



**EMPLOYMENT TRIBUNALS (SCOTLAND)**

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**Case No: 4110496/2021**

**Held on 26 January and 18 February 2022 (Members Meeting)**

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**Employment Judge J M Hendry  
Members Mr F Parr  
Mr P Kennedy**

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**Mr Zygimantas Naglius**

**Claimant  
In Person**

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**Lifescan Scotland Limited**

**Respondent  
Represented by  
Mr E Smith,  
Legal Manager**

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**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

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The Tribunal finds that the respondent failed to make a reasonable adjustment in terms of Section 20 of the Equality Act 2010 and that accordingly the claimant is entitled to an award of Two Thousand Pounds (£2000) to reflect the injury to feelings caused to the claimant by that failure.

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**REASONS**

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**E.T. Z4 (WR)**

1. The claimant raised proceedings for disability discrimination against the respondent company. The claimant is an agency worker who has worked with the respondent since 14 October 2014 as an Operations Technician in their manufacturing facility in Inverness. The respondent is involved in the manufacture of medical testing and diagnostic products.  
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2. The respondent denied any form of disability discrimination although they accepted that the claimant was disabled. They denied that they had knowledge of the disability at the relevant time or that the mandatory wearing of masks put the claimant at a substantial disadvantage compared to others.  
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3. The Tribunal heard evidence from the claimant and from Ms Yvonne Maclean, the claimant's Team Leader, Ian Soden, the respondent's Environmental, Health and Safety Manager and from Ms Shirley-Ann MacKenzie, HR Adviser.  
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4. Prior to the hearing parties had lodged a Joint Bundle of Documents which included an Agreed Statement of Facts those facts are incorporated into the Tribunal's findings.  
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### **Facts**

5. The claimant is a Lithuanian National who has worked in the UK for some years and for the respondent through an agency (Hays) since 2014. Prior to this he was involved in a variety of occupations. He works in the production packaging line. The claimant works shifts (four days on and four days off ) on a rota system.  
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6. Because of the nature of the products the respondent manufactures they were classed as an essential industry during the Covid pandemic and they were allowed to continue production.  
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7. The respondent took the Pandemic very seriously and as a global company they considered carefully what measures they should take to allow the facility

to continue operating safely whilst remaining compliant with best practice and Scottish Government rules.

- 5 8. Mr Soden the Health and Safety Manager was involved in discussions with various outside organisations including the Health and Safety Executive and NHS Scotland and also internally within the company to allow him to take advice on best practice as it developed throughout the world. The upshot of this was that staff were advised that from 14 October 2020 although they would not be required to wear masks at their work stations they were required  
10 to wear masks in communal areas, corridors and so forth.
9. The respondent's managers were flexible as to what type of face covering staff could wear. They allowed staff to wear visors and various cloth coverings of their choice.
- 15 10. In the claimant's production team, the Team Leader Ms McLean, was aware of two members of the production team who had medical conditions which militated against them wearing masks. Accordingly, these members of staff were not required to wear masks. One member of staff had produced a letter  
20 confirming appointments with his Cardiologist as evidence of his heart condition and although the letter did not confirm the nature of the condition or gave any recommendations in relation to mask wearing the respondent's management treated it as sufficient proof along with the staff members  
25 assertion that masks caused him difficulty to give the employee an exemption.
11. The claimant wore a mask at work without any apparent difficulty for some time. At some point he decided not to wear a mask at work and this was not immediately noticed until he was working on a night shift on 18/19 March  
30 2021.
12. When working at the facility staff such as the claimant were entitled to three breaks during a shift. They were also entitled to go to the toilets. On these occasions they were required to wear a mask passing through the corridors.

13. Late on the 18 March Ms Maclean, the claimant's Team Leader, noticed that the claimant was not wearing a mask when she passed him. She assumed that he had forgotten to put it on. She stopped and reminded him to put it on  
5 and he complied. Just after midnight the claimant spoke to Ms Maclean and indicated that he was exempt from wearing a mask and didn't want to continue doing so. The claimant made reference to his G.P. Ms Maclean understood this to mean that he had some form of letter or other evidence from the G.P. about mask wearing. This was not the case. She asked him to  
10 produce something from the G.P. supporting his request for an exemption. At this time Ms Maclean and other members of management were concerned about some negative views being expressed by staff about mask wearing and whether the company had authority to enforce the wearing of masks.
14. At this point the claimant did not advise Ms Maclean that he had an underlying  
15 condition of anxiety.
15. The claimant is an agency worker whose contract is extended periodically. He felt embarrassed about advising others that he had an underlying anxiety  
20 condition and it did not want it to become general knowledge. He was fearful that such a condition might affect his continued employment.
16. The claimant had a history of panic attacks and anxiety. He had not adjusted  
25 well to the Covid Pandemic. For some months he had felt depressed by the Pandemic and the various restrictions including the wearing of masks that had occurred. He was unable to visit his family in Lithuania because of travel restrictions. In the middle of 2021 his Grandmother was ill in hospital and he was unable to visit her. He was concerned about the effects of the Pandemic and all of these matters weighed on his mind. He found the wearing of a  
30 mask restrictive to his breathing. He would periodically have panic attacks and find it difficult to breathe. He found the mask impossible to wear when he was having a panic attack and gasping for breath. He felt that it restricted the amount of oxygen he could inhale quickly. He did not disclose these fears to the respondent's managers nor did they witness any attacks at work.

17. The discussion that had occurred between the claimant and Ms Maclean was brought to the attention of Mr Soden by Ms Maclean who e-mailed him and other managers on 19 March (JBp.67):

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*“Tonight, he came round the corner and no face covering on. I said to him, mind and put your face mask on in the corridor. He said nothing. Later on, I was going for lunch and he came up the corridor again and once again no face mask so I again, I said please put your face mask when in the corridor/locker room etc. He replied saying he was exempt. So I asked since when as up until tonight, he had been wearing a face mask. He said since three weeks ago. So I said well why would you not tell us that you are now exempt. I got back he doesn’t have to prove to anyone that he is exempt and that he doesn’t have to show any documentation or exemption card. It is the Government advice that those exempt cannot be discriminated against.*

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*Where do we stand on this as there are already rumblings on shift that he is not wearing a mask because he doesn’t believe in Covid.....*

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*Everyone else in the team with exemptions there are only two others, have come to me and said pretty much from the start, that they have an exemption and they have shown their card or doctor’s letters. This lad has been a year without issue and now all of a sudden, he has an exemption. If I was a betting girl, I would suggest that we might see more of this if there is no way of regulating who is exempt and who isn’t so I am after a bit of advice on it please before we see a snowball effect.....”*

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18. On 19 March he e-mailed setting out his advice to David McIntosh, a member of management, that he suggested was passed to Ms Maclean (JBp.69) which it was.

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*“I think our position is straight forward, we have an employee unwilling to comply with our site safety rules as encapsulated in the site risk assessment. This constitutes a breach of their Employee Duties (s.7 HASAWA 1974.7a) The duty to take reasonable care of self and others; 7b. Duty to co-operate on matters of H & S, in this case following the requirements of the Risk Assessment. Failure to comply is considered gross misconduct and the normal disciplinary process should be followed. The individual concerned is a temporary worker of 5 years standing and as such needs to be treated as if they were a permanent member of staff having been with us for so long.*

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*To tackle this situation I propose that I meet with Yvonne at the beginning of her shift this evening and she and I speak to the individual with the focus of explaining the LFS position and compliance with the Scottish Government’s requirements on face coverings in the workplace and how it is woven into the*

5 *site risk assessment those ideally, by adopting an explanatory approach we will be able to convince the individual, to comply, if he fails to comply at any time then he should be asked to leave the site depending and investigation. The conversation this evening is informal and does not form part of any disciplinary process.....”*

19. Mr Soden and Ms Maclean at the beginning of the next shift during the evening of the 19 March met the claimant and explained the respondent's position to him. Once more the claimant indicated that he thought he was  
10 exempt. He made reference to his G.P. He did not disclose his underlying medical condition nor was he asked what it was. In particular he did not disclose that about a year earlier he had been to see his G.P. about his anxiety condition following an examination he had a little time earlier at A & E when he had attended there believing he was having a heart attack. He  
15 had developed chest pains and breathlessness. He thought he was having a heart attack. He had been advised at A&E by a Doctor there that it was likely to be an anxiety attack.

20. Mr Soden's understanding was that the claimant would continue to wear a  
20 mask until the company could examine evidence from his G.P. that he was entitled to an exemption.

21. Following the meeting with Mr Soden the claimant reluctantly agreed to wear a mask. Mr Soden e-mailed his managers on 19 March following the meeting:  
25 *“Evening folks, Yvonne and I met with the employee in question and through a joint effort of coaxing and explanation we were able to convince him to wear a mask as per the risk assessment. He was given the option to provide evidence of an exemption which he was not able to do, he stated that he would provide this for the next set of shifts. We did not press him to produce  
30 the exemption now or for tomorrow's final shift deciding that it was enough for him to concede compliance with our request/instruction at this time, it was not asked why he believed he was exempt or whether he had an underlying medical condition.”*

35 22. The claimant had looked at Scottish Government advice on the internet which indicated that he could download an exemption certificate. He was aware,

however, that his Team Leader would not accept the exemption certificate as Ms Maclean had indicated to him that anyone could download such an exemption certificate. He was aware that after meeting Ms Maclean and Mr Soden that he had to get some evidence from his G.P. Thereafter, he contacted his G.P.'s practice on a number of occasions to get confirmation from them he was entitled to an exemption certificate. They would not provide him with an exemption certificate indicating that it was not their role to do so. The claimant found this whole process frustrating. He did not know what he could do.

23. On 25 March Ms Maclean spoke to the claimant about the situation. She asked him if he had any luck getting an exemption form from his G.P. (JBp.74). The claimant advised her that he couldn't get an appointment with his G.P. He asked for a letter from the business as to why he needed proof of his exemption. Ms Maclean explained that it wasn't something which she had heard of in the past.

24. On 26 April the claimant e-mailed (JBp.75):

*"On 18 March she stopped me and asked me why I'm not wearing a face covering. I said that I'm exempt. You asked for proof from a doctor to get a note where it says that I'm exempt that you don't need a note stating of my medical condition just a note stating that I am exempt from wearing a face covering. I said I'm not getting enough oxygen and feeling light-headed when I'm wearing a face covering. Next day, 19 March I'd been taken to Verio room to meet with Health and Safety representative (I can't remember the name) where he stated some of 1974 Health Act legislations that Lifescan is liable for people's safety and was getting me to put on mask at that time. I didn't have proof from a doctor stating I'm exempt. I said I can't get at this point and I can't wear it due to my health condition and not wearing a face covering worsens my health. I was given only two options to be sent home until I'll be able to provide a proof of exemption or wear a face covering..... But my doctor said that they don't provide notes stating exemptions from wearing face coverings. I've asked for written form from you stating of what I've been told last week and why I've been forced of wearing a face covering. But you said that the company will not provide such a thing. On April 15 I was at the doctor again and they said the same thing again that they don't provide notes of exemption since I've been forced into wearing a face covering my health condition worsen so much that every day that when I'm at work I'm experiencing heavy chest pain and feeling I'm not getting enough oxygen and*

lots of stress. I can't focus about anything else and thinking constantly about my health condition and face coverings causes me to think more about my health as well thinking that something will happen to me. I'm kindly asking to reply to my e-mail if I'll still be forced into wearing a face covering or not, in failure to reply to this e-mail will be considered as ignoring my medical condition."

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25. As the claimant was an agency worker the respondent's managers brought the situation to the attention of the agency that placed the claimant with them.

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In particular they were in contact with a Jessica Kierio who was their contact there.

26. Ms Keirio e-mailed Mr Soden and Ms Maclean on 6 April (JBp.77) confirming that they would contact the claimant ("Ziggy" as he was referred to) to request further information regarding his medical condition. Ms Keiro then spoke to the claimant. She recorded the contents of the discussion in her e-mail of 26 April which was sent to Ms Maclean and Mr Soden (JBp.76):-

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"Following my call with Ziggy this afternoon, he has said he is happy for me to pass on the below information:

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- His medical condition is anxiety. He has been suffering from anxiety from the past year and has been at his doctor as it has been gradually getting worse and hit a peak over the last weeks;
- He feels that when wearing a mask between communal areas particularly the canteen he feels that he struggles to get enough oxygen which in turn increases his stress and causes him chest pain which can continue for long periods of time after taking the face mask off;
- He has asked his doctor for an exemption note several times but he has been advised that this is not something which they did but instead been directed to the Government website to download an exemption card.

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Whilst his Doctor has advised that it is not customary to provide an exemption note, they are able to provide evidence of his anxiety but this would be at a cost (Ziggy is not sure how much this is).

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I have said that we will provide an e-mail confirmation this afternoon stating he is required to wear a face mask throughout the communal areas within Lifescan and advised that this can be passed on to his doctor in case it may support in them providing any information in relation to the exemption."

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27. The claimant once more contacted his G.P.

28. The claimant was not able to utilise the respondent's grievance process as he was not an employee. He was asked to put any "grievance" he had over mask wearing as a complaint which he did on 7 May. It was addressed to Ms Kierio. He wrote to her complaining that he had been forced to wear a face mask despite stating he was exempt. He explained once more that the G.P. would not provide exemption certificates. He raised the Equality Act and suggested that it was unlawful discrimination in relation to his disability. He did not set out what that disability was. He made reference to his health condition and he had been in contact with the EASS (The Equality Advisory & Support Service) and had completed a template letter provided by them.

29. There was then correspondence and contact between Hays and the respondent about these issues. Neither wanted to pay for the cost a a report from the claimant or to refer him to Occupational Health.

30. Ms Keiro e-mailed the claimant on 31 May indicating that Lifescan required a doctor's note or some form of medical proof of "your condition".

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31. The claimant e-mailed on 27 May (JBp.89):

25 *"I'm already frustrated asking multiple times of my G.P. about getting medical condition confirmation and being turned down all the time. Lifescan is asking proof of medical condition, my G.P. asking for what reasons I need proof of my medical condition as Lifescan needs a proof of my medical for exemption purposes, I already provided an e-mail stating from my G.P. 'If you feel you are exempt from wearing a face covering you need to go on to the NHS inform website and download an exemption certificate from there. If your employer declines to accept this then you would need to ask them to refer you to Occupational Health as doctor's do not provide letters for patients in regard to mask coverings.'*

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*I'm tired and stressed about this situation. Is Lifescan thinking that I'm lying about my medical situation?"*

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32. The claimant e-mailed Ms Keiro on 26 May (JBp.90):-

5 “Although I said I’m exempt I never said I have exemption provided from a  
doctor, it’s written in my e-mails that I will try and get exemption note from a  
doctor but as I’ve said before doctors don’t provide exemption notes. I never  
told about breathing the fibres in, I stated that I’m not getting enough oxygen  
and getting lightheaded and also getting chest pains, where later I also said  
10 on a phone call to Jessica that I was experiencing a panic attack when I said  
that after wearing a face covering I came back to work, I sit down and started  
feeling that I can get oxygen. I started freaking out but I managed to calm  
myself down, I tried wearing a Wiser (visor) in a different place by a request  
to an alternative solution to face covering, I was feeling more anxiety, feeling  
of judging that everyone looking at me causing me feel nervous, then I start  
getting heavy chest pains and that follows up with shortness of breath.”

15 33. The respondent’s HR department were concerned about asking the claimant  
about his medical condition as he wasn’t an employee and the respondent’s  
position was that any medical information or Occupational Health referrals  
should be made and paid for by Hays.

20 34. On 4 May the medical administrator from the claimant’s General Medical  
Practice, the Fairfield Medical Practice, e-mailed the claimant advising that  
he would have to go onto the NHS inform website and download an  
exemption certificate and if the employer declined to accept the certificate he  
would have to ask for a referral to their Occupational Health as the G.Ps in  
that practice do not provide letters from patients in regards to masks.

25 35. The claimant finally received a letter from his G.P. dated 27 July 2021  
(JBp.109) stating:

30 *“Please be advised that Zygimantas suffers from anxiety and panic attacks,  
has done so for the past year.”*

35 36. The claimant did not receive the letter until early August and did not  
immediately pass it to the respondent until at or around 25 August 2021. On  
9 September the respondent’s management indicated that in the light of the  
letter the claimant would be allowed his exemption (JBp.112). From that point  
he was no longer required to wear a mask.

## Witnesses

37. We found the witnesses called by the respondent to be honest and genuine witnesses. They were generally credible and reliable in their evidence and in their recollection of events. We also found the claimant to be generally credible and reliable in his evidence. There were some factual disputes between the parties. On the one hand the claimant said he had been not been wearing a mask for two weeks before the 18/19 March shift. He suggested that his Team Leader had been away on holiday. We prefer Ms McLean's evidence that she was not on holiday. That does not wholly undermine the claimant's assertion that he was not wearing a mask for a period as his failure to do so might not be noticed immediately. It could only be noticed when he was in a communal area and when first noticed Ms Mclean though he had just forgotten to wear it. We suspect that the claimant had stopped wearing a mask in those areas as he said but think it was unlikely to be for the full two weeks he asserts now as it probably would have been noticed earlier. The matter is in any event of no significance.

38. The second matter is of more significance in that Ms McLean was adamant, as was Mr Soden, that the claimant said he actually had a letter from his GP i.e evidence of his condition. We do not think the claimant would have misled the respondent's Team Leader in this way by saying he had something that he clearly did not have. He was aware that they were asking for proof and had asked other employees for similar evidence. We concluded that the most likely explanation was that there was confusion on both sides perhaps caused by the claimant's English which at times was imperfect when expressing himself. We accepted that it was more likely that he had meant that he could get evidence from his GP ( thinking about his visit to the GP following his panic attach which had led him to A&E) rather than he already had evidence in the form of a letter which he did not have.

30 **Submissions**

39. The claimant did not refer us to any legal authorities but asked us to accept his evidence. He believed that he had suffered discrimination by being forced to wear a mask even after he had said he was entitled to an exemption. He believed that this amounted to disability discrimination.

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40. Mr smith began by submitting that there was no basis for the claim under Section 20 of the EA. The mask wearing policy applied to all and related to the pandemic not his particular circumstances. He then turned to the issue of knowledge. The respondent's managers had an open mind and simply asked for evidence that the claimant was exempt. They acted once they had received the letter/report from his GP despite it's obvious shortcomings. There was he suggested a delay by the claimant passing the letter on or the decision would have been taken even earlier to exempt him from the policy on mask wearing. There was in addition no evidence to show that he suffered substantial disadvantage by being asked to wear a mask. He submitted that the respondent's witnesses had been credible and reliable in all aspects of their evidence. There was, he said, no obligation on the respondents to accept the claimant's word that he had a condition that allowed him to be exempt from this policy.

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### **Discussion and Decision**

41. The respondent here had, through their lawyers, conceded that the claimant was a disabled person in terms of the EA throughout the relevant period having developed an anxiety condition a symptom of which was panic attacks. The claimant's evidence as to the severity of the condition and the effect of the panic attacks was not challenged in cross examination. We would record however that the respondent's witnesses had not witnessed any such attack nor had been told about such attacks or indeed the underlying anxiety condition by the claimant. It was not disputed that the claimant had not, for example on starting work as an agency worker disclosed any anxiety condition nor had his attendance flagged up any potential problems.

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42. We considered the statutory basis of the two claims:

**“15 Discrimination arising from disability**

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

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

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

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

**20 Duty to make adjustments**

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

(2) The duty comprises the following three requirements.

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

39. The Tribunal first of all considered the issue of the respondent's knowledge. It  
25 was clear that there was no actual knowledge of the claimant's apparent condition until relatively late in the day. We have to consider their constructive knowledge namely what might they reasonably have been expected to know as a large and sophisticated organisation with its own internal HR department and access to Occupational Health advice. We considered the **Code of**  
30 **Practice on Employment 2011** issued by the Equality and Human Rights Commission ("the Code"). Paragraphs 15.14 and 15.15 are in these terms:

35 “5.14 It is not enough for the employer to show that they did not know that the disabled person had the disability. They must also show that they could not reasonably have been expected to know about it. Employers should consider whether a worker has a disability even where one has not been formally disclosed, as, for example, not all workers who meet the definition of disability may think of themselves as a ‘disabled person’.  
5.15 An employer must do all they can reasonably be expected to do to

*find out if a worker has a disability. What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially.”*

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43. During the lead up to the claimant being challenged by Ms McLean over his mask wearing there was no obvious sign that he was suffering discomfort by wearing it. He had done so without complaint despite writing in his ET1 that:  
“*I had anxiety attacks, heavy chest pain in the heart area, light-headedness,*  
10 *short(age) of oxygen ...”*

44. There was one aspect of this matter that puzzled the Tribunal somewhat. Neither the claimant’s Team Leader nor Mr Soden (both able and competent managers) asked the claimant what was the medical reason he believed  
15 allowed his exemption or what the letter they thought he had from his GP might say. This was not a case where we had any suspicion that the respondent’s managers, both of whom otherwise acted professionally, were trying to ignore the issue or turn a deaf ear to the claimant’s position.

20 45. There were, perhaps, background mitigating factors for failing to ask. The first is that there may have been a suspicion that the claimant was being awkward in some way and Ms MacLean certainly appeared more than a little sceptical in her correspondence. She had had no earlier or first-hand indication that the claimant was having difficulties, had heard what could be described as  
25 “rumblings” of discontent with the policy from some workers. The management view that it was up to him, the claimant, to justify the exemption. In passing we would observe that the bar was set pretty low as one employee simply asserted a difficulty and proved he was being seen for an examination in relation to a possible heart condition.

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46. Secondly at a later stage it was apparent that the claimant was in a ‘grey’ area in that as an agency worker there was no clear path to have him sent to

Occupational Health by the respondent or to have any independent referral paid for. Ms McKenzie mentioned that they were concerned about data protection issues. These could easily have been overcome and no doubt the respondent's management will want to look at the position closely to ensure that a worker's medical condition can be assessed quickly to ensure there is no undue delay in recognising a disability and putting in place adjustments to comply with the Equality Act.

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47. In the circumstances here, absent periods of illness, witnessing the panic attacks or some other source of information bringing the possibility of the claimant being disabled to the attention of management we have to look to the way things developed to understand the respondent's state of knowledge. The claimant certainly became frustrated that he could not get the necessary information from his GP's practice. They were no doubt stretched by the Pandemic, face to face appointments cancelled or restricted, and do not seem to have suggested that he or the respondent could ask for a medical report of some sort until later.

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48. The claimant emailed the respondent on the 26 April making it much clearer that he had a medical condition. He wrote that since being forced to wear the mask he had been stressed and experiencing a feeling that he was not getting enough oxygen and had heavy chest pains. In the light of this Hays was contacted and a Ms Keiro promptly spoke to the claimant on the 26 April. She relayed the contents of the discussion back to the respondent (JBp76). That indicated that the claimant's medical condition was anxiety. The Tribunal took the view that the respondents had now been sufficiently made aware of the claimant's condition and possible disability to put them under an obligation to make enquiries.

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49. We appreciate that these events took place during the Pandemic and that it still might have taken some time for the respondent, even if they had been so

5 minded, to make the sort of enquiries they needed to. We had no evidence about this matter. We took a broad view and concluded that it might have taken up to a month to either get a medical report from the claimant's GP by paying for it, have him assessed, perhaps by telephone or Zoom/Teams by an Occupational Health provider of their choice (or have this done by Hays).

10 50. The respondent's management acted quickly when they received the letter from the claimant's GP practice and we have no reason to believe they would not have acted as swiftly if they had received such confirmatory evidence earlier. We therefore have a period of about two months from 26 May (one month after the email from Ms Keiro) until the 27 July or thereby where the respondent was required to wear a mask in common areas while at work.

#### 15 **Failure to make reasonable adjustments**

15 51. In this case there is a clear PCP which is the mandate to wear masks in the common areas but not at the workstation. The comparator must be an employee who is asked to wear a mask but who does not have the claimant's disability and who would not have an adverse effect from wearing one.

20 52. The respondent's lawyer did not seek to argue objective justification but suggested that the weakness in the claimant's case arose from the claimant's failure to prove substantial disadvantage. Substantial disadvantage is defined in the Act as a disadvantage that is more than minor or trivial. Whether such a disadvantage exists in a particular case is a question of fact, and is assessed  
25 on an objective basis.

30 53. The Tribunal concluded that the respondent's failure over this two month period to implement a reasonable adjustment namely to allow the claimant not to wear a mask in common areas amounted to a substantial



disadvantage. In assessing this matter we were conscious that the claimant's evidence of the impact this matter had on him had not been challenged. We accepted that it caused the claimant heightened anxiety and symptoms of light headedness and suffocation and periodically chest pain. We also  
5 accepted that the heightened anxiety caused by the mask wearing impacted adversely on the claimant's anxiety condition exacerbating his sleep pattern leading him to become tired. In considering the severity of the impact we noted that the claimant was still able to continue to work and did not seem to have exhibited any obvious signs of distress causing him to take either time  
10 off or ask for additional break time to recover. Nevertheless, we accept that he found this period upsetting and wearisome.

54. We considered the Presidential Guidance on awards for injury to feelings which applies to claims from 6 April 2021. Our view was that an award on the  
15 lower 'Vento' scale was appropriate. We treated this as a single act of discrimination although one with consequences that lasted for this period. We will award the claimant £2000 which we believe is a fair and reasonable compensation.

## 20 **Arising from Disability**

55. We also considered Section 15 of the Equality Act and the claim for  
25 discrimination arising from disability. The question here is whether the disabled person has been treated unfavourably because of something arising in consequence of their disability. The consequences of a disability can be hugely variable. The common case is that of an employee being dismissed for absences caused by a disability. There is useful guidance in the case of  
***Pnaiser v NHS England*** 2015 where the EAT states:

30 *"a) A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.*

5 (b) *The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a section 15 case. The ‘something’ that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.*

10 (c) *Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A’s motive in acting as he or she did is simply irrelevant: see **Nagarajan v London Regional Transport** [1999] IRLR 572. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises, contrary to Miss Jeram’s submission (for example at paragraph 17 of her Skeleton).*

15 (d) *The Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is “something arising in consequence of B’s disability”. That expression ‘arising in consequence of’ could describe a range of causal links. Having regard to the legislative history of section 15 of the Act (described comprehensively by Elisabeth Laing J in **Hall**), the statutory purpose which appears from the wording of section 15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.*

20 (e) *For example, in **Land Registry v Houghton** UKEAT/0149/14 a bonus payment was refused by A because B had a warning. The warning was given for absence by a different manager. The absence arose from disability. The Tribunal and HHJ Clark in the EAT had no difficulty in concluding that the statutory test was met. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.*

25 (f) *This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator”*

30 4556. It does not seem clear to us that the facts narrated by the claimant showed that the behaviour complained of could be directly related to his disability (or symptoms) or other aspects of his disability. In other words, we do not see how this section can be engaged in these circumstances because he was not asked

to wear the mask because of any aspect of his condition: accordingly, this particular claim must fail.

5 **Employment Judge Hendry**

**Dated: 25 February 2022**

10 **Date sent to parties: 25 February 2022**