respondent was aware that religious leaders from all the main faiths were supportive of the vaccine. The Respondent was aware that a religious exemption had been considered by the government and had been discounted. The medical exemption could be independently and objectively determined by a GP. There was no equivalent means to independently and objectively determine an exemption on religious or philosophical grounds.
34. In August 2021 the Respondent drafted and adopted a Mandatory Vaccination Policy which applied the principles of the English Regulations to its Scottish care homes. However Scottish staff had an express right of appeal against dismissal but there was expressly no right to raise a grievance objecting to the mandatory vaccination policy itself.
35. The Mandatory Vaccination Policy in Scotland provided that from 11 November 2021 anyone entering the care home including staff, agency workers, and visitors must have completed the course of covid vaccination (i.e. both doses) unless medically exempt or under 18. Accordingly the first dose of vaccination required to have been administered by 16 September 2021. The Policy provided that informal vaccination status meetings were to be held with unvaccinated staff to explain the Mandatory Vaccination Policy, to discuss their concerns or reasons for not being vaccinated, to establish whether they intended to be fully vaccinated by 11 November, to explain that the first dose required to be administered by 16 September, and to warn that they are at risk of dismissal

unless exempt. The Policy provided that Formal meetings were to be held with staff who remained unvaccinated after 16 September and “a likely outcome of this meeting it that you are dismissed with notice.” The Policy sated that the Respondent was awaiting further advice on medical exemptions but this was likely to reflect The Green Book Chapter 14a and proof is likely to be in the form of a certificate. For those who were medically exempt, significant risk assessments would be undertaken and adjustments made with a view to reducing the risk including allocation to a limited number of non-contact roles within the home. It was however not possible to eliminate the risk of cross contamination.

36. In Scotland, 13% of staff were unvaccinated prior to introduction of the policy. After introduction of the policy, 3 staff self-certified but ultimately no staff were medically exempt, and 1% had their employment terminated as a result of the policy (8 out of a staff size of around 700 in Scotland). In addition some left voluntarily. Accordingly up to 12% of staff were persuaded to have the vaccine following the introduction of the Policy.
37. In relation to formal matters the Respondent would at times send letters to the Claimant. His new address had not been updated on the system and accordingly were sent by the Respondent to his old address. This meant that there was a fortnight's delay in him receiving some letters.
38. On 25 August 2021 the Respondent's CEO wrote to staff including the Claimant. It explained the need for the policy, that “vaccinated people are less likely to get infected, less likely to suffer serious side effects and less likely to spread the virus to others”. It further stated: “We are implementing a policy that aligns all our homes in the UK. This means that from 11 November 2021, all care home colleagues, and anyone going into one of our care homes, will need to have completed their course of covid-19 vaccination (both doses), unless they can evidence an official medical exemption. This means that the first dose of vaccination must be taken by Thursday 16th September 2021 to allow for the eight week gap between doses. If you are not able to comply with the policy from 11 November 2021, you will not be allowed to enter a Care UK home. Your line manager will discuss with you what steps we will take to comply with this policy.” It further stated: “We know there are many reasons for vaccine hesitancy and

have compiled a collection of resources and information about the vaccines on the Care UK intranet - mycareuk.com. This includes information provided by various religious and community groups and from organisations like the British fertility society. Your manager can help you access this information and will also be able to help you with how to book your vaccination.”

Informal vaccination status meeting

39. On 17 September 2021 the Claimant had an informal vaccination status meeting with the Care Home Manager, Gillian Goodall who was his line manager. She explained their mandatory vaccination policy and explained that if not fully vaccinated by 11 November 2021 he was at risk of dismissal. She asked him if there was any particular reason he did not want to get the vaccine. The Claimant advised that there were many many reasons, like religious reasons, like ill health in the past. The Claimant did not explain his religious reasons. His manager asked him if he would ever consider getting the vaccine. The Claimant advised that he was concerned about the long term effects of the vaccine but if after 5 year checks it was safe then he would probably have it. The Claimant wanted to know if the company would take any financial responsibility for the side effects of the vaccine. She explained the company weren't paying sick pay for side effects but if he was off sick with covid having been vaccinated he would be paid (but not if he wasn't). His manager understood that he did ultimately intend to be vaccinated but not by the 11 November 2021 deadline. The Care Home Manager wrote to him summarising their meeting.
40. The Claimant then contacted his GP Practice and asked them to provide a Medical Exemption Certificate. The Practice advised that they were unable to do so because mandatory vaccine was not a legal requirement in Scotland.
41. On 6 October 2021 the Claimant was invited to a formal meeting with the Care Home Manager to discuss his decision not to receive the vaccine, advising him of his right to be accompanied by a union rep or a colleague, and warning him that he was at risk of dismissal with notice in view of their Mandatory Vaccination Policy.
42. On 8 October 2021 the Claimant emailed the Care Home Manager to request that all written documentation be provided in Polish; to advise the financial

arrangements should he have an adverse reaction to the vaccine; to advise that he has taken legal advice and contacted a Scottish Minister who advised the Scottish government have not mandated vaccines in Scotland; and to ask what risk assessments have been carried out regarding unvaccinated staff continuing to enter the home. He did not raise any concern regarding his religious beliefs.

43. On 11 October he was provided a response explaining the policy and that he has a choice as to whether he receives the vaccine but he will not be allowed to enter the home after 11 November if he has not been vaccinated. He was advised that he was allowed to attend with an interpreter. He was invited to discuss his concerns. The Claimant considered that this response amounted to unlawful discrimination. He was not aware that he required to make a claim within 3 months. He did not seek legal advice or otherwise investigate how to enforce his rights.
44. The Claimant is of Polish origin and his first language is not English.. The Claimant's command of written and spoken English was good but there were occasional words he struggled with. The Claimant did not experience any material difficulty in understanding the documentation provided to him, in understanding what was being discussed at the meetings, in expressing himself in writing or in making himself understood at the meetings. There was no significant point in relation to the Policy and its application to him that he did not understand or fail to express because English was not his first language.

First formal vaccination status meeting

45. On 12 October 2021 the Claimant attended a formal vaccination status meeting with the Care Home Manager. The Claimant was not accompanied. During the meeting the Claimant advised that he believed he is medically exempt from vaccination, but he can't get an medical exemption certificate from his GP and he is trying to get documents from Poland. The Claimant did not advise the basis upon which he asserted medical exemption. The Claimant asserted that there wasn't any consultation on the Mandatory Vaccination Policy and that the Policy above Scottish Law which has not mandated vaccines (and was therefore unlawful). He suggested that they could give him an alternative non-resident facing role but she explained that the policy applies to all staff. All staff at the

care home come into contact with residents either directly or indirectly. He asked why they hadn't carried out a risk assessment and she explained he would not be able to enter the home so there was no risk to assess. He asked about financial compensation for side effects from the vaccine and she explained that he would only receive SSP. He asked why they held data on his vaccination status and she explained that it was only accessed by managers and they needed to know this because of the Policy. He advised having asked for a translation but they didn't answer and he feels that is discrimination. She explained that they won't provide an interpreter or an interpretation but he can bring his own interpreter. He explained that he still believed that the vaccine should be a choice and not a requirement in order to keep his job. Having taken advice during the meeting she asked him to fill in the self-certification medical exemption form which would then be checked to see if he fell into one of the exemption categories. She provided him with a self-certification medical exemption form to complete. She stressed the importance of doing this before 11 November and he agreed to provide it by next week. He did not mention his religion during the course of that meeting.

46. The self-certification medical exemption form gave a number of examples of exemptions. The form required the employee to certify that they met the medical criteria. The form explained that staff would be given a temporary exemption for 12 weeks during which time they would require to provide medical evidence or obtain the vaccine. The form noted that providing false information may result in disciplinary action. The Claimant did not submit a self-certification form because of a concern that he could be disciplined for providing false information.

Second Formal Vaccination Meeting

47. On 9 November 2021 the Claimant attended a second formal vaccination status meeting with the Care Home Manager. He was not accompanied. He advised that he was in touch with his GP in Poland 3 months ago but he still hadn't got anything back. It was noted that he had not completed the self certification form. He was also asked to get in touch with the NHS. In the circumstances he was dismissed with notice because he would not be fully vaccinated by 11 November and he had not provided the necessary documentation in respect of a possible

medical exemption (either a medical certificate / evidence or a self certification form). The Claimant was advised in error that he had no right of appeal.

Appeal against dismissal

48. On 11 November 2021 the Claimant submitted his appeal, along with a colleague, on the ground that it's not a real choice because if they say no to vaccination they have no job, and that they should be allowed to continue without vaccination because they still follow infection control. The Claimant did not mention his religion or medical exemption in that appeal.
49. On 19 November 2021 the Claimant attended an appeal hearing with Nicola Ferguson, Operations Support Manager. He advised that he believed he was medically exempt on account of an issue had as a teenager but he had no records to prove it and needs more time. It was confirmed that he was unable to provide evidence from his GP or the NHS that he had a condition which would make him medically exempt. It was confirmed that he is unable to meet the requirement to be vaccinated by 11 November 2021. The decision to dismiss was therefore upheld.

Observations on the evidence

50. The standard of proof is on balance of probabilities, which means that if the Tribunal considers that, on the evidence, the occurrence of an event was more likely than not, then the Tribunal is satisfied that the event did occur. Facts may be proven by direct evidence (primary facts) or by reasonable inference drawn from primary facts (secondary facts).
51. The Respondents' witnesses came across as entirely credible and reliable in their testimony which was fair and measured, and consistent with the documentary evidence. The Claimant's testimony came across at times as somewhat self-serving for the reasons noted below.

Religious belief

52. The Claimant asserted in his claim that he did not have the vaccination "as it goes against my religious beliefs and also because when I was younger I had a heart arrhythmia and I was concerned that the vaccination would cause me health problems".

53. It is not disputed that the Claimant is a Christian. He prays regularly but does not attend a church. In evidence he read some passages from the Bible including that “it is wrong for a person to eat anything that causes someone else to stumble. It is better not to eat meat or drink wine or to do anything else that will cause your brother or sister to fall” (Romans 14:20-21). He believes that the body is a temple and therefore a sin to harm it (“what is against the body is against God”).
54. The Claimant is very health conscious and exercises regularly and eats healthily. He lives a healthy life, participating in sport, and eating healthy food. He’s spent “years of work on improving himself”. He tries to avoid taking conventional medication but is not against it in principle and would take it where need arose (e.g. “I try not to take antibiotics”). However where possible he prefers to use natural substances (e.g. he has visible tattoos created using organic natural ink). He tries to do what is best for his body and tries not to take anything that will damage it.
55. The Claimant expressed significant concerns about the safety of the vaccine which he considered presented a risk to his health. He was concerned that the vaccine was introduced so quickly without lengthy clinical trials. He thought some patients at the care home had died because of the vaccine. His evidence on whether he would have the vaccine if it was healthy and safe was contradictory. He accepted having previously said that he would have it once it was safe but asserted he only said that to keep a job. That explanation was not considered credible given his strong focus on health and his significant concerns about its safety. It was apparent that the Claimant would have had the vaccine had he considered it to be safe.
56. The Claimant believes that being forced to absorb anything into the body is a sin and amounted to fascism or a dictatorship. He described the fight against mandatory vaccines in Poland. Whilst he was not physically forced to have the vaccine, he considered that making the vaccine a condition of his employment amounted to coercion because of the threat of dismissal and its economic consequences and was therefore ethically wrong.
57. He felt having the vaccine would dishonour the memory of his mother whom he nursed through lung cancer. He advised that she was a Christian who decided

against having the covid vaccination despite being terminally ill. Before the death of his mother in May 2021 he swore to her he would not get vaccinated having spent “years of work on improving himself.” He asserted the strength of his belief could be inferred through his decision to face the significant financial consequences of dismissal.

58. He asserted in his claim that the vaccine was contrary to his beliefs because “vaccines may be based on the cells taken from aborted fetus used to develop or test the pathology of the vaccines”. Compared with the scale of his evidence on the risk to personal health the Claimant gave little evidence in chief to this effect. Foetal cells lines have been used to develop and test other medications. When asked he was unable to advise any other medication he avoided because of that asserted belief. Whilst this may be the belief of some Christians it was apparent from his evidence that this did not represent his a belief held by him. Instead this assertion appeared to be the product of research undertaken after his dismissal.
59. The Claimant did not hold a religious (or philosophical) belief that the vaccine was morally wrong. He did not want to have the vaccine because he was concerned it was unsafe. That concern was based upon the current state of knowledge. If it was considered safe (after 5 year checks) he would have it. The fact that he was of Christian faith and the fact that he believed the vaccine to be unsafe did not render that belief to be a Christian belief.

Religious and philosophical belief exemption

60. The Claimant asserted that the Respondent should have either not introduced the policy at all or introduced an exemption on religious and philosophical grounds. He considered that the care home could have either taken an asserted belief on trust or made enquiries as to whether the worker seeking the extension genuinely held the belief. Having regard to the survey he thought a number of employees felt that way and they would choose to be exempt. It was anticipated that many of those who had elected not to be vaccinated would seek to rely upon such an exemption whether or not they held a religious or philosophical belief.

Failure to consult on unlawful policy

61. The Claimant believed that because there was no law in Scotland on mandatory vaccines it was unlawful for the Respondent to introduce a mandatory vaccination policy in Scotland.
62. The Claimant asserts in his claim that the Policy was introduced without consultation with staff. In evidence he accepted that there was online consultation which he had forgotten about.
63. The Claimant asserted in his claim that he had highlighted several times that he had religious reasons for having the vaccine and he had repeated this in meetings with the Care Home Manager. This was not supported by the evidence. He accepted that he had raised this with the Care Home Manager on only one occasion. On 17 September 2021 the Care Home Manager had asked him if there was any particular reason he did not want to get the vaccine. He advised that there were many many reasons, like religious reasons, like ill health in the past. The Claimant never articulated any religious belief and he did not raise his religion again.
64. The Claimant asserted in his claim that he was not given the opportunity to explain his religious beliefs. This was not supported by the evidence. The Claimant attended several meetings at which he had ample opportunity to explain his beliefs.
65. The Claimant asserted in his claim that his religious beliefs were deliberately avoided and ignored. This was not supported by the evidence. His religious beliefs, to the extent that he had raised them, were captured in the notes of the meeting and noted in the outcome letter. It is however accepted that he was not asked to provide further information regarding his religious beliefs (although he was given the opportunity to present this). It is also accepted that he was advised that only medical grounds could provide a basis for an exemption.

Health and safety

66. The Claimant accepted that health and safety was the aim of the policy but he disputed that the policy improved health and safety.
67. The Claimant in evidence was highly sceptical that the Covid pandemic had resulted in significant excess deaths within care homes despite being presented

- with both statistical evidence and first hand accounts. He considered that the mass media had disseminated false information about the Covid pandemic.
68. The Claimant asserted in his claim and in evidence that he had acquired natural immunity by having the vaccination twice. There was no expert evidence to that effect. The available evidence was that the vaccine was more effective than natural immunity.
 69. The Claimant asserted in evidence that the vaccine was not effective. His personal experience was that those who had the vaccine remained at the same risk. There was no expert evidence to that effect. The evidence available was that the vaccine was effective at reducing risk both to the recipient and others of transmission, infection, serious illness and death.
 70. The Claimant asserted in his claim that the care home didn't carry out a risk assessment to ascertain if his working in the care home presented a risk to the residents. The evidence available was that an unvaccinated person working in the care home presented a greater risk to the residents.
 71. The Claimant believed that the vaccine might cause him an allergic reaction but he did not produce any evidence to this effect and he did not advise falling into any of the known risk categories.

Medical Exemption/ health concerns

72. The Claimant asserted in his claim that he did not have the vaccination "as it goes against my religious beliefs and also because when I was younger I had a heart arrhythmia and I was concerned that the vaccination would cause me health problems". The Claimant stated in evidence that this was identified in his late teens/ early 20s and that he was not in receipt of medication or treatment.
73. When asked during the vaccination status meetings why he had not had the vaccine, the Claimant advised the Respondent that there were many many reasons, like religious reasons, like ill health in the past, and also like long term / side effects of the vaccine. Although he asserted he was medically exempt he did not assert that he had a condition which fell within the defined medical exemptions. He did not provide any information regarding any risk to his health.
74. The Claimant did not provide the Respondent with any medical evidence that the vaccination presented a risk to his health (and he did not provide any medical evidence at this hearing). It is accepted that when the Claimant contacted his

medical practice asking for a certificate that was declined as unnecessary in Scotland. However when that was declined it was unclear why he did not make arrangements to obtain his medical records from his GP in Scotland (having lived in the UK for 20 years) and only sought to obtain medical information from Poland which was historic and had not been forthcoming.

75. The Claimant asserted in his claim that he was pressured to produce medical information from Poland regarding his medical exemption. There was no evidence that he was pressured to do so. Rather the Claimant was advised of the need to produce medical evidence and he sought to obtain this from Poland.
76. The Claimant was given the opportunity to submit a self-certification form but he did not do so because of a concern that he could be disciplined for providing false information.
77. It is considered likely that the vaccine did not present any material risk to his health, that the Claimant did not have any concerns stemming from his particular own health (he described himself as very healthy), and that his concerns stemmed from a scepticism about the safety and effectiveness of the vaccine generally.

Regular testing

78. The Claimant asserted in evidence daily lateral flow tests provided a viable alternative to the vaccine. The available evidence was that: a person who has contracted covid has a latent and then an infectious phase; a person may be asymptomatic during the infectious phase; covid tests (particularly LFTs) are less reliable when a person is asymptomatic (i.e. there is a greater risk of a false negative); a person may therefore be infectious and at risk of transmitting covid before they have any symptoms and before they test positive. Accordingly, whilst regular testing does assist with infection control it does not provide wholly reliable protection against transmission and it does not provide the other benefits of vaccination of reducing risk of serious illness or death.

Alternative role

79. The Claimant asserted in evidence that he should have been given an alternative role instead of dismissed. The evidence was that staff at the care home come into contact with residents either directly or indirectly. Accordingly, there were no

alternative roles that did not have some degree of risk which is why the policy applied to all staff.

Command of English

80. The Claimant is of Polish origin and his first language is not English.
81. The Claimant has lived and worked in the UK for 20 years. The Claimant required to have a good command of English in order to undertake his role of Care Assistant which required reading and understanding agreed programmes of care, communicating with the residents, and completing daily records.
82. It was apparent from the final hearing that his command of written and spoken English is good but he is not fluent and there are some words with which he struggles. The Claimant was provided with an interpreter during the final hearing but for much of the hearing he elected to dispense with their services. On occasions however he would require them to translate a passage, particularly when a legal or technical word had been used. There was no evidence that his command of English had changed during the few months between dismissal
83. In the circumstances it is apparent that the Claimant did not experience any material difficulty in understanding the documentation provided to him, in understanding what was being discussed at the meetings, in expressing himself in writing or in making himself understood at the meetings. There was no significant point in relation to the Policy and its application to him that he did not understand or fail to express because English was not his first language.

The law

Protected characteristic

Religion or belief

84. Under Section 10 of the Equalities Act 2010 ('EA 10') a religion means any religion and a reference to religion includes a reference to a lack of religion and belief means any religious or philosophical belief and a reference to belief includes a reference to a lack of belief.
85. The Equality and Human Rights Commission Code of Practice on Employment ("EHCR Code") is not an authoritative statement of the law but tribunals must take into account any part that is relevant.

86. The EHCR Code at para. 2.53 provides that the term 'religion' includes the more commonly recognised religions in the UK. Denominations or sects within religions may also be considered a religion. A religion need not be mainstream or well known to gain protection as a religion. However, it must have a clear structure and belief system.
87. The EHCR Code at para. 2.56 provides that a 'Religious belief' goes beyond beliefs about and adherence to a religion or its central articles of faith and may vary from person to person within the same religion. A belief must affect how a person lives their life or perceives the world.
88. A tribunal should not seek to determine whether the belief is a core belief of the relevant religion (*Mba v London Borough of Merton 2014 ICR 357, Court of Appeal*). The issue is whether the person genuinely holds that belief. This is a limited inquiry to ensure the assertion is made in good faith (*R (Williamson) v Secretary of State for Education and Employment [2005] UKHL 15, House of Lords*).
89. For a religious or philosophical belief to be protected under the Act: it must be genuinely held; it must be a belief and not an opinion or viewpoint based on the present state of information available; it must be a belief as to a weighty and substantial aspect of human life and behaviour; it must attain a certain level of cogency, seriousness, cohesion and importance; it must be worthy of respect in a democratic society, not incompatible with human dignity and not conflict with the fundamental rights of others (*Grainger plc v Nicholson [2010] ICR 360*). There is no distinction in the tests to be applied to religious and philosophical beliefs (*Gray v Mulberry Company (Design) Ltd UKEAT/0040/17/DA*).

Racial group

90. Section 9 EA 10 provides that a reference to a person who has the protected characteristic of race is a reference to a person of a particular racial group defined by reference to colour, nationality, ethnic or national origins.

Direct Discrimination

91. Section 13(1) EA 2010 provides: “A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.”
92. Direct discrimination requires consideration of whether the claimant was treated less favourably than others and whether the reason for that treatment was because of a protected characteristic.
93. The Tribunal may consider firstly whether the claimant received less favourable treatment than the appropriate comparator and then secondly whether the less favourable treatment was on discriminatory grounds. However, and especially where the appropriate comparator is disputed or hypothetical, the less favourable issue may be resolved by first considering the reason why issue. “It will often be meaningless to ask who is the appropriate comparator, and how they would have been treated, without asking the reason why” (*Shamoon v The Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337)

Less favourable treatment

94. The claimant must have been treated less favourably than a real or hypothetical comparator. If there is no less favourable treatment there is no requirement to consider the reason why.
95. Under Section 23 of EA 2010 there must be no material differences between the relevant circumstances of the Claimant and their comparator. The comparison must be like with like (*Shamoon*).
96. The Tribunal may consider how an actual real person has been treated in the same circumstances or, if necessary, consider how a hypothetical person would have been treated in those circumstances. In determining how a hypothetical comparator would have been treated, it is legitimate to draw inferences from how an actual comparator in non-identical but not wholly dissimilar cases has been treated.

The reason why

97. The reason for the treatment need not be the main or sole reason but must have at least a significant (or more than trivial) influence on the treatment to amount to an effective cause of it. In “reason why” cases the matter is dispositive upon determination of the alleged discriminator’s state of mind. In “criterion cases” there is no need to consider the alleged discriminator’s state of mind when the treatment complained of is caused by the application of a criterion which is inherently or indissociably discriminatory (*R (E) v Governing Body of JFS* [2010] 2AC 728, SC).
98. Direct discrimination may be intentional or it may be subconscious (based upon stereotypical assumptions). The tribunal must consider the conscious or subconscious mental processes which caused the employer to act. This is not necessarily a question of motive or purpose and is not restricted to considering ‘but for’ the protected characteristic would the treatment have occurred (*Shamoon*).
99. The reason why may be proven by direct evidence (primary facts) or by reasonable inference drawn from primary facts (secondary facts).

Standard of Proof

100. Proof of facts is on balance of probabilities. Facts may be proven by direct evidence (primary facts) or by reasonable inference drawn from primary facts (secondary facts).

Burden of Proof

101. Section 136(2) of EA 2010 provides that “(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravenes the provision concerned, the court must hold that the contravention occurred. (3) But subsection (2) does not apply if A shows that A did not contravene the provisions”.

102. The burden of proof provisions apply where the facts relevant to determining discrimination are in doubt. The burden of proof provisions are not relevant where the facts are not disputed or the tribunal is in a position to make positive findings on the evidence (*Hewage v Grampian Health Board* [2012] UKSC 37, SC).
103. The burden of proof is considered in two stages. If the claimant does not satisfy the burden of Stage 1 their claim will fail. If the respondent does not satisfy the burden of Stage 2, if required, the claim will succeed (*Igen v Wong* [2005] ICR 935)

Stage 1 – prima facie case

104. It is for the claimant to prove facts from which the tribunal *could* conclude, in the absence of an adequate explanation, that the respondent has treated the claimant less favourably because of a protected characteristic ('Stage 1' *prima facie* case).
105. Having a protected characteristic and there being a difference in treatment is not sufficient (*Madarassy v Nomura International Plc* [2007] ICR 867). The claimant must also prove a Stage 1 *prima facie* case regarding the reason for difference in treatment by way of "something more".
106. It is unusual to have direct evidence as to the reason for the treatment (discrimination may not be intentional and may be the product of unconscious bias or discriminatory assumptions) (*Nagarajan v London Regional Transport* [1999] 4 All ER 65). Evidence of the reason for the treatment will ordinarily be by reasonable inference from primary facts.
107. At Stage 1 proof is of a *prima facie* case and requires relevant facts from which the tribunal could infer the reason. Relevant facts in appropriate cases may include evasive or equivocal replies to questions or requests for information; failure to comply with a relevant code of practice; the context in which the treatment has occurred including statistical data; the reason for the treatment (*Madarassy*). "In so far as this [information] was in the hands of the employer, the claimant could have identified the information required and requested that it

be provided voluntarily or, if that was refused, by obtaining an order from the Tribunal” (*Efobi v Royal Mail Group* [2019] EWCA Civ 19, CA).

108. Assessment of Stage 1 is based upon all the evidence adduced by both the claimant and the respondent but excluding the absence of an adequate (i.e. non-discriminatory) explanation for the treatment (which is relevant only to Stage 2) (*Madarassy*). All relevant facts should be considered but not the respondent’s explanation, or the absence of any such explanation (*Laing v Manchester City Council* [2006] ICR 1519, EAT and *Efobi*). (The respondent’s explanation for its conduct provides the reason why he has done what could be considered a discriminatory act.) “Most cases turn on the accumulation of multiple findings of primary fact, from which the court or tribunal is invited to draw an inference of a discriminatory explanation of those facts” (*Madarassy*). “In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts” (*Igen; Hewage*).

Stage 2 – rebutting inference

109. If the claimant satisfies Stage 1, it is then for the respondent to prove that the respondent has not treated the claimant less favourably because of a protected characteristic (Stage 2).
110. The employer must seek to rebut the inference of discrimination by explaining why he has acted as he has (*Laing*). The treatment must be “in no sense whatsoever” because of the protected characteristic (*Barton v Investec* 2003 IRC 1205 EAT). The explanation must be sufficiently adequate and cogent to discharge the burden and this will depend on the strength of the Stage 1 *prima facie* case (*Network Rail Infrastructure Limited v Griffiths Henry* 2006 IRLR 865).
111. The Tribunal may elect to bypass Stage 1 and proceed straight to Stage 2, if they are satisfied that the reason for the less favourable treatment is fully adequate and cogent (*Laing*).

Time Limit

112. Under Section 123 a complaint of direct discrimination may not be made after the end of the period of three months starting with the date of the act or such period as the tribunal thinks just and equitable. The three-month time limit may be subject to an extension of time to facilitate ACAS Early Conciliation.

Indirect discrimination

113. Indirect discrimination arises under Section 19 of the Equality Act 2010 where: an employer applies a provision, criterion or practice ('PCP') to a worker; the employer applies or would apply that PCP to persons who do not share the worker's protected characteristic and persons who do; the application of the PCP did or would put persons who share the Claimant's protected characteristic to a particular disadvantage in comparison with persons who do not share it ('group disadvantage'); the application of the PCP did or would put the Claimant at that disadvantage ('individual disadvantage'); and the employer cannot show it to be a proportionate means of achieving a legitimate aim ('objective justification').
114. The burden of proof is on the Claimant to prove the PCP, group and individual disadvantage. If established, the burden of proof is on the Respondent to prove objective justification.
115. Direct discrimination is aimed at inequality of treatment; indirect discrimination is aimed at equality of treatment which has an inequality of results (*Essop v Home Office; Naeem v Secretary of State for Justice [2017] UKSC 27*). Direct and indirect discrimination are therefore mutually exclusive.

Application of a provision, criterion or practice

116. The PCP must have been applied or would have been applied to the worker and others. Indirect discrimination may therefore arise where a PCP has not yet been applied.
117. It is for the Claimant to identify the PCP relied upon in making the complaint. The words "provision, criterion or practice" are cumulative and do not require an absolute bar (*British Airways plc v Starmmer [2005] IRLR 862, EAT*) but do not

include every act that results in inequality (*Ishola v Transport for London [2020] EWCA Civ 112*).

118. The phrase PCP should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions (para 4.5 ECHR Code).
119. A one off decision may amount to a practice if that decision would be applied in similar situations in the future (*Ishola*).

Group disadvantage

120. Group disadvantage arises where the application of the PCP did or would put persons who share the Claimant's protected characteristic to a particular disadvantage in comparison with persons who do not share it.
121. The disadvantage does not require to be serious, obvious or significant and includes any type of disadvantage.
122. Direct discrimination requires a causal link between the less favourable treatment and the protected characteristic. Indirect discrimination does not. Instead it requires a causal link between the PCP and the particular disadvantage. However there is no requirement to show why it does by identifying the context factor (*Essop*).
123. The comparison is with persons whose relevant circumstances are the same, or not materially different from the claimant, apart from the protected characteristic (Section 23(1) EA 2010). However the pool must not be artificially restricted by reference to the characteristic itself (because "such an approach would drive a coach and horses through the indirect discrimination provisions") (*Spicer v Government of Spain [2004] EWCA Civ 1046, Court of Appeal*). The pool must suitably test the discrimination complained of and "the pool should not be so drawn as to incorporate the disputed condition" (*Naeem v Secretary of State for Justice [2017] UKSC 27*). Once the PCP has been identified "there is likely to be only one pool which serves to test its effect" as a matter of logic (*Allonby v Accrington and Rossendale College and others [2001] ICR 1189*).
124. All the workers to whom the PCP is applied should be included within the pool. In general the pool for comparison should consist of the group which the PCP affects (or would affect) either positively or negatively, while excluding workers

who are not affected by it, either positively or negatively (4.18 EHRC Code) (*Essop*). The pool is all persons who would satisfy the relevant criteria apart from the PCP in question (*University of Manchester v Jones 1993 ICR 474, CA*). The pool may be external where the PCP affects potential applicants for work, or it may be internal where the PCP only affects a section of an existing workforce, provided it is properly representative.

125. Looking at the pool, a comparison must be made between the impact of the PCP on those with the relevant protected characteristic and the its impact on those without (4.19 EHRC Code).
126. Particular disadvantage may be established by quantitative and/or qualitative means e.g. by statistical evidence, personal testimony or expert evidence (*Homer v Chief Constable of West Yorkshire Police [2012] UKSC 15*). However, “sometimes, a PCP is intrinsically liable to disadvantage a group with a particular protected characteristic” (4.10 EHRC Code).
127. For indirect religious discrimination there must be a group of believers, including the Claimant, which the PCP puts at a disadvantage (*MBA*). In that case the PCP was the requirement to work Sunday shifts as rostered; the protected characteristic was her Christian belief that Sunday is for worship not work which led to her resignation. The Court of Appeal held it was necessary to consider the quantitative questions of whether some others held that belief and would be similarly disadvantaged by the PCP (in addition to the qualitative question of whether the belief was genuinely held).
128. *In Pendleton v Derbyshire County Council [2016] IRLR 580, EAT*, the PCP was the practice of treating as gross misconduct the failure to end a relationship with a person convicted of making indecent images of children. The protected characteristic was the holding of the religious belief that marriage vows were sacrosanct arising from vows made before God. The group to whom the PCP applied was those in long-term loving relationships. In considering comparative collective disadvantage it does not matter that some who share the belief might nevertheless end their relationship and some who did not might not. The issue is whether there is a particular disadvantage to those in the group who share the belief. The EAT found that those sharing the Claimant’s belief would suffer a

particular disadvantage given the crisis of conscience they would face. The PCP was intrinsically liable to put them to a disadvantage if the same circumstances arose. “Equally, I recognise there may be other forms of belief that could give rise to a particular disadvantage in the same circumstances” (Judge Eady QC).

129. In *Trayhorn v Secretary of State for Justice [2018] IRLR 502, EAT* the PCP was the application of their Equalities Policy. The protected characteristic was his Christian and/or Pentecostal religion belief. The particular disadvantage was being dismissed for speaking about homosexuality as a sin in his role as volunteer chaplain at a prison. It was held that it was necessary to consider whether there was any group disadvantage to others but the threshold is not a high one.
130. In *Gray v Mulberry Company (Design) Ltd [2019] EWCA Civ 1720* the PCP was a requirement to sign a copyright agreement. The Claimant refused to do so because she said it conflicted with her belief in the moral right to the copyright of her own creative work and was dismissed. The Court of Appeal held that there required to be evidence that the others who shared her belief would be put to the same disadvantage

Individual disadvantage

131. The application of the PCP must put the Claimant to the same disadvantage as the group. There must be a causal link between the PCP and the disadvantage suffered by the individual (*Essop*).

Objective justification

132. A particular disadvantage may be objectively justified if it is a proportionate means of achieving a legitimate aim.
133. The onus is upon the Respondent to establish justification. The test is objective and is therefore not limited to what the Respondent considered at the time of its application. Although judged at the time of application the justification does not have to have been consciously and contemporaneously considered by the Respondent. Justification may be established by reasoned and rational judgement (*Chief Constable of West Yorkshire Police and anor v Homer 2009 ICR 223, EAT*).

Legitimate aim

134. A legitimate aim must be legal, should not be discriminatory in itself, and it must represent a real, objective consideration (4.28 EHRC Code). The health, welfare and safety of individuals may constitute a legitimate aim.
135. Reasonable business needs and economic efficiency may be legitimate aims but solely aiming to reduce costs does not (4.29 EHRC Code).

Proportionate means

136. In deciding whether the means adopted to achieve the legitimate aim are proportionate the tribunal must apply an objective test based upon a fair and detailed analysis of the working practices, business considerations and needs of the employer and the discriminatory effect of the means adopted (*Hardy and Hansons plc v Lax 2005 ICR 1565, Court of Appeal*).
137. The tribunal must conduct a balancing exercise between the discriminatory effects of PCP against the employer's legitimate aim taking into account all relevant facts (4.30 EHRC Code). An objective balance must be struck between the discriminatory effect and reasonable need (*Hampson v Department of Education and Science 1989 ICR 179, CA*) The PCP must be justified having regard to the quantitative and qualitative effective on the disadvantaged group (including the Claimant) rather than just the individual claimant (*University of Manchester v Jones 1993 ICR 474, CA, the Court of Appeal*).
138. A PCP is proportionate if it is an appropriate and necessary means of achieving a legitimate aim. (4.31 EHRC Code). "Necessary" means reasonably necessary – the employer does not have to demonstrate that no other means are possible (*Chief Constable of West Yorkshire Police v Homer [2012] UKSC 15, [2012] IRLR 590*) but there must not be a less discriminatory measure which would have achieved the legitimate aim. An exception may be made to accommodate a protected group but not if doing so would undermine the aim (*Blackburn and anor v Chief Constable of West Midlands Police 2009 IRLR 135, Court of Appeal*).
139. Cost can only be taken into account as part of the employer's justification if there are other good reasons for adopting the PCP (4.32 EHRC Code).
140. It is an objective test and after the event justification is permitted. Unlike the test for unfairness of dismissal, there is no range of reasonable responses (*Hardy*).

The tribunal must make its own fair and detailed analysis of the working practices and business considerations in order to determine whether the PCP was reasonably necessary. As such a discriminatory dismissal may nevertheless be fair and a non-discriminatory dismissal may nevertheless be unfair.

141. In the *MBA case the Court of Appeal* upheld the finding of the tribunal that the claimant's dismissal for refusing to work Sundays had involved the application of a 'PCP' which was a proportionate means of achieving a legitimate aim because it was a requirement of her contract and there was no viable or practicable alternative. Ordinarily the greater the discriminatory impact (including the size of the group) the greater the justification required. However where the right to religious freedom under Article 9 is engaged this does not require consideration of the scale of group disadvantage:

“Assuming that the employer's criterion is designed to achieve a legitimate end, the greater the number of employees affected, the more difficult it is likely to be for an employer to accommodate those beliefs in a way which is compatible with his business objectives. So paradoxically, if a belief is not widely shared, which is more likely to be the case where it is not a core belief of a particular religion, that is a factor which under Article 9 is likely to work in favour of the employee rather than against” (LJ Elias)

Unfair dismissal

142. Section 94 of Employment Rights Act 1996 ('ERA 1996') provides an employee with the right not be unfairly dismissed by the Respondent. To qualify an employee must generally have 2 years continuous service (Section 108).
143. It is for the Respondent to prove the reason for the Claimant's dismissal and that the reason is a potentially fair reason in terms of Section 98 ERA 1996. At this first stage of enquiry the Respondent does not have to prove that the reason did justify the dismissal merely that it was capable of doing so. A dismissal is potentially fair if it is for 'some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held' (Section 98(1)(b)). It must be substantial and not frivolous, trivial or inadmissible (*Willow Oak Developments Ltd v Silverwood 2006 ICR 1552, CA*).

144. A reason for dismissal is a set of facts known to the employer, or beliefs held by him, which cause him to dismiss the employee (*Abernethy v Mott, Hay and Anderson 1974 ICR 323, CA*).
145. If the reason for her dismissal is potentially fair, the Tribunal must determine in accordance with equity and the substantial merits of the case whether the dismissal is fair or unfair under Section 98(4) ERA 1996. This depends whether in the circumstances (including the size and administrative resources of the Respondent's undertaking) the Respondent acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the Claimant. At this second stage of enquiry the onus of proof is neutral.
146. In determining whether the Respondent acted reasonably or unreasonably the Tribunal must not substitute its own view as to what it would have done in the circumstances. (*Foley v Post Office; Midland Bank plc v Madden [2000] IRLR 827*) Instead the Tribunal must determine the range of reasonable responses open to an employer acting reasonably in those circumstances and determine whether the Respondent's response fell within that range. The Respondent's response can only be considered unreasonable if the decision to dismiss fell out with that range. The range of reasonable responses test applies both to the procedure adopted by the Respondent and the fairness of their decision to dismiss (*Iceland Frozen Foods Ltd v Jones [1983] ICR 17 (EAT)*).
147. The Tribunal should consider whether any procedural irregularities affected the overall fairness of the whole process in the circumstances having regard to the reason for dismissal. It is irrelevant that the procedural steps would have made no difference to the outcome except where they would have been utterly useless or futile (*Polkey v AE Dayton Services Ltd 1988 ICR 142, HL*).
148. The ACAS Code of Practice on Disciplinary and Grievance Procedures expressly applies to misconduct and poor performance dismissals and expressly does not apply to redundancy and non-renewal of a fixed term contract dismissals. It may therefore apply to dismissals for some other substantial reason depending upon the circumstances. The Code requires employers to establish the facts, inform the employee of the problem, hold a meeting to

discuss the problem, allow the employee to be accompanied, decide upon appropriate action, and provide the employee with the opportunity for appeal.

Claimant's Submissions

149. The Claimant's submissions were in summary as follows –

- a. The Respondent witnesses were not open and not frank
- b. A religious belief may be relied upon as a protected characteristic (*Grainger; McEleny v Ministry of Science S/4105347/2017*)
- c. The adoption and implementation of the policy was challenged as unlawful. It was not lawful to dismiss him in Scotland when it was not a mandatory requirement under Scottish Law.
- d. The statistical evidence was used in a very biased and primitive way and in fact showed that the number of cases increased during the warmer months after immunisation
- e. The death narrative of the pandemic made people behave irrationally
- f. People were treated like statistics – like one size fits all
- g. There was no need for the policy at all or there should have been an exemption on religious and philosophical grounds.
- h. He was told the consultation survey was anonymous but it was then relied upon in evidence [Survey responses were anonymous and not disclosed to management but at request of the tribunal the responses were attributed]
- i. The policy amounted to a change to his terms of employment without his consent and it did not respect his religious beliefs which is a basic human right
- j. the Respondent failed to give the Claimant sufficient information about the vaccine ingredients which are artificial chemicals that caused side effects and risk to health that he witnessed. The vaccine would change his immune system and negatively impact upon his biological systems. The Respondent failed to properly advise, inform and encourage him about the safety of the vaccine. No one could guarantee its safety.
- k. When he said at the meeting on 17 September 2021 “I could take the vaccine in the future when it was safe” what he meant was that the vaccine's current origin is not appropriate for him because of his doubts about the impact on his health and also because of his private beliefs. He found it

difficult to convey what he meant at that meeting because was still being affected by the death of his mother in May 2021 and because he needed an interpreter to explain such a delicate matter. He swore to his mother he would not get vaccinated.

- l. His dismissal was a foregone conclusion and there was no possibility of a waiver except on specific medical grounds.
- m. When he mentioned his religious reasons why did GG not ask him for more details. No one was interested in his religious beliefs which were not taken seriously.
- n. Important correspondence was sent by 2nd class post to the wrong address instead of 'signed for' to the correct address
- o. He could have been given alternative employment e.g. as bus driver for residents separated by plexiglass
- p. He only received the Respondent's submissions 2 days before the hearing and only after prompting them
- q. He relies upon a New York Supreme Court decision that an order of the Department of Health requiring public employees to be vaccinated was arbitrary and capricious where it was not a city-wide requirement for all residents to be vaccinated "if it was about safety and public health, no one would be exempt".

Respondent's Submissions

150. The Respondent's submissions were in summary as follows –

- a. The Claimant was not a credible witness and changed his story to suit his ends

Direct religious discrimination

- a. Direct and indirect discrimination are mutually exclusive and both complaints cannot arise from the same circumstances
- b. The Claimant refused the vaccine because of a concern about an adverse impact on his health and not because of a Christian belief. The substantial majority of his submissions focused upon the risk the vaccine presented to his health.

- c. The Claimant was not dismissed because of any belief. He was dismissed because he had not been vaccinated.
- d. A colleague who did not share his belief but who had not been vaccinated would also have been dismissed.

Direct race discrimination

- e. The Claimant relies upon the refusal of translation services on 11 October 2021 as less favourable treatment. That refusal was made more than 3 months prior to the start of ACAS Early Conciliation on 24 January. That refusal is of a different character to the alleged religious discrimination and accordingly does not constitute a continuing act. It would not be just and equitable to extend time because the Claimant had already taken legal advice and considered this was “discrimination”. Even a short delay of 3 days will not necessarily justify an extension of time (*Adedeji v University Hospitals Birmingham NHS Foundation Trust 2021 ICR D5*)
- f. The refusal of translation services did not amount to a detriment because the Claimant had a good command of English and did not require these services.
- g. The relevant comparator is someone who does not share the Claimant’s racial group (i.e. is not Polish) and who is not fluent in English. They would also have been refused translation services. The Claimant’s race is not the reason why he was refused.

Indirect religious discrimination

- h. There was no challenge (contractual or otherwise) to the validity of the Mandatory Vaccination Policy
- i. There must be no material difference between the circumstances in the pool for comparison and accordingly, the pool for comparison is all colleagues who did not share the Claimant’s beliefs and who objected to being vaccinated. All members of that pool would have been equally at risk of dismissal. There is therefore no comparative disadvantage and accordingly no indirect discrimination.
- j. The objective justification of the policy is to be considered at the time of its effect i.e. the dismissal of the Claimant (*Seldon*)

- k. The aim of the policy was to safeguard the health and well-being of the residents and staff by reducing the spread and severity of Covid.
- l. covid outbreaks and deaths in nursing homes in the UK was a situation of grave urgency. The vaccine was highly effective in reducing transmission, severity and risk of death in the nursing homes. There was no reasonable alternative which would have had a similar effect. The majority of staff in Scotland were in favour of the policy. Whilst the English Mandatory Vaccination Regulations did not apply in Scotland the underlying scientific justifications did. It was reasonable and appropriate for these standards to be applied through their Policy to their Scottish (as well as their English) care homes. Vaccination was recommended and encouraged by the Care Inspectorate in Scotland. The Government Impact Assessment had considered and rejected a religious belief exemption because it would be difficult to prove and would significantly reduce the effectiveness of the policy. Additional exemptions would have increased costs through risk assessment etc.

Unfair dismissal

- m. The reason for the Claimant's dismissal was that he had not been vaccinated (and was not medically exempt) when the policy had made that a condition of his employment to reduce health and safety risk. His dismissal was for some other substantial reason which is potentially fair. Substantial means more than frivolous or insignificant (*Mercia Rubber Mouldings Ltd v Lingwood 1974 ICR 256, NIRC*)
- n. The Respondent consulted with staff before introducing the policy
- o. The Claimant was fully aware of the terms of the policy and the risk of dismissal
- p. The ACAS Code does not apply to substantial reason dismissals. The law does not require a particular process (*Jefferson (Commercial) LLP v Westgate UKEAT/0128/12/SM*). In any event a fair procedure was followed entailing consultation, warnings, meetings and an appeal.
- q. During the dismissal process, the Claimant mentioned religion only once. The discussion instead centred on a possible medical exemption. He did not

articulate his religious beliefs or his medical exemption during the dismissal process.

- r. The Claimant's role required close personal contact with the residents. There were no alternative roles that didn't entail a risk of transmission and would have enabled him to work unvaccinated. There was no suitable alternative employment.

Discussion and decision

Religious belief

151. The Claimant is a Christian. Some Christians believe that the Covid vaccine is morally wrong because foetal cell lines may have been used in its testing or development. A belief that the vaccine was morally wrong on this ground would satisfy the Grainger criteria. The Claimant, like some other Christians, did not believe that the Covid vaccine was morally wrong. He did not want to have the vaccine because he was concerned it was unsafe. That opinion was based upon the present state of his knowledge and accordingly did not satisfy the Grainger criteria. If it was considered safe (after 5 year checks) he would have it.
152. The Claimant believed that being forced to have the vaccine was ethically wrong. In this context forced meant economically coerced into having the vaccine by the threat of dismissal. A belief in consent to medical treatment without the undue influence of economic coercion would satisfy the Grainger criteria.

Direct Race Discrimination

153. The Claimant is Polish. There was no evidence that a non-Polish person for whom English was not their first language would have been provided translation services. There was no basis upon which it could reasonably be inferred that the Claimant was not provided with translation services because of his Polish race. The complaint of direct race discrimination does not succeed and is accordingly dismissed.

Direct Religious Discrimination

154. The Claimant was dismissed because he was not vaccinated. There were no facts from which it could be inferred that he was dismissed because of his religious belief. Any religious belief he held had no influence on that decision.

Indirect Religious Discrimination

155. The Mandatory Vaccination Policy (the requirement to be vaccinated against Covid-19 by 11 November 2021 in order to continue working for the Respondent unless medically exempt) amounted to a provision, criterion or practice. That Policy was applied to the Claimant and to other persons who do not share his religious belief.
156. The Respondent submits that the pool for comparison is all staff who object to being vaccinated but did not share the Claimant's belief. This artificially restricts the pool to only those negatively affected by the policy. The pool for comparison should be all staff to whom the policy was applied.
157. As regards the moral belief about the vaccine, the application of the Policy was intrinsically liable to put persons who believe the Covid vaccine was morally wrong at a particular disadvantage in comparison with persons who did not either by the crisis of conscience in having the vaccine or the financial consequences of being dismissed because they had not had the vaccine.
158. As regards the ethical belief in consent to vaccination without the undue influence of economic coercion, it was apparent from the survey of Scottish staff that: all of those in favour of mandatory vaccination had been vaccinated; all of those who had not been vaccinated were against mandatory vaccination; but of those against mandatory vaccination the substantial majority had been vaccinated. Of those against mandatory vaccination, their expressed reasons centred around a belief in free choice and/or health or efficacy concerns about the vaccine. The substantial majority of unvaccinated staff were persuaded to have the vaccine following the introduction of the policy presumably because of the economic consequences of dismissal and/or the wider information campaign. Given the numbers of staff who were persuaded it is likely that some staff were economically coerced into having the vaccine contrary to their belief in vaccination without undue influence. However, the Claimant was not economically coerced into having the vaccine contrary to his beliefs. He was not therefore put to that particular disadvantage by application of the Policy.

159. The Mandatory Vaccination Policy had the predominant aim of the health and wellbeing of its vulnerable residents and the subordinate aim of a consistency of approach to health and safety across its UK care homes. These were important and reasonable aims and therefore legitimate.
160. The Claimant submission that there was no reasonable need for a mandatory vaccination policy is not accepted. Covid-related deaths in the UK occurred predominantly within care homes. Within the Respondent's care homes, there were around 1,000 COVID related deaths out of a resident population of around 7,500. There was a noticeable correlation between the uptake of the Covid vaccination by residents and staff and a reduction in the number of COVID related deaths within the care homes. These patterns reflected the national position. The greater the vaccine uptake, the greater the level of protection against transmission, severe illness and death.
161. Before the introduction of the Mandatory Vaccination Policy around 87% of Scottish staff had been vaccinated. It was anticipated that around 1% of staff would be eligible for medical exemption, around 7% of staff would be dismissed, and accordingly around 99% of staff would be vaccinated. It transpired that no staff were medically exempt and 1% of staff (8 out of 700) were dismissed. Making vaccination a condition of employment within care homes would therefore increase the number of vaccinated staff working in the care home and thereby reduce the risk of serious illness and death.
162. The Claimant submits that there should have been an exemption on grounds of religious or philosophical belief akin to the medical exemption. The medical exemption could be independently and objectively determined by a GP. It was anticipated that around 1% would be eligible but in fact no staff were medically exempt. A religious or philosophical beliefs exemption could not have been independently and objectively determined and it would be difficult to establish whether they genuinely believed that the vaccine was morally or ethically wrong. It is considered likely that most of those who had chosen to remain unvaccinated for whatever reason (including scepticism about the risks of Covid and/or the safety and effectiveness vaccine) would understandably have sought to avail themselves of a beliefs exemption whether or not they genuinely held a religious or philosophical belief. At the time of the introduction of the policy around 13% of Scottish staff were

unvaccinated. This level of reliance upon a beliefs exemption would have significantly undermined the effectiveness of the policy compared to the estimated 1% of staff (in reality no staff) who were eligible for a medical exemption.

163. For the staff who were dismissed there were serious economic consequences (these staff were likely to be on lower incomes and were therefore unlikely to have significant savings). For the staff who were persuaded to have the vaccine there was no evidence of any negative consequences beyond the undue influence on their free will. Balancing the negative effects of the policy against the positive effects on the risk of serious illness and death, the policy was appropriate and necessary and therefore a proportionate means of achieving a legitimate aim.
164. Accordingly the complaint of indirect religious discrimination does not succeed and falls to be dismissed because the Claimant did not hold a religious belief that the vaccine was morally wrong on account of testing on foetal cell lines, because the Claimant was not put to the particular disadvantage of being economically coerced into having the vaccine contrary to his belief in vaccination without undue influence, and because, in any event, the policy was a proportionate means of achieving a legitimate aim.

Unfair dismissal

165. The Claimant was dismissed with notice because he had not been vaccinated against COVID-19 whilst working as a Care Assistant in a care home with vulnerable residents during the coronavirus pandemic. In the circumstances this was not a frivolous, trivial or inadmissible reason but a substantial reason which was potentially fair.
166. The Respondent is a large UK-wide employer with a dedicated HR function. There had been a public consultation exercise by the UK government before introduction of the English Mandatory Vaccine Regulations. The Mandatory Vaccination Policy sought to apply the principles of the English Regulations to its Scottish care homes. The Respondent consulted with its Scottish workforce including the Claimant before the introduction of the Mandatory Vaccination Policy. Those consultations were not extensive but there was limited time to introduce the Policy if there was to be a consistent approach across its UK care homes.

167. The substantial majority of Scottish staff were in favour of the Policy. When providing written comment on the proposed policy of mandatory vaccines no member of staff described their religion or religious belief. The Claimant himself did not give any detail whatsoever regarding his religion or a religious belief. When asked, during the informal vaccination status meeting, if there was any particular reason he did not want to get the vaccine, the Claimant advised that there were many many reasons, like religious reasons, like ill health in the past, like long term/ side effects of the vaccine. He did not otherwise mention or elaborate on these religious reasons. As regards his health concerns the Claimant advised the Respondent he believed he was medically exempt but did not provide the Respondent with any information or medical evidence regarding any risk to his health.
168. The Respondent took significant steps to inform all staff of the need for the policy and the benefits of vaccination, and to provide support and encouragement to all staff to take up the vaccine. Notwithstanding the reasonable steps taken by the Respondent, the Claimant remained sceptical about the risks of COVID and the effectiveness of the vaccine and its long term/ side effects.
169. A number of vaccination status meetings were also held with the Claimant to explain the Policy and the need to be vaccinated, to discuss his concerns and advise there were no alternative roles, and to warn of the risk of dismissal unless medically exempt. The Claimant was advised of his right to be accompanied to the formal meetings. For at least 2 months prior to his dismissal, the Claimant was aware that he was at material risk of dismissal if he was not fully vaccinated by 11 November or medically exempt. When the Claimant asserted he was medically exempt, but was struggling to obtain medical evidence, he was provided with the self-certification form and time to complete it but he declined to do so.
170. The Claimant was ultimately dismissed with notice because he would not be fully vaccinated by 11 November and he had not provided a medical exemption certificate or self-certification form. The Claimant appealed but the decision to dismiss was upheld.
171. Taking into account their size and administrative resources and the procedure adopted, the Respondent acted within the range of reasonable responses in treating the Claimant's vaccination status as a sufficient reason for dismissing him. It cannot be said that no reasonable employer would have acted in this way. Determined in

accordance with equity and the substantial merits of the case the decision to dismiss was fair. The complaint of unfair dismissal does not succeed and is accordingly dismissed.

Employment Judge: Michelle Sutherland
Date of Judgment: 05 January 2023
Entered in register: 05 January 2023
and copied to parties