



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr K Hindmarch

**Respondent:** North East Ambulance NHS Foundation Trust

**HELD at Newcastle CFCTC by CVP ON: Monday 13 to Friday 17 November 2023**

**BEFORE:** Employment Judge Johnson

**Members:** Mrs D Winter  
Mr P Chapman

## REPRESENTATION:

**Claimant:** Ms S David of Counsel

**Respondent:** Mr A Webster of Counsel

# JUDGMENT

The unanimous Judgment of the Employment Tribunal is as follows:-

1. The claimant's complaint of unfair dismissal is not well-founded and is dismissed.
2. The claimant's complaint of unlawful disability discrimination (unfavourable treatment because of something arising in consequence of disability) contrary to section 15 of the Equality Act 2010 is not well-founded and is dismissed.
3. The claimant's complaint of unlawful disability discrimination (failure to make reasonable adjustments contrary to sections 20-21 of the Equality Act 2010) is not well-founded and is dismissed.

# REASONS

1. The claimant in this case was represented by Ms David of counsel who called the claimant to give evidence and also called Mr Gary Webb, an ambulance driver and former colleague of the claimant. The respondent was represented by Mr Webster of counsel who called the following witnesses to give evidence on behalf of the respondent:-
  - 1.1. Mr Stephen Carr (ambulance care assistant and the claimant's line manager).
  - 1.2. Miss Claire Jobling (head of operations) who dealt with the claimant's grievance.
  - 1.3. Miss Tracey Gilchrist (deputy director for quality and patient safety) who dealt with the claimant's grievance appeal.
  - 1.4. Miss Amy Rosindale (the claimant's line manager at the time of his dismissal).
  - 1.5. Mr Barry Dews (head of scheduled care) who made the decision to dismiss the claimant.
  - 1.6. Mr Shane Woodhouse (head of operations) who made the decision to dismiss the claimant's appeal.
2. There was an agreed bundle of documents comprising two A4 ring binders containing a total of 1002 pages of documents. The claimant, his witness and the witnesses for the respondent had all prepared typed, signed witness statements, which were taken "as read" by the Tribunal, subject to questions in cross-examination and questions from the Tribunal.
3. By a claim form presented on 16 March 2022, the claimant brought a complaint of unlawful disability discrimination (failure to make reasonable adjustments). By a second claim form presented on 13 December 2022, the claimant brought complaints of unfair dismissal, unlawful disability discrimination (unfavourable treatment because of something arising in consequence of disability) and failure to make reasonable adjustments. The respondent defended all of those claims.
4. By way of a summary, the claimant's complaint of failure to make reasonable adjustments relates to the respondent's failure/refusal to provide the claimant with a particular item of personal protection equipment known as an FFP3 face mask, during the coronavirus pandemic. The claimant alleges that this failure/refusal to provide him with the FFP3 face mask meant that his stress and anxiety about contracting coronavirus exacerbated his existing mental impairment of depression to the extent that he was to attend for work from May 2021 until he was dismissed in September 2022. The claimant alleges that his dismissal because of long term absence was unfair because the respondent had failed to provide him with the FFP3 face mask which the claimant maintains would have enabled him to return to work so that he would not have been dismissed. The claimant further alleges that his dismissal was an act of unfavourable treatment because of something (his absence) which arose as a consequence of his disability. The claimant maintains that the dismissal was not a proportionate means of achieving a legitimate aim, because had the respondent provided him with the FFP3 face mask then he would not have been dismissed.

5. Whilst the unfair dismissal claim engages the provisions of the Employment Rights Act 1996 and the disability discrimination claims engaged the provisions of the Equality Act 2010, it was accepted by both parties that the main issue in the case and thus all the claims revolve around the respondent's alleged failure/refusal to provide the claimant with the FFP3 face mask. The claimant's case throughout has been that, had the respondent done so, he would have been able to return to work and thus would not have been dismissed under the respondent's absence management policy. The respondent's position throughout has been that, whilst it had issued the FFP3 face masks to other staff including ambulance drivers, it was not appropriate to issue that to the claimant because national guidelines issued by central government dictated that the claimant should be issued with an FFP2 face mask to enable him to undertake duties. The approach adopted in the proceedings was that if the respondent was not in breach of its obligation to make reasonable adjustments, then its dismissal of the claimant was fair in all the circumstances because the stage had been reached when it could not be expected to wait any longer for the claimant to return to work. Furthermore, the dismissal of the claimant because of that long term absence was justified in all the circumstances and was a proportionate means of achieving a legitimate aim.

### The Issues

6. The parties' representative had most helpfully prepared and agreed a list of issues (the questions which the Employment Tribunal will have to decide), which appears at pages 100-103 in the bundle. A convenient summary of those issues is as follows:-

6.1. Disability

Was the claimant a disabled person within the meaning of section 6 of the Equality Act 2010 by a reason of his mental impairment (stress and anxiety) at the time of the events the claim is about?

From which date did that mental impairment amount to a disability?

By which date did the respondent know, or ought it reasonably to have known, that the claimant suffered from a disability?

6.2. Failure to make reasonable adjustments

Did the lack of an auxiliary aid (namely an FFP3 mask) put the claimant at a substantial disadvantage compared to someone without the claimant's disability?

Did the respondent apply a PCP that FFP3 masks were only provided to staff performing roles which exposed the staff to Aerosol Generating Procedures (AGP)?

Did that PCP place the claimant at a substantial disadvantage compared to staff who are not disabled?

Did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at that disadvantage?

What steps could or should have been taken to avoid that disadvantage? The claimant maintains that the provision of an FFP3 mask would have removed the disadvantage.

Was it reasonable for the respondent to have taken that step – if so, when?

Did the respondent fail to take that step?

6.3. Discrimination arising from disability

Did the respondent treat the claimant unfavourably by failing to provide him with an FFP3 mask?

Did the respondent treat the claimant unfavourably by dismissing him due to his long term absence?

Did the respondent treat the claimant unfavourably by dismissing his appeal against that dismissal?

Did the claimant's long term sickness absence from 14 May 2021 to 21 September 2022 arise in consequence of his disability?

Was the claimant's dismissal something which arose in consequence of his disability?

Was the dismissal to uphold the claimant's appeal something which arose in consequence of his disability?

Has the claimant proven facts from which the Tribunal could conclude that the unfavourable treatment was because of any of those things?

If so can the respondent show that there was no unfavourable treatment because of something arising in consequence of his disability.

If not, did the respondent did have a legitimate aim, namely the effective management of sickness absence having regard to the health and well-being of employees following OH advice and managing public money. If so was the treatment of the claimant a proportionate means of achieving that legitimate aim?

6.4. Unfair dismissal

Did the respondent have a potentially fair reason for dismissing the claimant? The respondent proffers as its reason one related to the claimant's capability to perform the duties for which he was employed, namely because of his long-term absence.

Did the respondent genuinely believe that the claimant was no longer capable of performing his duties?

Had the respondent adequately consulted the claimant?

Did the respondent carry out a reasonable investigation including finding out about the up-to-date medical position?

Could the respondent reasonably be expected to wait any longer before dismissing the claimant?

Was the dismissal within the band of reasonable responses?

Did the respondent follow a fair procedure and act in accordance with the ACAS code of practice in all the circumstances of the case?

What, if any remedy should be awarded to the claimant including compensation for lost earnings and injury to feelings?

7. Having heard the evidence of the claimant and his witness and the witnesses for the respondent, the Tribunal made the following findings of fact on a balance of probabilities.
8. The claimant first worked for the respondent as an ambulance driver in November 2021, but he became an employee of the respondent on 26 April 2013. His job title was “ambulance care assistant”. The claimant’s role required him to provide scheduled care to patients, which required him to collect patients from hospital wards and transfer them to another hospital or to their home, or to transport patients from their homes to medical appointments and for non-urgent inter hospital transfers. On rare occasions the claimant may be required to provide unscheduled (ie Accident and Emergency) work, which required him to visit unwell patients at their home and transport them to Accident and Emergency Departments of various hospitals.
9. In early 2020 the coronavirus pandemic had an enormous impact upon the country generally and particularly upon the NHS and NHS support services, including the ambulance services.
10. The claimant had an underlying asthmatic condition and thus fell within the definition of those required to “shield” during the early stages of the pandemic. Within his family “bubble”, the claimant had a granddaughter whom he was most anxious to protect from the virus. The claimant “shielded” between 7 April 2020 and 2 August 2020. He returned to work on 3 August 2020.
11. The claimant had suffered from low mood and depression for a number of years and had been prescribed anti-depressant medication by his GP since 1997. The claimant’s evidence to the Tribunal was that, “the pandemic caused me a great deal of anxiety and I was very worried about contracting Covid”.
12. The claimant’s evidence to the Tribunal, as confirmed in his Disability Impact Statement at page 839, was that he lost weight due to his anxiety, was not sleeping properly and having episodes of not being able to sleep, following which he would feel excessively tired at other times. The claimant described how he was suffering from tiredness, headaches, muscle tension and nausea. He frequently felt frustrated, angry, sad and worried. The anxiety affected his appetite which affected his diabetes. He described how he was feeling “down, depressed or hopeless nearly every day, had very little interest or pleasure in doing things nearly every day, had trouble concentrating on more than half of the days and was feeling afraid as if something awful might happen on more half of the days”. By August 2021 his anxiety and depression had deteriorated to such an extent that he was unable to leave the house, was unable to attend meetings with the respondent and by September 2021 was unable to return to work in any capacity.
13. On his return to work after shielding, in August 2020, the claimant raised concerns about transporting Covid positive patients. The claimant consulted the respondent’s occupational health nurse who advised that the claimant should not transport patients who are “known to be Covid-19 positive unless he has had a formal risk assessment undertaken by risk management.” The claimant accepted in his evidence that from the period from 3 August 2020 to 15 November 2020, he was not asked to transport any patients who had been positively confirmed to have Covid-19. However, on 15 November 2020 the claimant was asked to transport a patient who had been diagnosed with Covid-19. The claimant refused to do so. That refusal was accepted by the respondent and the claimant was placed on alternative duties working in the respondent’s stores department away from any

patient-facing duties. The claimant agreed to work in the stores department as an alternative to transporting patients.

14. The Risk Assessment form relating to the claimant appears at page 255-256 in the bundle. The relevant extracts are as follows:-

*“Kenneth has recently returned post-shielding (August 2020) due to an underlying health condition. Kenneth contacted occupational health August 5 2020 to express his concerns regarding transporting Covid positive patients. Ken was placed on to alternative duties away from patient-facing duties 17/11/20”*

The risk assessment confirms that the claimant is at risk of contracting Covid-19 from Covid positive patients and/or their family or friends who may be in the house could put Kenneth at risk to his health if he was to contract Covid-19. Expected precautions are recorded on the risk assessment form as including:-

- EOC planning to be advised to arrange Ken's workload to mitigate risk of exposure to Covid positive patients when planning his jobs. This is subject to where and when operational demand allows.
- FFP3 protection – Ken could be fitted and tested and issued with either a reusable mask or disposable FFP3 if available. In the event he fails a fit test for either of these he could be issued a hood.
- If Ken works double crew and it is operationally safe, Ken remains with the vehicle and drives if suspected Covid patients are being transported on the vehicle.

Further controls include:-

- Refrain from carrying out operational duties to reduce contact with Covid patients.
- Ken remains on alternative duties in a position where trust Covid policy and social distancing rules are applicable which gives a tighter area of control against risk.

15. The claimant remained in the stores until he went on sick leave on 11 January 2021 with a chest infection. The claimant returned to work in the stores on 23 February and then began a phased return to work to his substantive driving role on 25 April 2021.

16. On 14 May 2021 the claimant was asked to transport a Covid-19 positive patient from hospital to the patient's home. The claimant states at paragraph 17 of his statement:-

*“As a result I suffered a panic attack and informed Control that I was not feeling well and was going home. I confirmed that I did not feel that the surgical face mask provided (FFP2) was appropriate and I had been worried about this for some time. For this reason it was a mental health incident and I had to remove myself from duty.”*

17. As from 14 May 2021 the claimant did not return to work until his dismissal on 21 September 2022.

18. On 14 May 2021 the claimant referred himself to the respondent's occupational health department. He also spoke to his GP on 14 May 2021. At paragraph 18 of his statement the claimant states that his GP diagnosed him suffering from “work related stress”. The claimant's GP issued a fit note stating that the claimant was

unfit for work for four weeks. The claimant records that he informed his GP that a decline in his psychological well-being was due to the decline in the level of personal protective equipment supplied and that he had asked for alternative respiratory personal protective equipment when transporting Covid-19 patients.

19. The claimant attended occupational health again on 8 June 2021. The report appears at page 260/261 in the bundle. That report confirmed that the claimant was not fit to return to work at that time and that resolution of his work issues would significantly assist in his recovery and return to work. The OH report does not specifically mention FFP3 but does state as follows:-

*“Based on my assessment today he is not fit to return to work at present. Although medical intervention will assist with improving his symptoms as he feels that the symptoms are linked to work issues, resolution of these issues will significantly assist with his recovery and ultimately return to work. I would therefore recommend that you have a meeting with Mr Hindmarch to discuss his work issues and also explore the possibility of alternative duties where he feels comfortable with his allocated work and his level of respiratory PPE provided to undertake the same.”*

There is no specific mention of FFP3 face masks.

20. The next long term sickness absence review meeting took place by telephone on 17 August 2021. The claimant informed his line manager Mr Carr that the situation had not changed and that he was still suffering from his underlying anxiety caused by the request to carry Covid positive patients. The claimant confirmed that he was not taking any medication to help with his stress and anxiety. The claimant's trade union representative enquired as to why unscheduled care staff (those undertaking emergency calls) were issued with FFP3 masks, whereas scheduled care drivers such as the claimant were not. Mr Carr confirmed that the difference was that unscheduled care staff may have to be involved in AGP procedures whereas scheduled care staff do not. Mr Carr explained that in accordance with National Guidance, FFP3 masks were not issued to scheduled care staff and there was no intention to change that policy. Nevertheless, Mr Carr confirmed that he would again seek guidance regarding FFP3 for scheduled care staff such as the claimant.

21. A further stress risk assessment was carried out on 14 September, the report for which appears at page 278 in the bundle. The relevant extracts include the following:-

*“The recommended risk assessment was carried out with Kenneth and it identified and provided considerations for the management team in the form of precautions, one of these was the consideration for the provision of FFP3 protection for known Covid positive patients. National Guidance was at this time for the provision of disposable surgical masks unless carrying out an APG. Kenneth felt even with the risk assessment and its considerations, the issue would not be resolved. Kenneth mentioned to his team manager his concerns regarding PPE and his anxiety at the risk he felt with contracting Covid-19 due to underlying condition. Kenneth felt he had no support from his direct line manager or within the management structure and his RA was ignored. (RA is presumably to mean reasonable adjustment). One of the “additional supporting measure” set out in the stress risk assessment states, “consideration of FFP3 with the provision of education around best practice.”*

22. At page 294 in the bundle is a letter to the claimant from Debora Wells, the respondent's health and safety officer. The letter specifically deals with the claimant's request to be issued with an FFP3 face mask. The relevant extracts are as follows:-

*"There are a lot of conversations that have happened during the whole pandemic regarding FFP3 across unscheduled and scheduled care. The challenge faced with issuing a scheduled care staff member with an FFP3 mask is the practical aspect of how and when to use it. We have to ensure that by issuing one it is appropriate and that you would not be at more risk having one. An FFP3 half mask and surgical masks do both provide a high level of protection and are both good at what they are designed to do, however this level of protection can decrease depending on how they are both worn or used. The mask may not fully cover the mouth and nose or it may be used and re-used too frequently. These can mean huge variations in mask performance outcome. To ensure you have the highest level of protection and are not at risk you would need to wear the FFP3 half mask the majority of your shift from collecting the patient to returning to the vehicle after taking them to their location and follow a robust cleaning schedule. Each time you take the FFP3 mask off it would need to be decontaminated by it being wiped down, once on you would not be able to touch it until removal. If you came into contact with a patient who coughed on to you excessively, be them Covid positive or not, the mask would need a full decontamination and filter change to provide you with the reassurance you were not at risk. With you being on a single crew and no bulk head, the challenge you would face is that you cannot wear an FFP3 driving for safety and legal reasons so the other option would be the surgical mask only. The other aspect that I was remiss to not advise and I apologise I didn't, if you could not be successfully fit tested the Trust do not have any other options available to provide you. I'm not trying to put you off your request for the FFP3 but I wanted to explain in more depth the considerations that have to be taken before a decision is made."*

23. The next long term absence review meeting took place on 18 October 2021, again with Mr Carr. Minutes appear at page 296 in the bundle. Mr Carr records that the respondent intended to comply with the National Guidance issued for the previous 18 months which was that FFP3 would only be issued for those undertaking roles that perform AGPs and could not be worn for a full shift or for driving. Mr Carr went on to confirm that even if the claimant were issued with an FFP3 mask, he would not be able to wear it all the time. If the claimant had contact with a Covid positive patient the Trust could not guarantee that he would not contract Covid. The claimant's objection to this was that his mental health condition was not being considered. The claimant's trade union representative stated, "we are talking about a staff member with mental health which could potentially end in Ken losing his job. We were assured that no one would lose their jobs because of Covid, yet Ken could because of a lack of support from the Trust." Mr Carr replied, "I'm trying to support Ken as much as I can. I fully understand Ken has a real issue. I offered Ken to return to the stores. I think it would benefit your mental health. I will bring up points raised with senior management re lack of support. How does that sound about coming back to work." The claimant replied only "I will consider". When asked by Mr Carr if he had been going out at all the claimant replied, "Not really. Couple of bike rides to my sons. I went down to ?? stores DIY store but that is the furthest I have been. I've been doing jobs around the house. I'm on medication now." Mr Carr asked the claimant, "How would you feel about returning to



alternative duties?”. The claimant replied, “Yes I would on meds now, hoping will start to feel better in the next couple of weeks.”

24. The contents of that meeting were set out in Mr Carr’s letter to the claimant dated 28 October 2021 which appears at pages 307-309 in the bundle.
25. On 17 August the claimant had completed a grievance form under the respondent’s grievance policy, a copy of which appears at page 266 in the bundle. Unfortunately that grievance had been passed to a member of staff who immediately went on sick leave and the grievance appears to have been overlooked until it was resubmitted on 21 October. The grievance form appears at page 267 in the bundle and states as follows:-

“

- Failure to follow guidance of risk assessment regarding my safety needs.
- Failure to offer any reasonable changes to help me overcome my mental health condition to enable me to return to my substantive role.
- Being informed my risk assessment should not have been issued due to risk department not knowing guidelines.
- Being told guidelines overrule my health issues.

The outcome or remedy sought by the claimant included:-

- My risk assessment to be acted upon ie FFP3 or non-Covid patients.
- My mental health and disabilities to be taken seriously”

26. The second copy of that form was submitted on 21 October 2021 and Miss Jobling was appointed to act as the grievance manager. A formal grievance meeting was arranged and took place on 26 November 2021. Whilst there are no minutes of that meeting in the hearing bundle, at page 312 there is a letter from Miss Claire Jobling who heard the grievance, to the respondent’s occupational health referrals department. The relevant extracts from the letter are as follows:-

*“I met Ken Hindmarch this morning as part of a grievance hearing in relation to his request to wear an FFP3 when he had to transport confirmed Covid positive patients. I explained to Ken that we wouldn’t consider an FFP3 as he doesn’t require this as part of his role and in line with National Guidance. I advised him that every patient we transported could be Covid positive so the risk is always there and not just when patients are identified as such. Ken has advised he only wants the FFP3 for his psychological well-being and not in relation to his underlying condition. I have explored today with Ken if he would refer to work if I could ask Control to not allocate him any known Covid positive patients who were requiring transport, as a reasonable adjustment. Ken said this would remove the barrier to return to work as the anxiety he has is only in relation to transport in confirmed Covid positive patients. He verbalised as well that he understands Covid is a community born disease and he can catch this routinely outside of work and transporting any patients, but he has advised his psychological barrier is around those who are confirmed as positive that he feels he wants to avoid moving. Can I ask, given that Ken has shielded previously and he has got an underlying condition, if he is suitable to work in a patient facing role wearing level 2 PPE in line with National Guidance or should he be re-deployed into a non-patient facing role due to his underlying condition. This is in line with what we have done with other staff who have been unable to return to patient*

*facing duties. If Ken can return to work in a patient facing role I can put in the reasonable adjustment to not transport confirmed Covid positive patients but this would be reviewed over a three month period with regular touch points to see the impact this has on our ability to respond to patients and also to check that this hasn't impacted Ken's mental health. Ken has advised this is the only barrier for him not to return to work currently. I would ask given his length of time off and his nervousness around Covid, if he is fit to work alternative duties now and what they would be so we can phase him back into his role."*

27. Occupational Health's reply is dated 7 December 2021 and appears at pages 621-622 in the bundle. The relevant extracts are as follows:-

*"He advises that he continues to have psychological symptoms, particularly related to transport of Covid positive patients without having an FFP3 mask. He feels that this issue continues to affect his emotional well-being. Further from my previous review, he is receiving appropriate treatment from his GP and is also receiving support through the NHS. He reports no significant change to his symptoms as he advises that the issue with regards to transporting Covid patients without an FFP3 mask remains unaddressed. I note the contents of your email and discussions with him. We have discussed today about whether he feels he can return to work in a substantive role provided he is assured that he will not be transporting any Covid positive patients. Alternatively as the main psychological barrier is transporting Covid positive patients, return to work to an alternative non patient facing role was discussed. He is aware of the community risk of transmission of Covid and is aware that he should adhere to appropriate infection control measures in either of the above scenarios. Mr Hindmarch feels that he may be able to try and return to work if either of the two options can be supported. If you are able to support either of those options I would recommend that he returns on a phased return."*

28. Miss Jobling's letter containing her outcome of the claimant's grievance is dated 13 December 2021 and appears at page 318 in the bundle. The relevant extracts are as follows:-

*"The grounds of your grievance are:-*

- Failure to follow guidance of risk assessment regarding your safety needs.*
- Failure to offer any reasonable changes to help you overcome your mental health condition to enable you to return to your role.*
- Being informed that your risk assessment should not have been issued due to the risk department not knowing the guidelines.*
- Being informed that guidelines overrule health issues.*

*You discussed that you wanted to be allocated an FFP3 mask, for use when attending a known Covid positive patient as Control are aware when you are being despatched to a Covid positive patient. You further discussed that a risk assessment was completed by Deborah Wells and the Trust had decided not to apply the measures and you wanted to understand what basis this was made upon.*

*I explained to you that the Trust follows National Guidance with other ambulance Trusts on the appropriate level of Personal Protective Equipment (PPE) based on the role staff are performing within their duties. Staff are fit tested to an FFP3 mask when performing roles which expose staff to a Aerosol Generating*

*Procedures (AGPs) – this is the current guidance for our unscheduled care staff as they work with patients when AGPs are being generated. You were assessed by the risk department and they provided a risk assessment to review return to work – risk assessments are advisory and proportionate to the risk and in line with the requirements of your role, being that level 2 PPE is the appropriate level PPE for the role of an ambulance care assistant and in comparative hospital settings. I advise you that risk assessments are advisory and not an instruction, it is for the manager reviewing the Control measures appropriate to risk and the job role. I reiterated that the National Guidelines for PPE for our scheduled care staff is level 2 as they are not performing or exposed to any AGPs in their line of duties. I assured you that we have had an internal meeting where the National Guidance was reviewed to ensure the guidance is applied appropriately. At this meeting it was determined that an FFP3 mask cannot be used for a full shift or extended periods of driving. As Covid is widespread in the community and with 1 in 3 patients being asymptomatic, level PPE2 is the appropriate level of PPE to wear in performing the scheduled care role. It is clear from our discussions that you are anxious about transporting known Covid positive patients, despite reasoning that every patient you carry could be Covid positive, so I took to understand this further with you. I explained that the FFP3 mask does not give 100% protection from Covid exposure and that IPC control measures when carrying out your role are the most important frequent handwashing, wearing of the appropriate level of PPE for the task and putting space in between you and your patients. You advised that your anxiety in relation to Covid is knowing exactly when the risk is there as you have underlying conditions and do not want to become unwell.*

*You advised that unscheduled care staff can wear FFP3 masks and you believe that you should have the ability to assess the job you are attending and feel you are being discriminated against. I explained that I didn't agree you were being discriminated against as there is a risk assessment in place to issue PPE for the job role. As you are not carrying out or exposed to AGPs in line with National Guidance level 2PPE is the appropriate level for your job role.*

*Because of your anxiety the occupational health department had advised that you were unfit for alternative duties. You advised that you would be happy to try to return to work on alternative duties, but your focus would be to return to your operational role. You advised that if Control didn't plan known Covid patients to you then your anxiety would be reduced and you would be happy to work in level 2PPE to transport patients in your operational role. I advise that I would refer you back to occupational health to explore the options with their guidance whether a return to the operational role was appropriate or if you are fit for alternative duties and what they would be.*

*Level 2PPE is the required protection for your role as you are not performing or exposed to procedures that generate AGPs. You have explained that the underlying condition preventing you from returning to your role is anxiety and you feel an FFP3 will help reduce this anxiety.*

*During our discussion I was able to clarify the National requirement and risk assessment for PPE and that level 3PPE (FFP3 mask) was required for unscheduled care staff who perform AGPs and level 2PPE (FFP2 mask) was advised for scheduled care and in comparative hospital setting. I further explained that FFP3 masks cannot be used for protracted periods or for driving*

*which made them unsuitable for scheduled care, while you explained that you felt that it would be a reasonable adjustment for yourself to wear when you were transporting a known positive patient. I explained that as 1 in 3 patients are non symptomatic, the use of a mask did not mitigate the risk and further for you imposed a further risk to yourself if used incorrectly.*

*You have been supported to remain at work through a period of alternative duties and offered the opportunity to be re-deployed on a non patient facing role within the Trust. However you feel that the Trust could consider not allocating you known positive patients to transport as an adjustment to facilitate your return to work. I agreed to consider this point further by making enquiries with the OC and advised if we were able to accommodate it would be in line with guidance from occupational health.*

*I have explained in our meeting that the Trust follows National Guidelines in relation to the level of PPE based on the tasks they carry out within their role. You explained that the underlying condition preventing you from returning to your role is anxiety and you feel an FFP3 will help reduce this anxiety. From our conversation today I explained that the appropriate level of PPE for your role is level 2 and follows IPC standards.*

*I will make a referral to occupational health and wait for the report. I hope to be able to meet with you week commencing 13 December 2021 to discuss the report and any adjustments and recommendations that are made.”*

29. Miss Jobling’s evidence to the Tribunal was that if she felt that Mr Hindmarch needed an FFP3 mask to be able to carry out his role safely, or if he was exposed to AGPs whilst transporting patients, then she would have given him an FFP3 mask. However, that was simply not the case. Cost was not a consideration in deciding whether the claimant should be given an FFP3 mask. Miss Jobling’s evidence was that the mask would not necessarily protect the claimant from Covid, nor would it address his underlying anxiety which Miss Jobling felt it was important to address. Miss Jobling said that she wanted to work with the claimant and put in place adjustments to address his anxiety and get him back in the workplace.
30. Miss Jobling upheld parts of the claimant’s appeal but rejected those parts which related to the position of the FFP3 masks. By letter dated 19 December (page 402) the claimant appealed against the rejection of his grievance on those grounds. The appeal letter dated 19 December 2021 states as follows:-

*“I am appealing my recent grievance outcome on the grounds of I disagree with all the decisions made on all points made. The main being I am being discriminated against by being refused the extra protection I need ie FFP3 mask when other scheduled staff have been issued FFP3 masks for various health issues and risk assessments. Also unscheduled staff are using the FFP3 protection for suspected Covid and Covid positive patients as they deem necessary. May I add against the guidelines the Trust keeps on quoting “FFP3 masks only used for AGP procedures” with regards to Covid. I may not perform AGPs but I would be exposed to aerosols on a daily basis doing my substantive role as an ACA which is recognised by Claire Jobling and the Trust.”*

31. It is relevant at this stage to explain the difference between an FFP2 mask and an FFP3 mask. The FFP2 is equivalent to a surgical face mask which is worn without a gown or gloves and is designed to provide protection against coughs and sneezing which produce particles from the respiratory tract. The FFP3 mask is a

more robust mask which is designed to provide protection to those carrying out Aerosol Generating Procedures, which relates to droplets produced from the lungs. Photographs of the different kinds of FFP2 and FFP3 masks appear on page 993 in the bundle. It was accepted by the respondent at all relevant times they had supplies of both FFP2 and FFP3 masks and that the costs of supplying an FFP3 mask as opposed to an FFP2 mask was not prohibitive. The main reason for the respondent's insistence that the claimant should undertake his duties whilst wearing an FFP2 mask was the clear National Guidance relating to which level of mask was appropriate for which kind of duty undertaken by NHS staff. The respondent's witnesses accepted that the FFP3 mask was slightly more robust, which meant that it could not be worn for lengthy periods of time, required to be "fit tested" to the relevant employee and was not suitable for those undertaking driving duties.

32. The claimant had been due to attend a meeting to discuss the outcome of his grievance on 16 December 2021 but that was rescheduled due to the claimant's pre-arranged medical appointments. It was re-arranged for Tuesday 4 January 2022 but the claimant says he was unable to attend that due to "an unwelcome downturn in my psychological condition." On 20 January 2022 the claimant advised that he was unable to attend a scheduled sickness absence review meeting on 20 January again, "due to ongoing medical issues". Mr Carr asked the claimant to provide further alternative dates for that meeting but the claimant advised that this would not be possible. By letter dated 31 January 2022, Mr Carr wrote to the claimant in the following terms:-

*"I note you emailed me on 20 January 2022 to advise you would not be able to attend in person or via telephone due to ongoing medical issues. I asked when you would be able to attend and you responded "at this moment I can't". I have since attempted to contact you via text and telephone during this time however you have not returned my calls and are no longer engaging verbally. I therefore emailed you on 31 January to inform you that I have referred you back to the occupational health department out of concern for your welfare. You confirmed by email on 31 January that you had received my email dated 31 January. I would like to take the opportunity to remind you that under the Trust's sickness absence policy you are required to reasonably engage in the absence management process and attend regular meetings. Failure to comply with this is a breach of policy and could result in the suspension of sick pay."*

33. By letter dated 2 February 2022, occupational health replied to Mr Carr in the following terms:-

*"I liaised with the occupational health consultant on 1 February 2022 and she recommended that an occupational health referral is not required at this time. She stated that as Ken is refusing to return to alternative duties and had advised you that he cannot attend meeting either face to face or via telephone that this is now an organisational issue to manage."*

34. By letter dated 8 February, the claimant wrote to Mr Carr in the following terms:-

*"I'm currently not fit for work as confirmed by my GP. In addition, I am only fit to work with adjustments, but these reasonable adjustments aren't being implemented. Therefore the Trust is discriminating against me due to my disability and is failing to make reasonable adjustments. Since your letter my solicitor has written to the Trust and I would ask that this correspondence is responded to before proceeding any further. One final point is that I have always*

*followed the Trust's policies in guidelines but because of issues surrounding my mental health I have been unable to speak to you or anyone from work over the previous months. I am getting help from my psychologist for this so I am hopeful that I shall speak to you soon."*

35. The grievance appeal hearing finally took place on 29 April 2022 and was heard by Tracey Gilchrist. Miss Gilchrist accepted that Mr Hindmarch was very anxious at the hearing and with being in the respondent's building in general. The claimant informed Miss Gilchrist that his main worries were about himself and his granddaughter who was also in a high risk group, about contracting Covid-19. The claimant informed the appeal panel that he had stopped going out where possible and was adhering to social distancing measures when he did need to go out. He was particularly concerned that he could potentially be transporting Covid positive patients whilst acting in his role as an ambulance care assistant. He was concerned that he regularly came into contact with patients who were coughing and sneezing, including dementia patients with whom he had close contact when entering their homes. For that reason he had requested an FFP3 face mask as an alternative to the level 2 surgical face mask with which he had been provided. Miss Gilchrist's unchallenged evidence at the Tribunal was that staff performing aerosol generating procedures would be issued with FFP3 masks but would only wear those masks whilst performing that procedure. They do not wear FFP3 masks for longer than they are required to perform the procedure as they become damp and ineffective if they are worn for too long. They can only be worn for up to three hours, but if the mask is compromised by becoming damp it would need to be changed sooner. Miss Gilchrist confirmed that the respondent complied with the guidance and recommendations made nationally and in accordance with other local ambulance trusts. Miss Gilchrist's evidence was that to allay Mr Hindmarch's concerns he would have to wear the FFP3 mask for the duration of his shift, which was wholly impractical. Miss Gilchrist mentioned that the claimant had a beard which would have to be removed if he wore the FFP3 mask and also wore glasses which tended to steam up whilst that kind of mask was in use. Because Mr Hindmarch worked as a single man crew he would always be required to drive and therefore the FFP3 mask was not an appropriate measure.
36. Miss Gilchrist mentioned that the claimant offered to provide his own FFP3 mask. Miss Gilchrist's concern about that was that there was a requirement for the service to use standardised equipment to ensure safety from a quality point of view.
37. Miss Gilchrist's opinion having heard everything which Mr Hindmarch had to say, was that he had "become fixated on being issued with an FFP3 mask, when in fact the respondent needed to address the wider issue of his anxiety around his role and Covid-19 to try and find ways in which the respondent could assist him to get back to work". Miss Gilchrist's opinion was that the provision of the FFP3 mask would not provide the necessary level of assurance to enable the claimant to return to work.
38. By a letter dated 6 May 2022 (page 485) Miss Gilchrist dismissed the claimant's appeal against the refusal of his grievance. Miss Gilchrist provides a full and detailed explanation in a letter which runs to four and a half pages. The relevant extracts are as follows:-
  - *For individuals working with unscheduled care they will use the FFP3 mask when it is working with a Covid positive patient, but they did not wear them all the time. The level 2 mask was appropriate for all of us and you*

*had agreed to this. You responded you've done some further research and will advise that coughing and sneezing is not an aerosol generated procedure.*

- *Claire explained that individuals could not wear FFP3 masks at all times as it would leave them more at risk of infection.*
- *You advised you feel anxiety when you are physically close to patients who are coughing or elderly or dementia patients who don't understand. The issue is about close proximity.*
- *There are issues with FFP3 masks. If an individual is wearing them regularly, they become soiled, damp and contaminated. You cannot wear an FFP3 mask with a beard or drive in an FFP3 mask. If worn over a longer period of time they can be uncomfortable and cause allergies. FFP3 masks result in glasses becoming misted and you agreed you felt breathing is more laboured when wearing a mask.*
- *Claire advised we want to support you with your anxiety but the FFP3 mask is not the full protection, as we also use aprons, gloves etc if needed. You need to understand the control measures are different as the world adjusts to Covid.*
- *You advised your mental health had gone downhill.*
- *We discussed if the provision of an FFP3 mask would assist your return to work and you responded, "Possibly, but only if it is in black and white."*
- *You advised you are happy to wear a level 2 mask when dealing with non-Covid patients and would want to decide when to use the FFP3 mask as you felt this was still suitable.*
- *Your anxiety was purely associated with the risk of Covid. You advised your main worry is about getting Covid and passing it on to your granddaughter who is in a high risk group. You were in a social bubble with your granddaughter and were concerned you could pass it on to her. You said you had stopped going out and keep social distance and use hygiene measures. You are suffering stress and anxiety about what is happening with your job, work etc.*
- *Due to the lack of testing, every patient could be Covid positive going forward and that it is your anxiety stopping you coming back to work, not Covid. We need to think about other roles. This is about support, not about giving you an FFP3 mask.*
- *I advise we did not feel the FFP3 mask would give you the level of protection to ease your anxiety. FFP3 is not appropriate for your role, but we know you want to return to your job and the world is changing.*
- *We don't uphold your grievance appeal associated with the FFP3 mask, but we do acknowledge your concerns. We were proposed to bring you back into a different role and in parallel look at alternative masks. A stress risk assessment will be conducted for each role as you step back into your frontline ambulance care assistant role.*
- *You have been invited to a case management meeting on Wednesday 11 May 2022. In attendance at the meeting will be a member of your line*

*management team, occupational health team, human resources team and risk and regulatory team, where they will discuss with you the various facial masks which may be suitable for you as an alternative to an FFP3 mask. I hope you feel able to fully participate and engage in the discussions to assist in a solution being identified which will provide you with confidence in support of your return to work.*

39. The claimant attended a further occupational health assessment on 24 May, by telephone. The report appears at page 490 in the bundle. The relevant extracts are as follows:-

- *Further his review in December 2021, he advises that he has been unable to return to work in any capacity. He reports that he had an appeal meeting with the organisation before any meeting to discuss a return to alternative duties. He advises me that he has noted a significant decline in his mental health symptoms following this appeal meeting.*
- *He advises me that his symptoms had started to improve with the NHS support. However, this support has now ended and he feels that his contributed to a decline in symptoms. He is due to contact the service this week for further support sessions. He has seen his GP and continues his treatment as ongoing.*
- *He advises me that his main stressors are about leaving the house and this causes a decline in symptoms. He reports that he is managing daily activities at home depending on whether he is having a good day or a bad day.*
- *He is not fit to return to work to a substantive role or alternative role at present. I am unable to comment on timescales for recovery and return to work as this would be dependant on further improvement of his symptoms.*
- *He advises me that although he cannot attend face to face meetings, he is happy to have meetings via Teams or over the telephone as needed. He reports that the main anxiety is about leaving the house to attend any venue.*

40. A further long term sickness review meeting took place on 6 June. The report of that meeting appears in the respondent's letter to the claimant dated 6 June 2022 which appears at page 492 in the bundle. The relevant extracts are as follows:-

- *You stated that you are still having good days and bad days. On a good day you manage to spend time with your children and grandchildren and have been for an occasional walk. You also enjoy spending time cleaning or working on your car and find this helps your mood. You still don't feel confident leaving the house to visit the shops or see friends. On a bad day you struggle to find the motivation to do anything.*
- *You initially felt anxious about transporting Covid patients and feel that this is when your low mood started. Following a grievance appeal you felt more anxious and stressed about everything.*
- *You feel nothing has changed following your last conversation with occupational health.*



- *At this moment you don't feel alternative duties on Station would be suitable. However would consider something that could be done remotely from home if it was available. I advised we would look into this.*
41. Another long term sickness absence review took place on 11 July. Those discussions were set out in the letter dated 11 July which appears at page 494 of the bundle. The relevant extracts are as follows:-
- *Little has changed since we last spoke. You are having more bad days than good and currently only feel able to spend time with your family.*
  - *You have visited your GP and been prescribed sleeping tablets.*
  - *We discussed the case review that has previously been cancelled. You advise you still don't feel ready to take part in this.*
  - *We discussed further support from occupational health's new psychological well-being advisor and you were keen to access this.*
42. The next long term sickness absence review meeting took place on 16 August. The discussions were recorded in the letter dated 16 August which appears at page 560 in the bundle. The relevant extracts are as follows:-
- *Little has changed since we last spoke. You are having more bad days than good and currently only feel able to spend time with your family. You have been going for walks but avoid areas where there may be crowds. You currently do not drive yourself anywhere and so your wife is usually with you when attending GP appointments.*
  - *You are awaiting an appointment for further counselling.*
  - *We discussed the case review that has previously been cancelled. You advise you still don't feel ready to take part in this. I advised that we could do this over the phone once you are ready if that is more suitable.*
  - *We discussed returning to work in a non-patient facing role, you don't feel like you could manage this and I'm sure if you could in the future.*
  - *I asked if you felt that you could return to your substantive role in the future – you did not wish to comment on this.*
43. On 16 August Mr Rossendale enquired of occupational health as to whether the report dated 24 May 2022 remained "up to date" or whether the claimant should be referred for another appointment. The letter notes that the claimant had told Mr Rossendale that he did not wish to and was not well enough to be considered for re-deployment in a non-patient facing role. The letter mentioned that the claimant had declined to attend a case review as he felt it would be little or no benefit in doing so. The letter asks whether any other adjustments or recommendations could be made. By a letter dated 23 August, occupational health replied stating that, "*if there has been no change to Ken's health since we last reviewed him on 24 May 2022, then there would be no change to the content of the aforementioned report.*"
44. By a letter dated 13 September 2022 (pages 567-568), the claimant was invited to a Final long term sickness absence hearing on Wednesday 21 September 2022. The letter stated that, at the hearing, the claimant's continued employment with the Trust would be considered which could result in his employment being terminated on grounds of a capability due to ill health.

45. The claimant attended the meeting on 21 September. The notes appear at pages 632-633. The hearing was conducted by Mr Barry Dews, head of scheduled care. When asked how he was, the claimant replied, *“Not too good, but I’m happy to go ahead. I don’t really have anything more to say, just let’s get on with it, I have no arguments, I am past caring”*. The claimant was asked whether he was happy with the management report and all the documentation contained within the pack which had been sent to the claimant prior to the meeting. The claimant’s reply was, *“At this moment in time no I don’t feel I got the support I deserved from the Trust as they stayed away from addressing the main issues.”* Mr Dews replied that he appreciated that the claimant still had a separate issue but his question was directed to the management of his sickness absence case. The claimant replied, *“yes as there is nothing to be done, I cannot give a date when I may be fit to return to work.”* When asked whether he felt that the Trust had supported re-deployment the claimant accepted that they had and stated, *“I was not prepared to do another role than my substantive role. I’m not prepared at my age to start a new role and I cannot be certain I can return to my substantive role.”* The claimant was then asked, *“clinically do you feel the Trust could have done anything more?”* The claimant replied, *“possibly not – no I don’t think so.”* The claimant was asked whether he felt that the respondent’s absence policy and procedure had been followed and the claimant replied, *“yes”*. The claimant was asked if he had any questions and confirmed that he did not.
46. After a short adjournment the claimant was informed that Mr Dews had decided to terminate his employment with immediate effect from 21 September 2022 on the grounds of ill health, confirming his ill health and attendance had been managed fairly and transparently. However he appreciated the outcome may not be the conclusion the claimant wanted. Mr Dews outlined the claimant’s entitlement to notice pay and holiday pay and confirmed that all would be paid at the end of October 2022. The claimant was advised of his right to appeal.
47. That decision was confirmed in a letter date 26 September which appears at pages 639-640 in the bundle.
48. By a letter dated 6 October 2022 the claimant wrote in the following terms:-  
*“I am lodging an appeal against the termination of my employment on Wednesday 21 September 2022 on the basis I think my dismissal is discriminatory and unfair as I would never have been in this position if reasonable adjustments had been made by the Trust at the first instance of my request for said adjustments.”*
49. The appeal hearing took place on 25 November and was conducted by Mr Shane Woodhouse (head of operations for unscheduled care South Division). By a letter dated 8 November 2022 the claimant further clarified his grounds of appeal as follows:
- (a) My dismissal is unfair due to disability discrimination.
  - (b) I was absent from work as the Trust would not provide me with FFP3 masks to alleviate my anxiety.
  - (c) If I had been given those masks I would have been able to work and I would not have been absent through sickness.
  - (d) I believe that my absence which led to my dismissal was caused by the Trust’s failure to make reasonable adjustments.

50. The appeal was heard by Mr Shane Woodhouse on 25 November. The appeal outcome is set out in the letter dated 1 December which appears at pages 687-690 in the bundle. The relevant extracts are as follows:-

- *Having set out his grounds of appeal, the claimant explained that he felt that he had been discriminated against since returning to work from shielding on 1 August 2020. He had had a risk assessment carried out in December 2020 which he stated had advised that FFP3 should have been provided for him and at which a discussion had taken place about him transporting non-Covid positive patients or undertaking alternative non-patient facing duties.*
- *The claimant provided examples of other colleagues within the Trust who had been provided with FFP3 masks.*
- *The claimant had raised a formal grievance about the FFP3 masks which had been rejected.*
- *He had never asked or indicated an intention to wear FFP3 for a full shift.*
- *In May 2021 the claimant had returned to operational patient facing duties without FFP3 because he knew he would have to return to patient facing duties at some time and was then happy "give it a go".*
- *The claimant understood that level 2 PPE was appropriate for his role, but felt that this was guidance only, that the Trust did not necessarily have to follow it and that the claimant accepted that if issued with FFP3 he would also need a normal mask, plastic gown, gloves and high protection.*
- *The claimant's understanding was that Covid-19 is an airborne virus and that therefore a mask would have been sufficient protection from a patient sneezing etc. However, the claimant's concern was that FFP3 masks are sealed to the face and therefore afford better protection and were being used within other NHS Trusts.*
- *The claimant had been asked in June 2021, "if an FFP3 mask was provided would you be able to return to work?, to which the claimant had advised that he was unsure but did wish to come back when he felt able to do so." The claimant accepted that this had been said.*
- *When asked what outcome he wanted from the appeal hearing, the claimant said he sought reinstatement and compensation for loss of earnings.*
- *When asked if he were to return to work, would he still be seeking FFP3, the claimant stated that he would.*
- *When asked to confirm his current state of mental health and well-being, the claimant stated that there had been some improvement but that he had felt better since leaving work.*
- *Barry Dews' view was that the claimant's issues over FFP3 had been addressed via the grievance route, that nothing had changed in terms of National Guidance and that the claimant's role required only FFP2 protection.*
- *The management team felt that they had exhausted all options for the claimant, had asked him whether there was anything else the Trust could*

*have done and the claimant confirmed that there was not, other than providing FFP3 protection.*

- *The claimant accepted that he had been full supported during the sickness management process, having received welfare calls, counselling etc.*
- *The claimant's view remained throughout that the issue of his absence could have been resolved in August 2020, by which time he had made the management team aware of his anxieties around transporting Covid positive patients, yet he felt he had been unprotected by the provision for only a basic FFP2 mask.*

51. Dealing with the four grounds of appeal, Mr Woodhouse's conclusions were as follows:-

51.1. Mr Dews was satisfied that the decision to dismiss the claimant on the grounds of capability due to ill health followed a fair process, that the Trust's sickness absence policy had been followed and all alternative options to dismissal had been explored.

51.2. The claimant's absence was not due to the Trust's alleged refusal to provide him with FFP3 protection to alleviate his anxiety. The claimant had been able to return to work for a short period between April and May 2021 without the use of FFP3.

The allegation that the claimant would have been able to work had he been provided with an FFP3 was not upheld on the basis that, by his own admission, he remained unsure as to whether, if and if so when, he may be able to return to work even if the Trust had provided him with FFP3.

51.3. Mr Woodhouse rejected the allegation that the claimant's absence was caused by the Trust's failure to make reasonable adjustments, namely the provision of FFP3. Mr Woodhouse found that the provision of FFP3 was not considered to be a reasonable adjustment. The definition of aerosol generated procedures had been set nationally and throughout the pandemic the Trust had consistently adhered to that National Guidance. Utilisation of FFP3 led to a downtime to don and remove the equipment as well as creating a communication barrier. FFP3 impaired tasks such as driving. Therefore its application and use was limited to a clinical situation such as those experienced by unscheduled drivers and FFP3 was not deemed as being required for drivers working on scheduled care.

52. The first claim alleging failure to make reasonable adjustments was presented to the Employment Tribunal on 16 March 2022, ACAS early conciliation having been engaged on 23 February 2022.

### **The Law**

53. The claimant's complaint of unfair dismissal engages sections 94 and 98 of the Employment Rights Act 1996.

#### **94 The Right.**

*(1)An employee has the right not to be unfairly dismissed by his employer.*

*(2)Subsection (1) has effect subject to the following provisions of this Part (in particular sections 108 to 110) and to the provisions of the Trade Union and Labour Relations (Consolidation) Act 1992 (in particular sections 237 to 239).*

**98 General.**

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

- (a) the reason (or, if more than one, the principal reason) for the dismissal, and*
- (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*

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

- (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,*
- (b) relates to the conduct of the employee,*
- (c) is that the employee was redundant, or*
- (d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.*

(3) *In subsection (2)(a) —*

- (a) “capability”, in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and*
- (b) “qualifications”, in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.*

(4) *Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—*

- (a) depends on whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*
- (b) shall be determined in accordance with equity and the substantial merits of the case.*

(6) *Subsection (4) is subject to—*

- (a) sections 98A to 107 of this Act, and*
- (b) sections 152, 153, 238 and 238A] of the Trade Union and Labour Relations (Consolidation) Act 1992 (dismissal on ground of trade union membership or activities or in connection with industrial action).*

54. The claimant’s complaints of unlawful disability discrimination engaged sections 6, 15, 19, 20, 21 and 136 of the Equality Act.

**6 Disability**

(1) *A person (P) has a disability if—*

- (a) P has a physical or mental impairment, and*
- (b) the impairment has a substantial and long-term adverse effect on P’s ability to carry out normal day-to-day activities.*

(2) A reference to a disabled person is a reference to a person who has a disability.

(3) In relation to the protected characteristic of disability—

(a) a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;

(b) a reference to persons who share a protected characteristic is a reference to persons who have the same disability.

(4) This Act (except Part 12 and section 190) applies in relation to a person who has had a disability as it applies in relation to a person who has the disability; accordingly (except in that Part and that section)—

(a) a reference (however expressed) to a person who has a disability includes a reference to a person who has had the disability, and

(b) a reference (however expressed) to a person who does not have a disability includes a reference to a person who has not had the disability.

(5) A Minister of the Crown may issue guidance about matters to be taken into account in deciding any question for the purposes of subsection (1).

(6) Schedule 1 (disability: supplementary provision) has effect.

### **15 Discrimination arising from disability**

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

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

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

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

### **20 Duty to make adjustments**

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

(2) The duty comprises the following three requirements.

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

(4) The second requirement is a requirement, where a physical feature 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.

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put 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 provide the auxiliary aid.

(6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.

(7) A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.

(8) A reference in section 21 or 22 or an applicable Schedule to the first, second or third requirement is to be construed in accordance with this section.

(9) In relation to the second requirement, a reference in this section or an applicable Schedule to avoiding a substantial disadvantage includes a reference to—

(a) removing the physical feature in question,

(b) altering it, or

(c) providing a reasonable means of avoiding it.

(10) A reference in this section, section 21 or 22 or an applicable Schedule (apart from paragraphs 2 to 4 of Schedule 4) to a physical feature is a reference to—

(a) a feature arising from the design or construction of a building,

(b) a feature of an approach to, exit from or access to a building,

(c) a fixture or fitting, or furniture, furnishings, materials, equipment or other chattels, in or on premises, or

(d) any other physical element or quality.

(11) A reference in this section, section 21 or 22 or an applicable Schedule to an auxiliary aid includes a reference to an auxiliary service.

(12) A reference in this section or an applicable Schedule to chattels is to be read, in relation to Scotland, as a reference to moveable property.

(13) The applicable Schedule is, in relation to the Part of this Act specified in the first column of the Table, the Schedule specified in the second column.

## **21 Failure to comply with duty**

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.

## **136 Burden of proof**

(1) This section applies to any proceedings relating to a contravention of this Act.

*(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*

*(3) But subsection (2) does not apply if A shows that A did not contravene the provision.*

*(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.*

*(5) This section does not apply to proceedings for an offence under this Act.*

*(6) A reference to the court includes a reference to—*

*(a) an employment tribunal;*

*(b) the Asylum and Immigration Tribunal;*

*(c) the Special Immigration Appeals Commission;*

*(d) the First-tier Tribunal;*

*(e) the Special Educational Needs Tribunal for Wales;*

*(f) an Additional Support Needs Tribunal for Scotland.*

55. The respondent relies upon “capability” as a potentially fair reason for dismissing the claimant. The respondent’s position is that the claimant was no longer capable of performing work of the kind for which he had been employed, because of his long term absence. That is a potentially fair reason under **S.98(2)(a) of the Employment Rights Act 1996**. The relevant authorities from the higher courts which provide guidance to the Employment Tribunal on the interpretation of that statutory provision are as follows:-

55.1. **Spencer v Paragon Wallpapers Ltd** – [1977] ICR 301.

55.2. **BS v Dundee City Council** [2014] IRLR 131.

55.3. **East Lindsay District Council v Daubney** [1977] ICR 566.

55.4. **HJ Heinz Co Limited v Kenrick** [2000] IRLR 144.

56. The basic principles established by those cases are as follow:-

56.1. It is essential to consider whether the employer can be expected to wait any longer for the employee to return. The Tribunal must expressly address this question, balancing the relevant factors in all the circumstances of the individual case.

56.2. Those factors include whether other staff are available to carry out the absent employee’s work, the nature of the employee’s illness, the likely length of his absence, the cost of continuing to employ the employee, the size of the employing organisation and the unsatisfactory situation of having an employee on very lengthy sick leave.

56.3. A fair procedure is essential. This requires in particular consultation with the employee, a thorough medical investigation to establish the nature of the illness and its prognosis and consideration of other options including alternative employment within the employer’s business. In one way or another steps should be taken by the employer to discover the true medical



position prior to any dismissal. Where there is any doubt, a specialist report may be necessary. The employer must also take into account not only the employee's current level of fitness but also his or her likely future level of fitness.

- 56.4. The employee's opinion as to his or her likely date of return and what work he or she will be capable of performing should be considered, including the possibility of alternative employment within the respondent's undertaking.
57. Setting aside for a moment the possibility of the provision of the FFP3 face mask which the claimant insists would have allowed him to return to work, the Tribunal was satisfied that the respondent had followed a fair procedure throughout the claimant's absence. The claimant accepted and admitted during cross-examination that he had no complaints about the procedure which the respondent followed between May 2021 when he went on long term sick leave and September 2022 when he was dismissed. Occupational health referrals were made at the appropriate time and the respondent's occupational health services remained available to the claimant throughout that time. The respondent accepted the information provided by the claimant with regard to his deteriorating mental health and the impact it was having upon his home life, work life and personal life. The claimant had accepted alternative roles within the stores for a short period of time and again accepted that he had been offered the opportunity to return to work in the stores. The claimant accepted that, when asked about whether he was willing to return to alternative role and if so to what, he had been unable to identify any such role, nor had he been able to confirm that he was fit enough to return to work in any event.
58. Mr Barry Dews evidence about the impact on the respondent's organisation of the claimant's absence was not challenged. That evidence was that the claimant's prolonged absence had a significant impact on the respondent's ability to deliver its contractual obligations, namely a timely and responsive transport to patients. An absence from work for a significant period placed additional pressures on other teams as there was fewer staff to complete the daily work, which remained constant. That was particularly so during the heightened levels of medical assistance during the Covid pandemic. Hospitals were particularly stretched as staffing levels were challenging because of Covid related absences. Patients were dependant upon patient transport services to get them to and from hospital appointments. It was therefore particularly important throughout that period to manage sickness absence effectively and to support staff back to work where possible.
59. The Tribunal accepted the respondent's evidence that by September 2022 the stage had been reached where the respondent could no longer be expected to wait any longer for the claimant to return to work. The only factor which could possibly have made any difference to the fairness of the dismissal was whether the refusal/failure to provide FFP3 equipment meant that the respondent's dismissal of the claimant became one which fell outside the range of reasonable responses open to a reasonable employer in all the circumstances.
60. The allegations of unlawful disability discrimination firstly required the claimant to satisfy the Tribunal that his mental health condition fell within the definition of a disabled person within **S.6 of the Equality Act 2010**. The claimant alleges that he suffers and at the relevant time suffered from a mental impairment which had a substantial and adverse effect on his ability to carry out normal day to day activities

to the extent that he satisfied the definition of disability under section 6. The claimant described (and quoted from his medical records) the history of his low mood and depression and the medical treatment which had been prescribed for that condition. The Tribunal had no difficulty in finding that the claimant's mental impairment was long term, in the sense that it had lasted or was likely to last for more than 12 months.

61. The Tribunal accepted the claimant's evidence as to the impact which that mental impairment had on his ability to carry out normal day to day activities. His stress and anxiety became enhanced by the impact of the Coronavirus pandemic and the potential consequences which that pandemic may have had for himself and other members of his family. The claimant had been required to shield during the early stages of the pandemic and had suffered a panic attack when asked to transport a Covid-19 patient on 14 May 2021 to the extent that he became too ill to attend for work thereafter. The Tribunal found that by not later than 14 May 2021 the claimant's mental health impairment satisfied the definition of disability in **S. 6 of the Equality Act 2010**.
62. The Tribunal had to be satisfied that the respondent knew or reasonably ought to have known that the claimant was a disabled person at the time when the alleged acts of disability discrimination took place. The Tribunal found that the respondent was in possession of sufficient information about the claimant's mental health impairment by not later than 21 October 2021 when it was provided with a second copy of his grievance form, which had originally been submitted on 17 August 2021. The grievance form makes clear reference to an allegation of unlawful disability discrimination based upon an alleged failure to make reasonable adjustments. By that time the respondent was in possession of sufficient medical information from the claimant, his GP and its own occupational health specialists for the Tribunal to conclude that it knew or reasonably ought to have known by then that the claimant was disabled.
63. The complaint of unlawful disability contrary to **S.15 of the Equality Act** requires the claimant to establish that he was subjected to unfavourable treatment because of something arising in consequence of his disability. The respondent has accepted throughout these proceedings that the claimant's dismissal amounted to unfavourable treatment and that the dismissal of his appeal against that dismissal was also an act of unfavourable treatment. The respondent has accepted that the reason for the claimant's dismissal was his long term absence and that the long term absence itself was a consequence of the stress, anxiety and depression which amounted to the claimant's disability. Accordingly, the claimant's dismissal was unfavourable treatment because of something arising in consequence of his disability.
64. Section 15 deals with what is commonly known as "discrimination arising from disability". It is for the claimant to establish three things:-
  - 64.1. Unfavourable treatment.
  - 64.2. That the treatment was because of "something".
  - 64.3. That the "something" arises in consequence of the claimant's disability.

If so, then the respondent will only be able to defeat the claim if it can show that its treatment of the claimant was a proportionate means of achieving a legitimate aim.

65. The claimant need only establish that he has been treated unfavourably – the test is not “less favourable treatment”. Accordingly, no comparator is required. There is a relatively low threshold of “disadvantage”, which is sufficient to trigger the requirement for the respondent to justify the treatment.
66. The unfavourable treatment must be because of the relevant “something” which must itself arise in consequence of the disability. This is not a question of whether the claimant was treated less favourably because of his disability. **Basildon and Thurrock NHS Foundation Trust v Weerasinghe** – (2016 ICR 305).
67. The Employment Appeal Tribunal has provided guidance on the correct approach to **section 15** cases in **Pnaiser v NHS England** (UK EAT/0137/15).
- (a) The Tribunal must identify whether there was unfavourable treatment and by whom. In other words, it must ask whether A treated B unfavourably in the respects relied upon by B. No question of comparison arises.
- (b) The Tribunal must determine the cause of 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 contentious or uncontentious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be one reason or cause for the 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 reason or sole reason, but must have at least a significant or more than trivial influence on the unfavourable treatment and so must amount to an effective reason for or cause of it.
- (c) Motives are irrelevant. The focus of this part of the inquiry is on the reason or cause of the impugned treatment and A’s motive in acting as he or she did is simply irrelevant.
- (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, 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 the something can properly be said to arise in consequence of disability.
- (e) 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.
- (f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.
- (g) It does not matter precisely in which order these questions are addressed. Depending upon the facts, the Tribunal might ask why A treated the claimant in the unfavourable way alleged, in order to answer the question whether it was because of “something arising in consequence of the claimant’s disability”.

Alternatively, it might ask whether the disability has a particular consequence for a claimant at least as to the “something” that caused the unfavourable treatment.

68. The 3 acts of unfavourable treatment alleged by the claimant are the failure to provide him with the FFP3 mask, his dismissal and the dismissal of his appeal. In her closing submissions, Ms David for the claimant did not pursue the allegation that the failure to provide the claimant with the FFP3 mask was because of something which arose in consequence of his disability. Indeed, it would have been difficult for the claimant to pursue that argument. The reason for the refusal by the respondent to provide the claimant with the FFP3 mask was not because of his mental health impairment which arose as a consequence of his disability, but was because of the national guidance issued by central government as to which level of FFP mask should be provided to those carrying out scheduled work. Mr Webster for the respondent conceded that the respondent’s dismissal of the claimant and the dismissal of his appeal both amounted to unfavourable treatment, that both arose because of his long term sickness absence which in turn arose as a consequence of his disability. It therefore falls to the respondent to satisfy the Tribunal that its dismissal of the claimant and its dismissal of his appeal amounted to a proportionate means of achieving a legitimate aim.

69. In **O’Brien v Bolton St Catherine’s Academy** (2017 ICR 737) the Court of Appeal addressed the apparent dichotomy between the “reasonable responses” test which applies to an unfair dismissal and the proportionality test in the defence available under **section 15**. Lord Justice Underhill explained,

*“I accept that the language in which the two tests is expressed is different and that in the public law context a “reasonableness review” may be significantly less stringent than a proportionality assessment (though the nature and extent of the difference remains much debated) but it would be a pity if there were any real distinction in the context of dismissal for long term sickness where the employee is disabled within the meaning of the 2010 Act. The law is complicated enough without parties and tribunals having routinely to judge the dismissal of such an employee by one standard for the purpose of an unfair dismissal claim and by a different standard for the purpose of discrimination law. Fortunately, I see no reason why that should be so. On the one hand, it is well established that in an appropriate context a proportionality test can, and should, accommodate a substantial degree of respect for the judgment of the decision taker as to his reasonable needs (provided he has acted rationally and responsibly), while insisting that the tribunal is responsible for striking the ultimate balance; and I see good reason for such an approach in the case of the employment relationship. On the other, I repeat – what is sometimes insufficiently appreciated – that the need to recognise that there may sometimes be circumstances where both dismissal and “non-dismissal” are reasonable responses does not reduce the task of the tribunal under section 98(4) to one of “quasi – Wednesbury” review. Thus, in this context, I very much doubt whether the two tests should lead to different results.”*

70. The Tribunal acknowledges that Lord Justice Underhill’s observations in that case are directed to the specific scenario of the dismissal for long term absence of an employee who is disabled within the meaning of the Equality Act. The principle is that, in a case where the same act of dismissal of an employee with a history of long term sickness absence gives rise to both claims of unfair dismissal and

discrimination arising from disability, it is counter intuitive for the section 15 claim to succeed but for the unfair dismissal claim to fail. Therefore, to avoid such different outcomes, the reasonableness test for judging the unfair dismissal claim should be “levelled up” to the equivalent of the proportionality test in respect of the **section 15** claim, rather than the latter being “levelled down”.

71. That principle was accepted by the Employment Tribunal in **Department for Work and Pensions v Boyers (EAT 0282/19)**. The Employment Appeal Tribunal found that in assessing the fairness of the dismissal under section 98 of the Employment Rights Act 1996 and the proportionality of a dismissal under section 15 of the Equality Act 2010, the Tribunal must balance the needs of the employer as represented by the legitimate aims pursued, against the discriminatory effect of the decision to dismiss.
72. In the claimant’s case, the Tribunal accepted the evidence of the respondent’s witnesses as to the impact upon the respondent’s services of the claimant’s very lengthy absence. The Tribunal accepted that it was perfectly legitimate for the respondent to aim to have an effective workforce which regularly attended for work so as to perform the duties required by the respondent. The Tribunal was satisfied that the respondent had properly addressed its mind to the evaluation of the impact on the claimant of his dismissal when weighed against the needs of the employer. The Tribunal found that the impact on the respondent of the claimant’s continued long term absence was a significant element in the balance which determined that the claimant’s dismissal in September 2022 was justified.
73. In coming to that conclusion, the Tribunal took into account the claimant’s complaint that the respondent had failed to make a reasonable adjustment for him by providing an auxiliary aid, namely the FFP3 mask. That specific claim is dealt with below.
74. As is mentioned in paragraphs 4 and 5 above, the main thrust of the claimant’s complaints to the Employment Tribunal related to the respondent’s failure/refusal to provide him with an FFP3 face mask. The claimant maintained that this amounted to a failure to make reasonable adjustments contrary to **sections 20-21 of the Equality Act 2010**.
75. The duty to make adjustments under **section 20** comprises three discreet requirements, any one of which will trigger an obligation on the employer to make any adjustment that would be reasonable:
  - (a) The first requirement applies where a provision criterion or practice (PCP) has been applied by the employer that puts a disabled person at substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled.
  - (b) The second requirement applies where a physical feature puts a disabled person at a similar substantial disadvantage in relation to a relevant matter, and
  - (c) The third requirement pertains where the lack of provision of an auxiliary aid puts a disabled person at a substantial disadvantage in relation to a relevant matter.

In each instance the employer falls under a duty to take such steps as it is reasonable to take to avoid the disadvantage in question.

In the claimant’s case, the first and third requirements only are relevant to his claims. The application of a PCP only applies to the first requirement, as the third

requirement is where the lack of the provision of the auxiliary aid itself puts the disabled person at the disadvantage. (**Mallon v Aecom Ltd** – 2021 ICR 1151).

76. In the claimant's case, the respondent has conceded that it applied a PCP that FFP3 masks were only provided to staff performing roles which exposed them to aerosol generating procedures (AGPs). However, the respondent does not accept that the application of that PCP put the claimant at a substantial disadvantage. Furthermore, the respondent does not concede that the lack of the FFP3 face mask put the claimant as a disabled person at a substantial disadvantage.
77. Ms David's submissions on behalf of the claimant were that the claimant tied the lack of an FFP3 mask to his worry and heightened anxiety which led to his inability to attend work. On 18 May 2021 the claimant reported stress related symptoms which he attributed in the main to being provided with respiratory PPE in the form of a surgical mask. Ms David submitted that the claimant had consistently raised the provision of the FFP3 mask with his manager, both in sickness absence reviews and in his grievance and grievance appeals. Ms David submitted that the claimant's multiple requests to use an FFP3 mask meant that the provision of such a mask would provide him with the chance of allaying his anxiety to such an extent that he would have been able to return to work. Mr Webster's submissions were that, whilst it does not have to be established that the step would necessarily remove the disadvantage, it must be shown that there is a real prospect that it would. (**Romec v Rudham – 2007 AER206**).
78. Mr Webster's submissions were that, whilst the claimant consistently sought an FFP3, his own evidence was such that his anxiety about Covid was too deep seated to materially improve with the provision of a mask.
79. It is most important for the Employment Tribunal not to lose sight of the root cause of the claimant's anxiety which prevented him from attending for work. That anxiety was the risk of contracting Covid-19, the possibility of him transmitting that to other members of his family and the potential impact of the virus on both himself and those members of his family. That risk heightened the claimant's anxiety to such an extent that he was unable to attend for work. The disadvantage suffered by the claimant was that he was more likely to be subjected to the respondent's absence management policy and ultimately to be dismissed because his heightened anxiety meant that he was unable to attend for work.
80. The duty to make an adjustment or to provide an auxiliary aid would only arise if the adjustment or the auxiliary aid would have a real prospect of removing that disadvantage. The question for this Tribunal is therefore realistically, "Were he to be provided with an FFP3 mask, what were the chances of the claimant returning to work and maintaining attendance at work to such an extent that he would not be subjected to the respondent's absence management policy and would not have been dismissed?"
81. The Tribunal was not satisfied in the claimant's case that, were he to have been provided with an FFP3 mask, there was a realistic chance that he would have returned to work to such an extent that he would not have been dismissed. The Tribunal accepted the evidence of the respondent's witnesses about their genuine reasons as to why the provision of an FFP3 mask to the claimant would not have provided the level of protection which he demanded. The respondent conceded that its refusal to provide the claimant with an FFP3 mask was not because it was too expensive to do, nor was it because they did not have sufficient FFP3 masks in stock. Their reason was that they were following national guidance issued by

central government and that, in addition, the FFP3 mask would not have provided the level of protection which the claimant demanded to enable him to return to work.

82. The Tribunal found it reasonable for the respondent to have provided the claimant with the FFP2 face mask. The Tribunal found that it was reasonable for the respondent to offer the claimant the opportunity to return to work in the stores, where he would not have been working “face to face” with patients who may have been diagnosed with, or exposed to, Covid-19. The respondent offered the claimant the opportunity to return to work on a phased return basis so that he could reacclimatise himself to the working environment.
83. Even when asked whether, and if so when, he would be able to return were he to be given an FFP3 mask, the claimant was entirely equivocal in his response. At no stage of the lengthy absence management process did the claimant specifically provide a date when he would be able to return to work were he to be offered an FFP3 mask. The Tribunal accepted Mr Webster’s submissions that the provision of the FFP3 mask could not be a reasonable adjustment when it was clear that the provision of the mask would not have led to the claimant’s return to work. From June 2021 the claimant had been unable to say whether he would be able to return if given an FFP3 mask. By September 2021 the claimant was too ill to meet his psychologist and by February 2022 was unable to speak to the respondent or attend meetings.
84. The Tribunal considered whether the provision of the FFP3 mask would, or might, be effective in removing or reducing the disadvantage that the claimant was experiencing at work as a result of his disability. The Tribunal was satisfied that it would not.
85. For those reasons, the claimant’s complaint of unlawful disability discrimination (failure to make reasonable adjustments) is not well founded and is dismissed. Furthermore, the Tribunal’s finding that the respondent’s dismissal of the claimant was fair in accordance with the provisions of sections 94 and 98 of the Employment Rights Act 1996, is not adversely affected by the claimant’s complaint that the respondent failed to make reasonable adjustments. Finally, the Tribunal’s decision that the respondent’s dismissal of the claimant was a proportionate means of achieving a legitimate aim under **section 15** of the **Equality Act 2010**, is not adversely affected by the claimant’s complaints of failure to make reasonable adjustments.

86. **TIME LIMITS – S123 Equality Act 2010**

The Respondent concedes that the unfair dismissal claim and those under **S.15** were brought within the appropriate statutory time limit, but alleges that those under **S.20-21** are out of time, as brought more than 3 months after the act upon which the claimant relies. Ms David argued that the failure to provide the FFP3 mask was a failure which began in May 2021 and continued up until his appeal against dismissal was dismissed on 25<sup>th</sup> November 2022. Mr Webster argued that the claimant knew of his right to present a complaint to the Tribunal by 8<sup>th</sup> February 2022 at the latest, that this was not a “continuing act” and that it was not just and equitable for time to be extended. The Tribunal agreed that the Respondent did fail or refuse to provide that mask throughout that period and thus was a continuing act, the last incident of which fell within the relevant 3-month time limit.

87. For those reasons the complaints of unfair dismissal and unlawful disability discrimination are all dismissed.

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G Johnson

**Employment Judge Johnson**

Date: 22 January 2024

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