



EMPLOYMENT TRIBUNALS

Claimant: Ms C Allette

Respondent: Scarsdale Grange Nursing Home Limited

Heard at: Leeds (by Cloud Video Platform) **On:** 8 November 2021

Before: Employment Judge Bright

Representation

Claimant: Mr Sharples (Trade Union Representative)

Respondent: Mr Weiss (Counsel)

RESERVED JUDGMENT

1. The claimant's dismissal was fair. The complaint of unfair dismissal is not well-founded and is dismissed.
2. The respondent did not breach the claimant's contract of employment. The complaint of wrongful dismissal is not well-founded and is dismissed.

REASONS

Background

1. This is a claim for unfair dismissal and wrongful dismissal arising out of the summary dismissal of the claimant, a care assistant, from her employment with the respondent, which operates a nursing home providing residential care to dementia sufferers. The claimant was dismissed following her refusal to be vaccinated against Covid-19 in January 2021. Her claim was presented on 9 July 2021.

Issues

2. It was agreed at the start of the hearing that the issues were:
 - 2.1. Do the circumstances of the dismissal fall within the ambit of Article 8 of the European Convention on Human Rights ("the Convention")? Mr Sharples confirmed that the claimant was not arguing that Article 9 of the ECHR was engaged, nor did she pursue a complaint of discrimination.

- 2.2. If so, is the interference with the employee's Convention right justified?
- 2.3. If any interference is not justified, was there a permissible reason for the dismissal under the Employment Rights Act 1996 ("ERA"), which does not involve unjustified interference with a Convention right?
- 2.4. If any interference with the Convention right was justified, was the dismissal fair according to section 98 ERA, reading and giving effect to that section under s3 of the Human Rights Act ("HRA"), so as to be compatible with the Convention right? Thus,
- 2.5. What was the reason for dismissal? Was it a potentially fair reason falling within section 98(1) or (2) ERA?
- 2.6. If so, did the respondent act reasonably or unreasonably in all the circumstances in treating that reason as sufficient reason to dismiss the claimant?
- 2.7. Did the respondent have a genuine belief that the claimant committed misconduct?
- 2.8. Was that belief formed on reasonable grounds?
- 2.9. Was that belief formed following a reasonable investigation?
- 2.10. Did the respondent apply the ACAS Code of Practice on Disciplinary and Grievance Procedures and follow a fair procedure?
- 2.11. Did the respondent act outside the range of reasonable responses of a reasonable employer, by:
 - 2.11.1. Allowing a short period of time for the claimant to consider her position on taking the vaccine;
 - 2.11.2. Failing to address her scepticism or refer her to independent scientific resources;
 - 2.11.3. Failing to take account of her reasons for refusing, in particular that she had recently had Covid-19 and there was no tangible benefit to having the vaccine;
 - 2.11.4. Failing to consider whether it could have made an exception for her;
 - 2.11.5. Failing to consider the interference with her private life?
- 2.12. If the dismissal was unfair, what basic award is payable to the claimant? Would it be just and equitable to reduce it because of any conduct of the claimant before the dismissal and, if so, to what extent?
- 2.13. If there is a compensatory award, how much should it be, taking account of any financial losses the dismissal caused the claimant and the period of loss for which the claimant should be compensated?

- 2.14. Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason? If so, should the claimant's compensation be reduced and, if so, by how much?
- 2.15. If the claimant was unfairly dismissed, did she cause or contribute to dismissal by blameworthy conduct? If so, would it be just and equitable to reduce her compensatory award and, if so, by what proportion?
- 2.16. Did the claimant commit gross misconduct, such that the respondent was entitled to summarily dismiss her? If not, to what damages is she entitled for breach of contract/wrongful dismissal?

Evidence

3. The claimant gave evidence on her own behalf from a written witness statement.
4. The respondent called two witnesses, both of whom gave evidence from written witness statements. They were:
 - 4.1. Mr Greg McDonagh (Director);
 - 4.2. Mrs Tamara McDonagh (Director).
5. The parties presented an agreed bundle of documents of 79 pages, of which I read only those pages to which I was directed. Numbers in brackets in these reasons are references to the page numbers in the agreed bundle.
6. Mr Sharples and Mr Weiss both made submissions which I have considered carefully and with equal care in making my findings of fact and in determining the issues.

Findings of fact in unfair dismissal complaint

7. I make the following findings of fact in the unfair dismissal complaint. Where there was a dispute of fact I have resolved it, applying the balance of probabilities, on the evidence before me, in accordance with these findings of fact. I set out the findings of fact in the wrongful dismissal complaint separately below.
8. The respondent is a family run business, owned by Mr Greg McDonagh and Mrs Tamara McDonagh. The respondent's nursing home ("the Home") provides residential care for dementia sufferers, with a capacity of 52 beds, around 65 permanent staff and, during the Covid-19 pandemic, an average occupancy rate of 34 residents.
9. The claimant was employed by the respondent as a Care Assistant from 3 December 2007 until her dismissal on 1 February 2021. The claimant's role involved attending to the personal care needs of the residents at the Home.
10. Despite widespread and devastating outbreaks of Covid-19 in care homes across the UK during 2020, the Home avoided any outbreaks from the start of the pandemic until December 2020. In December 2020 the government

announced the roll out of the Covid-19 vaccine programme to nursing home residents and health workers to try to address the particular vulnerability of that sector. The respondent made arrangements for staff to have their first vaccination against Covid-19 on 22 December 2020. However, the Home was unfortunately hit with an outbreak of Covid-19 in the days before the vaccines were due to be administered. This resulted in 33 staff and 22 residents contracting the illness in the course of 10 days. Around half the respondent's staff were required to self-isolate and there were a number of deaths among the residents. The claimant was one of the staff who contracted the illness and was required to self-isolate, so was absent from the Home during the height of the outbreak. The planned vaccinations on 22 December 2020 were cancelled by reason of the outbreak.

11. It is not disputed that the picture nationally at this time was bleak, and the claimant has not disputed the figures set out in Mr McDonagh's witness statement of 100,000 recorded cases of Covid-19 per day and 1,500 deaths per day nationally, with a large percentage of deaths occurring in nursing home settings. The situation nationally was also changing on a day-by-day basis, with a new national lockdown announced on 6 January 2021.
12. Following the outbreak at the Home Mr McDonagh rescheduled the vaccinations. It is not disputed that staff had previously been encouraged, but not required, to have annual flu vaccinations. It is agreed that there is nothing in the claimant's contract of employment (pages 32 – 34) which expressly requires her to have vaccinations nor in the disciplinary policy (pages 35 – 43) concerning vaccine refusal.
13. There was a dispute as to when the claimant first learned she would be required to be vaccinated. The claimant says she first heard that the respondent might make vaccination mandatory on 12 January 2021. The respondent says informal consultation about vaccines started in early December 2020, initially in the form of enquiries with staff about whether they intended to take up the offer of the vaccine. The respondent says a list of staff and residents was produced and staff were asked to provide their NHS numbers so that the vaccinations could be administered. Mr McDonagh says the list was almost complete by mid-December when the outbreak began and was re-visited on or around 10 January 2021. It was the claimant's reluctance to be included on this list which alerted him to the fact that she did not intend to be vaccinated.
14. I accepted the claimant's evidence that, although she clearly understood that vaccination was available and encouraged, it was not until 12 January 2021 that she realised it was mandatory if she wanted to keep her job. Mr McDonagh accepted in cross examination that she would not have known prior to a telephone conversation between them on 12 January 2021 that there was a risk of disciplinary action if she refused. The vaccine was due to be administered the following day. I find therefore that she had less than 24 hours to digest the fact that she risked disciplinary action if she refused to be vaccinated the next day and to make an informed decision.
15. The claimant did not want to have the vaccine. Her reasons for not wanting the vaccine were disputed. At paragraph 4 of her witness statement, the claimant explained that the reason was:

this was in the very early days of the government's vaccination programme, and I did not trust that the vaccination would be safe for me. At the time, it seemed to me that the vaccine had been rushed through testing and I did not see how it was possible to guarantee its safety. I had done some research and had heard stories about it being unsafe. I am also a practising Rastafarian. It is against my Rastafarian beliefs to take any form of non-natural medication. In addition, I had already contracted Covid resulting in me having to self-isolate when I missed some shifts at the Home. I therefore believed that I was likely to already have immunity.

16. The claimant explained her reasons to Mr McDonagh in the telephone conversation on the evening of 12 January 2021. It was agreed that the conversation was lengthy (43 minutes long) and Mr McDonagh listened to her reasons and tried to persuade her to have the vaccine. The claimant has not disputed that the Deputy Manager, Ms Ralph, was also in attendance during the telephone call. Mr McDonagh made a note of the contents of that conversation ("the Attendance Note") (pages 44 - 46). The Attendance Note records the claimant's reasons for refusing the vaccine as being different from those set out in paragraph 4 of her witness statement in some key regards (as discussed below).
17. The claimant has disputed the accuracy of the Attendance Note. I accepted Mr McDonagh's undisputed evidence that the telephone note was taken immediately after the conclusion of the call and that, as a solicitor, he is accustomed to and in the habit of taking attendance notes of all significant telephone conversations. It was not disputed that he had done the same in the course of various conversations with Public Health England and others regarding management of the Covid-19 outbreak at the Home and the vaccination programme. Mr McDonagh accepted that the Attendance Note condensed the 43 minute conversation into two sides of A4 paper. However, I accepted that the Attendance Note was taken almost contemporaneously and, while not verbatim, was intended to record the main points of the conversation.
18. The claimant did not take any note of the conversation at the time and relied on her recollection of the discussion. She accepted in her witness statement (paragraph 11) that the telephone call happened towards the end of her shift, shortly before 7pm, that she was tired and upset and became emotional during the call because she felt she was being put under pressure to have the vaccination. Mrs McDonagh recorded (paragraph 13 of her witness statement) that the claimant told her in the appeal meeting (page 60), some two months later, that she could not remember what she had said during the conversation on 12 January 2021. Mrs McDonagh's evidence was not disputed on this point and I also note that the claimant has not challenged Mrs McDonagh's evidence at paragraph 15 of her witness statement that the Deputy Manager had verified the note taken by Mr McDonagh. It seems unlikely that, if the claimant could not recall what she told Mr McDonagh only two months after the conversation, her memory of it would have improved by the time she prepared her witness statement for this hearing. I consider it more likely that her recollection has become distorted by intervening events. For these reasons, on the balance of probabilities, I preferred the evidence of Mr McDonagh, based on his contemporaneous Attendance Note, as to what was said during the conversation on 12 January 2021.

19. Mr McDonagh recorded (page 44):

I asked CA why and she explained that:

- *She did not trust the vaccine was safe as it had been rushed through without being properly tested - she would want to wait until it had been properly rolled out before she decided whether it was safe and that she would have it.*
- *She and her son had gone on the internet and had read stories about it being unsafe and that the government were lying about its safety - it was a conspiracy.*
- *No one could guarantee its safety - she then asked me whether I could guarantee its safety.*

20. Mr McDonagh went on to explain how the vaccine worked, why he considered it safe and wanted staff to have it. He explained to her that, in the absence of reasonable grounds for refusing to follow the instruction to have the vaccine, she could face disciplinary action. The Attendance Note records that (45):

CA restated what she had said previously and said that she did not trust the vaccine. CA explained that people had died from taking the vaccine.

21. It is therefore clear from the Attendance Note that the reason given to Mr McDonagh by the claimant for her refusal to take the vaccine was that it was not safe. She did not, however, refer to any medical authority or clinical basis for that belief. There was no mention of the claimant's religious belief nor was there any suggestion that she had any reservations about pharmaceutical medications generally or only took herbal remedies, as she suggests at paragraph 4 of her witness statement.

22. The claimant also says the Attendance Note is wrong when it records that she told Mr McDonagh she would wait until the vaccine had been properly rolled out before deciding whether or not to have it (page 44). The claimant says she would not have said this because she had already clearly made up her mind that she would not be vaccinated. For the reasons set out above, I preferred Mr McDonagh's evidence supported by his contemporaneous note. Further, when Mrs McDonagh mentioned to the claimant during the appeal that she had said she wanted to wait for the vaccination programme to be properly rolled out, the claimant did not dispute having said that (paragraph 16 Mrs McDonagh's witness statement). The Attendance Note also accords with the claimant's later argument that she wanted Mr McDonagh to show her scientific evidence of the vaccine's safety. Had she already made up her mind about vaccination, she would have been unlikely to ask for further evidence of its safety.

23. The Attendance Note records the claimant telling Mr McDonagh that he "would have to furlough her" and Mr McDonagh explaining to her that the furlough scheme was not for that purpose. The claimant says this record is inaccurate and the point she was making was that, if the respondent was planning to furlough her, there would be no need for her to be vaccinated. She says she was told by the Deputy Manager, on 12 January 2021, that the respondent was thinking about furloughing staff due to having too few residents at the time. For the reasons set out above, I preferred the evidence of Mr McDonagh as to what was said in the telephone conversation on 12 January 2021, supported by the Attendance Note. I also accepted Mr McDonagh's evidence that,

although the number of residents had reduced, so had the number of available staff because of their need to self-isolate. His description of the situation in the Home following the 10 days of the outbreak was compelling and highlighted the speed with which the disease had spread and the rapid-fire decision making involved in trying to ensure the safety of staff and residents at that time. I accepted that furloughing staff was not part of the respondent's thinking at that time.

24. The Attendance Note records Mr McDonagh telling the claimant that, if she refused to have the vaccine the following day, she would be suspended and disciplined. He told her to "sleep on it" and he would call her (page 46). The claimant said she was not told this in the conversation on 12 January 2021 and only found out about her suspension and disciplinary action when she went to work for her next shift and was asked by colleagues what she was doing there. She says that when she looked at the rota, her name had been crossed off and, when she queried it with the Deputy Manager, she was given a letter (page 47) which informed her she was suspended. For the reasons set out above, I preferred Mr McDonagh's evidence about the telephone call, as recorded in the Attendance Note. I also accepted Mr McDonagh's evidence (paragraph 23 of his witness statement) that he tried to call the claimant the following day, but the telephone number for her held at the Home was out of date and the number was unavailable. The claimant did not dispute that the contact number held by the Home was out of date and it would not, in my judgment, be unusual for management to expect employees to keep their contact details up to date on work records.
25. I accepted that, having failed to get through to the claimant, Mr McDonagh left instructions with the Deputy Manager that the claimant was to be suspended on full pay if she telephoned. However, as the claimant did not call the Home before turning up for her next scheduled shift on 16 January 2021 she was handed the letter of suspension and invitation to the disciplinary hearing (page 47) on that date.
26. The disciplinary allegation was that the claimant had refused to follow a reasonable management instruction to have the Covid-19 vaccination and that her reasons for refusing the vaccine (that she did not trust it) were not reasonable in the circumstances. It was not disputed that the letter inviting her to the disciplinary meeting did not include a copy of Mr McDonagh's Attendance Note.
27. The disciplinary hearing took place on 28 January 2021 via Zoom and was chaired by Mr McDonagh, with the claimant represented by her trade union representative.
28. The notes of the hearing (pages 48 – 53) record the claimant repeatedly referring to her religious beliefs and Rastafarianism as the reason for her refusal to take the vaccine. When challenged by Mr McDonagh about why she had not mentioned that reason during the phone call on 12 January 2021, she repeatedly asserted that she had raised her religion during the phone call, before eventually conceding that she had not done so. I accepted Mr McDonagh's evidence that it was only at the disciplinary hearing, when the claimant disputed what she had told him on 12 January 2021, that he realised the significance of his Attendance Note as a contemporaneous record of what had been said.

29. I accepted Mr McDonagh's evidence (paragraph 28 of his witness statement) that he felt that:

if the Claimant had held strong religious views, she would have stated them during our call on 12 January and would not have tried to falsely claim that she had mentioned this as her reason for refusing the vaccine during that call. I therefore did not think that the Claimant was refusing the vaccine on the grounds of strongly held religious beliefs... In my view, the Claimant had clearly accepted that her excuse was not good enough which is why she was prepared to invent a reason which she considered more plausible. I also have no doubt that the Claimant also knew of the potential consequences to the Home of having a discrimination claim brought against it. The Claimant repeatedly accused the Home of discrimination throughout the disciplinary hearing and I have no doubt that if the Claimant had not been forced into accepting that she misled the hearing that such a claim would now be lying against the Home.

30. I also accepted Mr McDonagh's evidence that he did not know until the disciplinary hearing that the claimant was a practising Rastafarian. The claimant did not suggest that she had previously told him, merely that she assumed he realised, because she had dreadlocks when she joined the Home. It was not disputed that Mr McDonagh made informal enquiries with other staff after the disciplinary hearing, to see if anyone was aware that the claimant was a practising Rastafarian. I consider that he would not have made those enquiries had he already known that fact. His evidence was that no one else appeared to know, although the claimant maintains that other staff were aware. I accepted Mr McDonagh's evidence that he did not believe religious beliefs were the reason for her refusal to be vaccinated. I also accepted that he believed she was being dishonest when she insisted that she had told him about her religious beliefs during the conversation on 12 January 2021. I find that he genuinely believed that she was cynically accusing him of discrimination during the disciplinary hearing, when she knew there had been no discrimination. Mr McDonagh did not carry out any other investigation into the claimant's assertion that her refusal of the vaccine was, in part, because of her religious belief because of his conclusion that the reason was bogus. The outcome letter (page 54) repeated his conclusion that that assertion was dishonest.
31. It is not disputed that Mr McDonagh explained to the claimant during the meeting on 28 January 2021 that the Home's insurers had told him they would not provide public liability insurance for Covid-19 related risks after March 2021 and that, thereafter, the respondent faced the risk of liability if unvaccinated staff were found to have passed the disease on to a resident or visitor. It was not disputed that Mr McDonagh also explained there were similar issues around employer's liability insurance and that, as she was the only staff member refusing the vaccine, it would be easier to trace transmission to her and make legal action more likely. Mr McDonagh also explained that the insurers had made it clear to him that they were expecting the respondent to insist that all staff were vaccinated, unless they could reasonably justify refusal. Mr McDonagh explained at paragraph 32 of his witness statement that he took the view that failing to vaccinate staff could lead to any affected third party suing the Home or its directors for allowing staff to continue working in that

environment without a vaccine. This was made clear to the claimant in the disciplinary outcome letter (page 54). The claimant disputed that litigation was more likely because she would be the only unvaccinated staff member, but I accepted that was a genuine concern for Mr McDonagh.

32. The claimant says that Mr McDonagh failed to present her with expert advice or independent scientific sources or evidence about the vaccine. As a result, she did not know how much safer, if at all, she would have been after being vaccinated. It was not disputed that there was, at that time, a significant volume of public information available in the media containing information from the Government's Medicines and Healthcare products Regulatory Agency ("MHRA") and Public Health England (PHE") about the safety of the vaccine and how the testing process had been compressed. It was also not disputed that Mr McDonagh had regular telephone conversations with PHE regarding all aspects of the pandemic relevant to the Home and the vaccine roll out. I accepted his evidence that he provided regular updates to staff at staff meetings and through information notifications. The Attendance Note and notes of the disciplinary hearing record Mr McDonagh explaining his understanding of the science, in particular addressing the claimant's concerns about the speed with which the vaccine had been developed, and relating to the claimant verbally what he had been advised by his insurers, the government, PHE and others. The respondent does not dispute that Mr McDonagh did not provide the claimant with any documentary evidence. The claimant does not dispute that she did not ask for any documentary evidence. I accepted Mr McDonagh's evidence that there was, in any event, little by way of documentary clinical proof of the safety of the vaccine available to the public, since this was a new roll out, and he himself only had what PHE were telling him to go on.
33. The claimant argued at the disciplinary hearing that, if she was the only unvaccinated staff member, she would not need to be vaccinated to protect others. Mr McDonagh explained to her at the disciplinary hearing and again in the outcome letter (page 54) that there were residents who had not received the vaccine so would still be at risk, as well as potential future unvaccinated residents and visitors. He also explained the limits to vaccine efficacy. The claimant refused, during the disciplinary hearing, to respond to questions about whether she thought she would pose a greater risk to residents if she was unvaccinated. Her refusal to take the vaccine was clear and categorical.
34. During the disciplinary meeting, the claimant did not repeat her argument from 12 January 2021 that, as she had just recovered from Covid-19, she was anyway already immune. However, it was put to Mr McDonagh in cross examination that there was no tangible benefit to be derived from vaccinating her as she had recently recovered from the virus and would have antibodies. I accepted Mr McDonagh's evidence that the advice from PHE was that it was possible to contract and transmit the virus more than once and that there was evidence of that occurring. He therefore concluded that the claimant could still contract the virus. He pointed out in his evidence, and I accepted, that the information available and in the public domain now, at the end of 2021, is very different to that which was available at the start of 2021. Mr McDonagh was required to make decisions on the evidence available to him at that time and the advice from PHE was that it was possible to contract the virus twice but that the vaccine reduced the risk of contracting it and its transmissibility to others once contracted.

35. I find that Mr McDonagh genuinely did not believe the claimant had a reasonable excuse for refusing the vaccine. He believed that, being unvaccinated, she would pose a real risk to the health or lives of residents, staff and visitors to the Home. He took the view that he could not make an exception for one member of staff because not all residents could be vaccinated, the vaccine was not 100% effective and visitors might be unvaccinated. Putting her on furlough was not an option and there was no alternative position for the claimant which could avoid her coming into contact with others. Mr McDonagh also genuinely believed that she was being dishonest when she cited religious reasons for refusing and that she had cynically alleged discrimination. However, he offered her a further opportunity to have the vaccine the following day.
36. I find that Mr McDonagh's principal reason for dismissing the claimant was for unreasonably refusing to follow his management instruction to have the vaccine. However, I find he lost trust and confidence in her because he believed her to have been dishonest during the disciplinary hearing and that contributed to his decision to summarily dismiss her. He accepted in cross examination that, had she changed her mind and had the vaccine the following day, he would still have disciplined her for lying to him during the disciplinary hearing.
37. Mr McDonagh wrote to the claimant on 1 February 2021 (page 54) informing her that she was summarily dismissed for gross misconduct on the ground that she had failed to follow a reasonable management instruction to be vaccinated.
38. The claimant appealed against her dismissal by letter dated 4 February 2021 (page 56). She argued that the dismissal was unfair because: she was not informed she was under investigation; Mr McDonagh was not impartial; she had not been shown the Attendance Note; the ACAS Code was not followed; and her refusal to have the vaccine was because of her religious beliefs. She was invited to an appeal hearing by letter dated 18 February 2021 (page 59) and was sent a copy of the Attendance Note and the minutes of the disciplinary hearing.
39. The appeal hearing was conducted by Mrs McDonagh on 24 February 2021 via Zoom. The claimant therefore had 6 days to consider the documentary evidence provided to her ahead of the appeal. It is not disputed that the appeal was a complete rehearing and the claimant does not suggest that Mrs McDonagh was an inappropriate person to hear the appeal. Given the size of the respondent, I accepted that Mrs McDonagh was the only available person for that role.
40. The claimant did not dispute that, during the appeal hearing, she accepted that having the vaccine would reduce the risk of Covid-19 to people's lives and health in the Home (paragraphs 19 and 20 of Mrs McDonagh's witness statement).
41. Nor did the claimant dispute Mrs McDonagh's evidence that, when asked again for her reasons for refusing the vaccine, the claimant said, "I am scared of it and its reaction to my body. I don't take any pain killers and only take natural herbal remedies. I do not believe it is healthy". The claimant went on

to explain that one of her grandchildren had developed autism following vaccination, but that her unvaccinated grandchildren were healthy. The claimant did not mention her religious beliefs. When asked why she had not mentioned her religious beliefs during the telephone conversation on 12 January 2021 she explained it was because she did not realise she was under investigation.

42. I accepted Mrs McDonagh's evidence (paragraph 18 of her witness statement) that she concluded that the claimant's reason for refusing the vaccine was a "deep distrust for vaccines and that their safety could not be guaranteed", rather than religious belief. Mrs McDonagh therefore did not carry out any investigation into the claimant's assertion that her religious beliefs were part of her reasoning. Mrs McDonagh did not make a finding that the claimant had been dishonest by citing her religious beliefs, because she felt that the refusal of the vaccine was sufficient ground for dismissal in itself.
43. I find that Mrs McDonagh, in holding a full re-hearing, considered each of the points raised by the claimant and genuinely concluded that the claimant had unreasonably refused to follow a reasonable management instruction and was guilty of gross misconduct. Mrs McDonagh concluded that the claimant's refusal to take the vaccine was because she did not trust it, rather than any religious belief, and that her refusal represented an unreasonable risk to the health and safety of the Home's residents, staff and visitors, and exposed the Home and possibly the directors to the risk of legal claims. Mrs McDonagh also concluded that the claimant's acceptance that vaccination would reduce the risk of death or serious illness, while still refusing to take it, was unreasonable and justified a dismissal for 'some other substantial reason' (paragraph 21 Mrs McDonagh's witness statement). Mrs McDonagh wrote to the claimant on 10 March 2021 (pages 69 – 71) upholding the decision to dismiss her.
44. Following her dismissal, the claimant found work after one month providing care to a resident in a care home. The claimant gave evidence that, as at the date of the hearing, the claimant had not had a Covid-19 vaccination. The hearing took place three days before the Health and Social Care Act 2008 (Regulated Activities) (Amendment) (Coronavirus) Regulations 2021 ("the Regulations") came into force, requiring care home workers to be vaccinated against Covid-19. The claimant was asked in cross examination what she proposed to do when the Regulations came into force and she replied that her current employer had not discussed it with her and she had not given it any thought. I found that surprising, given the widespread publicity around the Regulations and the history of this case.

Findings of fact in wrongful dismissal complaint

45. It was agreed that there was no contractual term requiring the claimant to have the Covid-19 or any other vaccine. In all the circumstances, in particular the state of the Covid-19 pandemic nationally at that time, the dreadful consequences of the recent outbreak at the Home, and the advice from PHE and MHRA with regard to the virus and vaccination, in my judgment Mr McDonagh's decision to make vaccination mandatory for staff who were providing close personal care to vulnerable residents was a reasonable management instruction.

46. I find, as set out above, that the claimant's primary reason for refusing the vaccine was that she did not believe it to be safe and was sceptical about it. I do not know what sources of information the claimant was relying on, but she referred to a 'conspiracy' and did not accept Mr McDonagh's reassurances or the information he conveyed from the sources he had. As the vaccination programme was being rolled out nationwide at that stage, the claimant was also clearly not accepting the word of authorities that the vaccine was safe. She has not presented any medical authority or clinical basis for her belief that the vaccine was not safe in the course of this hearing. I was not persuaded that the claimant's actions, in relying on unidentified Internet sources and believing that there was a conspiracy about vaccination, constituted a reasonable refusal of the management instruction to have the vaccine.
47. I do not accept the claimant's evidence that religious beliefs were a part of her reason for refusing the vaccination. I consider that, had religious beliefs featured in her reasoning, she would have mentioned that to Mr McDonagh on the telephone on 12 January 2021. I accepted from the evidence of the Attendance Note and the notes of the disciplinary hearing that she did not do so. Furthermore, at the appeal hearing, the claimant reiterated her concerns about vaccine safety, without mentioning religious beliefs.
48. On the balance of probabilities and on the evidence before me I find that the claimant's refusal to comply with Mr McDonagh's instruction to have the vaccine was because she did not trust what he or the authorities were saying at the time about the safety of the vaccine. The context for that decision was the very recent Covid-19 outbreak and deaths of residents at the Home, the growing Covid-19 pandemic nationally and the widespread publicity and advice about vaccine safety, which was relayed to the claimant by Mr McDonagh. Against that background, I find that the claimant's refusal to be vaccinated was not reasonable. When asked in the disciplinary hearing to acknowledge that, as the only unvaccinated member of staff, she would present an increased risk to residents and others, she refused to answer. At the appeal, she accepted that having the vaccine would reduce the risk of Covid-19 to people's lives and health in the Home. I find that she knew therefore that her decision to remain unvaccinated would potentially put others at risk. The respondent's disciplinary policy (page 38) lists "Gross insubordination/refusal to carry out legitimate instructions" and "a serious or wilful breach of the Unsatisfactory Conduct and Misconduct Rules" as examples of gross misconduct. The Unsatisfactory Conduct and Misconduct Rules (page 36) require that "No action is to be taken by you, which could threaten the health or safety of yourself, other employees, residents or members of the public". I find that the claimant's actions in refusing to follow Mr McDonagh's instruction to have the Covid-19 vaccine were gross insubordination/refusal to carry out legitimate instructions and a serious breach of the rule requiring her not to take action which would threaten the health of others. In the specific circumstances of this case, therefore, I find that her actions amounted to gross misconduct. That does not mean that a refusal to be vaccinated would amount to gross misconduct, or even misconduct at all, in another case on different facts.

Law

49. Article 8 of the European Convention on Human Rights (“the Convention”), which is set out in Schedule 1 to the Human Rights Act 1998 (“HRA”), says:

1. *Everyone has the right to respect for his private and family life, his home and his correspondence.*
2. *There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

50. Section 2 of the HRA requires a court or tribunal determining a question which has arisen in connection with a Convention right to take into account any judgment, decision or opinion of the relevant institutions (the European Court of Human Rights and the Commission) *'so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which the question has arisen.'*

51. Section 3(1) of the HRA provides:

So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

52. Section 3 of the HRA applies to all primary legislation and subordinate legislation. That includes the Employment Rights Act 1996 (“ERA”) and the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 (Schedule 1 of which is the Employment Tribunal Rules (“the Rules”). Section 3 draws no distinction between legislation governing public authorities and legislation governing private individuals.

53. Section 6 HRA provides that:

- (1) *It is unlawful for a public authority to act in a way which is incompatible with a Convention right.*
- (2) *[not applicable]*
- (3) *In this section 'public authority' includes -*
 - (a) *a court or tribunal ...*

54. The Employment Tribunal is therefore a 'public authority' within section 6 HRA.

55. Section 7 HRA provides that a person who claims that a public authority has acted in a way which is made unlawful by section 6(1), may bring proceedings against the authority under the HRA in the appropriate court or tribunal.

56. Section 98 ERA provides:

- (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 -*

(b) *relates to the conduct of the employee.*

(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.*

57. The reasonableness test in section 98(4) requires the tribunal to determine whether the act of dismissal fell within the 'range of reasonable responses' available to an employer acting reasonably (**British Leyland v Swift** [1981] IRLR 91). It is not for the tribunal to decide for itself what it would (or might) have done in the circumstances, thereby substituting its view for that of the employer (**Foley v Post Office** [2000] ICR 1283).

58. In **Pretty v United Kingdom** (2002) 35 E.H.R.R.1, the European Court of Human Rights observed that [63]:

In the sphere of medical treatment, the refusal to accept a particular treatment might, inevitably, lead to a fatal outcome, yet the imposition of medical treatment, without the consent of a mentally competent adult patient, would interfere with a person's physical integrity in a manner capable of engaging the rights protected under Article 8(1) of the Convention.

59. In **X v Y** [2004] IRLR 625, the Court of Appeal observed:

Article 8 is not confined in its effect to relations between individuals and the state and public authorities. It has been interpreted by the Strasbourg court as imposing a positive obligation on the state to secure the observance and enjoyment of the right between private parties [54(1)].

60. Mummery LJ went on to analyse the relevance of Article 8 in respect of unfair dismissal [55]:

(2) *If the dismissal of the applicant was in circumstances falling within Article 8 and was an interference with the right to respect for private life, it might be necessary for the employment tribunal then to consider whether there was a justification under Article 8(2) for the particular interference. As explained below, Article 8 and Article 14 may have to be considered by tribunals in the case of a private sector employer, as well as in the case of a public authority employer, by virtue of s.3 of the HRA. Justification involves considering whether the interference was*

necessary in a democratic society, the legitimate aim of the interference, and the proportionality of the interference to the legitimate aim being pursued.

- (3) *On questions of justification the tribunal should bear in mind the complexity of employment relationships. In addition to the right of the employee under Article 8 and Article 14, the employer, fellow employees and members of the public also have rights and freedoms under the Convention.*

61. Mummery LJ examined the effect of section 3 HRA and section 6 HRA [56 and 57] in unfair dismissal claims against private sector employers and how section 3 affects the interpretation of section 98 ERA in cases falling within Article 8. He suggested a framework of questions to assist employment tribunals in dealing with points raised under the HRA in unfair dismissal cases between private litigants in a structured way [63]:

- (1) *Do the circumstances of the dismissal fall within the ambit of one or more of the Articles of the Convention? If they do not, the Convention right is not engaged and need not be considered.*
- (2) *If they do, does the state have a positive obligation to secure enjoyment of the relevant Convention right between private persons? If it does not, the Convention right is unlikely to affect the outcome of an unfair dismissal claim against a private employer.*
- (3) *If it does, is the interference with the employee's Convention right by dismissal justified? If it is, proceed to (5) below.*
- (4) *If it is not, was there a permissible reason for the dismissal under the ERA, which does not involve unjustified interference with a Convention right? If there was not, the dismissal will be unfair for the absence of a permissible reason to justify it.*
- (5) *If there was, is the dismissal fair, tested by the provisions of s.98 of the ERA, reading and giving effect to them under s.3 of the HRA so as to be compatible with the Convention right?*

62. Mr Weiss also referred me to the case of **Gaskin v United Kingdom** (1990) 12 E.H.R.R. 36:

42. *In accordance with its established case law, the Court, in determining whether or not such a positive obligation exists, will have regard to the 'fair balance that has to be struck between the general interest of the community and the interests of the individual...In striking this balance the aims mentioned in the second paragraph of Article 8 may be of a certain relevance, although this provision refers in terms only to "interferences" with the right protected by the first paragraph – in other words is concerned with negative obligations flowing therefrom..."*

Determinations

Unfair dismissal

63. The cause of action asserted by the claimant was under section 94 of the ERA: that she had a right not to be unfairly dismissed by the respondent.

The claimant is entitled to have her unfair dismissal complaint determined by the Employment Tribunal in accordance with the provisions of Part X of the ERA. The claimant has not presented a claim under the Equality Act 2010, nor has she asserted any cause of action against the respondent under the HRA.

64. Since the respondent is not a public authority within section 6 HRA, its actions could not be in direct breach of Article 8. However, the Employment Tribunal is required to read and give effect to primary and secondary legislation in a way which is compatible with the Convention rights so far as is possible (section 3 HRA) and is, itself, a public authority bound to act in a way which is compatible with Convention rights (section 6 HRA).
65. The cause of action under section 94 ERA and the alleged interference with Article 8 are based on the claimant's dismissal. Both parties accepted, and I agree, that the Convention Right is engaged in the circumstances of this case by the reason for dismissal (there was no argument that the consequences of dismissal brought the claim within the ambit of the Convention). The respondent says it dismissed the claimant for her conduct because she unreasonably refused to comply with a reasonable management instruction. There is an implied term in every contract of employment requiring an employee to comply with reasonable management instructions. A sufficiently serious failure to follow a reasonable management instruction can justify a dismissal on the grounds of conduct.
66. The management instruction in question in this case was to have the Covid-19 vaccination in January 2020 on the date specified by the employer. Although **Pretty** is a medical treatment case, rather than one concerning vaccination, the same principles apply in my judgment. An employer's instruction that an employee must be vaccinated, unless they have a reasonable excuse, interferes with the employee's physical integrity in a manner capable of engaging the rights under Article 8(1) of the Convention. In this case, the claimant faced disciplinary action and dismissal because she would not have the vaccine. Although no one was forcing her to have the vaccine because she had the option to remain unvaccinated, doing so would mean losing her job. Keeping her job therefore required her to have the vaccine and that was an interference with her physical integrity to which she objected. I therefore judge that her dismissal for refusing to have the vaccine falls within the ambit of Article 8 of the Convention and there was an interference with the right to respect for her private life.
67. The State having a positive obligation to secure enjoyment of the relevant Convention right between private persons, the key question for the Tribunal is therefore whether there was justification under Article 8(2) for the particular interference in this case: i.e. was dismissal for a refusal to have the vaccination justified. Justification involves considering whether the interference was necessary in a democratic society, the legitimate aim of the interference, and the proportionality of the interference to the legitimate aim being pursued. According to Mummery LJ in **X v Y**, it is important to note that, in addition to the right of the employee under Article 8, the employer, fellow employees and members of the public also have rights and freedoms under the Convention.

68. In my judgment, the respondent had a legitimate aim for both the management instruction requiring employees to be vaccinated against Covid-19 and the dismissal of the claimant for unreasonably refusing to comply with that instruction. It was not disputed that the key legitimate aim was to protect the health and safety of residents, staff, and visitors to the Home during the Covid-19 pandemic. I accepted the respondent's evidence that a second legitimate aim was concern about the withdrawal of insurance cover and that the claimant's status as the only unvaccinated staff member (and therefore the most likely vector for infection) might increase the likelihood or success of claims against the respondent.
69. In my judgment, the requirement for the staff of the Home to be vaccinated against Covid-19 corresponded to a pressing social need, which was to reduce the risk to the residents, who were among those most vulnerable to severe illness and death through catching Covid-19. The state of the Covid-19 pandemic in early 2021, the history of outbreaks in nursing homes during 2020 and the recent outbreak at the Home itself were evidence of the pressing social necessity of reducing the risk to residents. In my judgment, the interference with the claimant's private life in requiring her to have the vaccine was therefore necessary in the circumstances of this case.
70. Mr Weiss submitted that dismissal was proportionate because the consequence of any increased risk of Covid-19 was potentially so serious. The interference with the claimant's Article 8 rights consisted of a requirement that she accept an unwanted vaccination, a violation of her bodily integrity, or lose her job. She had reasons for refusing the vaccine and, while I did not accept that genuine religious beliefs were among those reasons, I did not doubt the strength and genuineness of her fear of and scepticism about the vaccine. In my judgment, that fear and scepticism was unreasonable in the circumstances, as she had no medical authority or clinical basis for not receiving the vaccine. However, she was not forced to have the vaccine. She had the choice (however undesirable) of losing her job to avoid having the vaccine.
71. Balanced against this, the respondent was a small employer with a legal and moral obligation to protect its vulnerable residents. The Article 8 rights of those residents, the other staff and any visitors to the Home need to be balanced with the claimant's Article 8 rights. I accepted Mr Weiss's submission that the Home was the place of residence for vulnerable people suffering dementia, some of whom may not have had capacity to exercise choice over whether they came into contact with unvaccinated people nor whether they resided at the Home or left. I agreed with Mr Weiss that, in all the circumstances, for an unvaccinated person to work in the Home would pose a significant and unjustified interference with the Article 8 rights of the residents and the other staff and visitors to the Home, such that the requirement to have the vaccine and the claimant's dismissal was justified by reference to Article 8.
72. As part of this balancing exercise, I have scrutinised what the requirement to have the vaccine and the dismissal of the claimant achieved in practice and whether the respondent's aims could have been achieved through less draconian means. The claimant submitted that the risk posed by one unvaccinated staff member could have been mitigated in some other way. However, the respondent gave unchallenged evidence that not all residents could be vaccinated, that the vaccine was not 100% effective and that visitors might be unvaccinated. Putting the claimant on furlough was not an option

and there was no alternative position available for the claimant. I find that dismissal was proportionate in the circumstances, in particular in light of the claimant's unreasonable reasons for refusing the vaccine, refusal to answer questions about/acknowledgement of the risk she posed, the strength and finality of her refusal and the difficult position presented by the imminent withdrawal of insurance cover.

73. It would be easy, as Mr McDonagh pointed out in his evidence, to fall into the error of evaluating the respondent's decision-making in the light of everything we know today about the pandemic and vaccinations. It is important therefore to bear in mind the much more limited state of knowledge around the vaccines and the progress of the pandemic as at January 2021. The Covid-19 pandemic in the UK was a year old and the third national lockdown had just commenced. There had been reports of widespread illness and death, particularly in care homes during 2020 and the Home itself had just suffered an extensive outbreak, resulting in the deaths of residents. Comprehensive scientific studies were still in their early stages and the vaccines were very new. The situation nationally was fast-moving and, given the nature of the respondent's business and vulnerability of its residents, Mr McDonagh was required to do some difficult decision making. In this context, I conclude that the respondent's decision to make the Covid-19 vaccination mandatory for staff and to dismiss the claimant for her unreasonable refusal to comply was proportionate in the circumstances. The interference with the claimant's Article 8 rights was proportionate to what the measure was likely to achieve generally, given the evidence about the effect on the general workplace risks balanced against the particular risks faced by the claimant in refusing to have the vaccine.
74. I am required, next, to consider whether the dismissal was fair under the provisions of section 98 ERA, reading and giving effect to them under section 3 HRA so as to be compatible with the Convention right.
75. I find that Mr McDonagh genuinely believed that the claimant was guilty of misconduct. He did not believe that her refusal was connected with any religious belief and he concluded it was on grounds of scepticism about the vaccine itself. Mr McDonagh was required to establish the claimant's reasons for refusing the vaccine, and he did so during the telephone call on 12 January 2021. The claimant suggested that the respondent should have investigated her religious beliefs further after the disciplinary hearing. However, the manner in which she raised her religious beliefs at the disciplinary hearing, accused Mr McDonagh of discrimination, and insisted for much of the meeting that she had previously told him about her religion, led him to genuinely conclude she was being dishonest. He considered that religious beliefs were not the real reason for her refusal and therefore did not conduct any further investigation beyond enquiring whether other staff knew she was Rastafarian. In my judgment, his conclusion that no further investigation into her religious belief was needed was not outside the range of reasonable responses for a reasonable employer in the circumstances.
76. Mr McDonagh concluded that the claimant's reason for refusing the vaccine was unreasonable. He had sought to persuade her of the vaccine's safety, referring to medical evidence and guidance from PHE and the government that the vaccine was safe and would save lives. She was sceptical of that guidance and suspicious of the vaccine because of what she had read on the Internet. In the circumstances of the Home at that time, including the recent deaths, the

state of the pandemic, the level of ongoing risk to residents, staff and visitors, the information from PHE, the insurance position and the urgency with which measures to protect residents needed to be put in place, I find that it was not outside the range of reasonable response for an employer to conclude that an employee who was merely sceptical of the advice and did not trust the vaccine did not have a reasonable excuse for refusing to follow the management instruction to have the vaccine. I therefore find that Mr McDonagh had reasonable grounds on which to conclude that the claimant was guilty of misconduct.

77. The claimant submitted that the ACAS Code was breached because she did not know until the day before the vaccinations were due that she risked disciplinary action. I accepted that she had less than 24 hours in which to re-consider her decision in light of that knowledge. She had known previously that there were moves to vaccinate staff, but not that her job would be on the line if she did not comply. She was not dismissed immediately however, but suspended until the disciplinary hearing on 28 January 2021, some 15 days later. She had notice of the disciplinary hearing, knew what it concerned and time to prepare for it. In the context of an unfolding pandemic and the circumstances of the Home over the Christmas period 2020 I do not find that the respondent acted outside the range of reasonable responses nor in breach of the ACAS Code in respect of the notice it gave to the claimant that she was expected to have the vaccine, nor the notice provided for the disciplinary hearing.
78. The claimant submitted that the failure to provide her with the Attendance Note prior to the disciplinary hearing deprived her of the opportunity to review the evidence and properly defend herself. However, I accepted Mr McDonagh's evidence that he did not appreciate the significance of the Attendance Note until the claimant asserted in the disciplinary hearing that she had told him on 12 January 2021 about her religious beliefs, something which he knew to be wrong. In any event, the claimant accepted during the disciplinary hearing that she had not mentioned religious beliefs previously and the Attendance Note had no other significance that I can make out. The claimant was not denying that she had refused to take the vaccine and that was the misconduct to be discussed at the disciplinary hearing. I conclude that the failure to provide the Attendance Note sooner was not a breach of the ACAS Code nor outside the range of reasonable responses of a reasonable employer. Even if the disciplinary hearing was unfair for that reason, the flaw was remedied in time for the appeal, as the claimant was sent the Attendance Note well in advance.
79. The claimant argued that the respondent acted outside the range of reasonable responses because Mr McDonagh failed to refer her to independent scientific sources of information and failed to properly address her scepticism. I find as a fact that Mr McDonagh did seek to address her scepticism during the telephone conversation on 12 January 2021 and again in the disciplinary hearing. He relayed to her the information he had gleaned from various sources and addressed her concerns about the speed with which the vaccines had been produced. He did not provide her with any specific documentary evidence or refer her to specific scientific sources, but referred to the advice from PHE and the government, which was widely available on the Internet. She referred to having done her own Internet research and was

clearly capable of researching independent scientific material for herself, had she chosen to do so.

80. The claimant argued that the respondent failed to take account of her explanations for her reluctance to have the vaccine, in particular that she had recently had Covid-19 and there was therefore no tangible benefit to her having the vaccine. She also argued that Mr McDonagh did not consider making an exception for her. However, the claimant did not put the argument about having recently had Covid-19 to Mr McDonagh in the disciplinary hearing. In any event, he was guided by the prevailing medical advice at the time that it was possible to contract and transmit Covid-19 on more than one occasion. He concluded there was a tangible benefit to her having the vaccine and a real risk to the residents, staff and visitors of the Home if she did not. He rejected the possibility of making an exception for her because of the risk of legal claims against the Home and/or the directors if transmission could be traced to her, in the absence of insurance. Mr McDonagh did not expressly consider the interference with her private life, because she did not expressly raise her Article 8 rights either in the 12 January 2021 telephone conversation nor during the disciplinary hearing. However, it was implicit both in the line of argument she presented, her fear of and scepticism about the vaccine and also in Mr McDonagh's efforts to persuade her it was safe and his considerations concerning her conduct.
81. On balance, I find that the respondent acted within the range of reasonable responses of a reasonable employer and, taking account of the claimant's Article 8 rights, dismissal was proportionate in the circumstances. There is no denying that Mr McDonagh could have given the claimant more opportunities to change her mind, may have been able to place the claimant on unpaid or paid leave and/or could have sought further independent scientific information or material to seek to persuade her that the vaccine was safe and necessary. However, applying the 'range of reasonable responses' test, I cannot say that no reasonable employer would have acted as Mr McDonagh and Mrs McDonagh did in the particular circumstances of this case. Step 5 of Mummery LJ's guidance in **X v Y** requires that, unusually for an unfair dismissal case, the claimant's Article 8 rights are taken into account in applying the test of reasonableness set out in section 98(4) ERA, as formulated in case law such as **Foley**. In this case, therefore, the protection of health and the rights and freedoms, including the Article 8 rights, of the residents, other staff and visitors to the Home, as well as those of the claimant, are all significant factors in determining the range of reasonable responses of a reasonable employer. In my judgment, in the specific circumstances of this case, in particular the recent outbreak and deaths at the Home and urgency with which measures to protect vulnerable residents needed to be put in place, the decision to dismiss the claimant was within the range of reasonable responses applicable to section 98(4) ERA, as read and given effect in under s.3 of the HRA so as to be compatible with Article 8.
82. I conclude that the claimant's dismissal was fair, tested by the provisions of section 98 ERA. I have read and given effect to those provisions under section 3 HRA so as to be compatible with Article 8 of the Convention. The complaint of unfair dismissal is not well founded and is dismissed. My decision in this case is based entirely on the facts of this case and cannot and should not be

taken as a general indication that dismissal for refusing to be vaccinated against Covid-19 is fair.

Wrongful dismissal

83. I find that the claimant's refusal to be vaccinated was an unreasonable refusal to comply with a reasonable management instruction. Her reason was her fear of and scepticism about the vaccine and unsubstantiated belief that there was a conspiracy, rather than religious belief. I find, above, that in particular because she knew she represented a risk to others, her actions fell within the definition and examples of gross misconduct set out in the respondent's disciplinary policy. Her refusal to be vaccinated was therefore an action which, in the circumstances of this case, amounted to a repudiatory breach of her contract of employment with the respondent. The respondent was therefore entitled to summarily dismiss her.
84. The complaint of wrongful dismissal is not well founded and the claimant's claim for damages for breach of contract in respect of notice is therefore dismissed.

Employment Judge Bright
10 January 2022

RESERVED JUDGMENT & REASONS SENT TO THE
PARTIES ON
11th January 2022