Case No: 1806679/2021

EMPLOYMENT TRIBUNALS

Claimant: **Mr M Farnaby**

Respondent: **Anchor Hanover Group**

Heard at: **Leeds Employment Tribunal (by CVP)** **On: 7-8 April 2022**

Before: Employment Judge T Perry

Representation
Claimant: Dr A Loutfi (Counsel)
Respondent: Ms R Swords-Kieley (Counsel)

JUDGMENT

The Claimant's dismissal was fair. The Claimant's claim of unfair dismissal fails and is dismissed.

REASONS

Claim and issues

1. The Claimant's sole claim is one of unfair dismissal.

2. A number of preliminary matters were addressed during the hearing. It was agreed that the Claimant was an employee, that he was dismissed and that he had the required length of service to bring a claim of unfair dismissal. The parties confirmed the Respondent was correctly identified. The parties did not feel that the case required the Tribunal to consider the application of Article 8 of the European Convention on Human Rights. I was provided with a copy of a decision of HHJ Whipple in the High Court QBD Administrative Court refusing permission for Judicial Review of the legality of the Regulations considered further during the course of this case. **R. (on the application of Peters) v Secretary of State for Health and Social Care, R. (on the application of Fairburn) v Secretary of State for Health and Social Care, [2021] EWHC 3182 (Admin)**.

3. The issues to be decided were discussed and agreed at the start of the hearing. They were:

   3.1. Has the Respondent shown the reason for the dismissal and that it was a potentially fair reason within section 98(1) or 98(2) Employment Rights Act 1996 ('ERA')? The Respondent relies on 98(2)(d) ERA contravention of a duty or restriction imposed by or under an enactment or, in the alternative, s98(1)(b) ERA some other substantial reason of a kind such as to justify dismissal.

   3.2. If so, did the Respondent act reasonably in all the circumstances in treating that reason as sufficient reason to dismiss the Claimant within the meaning of s98(4) ERA?

   3.3. If not, what basic and compensatory award is payable having regard to:

      3.3.1. Whether there should be a reduction to compensation to reflect the chance that if a fair procedure had been followed the Claimant would have been dismissed in any event;

      3.3.2. Whether it would be just and equitable for there to be a reduction to compensation to reflect blameworthy conduct on the part of the Claimant contributing to dismissal; and

      3.3.3. Whether there should be an increase to compensation to reflect an unreasonable failure to follow the ACAS Code of Practice on Disciplinary and Grievances?

Evidence

4. I was provided with an agreed final hearing bundle running to 430 pages. References in square brackets are to this bundle.

5. The Claimant gave evidence on his own behalf from a witness statement.

6. The Respondent called two witnesses, both of whom gave evidence from witness statements. They were:

   6.1. Mrs Louise Morley, the Respondent's Regional Support Manager for the north of England and the dismissing officer; and

   6.2. Ms Mishel Ingle, a District Manager for the Respondent with responsibility for the Teal Beck Care Home where the Claimant worked and the appeal officer.

7. In advance of the hearing, I was provided with a skeleton argument for the Claimant and an opening note for the Respondent. Ms Swords-Kieley updated her opening note to written closing submissions. I heard oral submissions from both representatives.

Findings of fact

8. Although detailed, much of the chronology of the case is not in dispute. Where there were disputes of fact I have resolved them, applying the balance of probabilities, on the evidence before me in accordance with these findings of fact.

9. The Respondent is a Community Benefit Society under the Co-operative and Community Benefit Societies Act 2014. It is a not-for-profit organisation providing housing, care and support to people over 55 years old. The Respondent is a large employer with 6,500 staff at 114 care homes and over 1,000- housing locations.

10. The Claimant was employed as a Care Assistant at Teal Beck Care Home. The Claimant's continuity of employment ran from 27 February 2017. However, apart from a brief period before that date, the Claimant had actually been employed by the Respondent and its predecessor, Anchor Trust, since June 2004. It was agreed by all parties that the Claimant had had no complaints against him and had a clean disciplinary record.

11. The crucial context to this case and the Claimant's ultimate dismissal is the Coronavirus pandemic and the roll out, from December 2020, of vaccines. Due to the need to protect the large number of vulnerable individuals living in care homes, care home residents and staff were given priority to get vaccines.

12. The Respondent began a communication campaign to encourage employees and residents to get vaccinated. This included providing a lot of information about vaccines and "myth busting" via internal social media and intranet sites. The information included government, NHS, and Public Health England documents as well as the Respondent's own FAQ documents, and case studies from colleagues. The campaign also included videos from celebrities encouraging people to get vaccinated.

13. In around March 2021 the possibility of the government making vaccines mandatory for care home staff was reported. On 16 June 2021, this was reported extensively in the press. Mr Rob Martin, the Respondent's Managing Director - Care, updated staff on this development and encouraged staff to book a vaccination if they had not done so already [64].

14. On 28 June 2021, Mr Martin wrote to the Claimant (and other unvaccinated

colleagues) confirming the government's proposal and setting out that staff who were not fully vaccinated would not be able to continue working in a care home "unless they are classed as medically exempt" [68]. The letter encouraged the Claimant to have the vaccine as soon as possible. The letter attached links to colleague case studies and other sources of information on the vaccine.

15. On 5 July 2021, managers were asked to speak to unvaccinated colleagues by the end of July to ensure they understood the implications of not having the vaccine on their future employment. This included advice on medical exemptions from the requirement to have the vaccine which were stated to be "limited to those detailed in Public Health England's Green Book" [70].

16. On 20 July 2021, the Home Manager of Teal Beck Care Home, Ms Louise Bulcock, spoke to the Claimant and encouraged him to get a vaccination. The Claimant complained that he was being pressured and said "she would have to sack [him] as [he] was medically exempt."

17. On 22 July 2021, the Health and Social Care Act 2008 (Regulated Activities) (Amendment) (Coronavirus) Regulations 2021 were approved by Parliament ("The Regulations"). Regulation 5 amended regulation 12 of the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 to require that, with effect from 11 November 2021

"a registered person ("A") in respect of a regulated activity specified in paragraph 2 of Schedule 1 (accommodation for persons who require nursing or personal care) in a care home must secure that a person ("B") does not enter the premises used by A unless—

(b) B has provided A with evidence that satisfies A that either—

(i) B has been vaccinated with the complete course of doses of an authorised vaccine; or

(ii) that for clinical reasons B should not be vaccinated with any authorised vaccine;"

18. On 26 July 2021, Mr Martin wrote again to the Claimant confirming the requirement for staff to have had two doses of vaccine by 11 November 2021 "unless they have a valid medical exemption". The letter set out that to have two doses by 11 November 2021 employees would need to have a first dose by 16 September 2021. In respect of medical exemption, the letter simply stated "If you are medically exempt. Please let

your home manager know so they can update your record on myHR." [81]

19. On 28 July 2021, an administrator at Teal Beck Care Home, Lynne, called the Claimant. The Claimant repeated that he would not be getting vaccinated and that he felt he was being pressurised.

20. In early August 2021, managers were briefed by HR regarding the mandatory vaccinations and on 5 August 2021 a manager guidance pack was circulated. This advised managers of colleagues who were medically exempt to liaise with Manager Direct, the Respondent's Employee Relations advisory team, before holding a consultation meeting. The guidance pack stated in respect of medical exemption, that very few individuals could not receive an approved vaccine and listed what were stated to be "the only exemptions". This list covered those who had had an allergic reaction to the covid vaccine, people currently acutely unwell or with COVID, people with a history of heparin-induced thrombocytopenia and thrombosis, people who had clotting episodes with the AstraZeneca vaccine, pregnant women, and "anyone exempt on medical grounds as defined in writing by the GP/clinician" [87]. Where such proof was provided colleagues should not be subject to the process outlined in the pack. The pack went on to state that if dismissals were necessary the potentially fair reason would be "statutory restriction."

21. The pack went on to include the following template documents: an invite to a consultation meeting; an invite to a disciplinary hearing; dismissal letters; a timeline; a checklist for a consultation meeting; a checklist for a dismissal hearing; and an FAQ document. The FAQ document stated the only acceptable evidence of medical exemption was a letter from their GP or consultant confirming an exemption reason as set out in the Green Book. Private GP exemptions were stated not to be accepted [120].

22. On 11 August 2021, Mrs Morley wrote to invite the Claimant to a consultation meeting. In this letter the Claimant was invited, if claiming medical exemption, to provide evidence to update his record on myHR [122]. The administrator, Lynne, called and spoke to the Claimant's wife on 12 August 2021 to ask the Claimant to collect the letter. The Claimant was on holiday and in the end the letter was delivered to the Claimant.

23. On 12 August 2021, the Claimant sent a letter, taken from the website of a law firm, PJH Law, regarding the mandatory vaccination of care workers. The letter covered a number of different issues. It alleged that T Cell immunity may be a better response than vaccination. It also alleged that any request for medical information from people claiming medical exemption was unlawful and unreasonable. It alleged that mandatory vaccination discriminated against pregnant workers, those whose first language was

not English, those with religious beliefs regarding the contents of vaccines, BAME community members, and younger workers. The letter requested that the employer confirm within 28 days that "my legal rights are respected and that the status quo relating to free and informed consent and bodily autonomy is preserved pending clarification on the obvious conflicts that the regulations raise." [125]

24. On 13 August 2021, Ms Bulcock replied to the Claimant with a letter drafted by Manager Direct stating, effectively, that the Respondent was obliged to comply with the Regulations, and that it needed evidence of vaccination or medical exemption to continue to employ the Claimant beyond 11 November 2021. This letter denied that the Respondent was in breach of any legal obligation.

25. On 20 August 2021, the Claimant attended a consultation meeting held by Mrs Morley, with Ms Bulcock taking notes. Having initially been told he could not be accompanied, the Respondent had agreed to the Claimant having a union representative with him in this meeting. In this meeting the Claimant stated that he believed he was clinically or medically exempt. The Claimant stated that he was able to evidence his medical exemption. The Claimant's union representative raised that confirmation of exemption by a GP was not required by law and said that GPs were refusing to issue such exemptions. Mrs Morley said that such concerns should be emailed to Mrs Bulcock. The Claimant was told to look at vacancies on the Respondent's career page as there were roles outside of care homes where vaccination was not mandatory. At the end of the meeting, it was mentioned that continued refusal not to take the vaccine would lead to an invite to a potential dismissal hearing. In saying this, Mrs Morley was following the checklist for the meeting in a standard form provided by HR. Whilst it is regrettable that this scripted conclusion did not account for the possibility of the Claimant establishing his medical exemption (and therefore not being required to attend a dismissal hearing) this was not, as alleged by the Claimant and his union representative at the time, an attempt to threaten, bully or coerce the Claimant nor was it, as the Claimant alleged in evidence, a response to the Claimant involving a union representative. It was part of the pre-prepared script used generally for such meetings. In response to a question as to what would be the Respondent's liability if the Claimant suffered an adverse reaction to the vaccine, Mrs Morley stated that there would be no liability. I find this response entirely unsurprising.

26. On 23 August 2021, Ms Bulcock signed a letter to the Claimant on Mrs Morley's behalf that covered some of the points mentioned in the 20 August 2021 conciliation meeting. This was similar to the 13 August 2021 letter mentioned above.

27. On 24 August 2021, manager guidance was updated to reflect a chance to

exemptions. The previous catch all provision allowing medical exemption (and therefore exclusion from the process leading to dismissal) for "anyone exempt on medical grounds as defined in writing by the GP/clinician" [87] was changed to read "anyone exempt on medical grounds who provides valid medical exemption evidence." [138]. The reason for this change can be seen at [143] where the guidance reads "It has been announced that the Government will be introducing a process for colleagues to follow if they think they may have a medical reason to be exempt from the vaccine. If a medical reason is a valid exemption, certification of exemption will be provided through this process. At present we await further details of the Governments process and as soon as this information is available, we will update you." The relevant FAQ was updated to remove the reference to a letter from their GP or consultant which was replaced with "valid evidence of medical exemption confirming an exemption reason as set out in the Green Book." The FAQ stated that once the government's process for verifying an exemption was in place, the colleague would need to follow that process.

28. On several occasions in late August and early September 2021, Ms Bulcock asked the Claimant if he had his medical evidence together.

29. On 9 September 2021, Mr Martin wrote to the Claimant and other unvaccinated colleagues. This letter set out that the Respondent was awaiting government guidance on how colleagues could evidence medical exemption and promised further communication once the Respondent had clarity on this [173].

30. On 13 September 2021, the Claimant wrote to Ms Bulcock setting out his basis for claiming medical exemption. The Claimant detailed his previous bad cold/flu symptoms in response to the flu vaccine and disclosed the existence of a 5mm brain lesion. The Claimant maintained that a personal or family history of neurological or inflammatory disease or condition was a medical exemption from the requirement to be vaccinated. The Claimant included two letters from Consultant Radiologists from 2011 and 2012 regarding the brain lesion.

31. On 14 September 2021, Ms Bulcock forwarded this to Ms Ingle. The same day, Ms Ingle herself sent this to Manager Direct stating "Whilst I do not think it would warrant an exemption, please can you take a look at this and advise." Later that day, Ms Tomlinson ER Advisor at Manager Direct replied stating that what had been provided "does not meet the criteria for [any] of the categories." In Ms Tomlinson's view, "Mick will be required to provide evidence - a letter from GP or specialist to reflect that he falls into one of the categories below." [226] Ms Tomlinson then quoted the categories in the latest version of the manager guidance.

32. On 15 September 2021, the Department of Health and Social Care ("DHSCW") wrote to confirm that:

"On a temporary basis, from today, people working or volunteering in care homes who have a medical reason why they are unable to have a COVID-19 vaccine will be able to self-certify that they meet the medical exemption criteria, using the forms attached to this letter.

Care home workers who are exempt will need to sign the form attached to this letter and give this to their employer as proof of their temporary exemption status. This temporary self-certification process has been introduced for a short period prior to the launch of the new NHS COVID Pass system which will go live imminently.

Once the NHS COVID Pass system is launched, care home workers will need to apply for a formal medical exemption through that process. This temporary self-certification will expire 12 weeks after the NHS COVID Pass system is launched."

33. The letter included a non-exhaustive list of medical exemptions, which overlapped somewhat with the list contained in the Respondent's manager guidance. The letter also attached self-certification forms.

34. On 16 September 2021 at 08:50 an email was sent to Home Managers from the Respondent's communications team informing them of the temporary self-certification process. At 09:58, presumably without having seen this email, Ms Bulcock informed the Claimant that he would need to provide a letter from a GP or specialist to be considered medically exempt. At 10:30 Ms Bulcock, presumably by this point appraised of the new guidance, emailed the Claimant to ask him to ignore her email of 09:58. [236-238]. At 10:58, Ms Bulcock sent the Claimant the Respondent's version of the self-certification form and asked him to complete it without further explanation as to why [245].

35. The self-certification form sent to the Claimant largely replicated that provided by the DHSC. There were differences. Notably the Respondent's form asked for details of why the individual met the medical criteria for exemption, which the DHSC form did not. Also, there was no mention in the Respondent's form of exemptions for conditions in the Summary of Product Characteristics for each different vaccine manufacturer, which was included on the DHSC form.

36. On 17 September 2021, the Claimant met with Ms Bulcock and she encouraged him to sign the self-certification form. The Claimant refused to do so until he had received advice from his union. The Claimant asked if a decision had been made on his existing

application for medical exemption.

37. On 21 September 2021, the Claimant met with Ms Bulcock again and she encouraged him again to sign the self-certification form, telling him this was his last chance to save his job. The Claimant was told that he would also need to apply for an exemption beyond the end of the 12 week period via the government's scheme. Ms Bulcock told the Claimant she was going to have some time off and that the form should be sent to Mrs Morley before 24 September 2021. The Claimant told Ms Bulcock that he would not be signing the self-certification form.

38. Later on 21 September 2021, Ms Bulcock emailed the Claimant to provide background on the self-certification form in the form of an excerpt from the government guidance, covering both the temporary self-certification form and the COVID Pass system [247-248].

39. On 24 September 2021, Mrs Morley sent the Claimant an invite to a potential dismissal meeting. This letter mentioned the consultation meeting on 20 August 2021 and the discussion of alternative roles but stated that as the Claimant had not notified Mrs Morley of any roles, she assumed the Claimant had not found one he was interested in.

40. On 29 September 2021, the Claimant wrote to Mrs Bulcock stating that "I have, under penalty of perjury (the Perjury Act 1911), filed with my Union a Statement of Truth, stating that I have one or more of the medical conditions that qualify me for clinical exemption in accordance with Government guidelines. My medical data is private and confidential and protected under GDPR and the Data Protection Act 2018. This certificate complies with the requirements of the Health and Social Care Act 2008 and its subsequent amendments." Accompanying this letter was a Certificate of Clinical Exemption from Vaccination from the Workers of England, Scotland, and Wales Union which identified the Claimant as having provided the statement of truth and certified the Claimant as exempt from requiring vaccination under the Human Medicines Regulations 2012 and the Health and Social Care Act 2002 (Regulated Activities) Regulations 2014 as amended.

41. Mrs Bulcock forwarded these documents to Manager Direct later that day, copying Louise Morley. Mrs Morley responded to state that her understanding was that the Respondent could not accept what had been provided.

42. On 30 September 2021, Ms Tomlinson replied confirming that the self-certification form was required but clarifying that the Claimant could leave the section for the reason blank or state that he did not want to reveal the reason but confirming that she believed

this information would need to be provided to the government to secure a permanent exemption in due course. Ms Bulcock passed this information on to the Claimant the same day [259].

43. Later on 30 September 2021, the Claimant emailed Ms Bulcock asking her to evidence in detail how the certificate provided did not meet the requirements of the government guidance. The email pointed out that certification did not need to be by a GP or healthcare professional. The Claimant complained that refusal to accept his certificate was a breach of the Health and Safety at Work Act 1974, Public Health (Control of Disease) Act 1984 and the Equality Act 2010. The Claimant chased for a response to his letter on 4 October 2021 [265].

44. On 4 October 2021, the Respondent's communications team issued updated guidance on the verification process for colleagues with medical exemption. Managers were asked to inform colleagues of the process, which required calling 119, completing an application form, which would be reviewed by a GP or specialist [271].

45. On 5 October 2021, Ms Bulcock emailed the Claimant a letter from Mr Martin to update the Claimant on this process [277, 279-280].

46. On 6 October 2021, the Claimant replied to Ms Bulcock repeating a number of questions raised in previous correspondence.

47. On 7 October 2021, Ms Bulcock replied to the email of 6 October 2021 inserting responses into the Claimant's text. In essence, the responses were similar to those given throughout, the Respondent considered itself to be complying with the law and government guidance in requiring the Claimant to complete the self-certification form with the reason left blank. The certificate from the union was considered insufficient.

48. On 12 October 2021, the Claimant attended the potential dismissal meeting with Mrs Morley. Ms Bulcock took notes. During this hearing the Claimant's union representative, Mr Graham Collins, stated that the Claimant had a medical exemption, that the CQC did not require evidence or details of the exemption, and that neither the CQC nor the government dictated that only temporary exemption certificates should be used. Mrs Morley stated that because the Claimant had not submitted the evidence required, she had no alternative but to issue the Claimant with notice of dismissal with effect from 11 November 2021. The Claimant was told of his right of appeal. Mr Collins repeated that the certificate already provided was compliant with DHSC guidance and said he did not accept the dismissal. The Claimant said that he would go to Tribunal rather than appeal the dismissal. Mrs Morley stated that guidance had been prepared by the legal team and that the email, copies of medical records and certificates from the Union were not

sufficient, the Claimant needed to self-certify exemption using the form provided. The Claimant complained that he had already provided medical evidence that was not being accepted. He said that the exemption was only for three months and that he would have to provide his medical records yet again and that after the three month period he would get given notice anyway. The Claimant said that he had not been given answers and accused Mrs Morley of not having brought her evidence. Mrs Morley ended the meeting by saying she was "adjourning the meeting now". Whilst adjourn was an unfortunate word to have used, I find that, having given the Claimant notice to terminate employment on 11 November 2021 and discussed an appeal, it was clear or should have been clear both that the Claimant had been dismissed and that the dismissal meeting was at an end.

49. Mrs Morley prepared the dismissal letter based on the template letter in the management pack. As a template letter, this did not marry up exactly with the circumstances of the Claimant's dismissal - in particular, the letter stated that the Claimant had confirmed that he was not medically exempt, which is exactly the opposite of the Claimant's position. The dismissal letter made clear that the reason for dismissal was "the legal requirement made by the Health and Social Care Act 2008 (Regulated Activities) (Amendment) (Coronavirus) Regulations 2021 for all individuals working within a care home to be fully vaccinated against COVID-10. This is a statutory restriction which prevents you from working in one of our care homes from 11 November 2021." [304]

50. Ms Bulcock tried to provide the dismissal letter to the Claimant in a pack including the minutes of the hearing but the Claimant refused to accept this. The letter was posted instead. In light of Mrs Morley having said in the meeting that the Claimant would be issued notice, I find nothing underhand in this being included in the pack with the hearing minutes.

51. On 13 October 2021, DHSC wrote to confirm that

"Government have been made aware of various documents making claims regarding the legality of implementing [mandatory vaccination]. We are very clear that care home providers should follow government guidance for implementation, including on … assessing how individuals working or volunteering in CQC-registered care homes provide evidence of medical exemption.

Government guidance for temporary self-certified exemptions, available here, and the formal exemptions, found here, clearly sets out the specific forms of evidence that the government considers satisfactory in demonstrating that a person is exempt from

vaccination for clinical reasons. Care home providers should take such government guidance into account when considering what evidence is satisfactory. We advise providers to accept exemption evidence that is in line with government guidelines as follows:

Exemptions can be demonstrated through the temporary self-certified exemption letter we have published until 24 December.

After 24 December exemptions will need to be demonstrated by the formal process."

52. On 15 October 2021 the Claimant wrote to Mrs Morley by email to request a grievance hearing. The Claimant raised five grounds for grievance. The first ground was a challenge to the validity of mandatory vaccination generally. The fifth ground related to rejection of the Claimant's exemption certificate. The other grounds alleged criminal intimidation in the workplace and complained of failure to perform a risk assessment which, the Claimant maintained, should include evidence that COVID 19 had been identified such that a vaccine was capable of countering it.

53. On 18 October 2021, the Claimant supplemented his grievance by complaining about bullying, intimidation and coercion in relation to his medical exemption.

54. On 20 October 2021, Mr Faizal Khalifa, from Manager Direct, wrote to confirm that as the matters contained in the emails of 15 and 18 October 2021 related to the Claimant's dismissal, they would be dealt with as an appeal against dismissal.

55. On 21 October 2021, the Claimant attended Louise Bulcock's office at the time originally proposed by Mr Collins for a grievance meeting. No meeting had been confirmed for that time. Ms Kirsty Francis was in the room at the time on an unrelated matter. I find based on Ms Francis' contemporaneous email at [321], that the Claimant entered the room without knocking and stated that he was attending a grievance meeting for which a Teams invite had been sent. No such invite was in evidence before the Tribunal. The Claimant complained that he did not want an appeal with Manager Direct but a grievance meeting with Ms Bulcock. The Claimant described Ms Bulcock as washing her hands of him.

56. On 21 October 2021, the Claimant emailed Mr Khalifa complaining about the meeting that morning and stating this his dismissal meeting was adjourned and not completed. The Claimant included the 15 October 2021 email at the bottom.

57. The Claimant's appeal hearing took place on 9 November 2021. It was chaired by Ms Ingle. The Claimant attended with Mr Collins without having submitted further grounds

of appeal. At the hearing the Claimant complained that the previous hearing had been adjourned and not closed. The Claimant's comments focussed very much on ground 5 regarding his allegedly valid certificate of medical exemption. The Claimant stated that the self-certification form was a temporary measure that he refused to sign because "by the time they asked me to sign this, we were well into it and the bullying and coercion had begun." The Claimant commented that "it was to be reviewed in December anyway and it would have led to this outcome anyway". Despite having seen the Claimant's medical evidence provided on 13 September 2021, Ms Ingle asked to be told what the exemption was but the Claimant refused this request. In relation to ground 2, relating to criminal intimidation, the Claimant complained about being repeatedly asked to prove his medical exemption. Grounds 3 and 4 were dealt with very briefly. When it came to ground 5 relating to the validity of the certificate, the Claimant stated "I wasn't going cap in hand to explain to the government representative. I wasn't prepared to do this. It was private." Ms Ingle asked to be sent outstanding questions by email and adjourned the meeting.

58. Later on 9 November 2021, Mr Collins emailed Ms Ingle an email purporting to be from a customer service adviser from CQC whose name was recorded simply as Omar. It included a contact number but no email address identifying the individual. This letter stated "there is no legal requirement for care workers to only use the letters and forms provided on the DHSC website … If, however, people choose to use alternatives, such as those issued by the Workers of England, Scotland and Wales Union, it should be noted this will only be acceptable until the 24th December 2021." Ms Ingle forwarded this on to Ms Tomlinson at Manager Direct and queried the point about CQC's opinion of the form of certificate provided by the Claimant. Ms Ingle's evidence was that she was led to believe that Ms Tomlinson sought to confirm the position with the CQC but that she received no response. I accept Ms Tomlinson's evidence on this point, in so far as it goes, which was unchallenged.

59. The Claimant's employment ended on 11 November 2021.

60. Ms Ingle provided the Claimant with the outcome of his appeal by letter dated 25 November 2021. This addressed the five grounds of appeal raised by the Claimant. It addressed the rejection of the Claimant's medical evidence before self-certification and the Claimant's union certification, both of which were stated not to meet government guidelines. The outcome addressed the letter from the CQC advisor stating that this had been considered but was inconsistent with government guidelines that required the self-certification form to be used. The decision to dismiss the Claimant was upheld.

The Law

61. Section 98 ERA states

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

……

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

……

(4) In any other case where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

62. The burden is on the Respondent to show the reason for dismissal and that it is potentially fair.

63. Once the employer has shown the reason for dismissal, it is then for the tribunal to determine whether the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissal. That question is to be determined in accordance with equity and the substantial merits of the case and the circumstances to be taken into account include the size and administrative resources of the employer's undertaking. The burden as to fairness under s 98(4) ERA is neutral.

64. The Tribunal must assess the reasonableness of the employer's decision and must

not substitute its view of the right course of action. There is a band of reasonable responses within which one employer might take one view and be acting fairly and another quite reasonably another view and still be acting fairly (**Iceland Frozen Foods Ltd v Jones 1982 IRLR 439)**.

65. For a dismissal to be for a potentially fair reason under s98(2)(d) ERA there must actually be a contravention of a duty or restriction imposed by an enactment. However, a genuine mistaken belief that there is a contravention of a duty of restriction imposed by an enactment can amount to a potentially fair reason for dismissal, namely "some other reason" under s98(1)(b). The leading case remains **Bouchaala v Trust House Forte Hotels Ltd** [1980] IRLR 382. It is for the Tribunal to decide if that reason is both substantial and justifies dismissal.

66. Many of the cases in this area focus on immigration law where there is often specific (mistaken) guidance from the government on individual cases. However, a reasonable belief can be established absent specific advice relating to the individual's case per **Nayak v Royal Mail Group** UKEATS/0011/15/SM.

67. In **Baker v Abellio London Ltd** [2018] IRLR 186 it was held that belief that it would be a contravention of the law to employ an employee without being provided with the documents the employer believed were required can amount to some other substantial reason (para 29). In that case it was unclear on the evidence what had been said to or by the Home Office regarding the claimant. Accordingly, it was held that when considering the reasonableness of the dismissal the Tribunal should have taken into account whether or not full information was given to the authorities and whether the authorities had all the material on which they could consider the status of the individual.

68. In considering whether a dismissal is within the band of reasonable responses, a Tribunal may need to consider the balance of prejudice including the injustice to the Claimant **Ssekisonge v Barts Health NHS Trust** UKEAT/0133/16/LA. In that case, the Home Office had raised concerns that the Claimant might not be who she claimed to be but no definitive decision had been reached that she was not who she claimed to be.

69. In **Kelly v University of Southampton** [2008] ICR 357 HHJ Richards in the EAT commented, obiter, on several factors that may be relevant to reasonableness in cases of this kind including whether the position resulted from some past conduct or omission of the employer and if something could be readily done in the future to remedy the position.

70. There are conflicting authorities on whether the ACAS Code on Disciplinary and

Grievances can apply in cases of dismissal for some other substantial reason (**Phoenix House Ltd v Stockman** [2016] IRLR 848 and **Holmes v QINETIQ Ltd** [2016] IRLR 664). There is authority that procedures strictly required for misconduct dismissals may be different in cases of dismissal for some other substantial reason (**Hawkes v Ausin Group (UK) Ltd** UKEAT/0070/18). However, the importance of offering an appeal in the immigration cases that often feature in the case law was stressed in **Afzal v East London Pizza Ltd (t/a Domino's Pizza)** [2019] IRLR 119.

71. The approach to be taken to procedural questions is a wide one. A Tribunal should view it if appropriate as part of the overall picture, not as a separate aspect of fairness **Taylor v OCS Group Ltd** [2006] IRLR 613.

Conclusions

The reason for dismissal

72. I find that the Respondent has established that the reason for dismissal was Mrs Morley's genuine belief, reinforced by the advice she received from Manager Direct, that continuing to employ the Claimant beyond 11 November 2021 without him having signed the Respondent's self-certification medical exemption form would have been illegal. It was said on behalf of the Claimant that there was confusion as to the reason for dismissal and that a distinction could be drawn between failure to sign the self-certification form and employment being illegal. However, similar to the decision in **Baker** above, I see this as an artificial distinction. The two were inextricably linked in Mrs Morley's mind. In evidence she said "My understanding was they had to sign the exemption, then there was a process with the government where you would be given an exemption by a person at the end of the phone." Mrs Morley repeatedly said when pushed on the reason for dismissal "We did not have proof that he was medically exempt." No alternative reason for dismissal was suggested.

73. The question then becomes whether the Respondent has shown that there would in fact have been a contravention, in this case on the Respondent's part, of a duty or restriction imposed by or under an enactment had the Claimant not been dismissed. The relevant enactment was Regulation 12 of The Health and Social Care Act 2008 (Regulated Activities) Regulations 2014(1) as amended by The Regulations. In particular, Regulation 5 inserted the following wording

"a registered person ("A") in respect of a regulated activity specified in paragraph 2 of Schedule 1 (accommodation for persons who require nursing or personal care) in a care home must secure that a person ("B") does not enter the premises used by A unless—

(b) B has provided A with evidence that satisfies A that either—

(i) B has been vaccinated with the complete course of doses of an authorised vaccine; or

(ii) that for clinical reasons B should not be vaccinated with any authorised vaccine;"

74. The effect of this provision is that it would have been unlawful for the Respondent to have allowed the Claimant to enter its premises after 11 November 2021 if it was not satisfied based on evidence provided by the Claimant that for clinical reasons he should not be vaccinated.

75. It is clear that on 16 September 2021 the Respondent had not been satisfied by the medical evidence provided by the Claimant. The Respondent wanted a letter from a GP or specialist recommending that the Claimant should not have the covid vaccine. The Respondent was in fact consistent on this throughout the period until the introduction of self-certification. I am satisfied that was a reasonable position for the Respondent to take. The medical evidence provided by the Claimant on 13 September 2021 was quite old (10-11 year) and did not obviously show on its face that the Claimant should be exempt from vaccination on the basis of the Respondent's understanding of the exemptions as set out in the guidance for managers.

76. However, to an extent that became irrelevant with the DHSC advice on the self-certification process on 15 September 2021, which indeed prompted the hurried retraction of the email on 16 September 2021 detailing the Respondent's rejection of the Claimant's medical evidence.

77. In light of the letter from DHSC dated 15 September 2021, the Respondent understood that proof of temporary exemption status could only be provided in the form attached to that letter. That form was largely transposed into the version provided to the Claimant by the Respondent. I conclude that the removal in the Respondent's form of the exemptions for conditions in the Summary of Product Characteristics for each different vaccine manufacturer, which was included on the DHSC form, must have been unintentional. No other reason has been suggested.

78. The Respondent initially went beyond the requirements of the DHSC form in asking for the reason for the Claimant's exemption, but this further condition was later dropped. What the Claimant was ultimately being asked to sign at the time of his dismissal was intended to be a copy of the form provided by DHSC.

79. It is notable that the Regulations do not appear to provide any fetter to the Respondent's discretion to reject evidence. There is no requirement of reasonableness nor any process for appeal nor any route in the Regulations for the Respondent to seek clarification if it is unsure. On that basis, I find that, in circumstances where the Respondent did not accept anything less than signature of the form it had provided to the Claimant as evidence of a medical exemption, there would have been a contravention of Regulation 12 of The Health and Social Care Act 2008 (Regulated Activities) Regulations 2014(1) as amended by The Regulations if the Claimant had entered the Claimant's premises after 11 November 2021 and accordingly the Respondent has satisfied its burden to show that the reason for dismissal was potentially fair within s98(2)(d) ERA.

80. If I am wrong about this and there would not have been a breach of an enactment, I find that the Respondent (through Mrs Morley) held a genuine belief that there would have been a breach of an enactment for the reasons above.

81. I also find that such belief was reasonable and therefore that dismissal would have been for a potentially fair reason under section 98(1)(b) ERA for the following reasons:

81.1. The medical evidence provided by the Claimant had been rejected and was quite old and did not clearly show on its face that the Claimant should be exempt from vaccination on the basis of the Respondent's understanding of the exemptions as set out in the guidance for managers;

81.2. The union certificate provided by the Claimant was substantially different to that provided by DHSC. It was not signed by the Claimant (although the covering letter was). It did not include a statement that providing false information may result in disciplinary action nor that the exemption was temporary; and

81.3. The DHSC letter dated 15 September 2021 stated that self-certification was possible using only the form attached to that letter. It did not envisage the use of other forms of self-certification.

Reasonableness

82. Having established that there was a potentially fair reason for the dismissal, I turn to the question of whether dismissal was reasonable in all the circumstances under section 98(4) ERA. I remind myself that there is a band of reasonable responses.

83. An important consideration is that the Respondent explored with the Claimant the possibility of alternative roles that would not have required the Claimant to be either

medically exempt or vaccinated. This was discussed with the Claimant at the consultation meeting on 20 August 2021 and the Claimant was reminded of this in Mrs Morley's letter of 24 September 2021. The Claimant did not give any indication that he wanted to take up any such alternative role.

84. The DHSC letter dated 13 October 2021 (sent during the Claimant's notice period and before his appeal) restated the importance of the self-certification form published by DHSC. That the government guidance continued to state that only this form was acceptable reinforces the conclusion that the Respondent's decision to dismiss was one open to a reasonable employer.

85. A potentially relevant consideration, according to HHJ Richardson in **Kelly**, is whether the position resulted from some past conduct or omission of the employer and if something could be readily done in the future to remedy the position. It is a feature of this case that the position the Respondent found itself in was not of its own making. The Respondent was at pains to point out throughout that it was responding to government guidance throughout and that it had no desire to dismiss the Claimant. Equally, it is hard to see what the Respondent could have done other than proceed to dismiss the Claimant if it believed his continued employment was illegal.

86. One matter explored in cross examination on the Claimant's behalf was whether the Respondent did all that a reasonable employer would do to explore the email from Omar at CQC which suggested that certificates other than that provided by DHSC were acceptable. I have been somewhat concerned that no definitive answer was provided at the appeal stage that this email was incorrect. There is some similarity here with **Baker**. However, unlike in **Baker**, I find that this did not render the decision to dismiss outside the band of reasonable responses. This is in large part because of the DHSC letter dated 13 October 2021 which effectively addressed this point. It is also notable that, unlike in immigration cases, all the decisions were being pushed onto the employers to make these decisions about whether they were satisfied by what they were being provided. There appears to have been no easy way to check any individual cases with the authorities.

87. The procedure followed by the Respondent was overall well within the band of reasonable responses. The Respondent conducted a thorough information campaign to raise awareness of the vaccine and the possible consequences of remaining unvaccinated. This was not threatening the Claimant. The Respondent would have been remiss had it not pointed out that his job might be at risk. Correspondence referred from at least June 2021 to the possibility of medical exemption. At no point was this, as characterised by the Claimant, no jab no job. Thorough manager guidance was

produced. Over time this did change as to what was considered acceptable evidence of medical exemption but this reflected changes to guidance from government. As mentioned above, at points template letters contained in the pack did not exactly match up to the realities of the Claimant's situation. However, overall the Claimant was treated as an individual.

88. Undoubtedly the Claimant was unsettled by being repeatedly encouraged to get the vaccine, to produce evidence of his medical exemption when he raised this, and then to sign the self-certification form. In circumstances where his employment was on the line, it is understandable that this was extremely draining on the Claimant. However, I do not accept that the Respondent's conduct was at any point intimidating, bullying or coercive.

89. The consultation meeting on 20 August 2021, the dismissal meeting on 12 October 2021 and the appeal hearing on 9 January 2022 were all conducted reasonably and the Claimant was able to make his points and was listened to.

90. The Claimant at various stages raised concerns including on 12 August 2021, on 30 September 2021, and on 6 October 2021. These communications were lengthy and dealt with the Claimant's broader complaints about the legality of the government's approach to mandatory vaccination. At points they included allegations of illegality by the Respondent's employees. The written responses from the Respondent (13 August 2021, 7 October 2021) tended to be shorter and, unsurprisingly, focussed on the fact that the Respondent was complying with the law. I find that these responses were reasonable in the circumstances.

91. The Claimant raised what was described as a grievance on 15 and 18 October 2021. The grounds contained in these documents directly related to the rejection of the Claimant's union self-certification. Their content was therefore inextricably linked to the Claimant's dismissal. The ACAS Code on Disciplinary and Grievances states at paragraph 46 that where grievance and disciplinary cases are related it may be appropriate to deal with both issues concurrently. Dealing with the Claimant's complaints as an appeal was well within the band of reasonable responses. It is noteworthy that once the Claimant accepted his concerns were being dealt with by way of an appeal, he did not seek to raise alternative grounds. All his grounds were addressed in the outcome letter.

92. The appeal officer, Ms Ingle, had had limited involvement in the case before hearing the appeal. The extent of this appears to have been forwarding on the Claimant's medical evidence to Manager Direct and expressing a provisional view on whether they

merited a medical exemption. When I asked the Claimant what practical difference he felt Ms Ingle's prior involvement had on the outcome of his appeal, the Claimant's answer focussed on Ms Ingle having asked him about the reason for his medical exemption when, the Claimant says, she was already aware. I find it much more likely that Ms Ingle had simply forgotten the details of the Claimant's exemption than that there was anything untoward in this question. I do not consider that the Claimant was able to give me any answer to suggest that Ms Ingle's very limited prior involvement did affect her impartiality. In submission, it was suggested on the Claimant's behalf that a different appeal officer would have issued a temporary certification for the Claimant but I do not find this credible as it was the Respondent's policy to only accept its self-certification form, based on the DHSC form. I find that it was within the band of reasonable responses for Ms Ingle to hear the appeal and I accept her evidence that she wanted to find something to enable her to allow the Claimant to remain employed.

93. A point developed for the Claimant was the extent of involvement of Manager Direct in the rejection of the Claimant's medical evidence, the rejection of the Claimant's union self-certification form and the decision to dismiss the Claimant. This was described as an overreliance on Manager Direct. For the Respondent, it was suggested that the unusual circumstances of the pandemic, the obligations imposed on the Respondent to be satisfied as to medical exemption and the fast past of changing government guidance meant that it was more appropriate for managers to rely on the advice of human resources professionals. A comparison was drawn to immigration situations where specialist advice, often legal advice, is the driving force of the employers' decisions. Whilst at points both Mrs Morley and Ms Ingle did fall back in answers to cross examination to the advice they received from Manager Direct to an unusual degree, I find that this reflected the unusual nature of the position the Respondent found itself in. I accept the submissions for the Respondent on this point and find that reliance on HR advice in this case did not reach the point where it rendered the dismissal outside the band of reasonable responses. Indeed, any reasonable employer would rely on subject matter experts when dealing with a situation such as this one.

94. For the reasons set out above, I find that the decision to dismiss and the process followed were within the band of reasonable responses. The Claimant's claim of unfair dismissal therefore fails and is dismissed.

Employment Judge T Perry

Date: 13 April 2022