



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms S Graham  
**Respondent:** Ascot Care Ltd  
**Heard at Newcastle Employment Tribunal**

**By:** Cloud Video Platform (CVP)

**On:-** 24<sup>th</sup>, 25<sup>th</sup> and 26 April 2023;  
**Deliberations on 24<sup>th</sup> May 2023**

**Before:** Employment Judge Martin  
**Members:** Mr J Ostrowski  
Mr P Curtis

**Appearances:**

**Claimant:** Ms A Loutfi (Counsel)  
**Respondent:** Miss L Halsall (Counsel)

## RESERVED JUDGMENT

1. The claimant's complaint of unfair dismissal is not well founded and is hereby dismissed.
2. The claimant's complaint of discrimination on the grounds of religion/philosophical belief is also not well founded and is hereby dismissed.

## REASONS

### Introduction

1. The claimant gave evidence on her own behalf. Mrs M Lovelace (formerly Farragher, head of operations; Mr G Nesbitt, Director, gave evidence on behalf of the respondent.

2. The Tribunal was provided with an agreed bundle of documents, a supplemental bundle supplied by the respondent during the course the hearing which consisted of brief notes of meetings as well as the respondent's disciplinary policy.

### The law

3. The law which the Tribunal considered was as follows:-
  - 3.1. Section 98(1) of the Employment Rights Act 1996 which provides:

“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.”
  - 3.2. Section 98(4) ERA 1996:

“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.
  - 3.3. Section 13 of the Equality Act 2010:

“(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

A protected characteristic includes religion/philosophical belief.
4. The leading case of *Grainger Plc v Nicholson* [2010] IRLR 4 where the EAT set out five criteria to consider as to whether a belief amounts to a philosophical belief under the legislation:-
  - The belief must be genuinely held;
  - It must be a belief and not simply an opinion or view point based on the present state of information available;
  - It must concern a weighty and substantial aspect of human life;
  - The belief must attain a certain level of cogency/seriousness, cohesion and importance and;
  - It must be worthy of respect in a democratic society and not be incompatible with human dignity and not conflict with the fundamental rights of others.
5. The case of *Polkey v A E Dayton Services Limited* [1987] IRLR 503 where the House of Lords held that it could only be a fair dismissal where procedures had

not been followed where following such procedures would be utterly useless or futile. The House of Lords also held that a deduction up to 100% could be made to reflect the likelihood of there would have been a fair dismissal in any event.

6. The case of *BBC v Nelson No 2* where it was held that any award of compensation could be reduced to nil where an employee caused or contributed to his dismissal. This includes any award that may be made in relation to any basic award.
7. The Tribunal also considered the case of *Jhuti v Royal Mail Limited* [2018] ICR 982 referred to by the claimant's counsel. The case concerned factors operating on a mind of the decision maker at the time of the dismissal.
8. The Tribunal also considered the case of *X v Y* ET 2413947/20, referred to in the respondent's submissions which was a case which concerned whether a reaction to the threat of harm amounted to a protected philosophical belief which was held not to in those circumstances.
9. The Tribunal also considered and took account of a number of other cases referred to by the both respondent's and claimant's representatives in their submissions as follows:
  - *Alettt v Scarsdale Grange Nursing Home* ET 1803699/2021.
  - *Dimitrova and Others v Barchester Health Care Limited* ET 1803315/2021  
Those first instance decisions related to cases in the Leeds Tribunal bases concerned with No Job No Job policy arising from the Coronavirus pandemic.
  - *Royal Bank of Scotland Plc v McAdie* [2007] EWCA Civ 806.
  - *Tuppenden Primary School Governors v Sylvester* [2012] ICR D29.
  - *R (Peters and Findlay) and Fairburn v Secretary of State for Health and Social Care (1) and the Joint Committee for Vaccination and Immunisation (2)* 2021 EWHC 3182.
  - *Phoenix House Limited v Mrs T Stockman* UKEAT/0058/18/00.
  - *Lock v Cardiff Railway Company Limited* [1998] IRLR 358.
  - *Mirab v Mentor Graphics (UK) Limited* UKEAT/0172/17.
  - *Brown v Veolia ES [UK} Limited* UKEAT/041/20
10. The Tribunal also took account of the ACAS Code of Practice which it is not intending to repeat here. That Code sets out some basic principles around conducting disciplinary and grievance hearings namely: - the requirement to investigate matters; provide the employee with the relevant information so that they can properly and fairly respond to any allegations; hold disciplinary and grievance hearings and the reference to an appeal process.
11. The Tribunal also considered Regulation 5 of Regulations Health and Social Care Act 2008 (Regulated Activities) Amendment Regulations 2021 which provided that a registered person (A) must secure that a person (B) does not enter care home premises used by A unless B provided A with evidence that satisfies A that either:

- (i) B has been vaccinated with the complete course of doses of authorised COVID vaccines; or
  - (ii) That for clinical reasons B should not be vaccinated with any authorised COVID vaccine.
12. The case of *Taylor v OCS Group Limited* [2006] IRLR 613 where the Court of Appeal made it clear that any defects at any early stage of a disciplinary process will not in itself render any dismissal unfair. They urged a tribunal to examine the whole process, including any appeal to determine whether procedures adopted were fair or unfair and consider the thoroughness or lack of it in the process notwithstanding any deficiencies at an earlier stage.
13. The case of *Gallacher v Abellio Scott Rail Limited* UK EAT/0027/2019 where the EAT upheld the Employment Tribunal's decision to find a dismissal fair where a formal procedure was not used. It was noted that it would be an unusual and rare case where an employer dispensed with formal procedures altogether. The EAT held that it was within the range of reasonable responses for an employer to dismiss where it would be effectively futile to proceed with a formal procedure.

### **Issues**

14. The issues which the Tribunal had to consider were firstly whether the claimant had been dismissed for a fair reason or whether she was dismissed for some other substantial reason. In that regard, the Tribunal had to consider what was that substantial reason and whether it entitled the respondent to dismiss the claimant. The Tribunal had to then consider whether the respondent acted reasonably in dismissing the claimant for that reason, including whether it followed a fair procedure and whether dismissal was a reasonable response in the circumstances of the case. The Tribunal indicated that it would also consider whether the claimant would have been fairly dismissed in any event, if a fair procedure had not been followed and whether or not the claimant had caused or contributed to her dismissal.
15. In relation to the claimant's complaint of discrimination on the grounds of religion/philosophical belief. Firstly, the Tribunal had to consider whether the claimant had a philosophical belief and identify that philosophical belief. In that regard, it indicated that it needed to consider the criteria identified in the case of *Grainger* referred to above. The Tribunal then had to consider whether the respondent treated the claimant less favourably than it treated a comparator and whether that treatment was because of the claimant's philosophical belief. The less favourable treatment relied upon was the claimant's dismissal. In that regard, the Tribunal had to take account of shifting burden of proof, namely whether or not the Tribunal could properly and fairly conclude that the difference in treatment was because of the claimant's belief and, if so, it then had to look to the respondent for its explanation for the claimant's dismissal.

### **16. Preliminary Matters**

17. At the outset of the first day of the hearing, the Tribunal noted that the claimant's application for leave to amend her claim had been allowed by the Tribunal. However, it appeared that, for some reason, the respondent's representative was unaware of this, despite the Tribunal notifying them in writing to that effect. This was a matter which arose on the last occasion when the case was listed for a final hearing following which the claimant's representative made the appropriate application. The respondent's representative, had objected to the application at

the last hearing but did not file any written submissions, despite having been copied into the claimant's representative's application for leave to amend.

18. As this matter had already been dealt with, Employment Judge Martin did not consider it was appropriate to revisit the matter. The respondent's representative then indicated that they may wish to produce some additional documents. Employment Judge Martin agreed with the claimant's representative that they could do so, provided these were limited and that the claimant had a proper opportunity to consider those documents and discuss them with the claimant. As a result, the first day of the hearing was largely lost to dealing with that matter.
19. Prior to the hearing today, the respondent's representative had also made an application for the wasted costs of the previous hearing. That application was not dealt with, albeit that Employment Judge Martin did ask the respondent's representative whether they were going to proceed with that application, bearing in mind the subsequent delay which had been caused in respect of the first day of this hearing.

### **Findings of fact**

20. It is important to note the background to these proceedings. They relate to unprecedented circumstances which arose in 2020/2021, when the Coronavirus Pandemic occurred and affected huge parts of the world, including the UK. As a result, many lives were sadly lost in the UK, particularly affecting those residing in care homes. A COVID Vaccine was subsequently introduced into many parts of the world.
21. This case concerns followed the roll out of the COVID vaccine and Regulations introduced by the UK Government in 2021 relating to care homes. Those Regulations effectively meant that anyone working in a care home was required to either be vaccinated from COVID 19 or to be able to prove that they were medically exempt from being vaccinated. Due to the circumstances and backlog with access to medical care, it became clear that not everyone who was entitled to a medical exemption would be able to obtain it from the GP or consultant. As a result, the Government introduced a Self-Certification form for Medical Exemptions to enable people to be able to self-certify until they were able to obtain the appropriate medical exemption from their GP or consultant. The Government introduced a Self- Certification form, which included a declaration from the individual that they were medically exempt.
22. The respondent is a care home. It operates seven homes across seven locations in the North East of England.
23. The claimant was employed by the respondent as a senior care assistant. She commenced employment with the respondent in June 2005, initially as a care assistant. She was then promoted fairly quickly to the role of a senior care assistant. She was well respected and well regarded by the respondent. She had a clean disciplinary record.
24. The Government requirements for Care homes under the Regulations as referred to at paragraph 21 above were to be effective as 11 November 2021. The respondent was regulated by the Care Quality Commission, who would require evidence of compliance with those Regulations.

25. The respondent says that they provided fact sheets to employees from July 2021 onwards when the Regulations came into force. They say all staff were made aware of what they had to do to; namely either be vaccinated or obtain an exemption. The claimant says that she did not specifically see any fact sheets, but she did confirm in her evidence that she was aware of the requirements.
26. The respondent indicated that they sent memoranda to staff reminding them of the requirement to be vaccinated or obtain the appropriate medical exemption as is noted at page 106 of the bundle. Mrs Lovelace in evidence said the respondent put up posters in the Care Home. The claimant accepted in evidence that she may have seen the posters, but cannot recall receiving the memoranda. A sample of the poster located in the respondents is at page 108 of the bundle. Having said that the claimant clearly acknowledged throughout her evidence that she was fully aware of the requirements to either be vaccinated or obtain a medical exemption.
27. The claimant said in evidence and that she suffered from high blood pressure, cholesterol and that she was at high risk of blood clots. She said that she lost her only sibling in December 2022 to similar type of acute illnesses.
28. The claimant relies on a philosophical belief. It is not entirely clear what is her philosophical belief. There was no specific details referenced in her claim form to her philosophical belief and certainly no particulars along the lines of how she now articulates that belief. At the preliminary hearing before Employment Judge Jeram in May 2022, the claimant's union representative indicated that the belief was taking part in clinical and medical trials. Although she was then asked to provide some further information about that belief, she did not do so until she produced her first witness statement produced in respect of the final hearing originally listed for November 2022. In that witness statement, she refers to core values instilled into her from childhood around integrity, self-respect and independence. She refers to not experimenting with drugs and talked about her concerns about the risk of the COVID vaccine. She also refers to bodily autonomy, about being able to make informed choices about medical intervention. In the course of the hearing on cross-examination, she indicated that her philosophical belief was effectively around informed consent and medical interventions where there were no medical trials. She did not provide any details about this in her witness statement. She accepted that she did take drugs for her medical conditions, however she said she would only take drugs that had been on the market for a long time. She also talked about checking products, including food products to ascertain what they contained, which she suggested was something she did very regularly.
29. The self-certification form was available on the Government website. The form was only valid until 24 December 2021, albeit that deadline was subsequently extended, due to ongoing difficulties in individuals being able to see their GPs or medical consultants in order to be certified by those medically qualified persons as medically exempt.
30. The respondent adopted the form from the Government website. It required employees to sign that form until they were able to obtain a formal medical exemption.
31. The form set out examples of medical exemptions stating it could include individuals receiving end of life care; people with learning difficulties or autism; individuals with a combination of impairments to the COVID 19 vaccine or its constituents; or people who had had adverse reactions to the first dose of the vaccine. The form made it clear it was a temporary medical exemption. It went on to explain how the formal

medical exemption could be obtained. It was noted on the form that providing false information may result in disciplinary action. The form adopted by the respondent is at page 309-310 of the bundle. The claimant was referred to that form on various occasions which she does not dispute.

32. A meeting took place between the claimant and her line manager which Mrs Lovelace attended on 13 October 2021. At that stage, Mrs Lovelace had not long been working in the business. Mrs Lovelace said that the meeting was to discuss the rotas. She said that she also there was also suggested trying to rearrange the rotas to provide for the claimant to have more time off with alternate weekends off. The claimant says that there was a discussion about the rotas, but she says that the rotas were already in place and that she did have alternate weekends off in any event. She says that she was told at that meeting that she could not be added to the rota because she did not have her vaccine status. Mrs Lovelace says that the claimant raised the issue about the COVID vaccine and asked what would happen if she did not have the vaccine. Mrs Lovelace said that she explained the position to the claimant namely that she would require either the claimant to be vaccinated or to provide a medical exemption. Mrs Lovelace said in evidence that the claimant said at that meeting that she would meet the medical exemption requirements. Mrs Lovelace said she told the claimant she would need to make the application for medical exemption, but in the meantime could provide the self-assessment form via the government website. Mrs Lovelace indicated that she asked the claimant about her medical reasons but the claimant did not want to discuss them. The claimant suggested that she was effectively threatened with her job if she was not vaccinated at that meeting. It is clear from both parties evidence that there was a discussion about the claimant's vaccination status and that the claimant was informed at that meeting that she needed to obtain a medical exemption if she considered she was medically exempt, but she could provide a self-certification in the form indicated on the government website until she obtained that medical exemption.
33. Mrs Lovelace said that she offered a meeting to the claimant, who wanted to have her trade union representative available. Mrs Lovelace said that she attempted to set up a meeting but to no avail.
34. At this stage the claimant was asserting that she was medically exempt from the vaccine. She made no reference to any objection to the vaccine on philosophical grounds.
35. The respondent said in evidence that they had received self-certification forms for medical exemptions from other staff which had been accepted.
36. Although the claimant indicated in her evidence that there had been a meeting in early October about her hours of work and rotas, it appears that there was no discussion about the COVID vaccination at that stage.
37. Mrs Lovelace said that she made a note of the meeting on 13 October 2021, which is at page 112 of the bundle. She notes that the claimant has declared that she is exempt from the Covid-19 vaccination and that the respondent requested evidence or self-certification via the government website. #
38. The claimant did not deny in her evidence that Mrs Lovelace had directed her to the self-certification form from the government website at that meeting. This was the form which the respondent had decided to use.

39. On 23 October 2021 the claimant sent Mrs Lovelace what was purported to be a self-certification form. The email is at page 118 with the certificate at page 117. The certificate states that it is a Certificate of Clinical Exemption from Vaccination. It is issued by the Workers of England Union. It states that the claimant provided a statement of truth which was lodged with the union on 21 October 2021 which confirms that she is exempt from requiring vaccination. It states that it satisfies the requirements of the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 as amended. It states that the reasons for the clinical exemption are private and medical. This is signed by the regional co-ordinator for the Workers of England Union.
40. During the course of the hearing the claimant was asked whether the person who had provided the Certificate issued by the Union was medically qualified, which she said she understood not to be the case. She also said she had provided her Union with a certificate of truth, but had not provided any medical evidence to them.
41. The Certificate issued by the Union did not contain any statement of truth which was required by the Form required under the respondent's policy.
42. Mrs Lovelace said that she then sought to contact the claimant to discuss the exemption form provided and to inform the claimant what was required as per the respondent's policy namely the self-certification form on the government website to which she had referred her.
43. On 29 October 2021 Mrs Lovelace emailed the claimant to make it clear to her that she had not refused to accept a self-certificate form. She explained that the claimant would need to complete the correct self-certification form required under the respondent's policy to self-certify her medical exemption. She explained that the correct self-certification form could be found via the government website. She also offered to print a copy for the claimant and leave it in the office (page 190 of the bundle).
44. This email followed on from an email from the claimant requesting in writing the reasons why Mrs Lovelace was refusing as she saw it to accept the exemption form. It followed on from a telephone discussion which had clearly taken place between the two of them (page 121).
45. On 1 November 2021 the claimant emailed Mrs Lovelace with a response from her trade union (page 122).
46. A further email was sent by the claimant to Mrs Lovelace on 2 November 2021 again referring to the union's position regarding the Certificate of Clinical Exemption which they had issued. In that email, she asked the respondent to confirm why it did not meet the requirements. In that email, the claimant suggested that medical exemptions do not only need to be issued by a GP or Healthcare professional. In her email, the claimant suggests that the certificate issued by the Union is compliant with the guidance.
47. Throughout this time Mrs Lovelace said that she had made it clear to the claimant the deadline when the claimant had to produce the correct Self certification form as required by the respondent and available via the government website.
48. On 9 November 2021 the claimant raised a grievance. Her grievance letter is at page 124-127 of the bundle. In the grievance letter she also asked for certain documents including policies and her contract of employment.



49. The grievance is difficult to follow. It refers to a number of grounds - 1 to 10. The claimant said in evidence the grievance was drafted by her trade union representative. She said she was asked to complete certain parts of it and add in her comments. It sets out various different grounds:- Ground 1 deals with clinical exemption in that she refers to providing a clinical exemption certificate, which she asserts is compliant with the legislation and asks the respondent to explain their objections to that certificate. In Ground 2 she refers to medical treatment no details are included. It refers to particular legislation. Ground 3 refers to intimidation at work. Ground 4 refers to health and safety at work. She refers to a breach of the duty of care and references certain legislation. Ground 5 is described as harassment in which she refers to being put under pressure with regard to her vaccine status and her employment. She refers to family members and service users asking her similar questions. Ground 6 refers to discrimination and beliefs. Under this section it states that she has beliefs which forbid her from participating in certain medical interventions. In her evidence to the Tribunal she confirmed that sentence had been drafted by her trade union. She said in evidence that she had then been asked to add any particulars which are paragraphs A and B. In paragraph A thereof she has added "it has been noted that other members of staff were offered new contracts but I was not because of vaccine status". She does not include anything under paragraph B. Ground 6 goes on to ask the respondent to explain how medical intervention policies and conduct comply with equality legislation. Ground 7 is about policies complying with the Department of Health guidance on informed consent. Ground 8 refers to the respondent refusing to accept her self-declared medical exemption. She then refers to discrimination on the grounds of disability referencing health. In Ground 9 she refers to her personal health concerns about the vaccine and refers to a risk assessment. Ground 10 refers to the respondent requiring the Department of Health exemption form listing that is not a legal requirement.
50. The Government Regulations came into force on 11 November 2021. They required anyone working in a care home to either have had a COVID vaccine or to have produced a medical exemption, or alternatively a self-certificate confirming that they had a medical exemption. The latter was a temporary measure and, at that stage, only valid up to the end of December 2021. This was to enable doctors and other medical professionals to be able to issue medical exemptions to those who required them.
51. In her evidence to the Tribunal, the claimant said she worked on 11 November 2021. The respondent initially indicated that they did not think she worked. However they accepted that she may have worked in error. The rota in the bundle confirms that the claimant did appear to work on 11 November.
52. Mrs Lovelace said that she offered to meet with the claimant to discuss her grievance on 12 and 15 November. It appears that the claimant's trade union representative was not available on either of those dates.
53. On 17 November the respondent suspended the claimant from duty. Mrs Lovelace wrote to the claimant to confirm her suspension on that date (page 152 of the bundle). The claimant suggested she did not receive that letter until later. In her evidence to the Tribunal, Mrs Lovelace says that she attempted on various occasions to try and chase the claimant about her vaccine status, medical exemption or self-certification form, but that the claimant refused to co-operate. She said that she was then forced to suspend the claimant from her duties due

to the legislation which was coming into force. She appears to have been unaware at that stage that the claimant had in fact worked on 11 November 2021. In her evidence to the Tribunal, Mrs Lovelace indicated that she needed to suspend the claimant because she understood under the rota the claimant was due to attend work and she had to take immediate steps to comply with the legislation. The claimant was suspended without pay although it is understood that the claimant was then subsequently paid for that period of suspension. The respondent explained that the reason for the claimant's suspension was for failing to provide an acceptable self-declaration / evidence of exemption stating she was medically exempt from being vaccinated against Covid-19.

54. The grievance hearing then took place on 24 November. The claimant attended with her trade union representative. The Tribunal has been provided with copies of the notes from that suspension meeting which the claimant indicated she had not seen before and with which she did not agree; albeit that she did not indicate in her evidence exactly what parts of the notes she disputed.
55. The note of the grievance the hearing is in supplemental bundle at pages 1 to 3. In her evidence, and as noted in the notes of the hearing and accepted by the claimant, Grounds 1 and 2 of her grievance were not taken forward, as neither the claimant nor the trade union representative were able to explain exactly what was meant in respect of those two Grounds of appeal.
56. At the grievance hearing, the claimant insisted that she was being forced to have the COVID vaccine. It was made clear to her that that was not the case, but that the respondent was following Government legislation and company policy. It was asking staff either to be fully vaccinated or if they medically exempt to complete the self-certification form to confirm they are medically exempt, if they cannot obtain a medical exemption at this stage. At the grievance hearing, Mrs Lovelace made it clear to the claimant that she required the claimant to complete the correct self-certification form confirming she was medically exempt as per the Government website and company policy. The claimant did not provide any explanation as to why she could or would not complete the correct form. A discussion also took place about risk assessments and the allegations of bullying and harassment.
57. At the grievance hearing, the claimant made it clear that she would not be completing the correct self-certification form. She said that the only documentation she would provide was the Certification of clinical exemption from her trade union. In her evidence to the Tribunal, the claimant acknowledged that she had stated at the grievance hearing that she would not complete the self-certification form requested by the respondent. She indicated that she did not understand why she had to do so. She maintained that position throughout her evidence to the Tribunal namely that all she was only prepared to provide to the respondent was the form completed by her the trade union. She also maintained that position throughout the appeal process and during the course of these proceedings. When she was asked to explain this position during the course of her evidence, she was unable to explain why she could or would not provide the form requested by her employer, except to say that was the advice received from her trade union.
58. A discussion took place about Ground 6 relating to discrimination on the grounds of religion/belief. The claimant was asked in the grievance hearing to explain this ground. She did not dispute in her evidence that she was given the opportunity

to do so. Her response was to indicate that she believed other staff had got new contracts and that she had not because she was not vaccinated. During the grievance hearing, the claimant made no reference to the belief upon which she now relies on before this Tribunal. The only comments that she made in the grievance about religion/ belief relate to staff about not being put on a rota because she did not have the vaccine. When she was questioned about this during her evidence, she acknowledged that that was the only discussion which took place during the grievance hearing about this part of her grievance. She accepted that the respondent would not have been aware of any issues around philosophical belief during the grievance process along the lines she is now seeking to advance in these proceedings as to the reason why she could not be vaccinated.

59. The respondent's response to the grievance made sent on 7 December 2021 is entirely consistent with notes of that hearing.
60. It is clear to the Tribunal that there was clearly a discussion during the grievance hearing about the trade union certification form produced by the claimant and the one required by the respondent. The claimant does not dispute that such a discussion took place during the course of the grievance hearing nor that she made it clear during the course of the grievance hearing she would not be providing the form requested by the respondent, but maintained her stance that the only form she would provide was that produced by the trade union which she had sent on to the respondent.
61. In her evidence to the Tribunal, the claimant admitted reluctantly that the only discussion about religion or belief which took place during the grievance hearing was about not being put on the rotas due to her vaccine status. That is entirely consistent with the respondent's evidence, the notes of the meeting, and the response to the grievance. It was quite clear that there was no discussion, as acknowledged by the claimant, which would have made the respondent aware of the belief articulated at this hearing, which the claimant now relies on regarding her objections to the vaccine. The claimant acknowledged in her evidence that she had the opportunity to provide this information by adding comments to the template produced by her trade union representative and/or by raising it at the grievance hearing, but she did neither.
62. On 29 November 2021 the claimant appealed against her suspension/resignation. (Page 166/167 of the bundle). At this stage her employment had not been terminated.
63. On the same day, the claimant emailed Mrs Lovelace further regarding the certificate of clinical exemption issued by her union. She again sought to argue that certificate should be accepted and was compliant with the Department of Health guidance. It was quite clear, even at that stage, as was confirmed by the claimant in her evidence, that she was still insisting the respondent accept the clinical exemption provided by her union and thereby was refusing to complete the self-certificate form required by the respondent. That email is at page 169/170 of the bundle.
64. On 7 December 2021 the respondents wrote to the claimant to reject her grievance. They responded to each of the grounds in detail. The letter is at pages 174-178 of the bundle. In the grievance response, the respondent makes it clear that they are not preventing the claimant from self-certifying for a medical exemption, but required her, as previously instructed on 29 October 2021, to

complete the self-certification form provided on the government website. They had already offered to provide a copy of that document to her. The respondent made it clear at Ground 10 that it required all employees to either have two vaccines of the Covid-19 vaccination, or if an employee was medically exempt that they may self-certify using the self-certification form on the government website. They explained that could be used up until 24 December. The respondent reiterated in that letter that an employee with medical exemption could seek a medical exemption by completing the self-certification form as an alternative to their vaccine status.

65. In the letter rejecting the grievance the respondents also responded to ground 6 which apparently related to discrimination on the grounds of belief. The response simply dealt with the matter raised by the claimant about other staff being put on the rota and that she was not due to her vaccine status, which is entirely consistent with what both Mrs Lovelace and the claimant said in evidence and the notes of the meeting.
66. The claimant accepted in evidence that she was given the opportunity in the grievance hearing to expand on any aspects of her grievance, in particular ground 6 and acknowledged that neither she nor trade union representative, who was present, did so. She accepted in evidence that there was no reference by her during the course of her grievance hearing to her philosophical belief as it is now presented. She could not explain why there was no reference to the matters which she now raises about philosophical belief in either her grievance letter or the grievance meeting.
67. As a result of, and following, the grievance meeting and the response to the grievance, it would have been absolutely clear to the claimant what she was required to provide by way of a self-certificate form for medical exemption. It would also have been abundantly clear to her as a result that, what she had provided, was not sufficient. In the grievance hearing and the in the response to the grievance the respondent reiterated the documentation required namely, the self-certification form on the government website and incorporated into the respondent's policy. There was no explanation in the grievance meeting as to why the claimant could not provide this form.
68. On the same day, 7 December 2021, the respondent went to terminate the claimant's employment. The letter is dated 7 December 2021 and is at page 172-173 of the bundle. In the letter, the respondent states that the claimant is being dismissed for her refusal to comply with the requirement to have a Covid-19 vaccination or to provide a medical exemption form or self-certification evidence to prove that she is medically exempt in accordance with the government policy and the respondent's own policy. They informed the claimant that they have not been able to find any alternative position for her and provided her with 12 weeks' notice. She is given a right of appeal.
69. In her evidence to the Tribunal, Mrs Lovelace stated that the respondent could not continue to employ the claimant as she could not work in the care home without either her COVID vaccinations or a medical exemption form. This would be in breach of Government legislation. The respondent's own policy incorporated that Government legislation. She said the respondents were subject to CQC inspections. The claimant could not work in the care home, as it would be identified as a breach by the CQC who regulate the care home industry.

70. Mrs Lovelace accepts that there was no disciplinary hearing. However in evidence, she said that there were numerous discussions with the claimant about what she had to provide to the respondent to comply with the respondent's policy following the introduction of the Government regulations around care homes. She referred to various occasions with the claimant's line manager and the meeting on 13 October. Mrs Lovelace said that the matter was discussed in detail at the grievance hearing when she made it clear what the claimant needed to provide to the respondents to comply with the legislation. She said that the claimant made it clear that she was not prepared to provide that information and was only prepared to provide the union clinical exemption form, which the respondent had made absolutely clear was not acceptable.
71. Mrs Lovelace said that it was quite clear that the claimant had not provided the required certificate, nor had she given any indication that she was going to do so or indeed change her position and do so. Mrs Lovelace said that, even after the grievance hearing, when the matter had been discussed, the claimant had reiterated in her email of 29 November that only document she would provide was the union certificate form, despite being told at the grievance hearing that she needed to provide the self-certification form from the government website which was part of the respondent's policy. In the email of 29 November again makes no reference to the claimant's refusal to be vaccinated on grounds of religion. The claimant was unable to explain in evidence to the Tribunal why that may be the case.
72. In evidence, Mrs Lovelace concluded that it was quite clear that the claimant was refusing to provide the documentation required by law. She said she was therefore left with no choice, because unless the claimant was either vaccinated or had provided the appropriate documentation, she could not allow her to work in the care home, as the respondent would be in breach of CQC guidance and the Government legislation. Mrs Lovelace said that there was no need to have any further meetings with the claimant, as the claimant had made her position clear at the grievance meeting that she would not provide the required documentation, despite being asked to do so again at that meeting. Mrs Lovelace went on to say that the claimant then followed up with a further email on 29 November making it clear that her position had not changed.
73. Mrs Lovelace said that she had looked at whether the claimant could be deployed elsewhere, but the respondent only operated care homes. She said that they had even considered moving her to head office, but said in evidence to the Tribunal that the office itself was based in a care home. Therefore, she said there were no alternative options, because working anywhere in the respondent's business meant that the claimant would be in breach of the Government legislation. On that basis, Mrs Lovelace concluded that she had no alternative other than to dismiss the claimant, because, bearing in mind, the requirements for care workers meant that the claimant was unable to enter into the home and undertake her role.
74. The claimant appealed against the termination of her employment. The details of her appeal are set out at pages 305 to 306 of the bundle. In her appeal document, she refers to a failure to hold a consultation with her with regard to the changes to her employment, failure to comply with the Health and Social Care Act and a failure to comply with the Equality Act. She goes on to refer to discussions on 6 and 13 October. She indicates that she has provided a clinical exemption. She asserts she does not understand what evidence is required. She

also indicates that she was not aware any alternative employment was considered. Her appeal letter makes no reference to her philosophical belief. She was unable to explain why that was the case.

75. An appeal hearing took place with the claimant on 16 December 2022. The claimant attended with her trade union representative. The hearing was conducted by telephone at the claimant's request. The hearing was conducted by Mr Nesbitt.
76. The notes of the appeal hearing are in the supplemental bundle at pages 4 to 5. The claimant indicated that this was the first time she had seen the notes of the hearing. She suggested they were not consistent with what happened at the hearing, but provided no details as to why they were inconsistent. In his evidence Mr Nesbitt said that he asked the claimant if she would come back to work and if she would be willing to complete the self-certification on the Government website. In his evidence, he said that the claimant was a good employee and he did not want to lose her particularly at a time when it was difficult to attract employees into the health care sector especially senior healthcare assistants.
77. At the appeal hearing, Mr Nesbitt said in evidence that the claimant was suggesting she was being forced to get the vaccine. He said he made it clear that they were not forcing her to get the vaccine, but explained the Government requirement to either have the vaccine or obtain a medical exemption. He said that he explained to her that, if she was medically exempt that she needed to complete the self-certification form until she could obtain a medical exemption from her GP.
78. In his evidence, Mr Nesbitt said that the claimant made it clear during the appeal hearing that she would not get the vaccine and that she considered herself to be medically exempt. She maintained she had already given the exemption form from the union which she considered to be all that was required. Mr Nesbitt said he told the claimant that she had to complete the self-certification form as per the Government website, which he said was the one adopted by the respondents.
79. Mr Nesbitt said a discussion took place about all the matters raised in her appeal. In evidence to the tribunal, he said that what he really wanted to achieve from the appeal hearing was to try and get the claimant to come back to work. He made that clear at the appeal hearing, but also made it clear she had to comply with the respondent's requirements in respect of the self-certification form. Mr Nesbitt said the claimant maintained her position that she was not prepared to complete the self-certification form as per the government website and as required under the respondent's own policies. The claimant did not contest any of Mr Nesbitt's evidence in that regard. She did not deny that the respondent had asked her if she wanted to come back to work, nor did she deny that they asked her to complete the self-certification form as per the government website. She acknowledged that she made it clear during the appeal hearing that she would not do so.
80. During the course of her evidence, she made it clear that her position remained the same, namely that she considered that the union certification form was sufficient and that she was not prepared to sign any self-certification form from the Government website. She was not really able to give any proper explanation to the Tribunal as to why she was not prepared to sign the government self-certification form. She said that she was being advised by her union and that

was the form that the union advised her to use which they told her was sufficient for the purposes of the regulations.

81. During the course of the appeal hearing, the only discussion which appeared to take place related to the claimant's medical exemption. The claimant did not suggest that she raised any matter regarding reasons on grounds of her philosophical belief as to why she would not take the vaccine. It was acknowledged that there was no reference in the notes to any issues around philosophical belief. She acknowledged that the only discussion about exemptions related to either the vaccine status or her medical exemption.
82. During the course of the appeal hearing the claimant had raised an issue with regard to an advert which she said had been for a domestic assistant in which the respondent was encouraging applicants to be vaccinated. Mr Nesbitt said that at the time he was not aware of the advert. In any event he made it clear that he would expect all employees working in the care sector to be vaccinated, namely either to be vaccinated, have a medical exemption, or have the appropriate self-certification form. He made it clear that nobody would be employed by the respondent if they did not comply with those requirements. He said that he would not engage or employ anyone, who was not compliant with the Government Regulations.
83. The respondent wrote to the claimant following the appeal hearing. The letter dismissing her appeal is at pages 303-304 of the bundle. In the letter the respondent confirms that her appeal has been dismissed and her dismissal is upheld. In the letter, Mr Nesbitt makes it clear that the claimant's refusal to either to be vaccinated, produce a medical exemption, or self-certification on medical grounds meant she could not remain employed by the respondents. He noted that the claimant had been consulted about the matter in advance and the requirements explained as to exactly what information was required. He noted that the clinical exemption form provided by her was not sufficient and that she had been informed of this on a number of occasions.

## **Submissions**

84. Both parties filed written submissions.
85. The claimant's representative submitted that the dismissal was both substantially and procedurally unfair. She submitted that the respondents did not have a substantial reason for dismissal. She suggested that the Department of Health allowed a flexible approach to exemptions and suggested that the respondents could have lawfully granted the claimant a temporary extension up to the end of December 2021. She submitted that there were inconsistencies in the respondent's reasons for dismissal, namely whether it related to not having the vaccine; a failure to provide an acceptable self-declaration; or refusal to complete the documentation required by the respondents. She submitted that was a substantial reason to dismiss the claimant. She also submitted that the procedure followed was unfair and relied in particular on the fact that there had been no disciplinary hearing before the claimant had been dismissed.
86. The claimant's representative's submissions on religion were somewhat limited. She had been asked at various times throughout the proceedings whether the claimant was still pursuing her complaint of discrimination on the grounds of philosophical belief and confirmed she was pursuing those complaints. In that regard, the claimant's representative submitted that the claimant did hold a

philosophical belief. She submitted that the belief was about informed choice or consent to medical treatment. She submitted that amounted to a philosophical belief. She did not expand on her submissions about how the claimant was less favourably treated. She accepted that the claimant had not raised this philosophical belief with the respondents either as part of her grievance or appeal.

87. The respondent's representative submitted that the dismissal was for some other substantial reason and that it was both substantially and procedurally fair. She submitted that the respondents effectively had no choice other than to dismiss the claimant, because if they did not they would be in breach of the Government regulations and CQC requirements. She submitted that it was not a disciplinary matter and that the ACAS code did not apply, but that even if it did, that the respondents had discussed the matter in detail with the claimant at the grievance hearing and that there was also an appeal process.
88. The respondent's representative submitted that the claimant did not have a philosophical belief. She submitted that it was difficult to ascertain exactly what was the philosophical belief relied by the claimant. She said it seemed to change from the preliminary hearing to what was now being put forward in the final hearing. She submitted that it did not meet the Grainger test. In any event, she said that the claimant was clearly not dismissed because of her belief because the respondents were not even aware of her belief, as acknowledged during the course these proceedings by the claimant herself. The claimant said that she would not be vaccinated for medical reasons and never suggested to the respondents that it was for reasons relating to her belief.

## Conclusions

89. This Tribunal finds that the claimant was dismissed for some other substantial reason. The Tribunal accepts that the respondent did have a substantial reason for dismissing the claimant in these exceptional and unique circumstances. The substantial reason for dismissing the claimant was basically because she refused to either be vaccinated, provide a medical exemption or a self-certification form as posted on the Government website and required by the respondent's own policies. As a result, if the respondent continued to employ the claimant, they would be in breach of the law, namely the Government legislation requiring anyone working in a Care Home to be vaccinated, provide a medical exemption or self-certify that they were medically exempt until they could obtain the medical exemption from their GP or healthcare provider. Any such breach would also be a breach of CQC requirements; the latter who regulate all Care home providers. The approach by the respondents in adopting for their own policies the government form was reasonable in the circumstances. It ensured that they complied with government legislation and CQC requirements. The reason for dismissal was clearly clear and substantial. The respondent could not have an employee working in one of their care homes who was in breach of Government legislation and not legally entitled to do so.
90. The Tribunal finds that it was clear from the evidence from both the respondent's witnesses and indeed the claimant herself that she clearly understood what she was required to do in order to comply with the legal requirements namely either she had to have had the vaccine, or produce a medical exemption or she had to produce a self-certification form as per the one on the Government website. She was told this on several occasions. She acknowledged herself that she was



aware of what she had to do from the posters displayed throughout the Care Home. She was told in a meeting in October. It was then confirmed to her in writing by the respondent, who provided her with a copy of the appropriate form. She was told at the grievance hearing and in the letter in response to her grievance. Yet she refused to comply with those requirements and made it absolutely clear that she was not going to produce anything other than the clinical exemption form produced by her which the respondent made clear on several occasions both before, during, and after her grievance was not acceptable.

91. By the end of the grievance hearing it was quite clear that the claimant would not comply with the respondent's requirements, namely to provide the self-certification form as per the Government website and required under their policy. Accordingly, it would have been futile for them to have a further meeting with the claimant by way of a disciplinary hearing. The Tribunal finds that this was one of those exceptional circumstances referred to in the cases of both Polkey and Gallacher. The grievance hearing effectively covered all the matters which would have been discussed at any disciplinary hearing. The claimant's position was intransigent. It was quite clear by the end of the grievance hearing that the claimant would not comply with the respondent's requirements. That was reinforced by her following her email after the grievance hearing sent on 29 November. Therefore this Tribunal finds that it would have been completely futile for the respondent to arrange a further hearing when all these matters had been discussed and canvassed at the grievance hearing where the claimant's position being made absolutely clear, at the grievance hearing.
92. In any event the Tribunal finds that there was indeed a process followed because the claimant was given the right to appeal. The appeal process clearly rectified any failure, if any, from failing to hold a disciplinary hearing. The Tribunal accept Mr Nesbitt's evidence, which is supported by the documentary evidence, that he tried to encourage the claimant to comply with the respondent's requirements and that he would have given her job back. The claimant did not dispute that was the case. Therefore she was given yet a further opportunity during the appeal hearing to comply with the respondent's requirements, so they could comply with the Law, and would have got her job back, but again she chose not to do so. It was quite clear from her evidence before the Tribunal and indeed from what was said at the appeal hearing that she was not prepared under any circumstances to comply with the respondent's requirements and provide the form they requested. Therefore, she left the respondent's with no choice whatsoever other than to dismiss her.
93. The Tribunal consider that, even if there were any procedural failings in the form of a lack of a specific disciplinary hearing, it would have made absolutely no difference whatsoever, as was effectively confirmed by the claimant herself in the appeal hearing. The claimant's refusal to provide the form requested by the respondent remained exactly the same by the time of the appeal hearing. She remained intransigent. She refused to provide anything other than the clinical exemption form produced by her trade union, despite the respondents having made it clear throughout the previous few months, that form was not acceptable. Accordingly, this tribunal finds there is 100% chance she would have been fairly dismissed if as is submitted a fair procedure was followed, noting this Tribunal considers the procedure was fair. Any Polkey reduction would therefore be 100%.

94. The Tribunal also considered whether the claimant's actions, albeit it seems influenced by her trade union, contributed to her dismissal. It is quite clear from the respondent's evidence that the only reason the claimant was dismissed was because of her intransigence and refusal to comply with a reasonable request from the respondent to provide the self-certification form requested by them, thereby enabling them to comply with Government legislation and CQC requirements. That is the only thing which led to her dismissal. Therefore, the claimant was entirely responsible for her dismissal, Mr Nesbitt's evidence was that he would rather have retained the claimant who was recognised to be a senior and good employee. Therefore any contribution would also have 100% if, which it did not, the Tribunal had found the dismissal unfair for procedural reasons.
95. Accordingly the claimant's complaint of unfair dismissal is not well-founded and is hereby dismissed.
96. This Tribunal has struggled with why the claimant continued to pursue her complaint of discrimination on the grounds of religion/philosophical belief. The evidence given by her in these proceedings did not support such a claim.
97. Although this Tribunal accept that it is possible that a belief in informed consent medical procedures could amount to a philosophical belief under the legislation, it does not find that is it did amount to a philosophical belief in in this case.
98. The Tribunal has applied the guidance in the case of Grainger. Firstly the Tribunal do not consider that the claimant has provided sufficient evidence to show that she even genuinely believed that belief. Indeed, it is not clear from the claimant's evidence what her philosophical belief is. In the preliminary hearing, she suggested that it related to informed consent about medical procedures, but her witness statement goes much further. In that statement, she refers to different childhood beliefs, which do not directly relate to informed consent. Further, the belief that she has expressed is simply an opinion and view point based on the COVID pandemic. She has not produced any evidence to show a belief system which was anything other than an opinion or view point at the time of the Pandemic. She gave no evidence about any time when she has exercised her beliefs except during the COVID pandemic. Further, it is not clear from the evidence she provided that this belief could concern a weighty or substantial aspect of human life which did not conflict with the fundamental rights of others, namely significantly in this case the rights of those individuals living in the care home not to die from the claimant not taking the steps as per the government legislation. Finally, from what has been set out above, it is quite clear that the belief relied upon by the claimant does not attain a certain level of coherence because the claimant was herself unable to coherently explain what was her philosophical belief. Therefore this Tribunal does not find that she had a philosophical belief as defined under section 10 of the Equality Act 2010.
99. However it is quite clear that the claimant in this case was not discriminated against because she held any philosophical belief. Firstly and most significantly, as acknowledged by the claimant herself throughout these proceedings, the respondent did not know and was never told any stage that she had any such philosophical belief upon which she now relies. She had ample opportunities to do so both in her grievance letter; the grievance meeting, her appeal letter and the appeal hearing. At no stage, did she raise any matter concerning her apparent philosophical belief. The only reference to her belief related to not being

put on the rota because of her vaccine status, which is completely different to the belief upon which she now suggests she relies in these proceedings. It is therefore inconceivable how the respondent could have discriminated against her on the grounds of her belief.

100. In any event, the respondent understood as noted from their from the oral and documentary evidence in this case, which was not challenged by the claimant, that the only basis upon which the claimant appeared to be objecting to being vaccinated was on medical grounds. The reason for her dismissal was because she was asked to produce a medical exemption or self-certification on medical grounds which she refused to do. The form produced by the trade union on her behalf was a clinical exemption which the respondent repeatedly told her was not acceptable. She never at any stage made any reference to an exemption on the grounds of a philosophical belief.
101. For those reasons the claimant's complaint of discrimination on the grounds of religion/belief is not well-founded and is hereby dismissed.

**Employment Judge Martin**

Date: 20<sup>th</sup> June 2023

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