EMPLOYMENT TRIBUNALS

Claimant: **Mr J Linton**

Respondent: The Athlestan Trust

Heard at: Bristol (CVP) **On: 26 January 2022**

Before: Employment Judge A.M.S. Green

Representation

Claimant: Mr R Downey - Counsel
Respondent: Mr M Williams - Counsel

RESERVED JUDGMENT ON PRELIMINARY MATTERS

1. The claimant was not disabled at the material time and his claim for discrimination arising from disability under Equality Act 2010, section 15 is struck out under Rule 37 as having no reasonable prospect of success.

2. The respondent's application under Rule 37 to strike out the claimant's claim for unfair dismissal on the grounds of having made a public interest disclosure pursuant to Employment Rights Act 1996, section 43B is dismissed

REASONS

<u>Introduction</u>

1. By a claim form dated 17 March 2021, the claimant brought the following complaints:

    a. Unfair dismissal on the grounds of having made public interest disclosures.

    b. Discrimination on the grounds of disability.

c. A failure to provide written terms of employment.

2. The claimant was employed from 7 September to 26 November 2020 as an ICT technician at the William Romney School (the “School”) in Tetbury, a school within the Respondent multi-academy Trust.

3. The claimant claims that he was as successful as he could have been in his role considering, which focused upon migrating the School’s IT system to a Microsoft 365 platform, but he was initially severely limited by the fact that a delay on his DBS check prevented him from working freely on the premises. Once he was allowed to work freely, he was concerned about the manner in which teachers’ workstations had been set up in classrooms from a health and safety perspective. He says his work was, however, generally curtailed by the ICT manager (Mr Cox) failing to support him.

4. The claimant also alleges that, on 15 October 2020, he informed Mr Bell, the School’s headmaster, that he was exempt from wearing a face mask. Thereafter he claims that upon Mr Bell’s enquiry for an explanation for the exemption, the claimant accepted that he declined to provide that information on 17 October 2020.

5. The respondent has denied liability and alleges that it became clear that the claimant appeared to lack technical knowledge from the very outset of his employment and steps had to be taken to repair mistakes which he had made regarding software downloads. His performance was not seen to improve during his probationary period.

6. The respondent alleges that on 7 November 2020, the claimant attended a rally in Stroud and posted images on social media of him holding a sign which read “Covid 19 Equals Control”. The respondent considered that the event was crowded, and he was not wearing a mask. He was suspended on 9 November 2020 pending an investigation into his involvement in the event which could have caused infection to staff and pupils within the School and which could have brought it into disrepute.

7. There was a meeting on 26 November 2020 and the claimant was dismissed on 30 November 2024 for reasons which the respondent says related to his performance as claimed. The claimant subsequently asserted that he had a disability, and he had a medical reason/exemption for not wearing a face mask and appealed the dismissal. His appeal was dismissed on 7 January 2021.

8. On 28 October 2021 Employment Judge Livesey conducted a telephone private preliminary hearing. The respondent alleged that the complaints had no or little reasonable prospect of success.

9. Employment Judge Livesey was concerned about the manner in which the claimant had described the disclosure that he relied upon, its causative relevance to his dismissal and his ability to demonstrate disability at the relevant time. He considered it reasonable and proportionate to list a public preliminary hearing to determine the following matters:

a. Whether the claimant was disabled within the meaning of section 6 of the Act at the time of the alleged discrimination.

b. Whether any complaints made by the claimant ought to be struck out under rule 37 on the basis that it has no reasonable prospects of success.

c. Whether to order the claimant to pay a deposit (not exceeding £1000) as a condition of continuing to advance any specific allegation or argument in the claim if the Tribunal considers that allegation or argument has little reasonable prospect of success.

d. What further directions would be necessary to enable a final hearing should take place and when it should be listed.

10. We worked from a digital bundle. The claimant adopted his two witness statements and gave oral evidence. The parties' representatives made closing oral submissions.

11. The claimant claims to suffer from PTSD.

12. On the question of disability, the claimant must establish that he is disabled on a balance of probabilities.

13. In reaching my decision, I have carefully considered the oral and documentary evidence. The fact that I have not referred to every document produced in the hearing bundle should not be taken to mean that I have not considered it.

Findings of fact

14. The claimant applied for the position of IT technician at the School. He completed an application form [93]. Part 3 of the form is entitled "Quality and Diversity Monitoring". In the section entitled "Disability" he was asked the question "Do you consider that you have a disability?". He ticked the box "No" [101].

15. The claimant's application was successful and his employment commenced on 7 September 2020 until his dismissal on 11 November 2020.

16. In his disability impact statement, the claimant states that he suffers from PTSD and that approximately 10 years ago, he suffered from a scuba-diving accident during which he believed that he was going to fatally drown. He further states that for some two years following that incident, he experienced recurring nightmares (drowning, claustrophobia et cetera) associated with reliving that traumatic event. He states that he self manages the problem and, eventually, for the most part he was able to put it behind him.

17. The claimant was taken to a letter from Ms Heather Humphries, a High Intensity Therapist at the Gloucestershire Health and Care NHS Foundation Trust, Mental Health Intermediate Care Team, dated 15 July 2021 [66]. In her letter, Ms Humphries refers to the claimant telling her that the incident occurred 10 years ago. Ms Humphries states, amongst other things:

Mr Linton was referred by his GP by MHICT (nursing) team for an assessment as he was struggling to wear a mask due to the distress, anxiety and feelings of claustrophobia that this was causing.

I have now completed 3 sessions with Mr Linton, and I can confirm that his symptoms appear to meet the diagnostic criteria for Post Traumatic Stress Disorder (PTSD), although an actual diagnosis would need to be confirmed by a medical professional. We have completed the Post-traumatic Checklist (PCL-5) together, and he scored 40 (which is above the clinical cut-off at 33 four PTSD).

Mr Linton experienced a traumatic event, approximately 10 years ago whilst scuba-diving, during which he believed he was going to die. For several years afterwards, he describes experiencing flashbacks and nightmares connected to the event, although these eventually seem to diminish and he got on with his life. Until the Covid-19 pandemic, and the mandatory wearing of masks, he was unaware that these would be a trigger for the reappearance of the trauma memories emotions and bodily sensations that were present at the time of the trauma. Wearing a mask is a specific trigger for Mr Linton due to the nature of the trauma, during which he felt as though he was suffocating and unable to breathe whilst wearing a mask and being deep underwater at approximately 20 metres. He experienced associated emotions such as anxiety and panic, as well as fears that his mask would come off whilst he was underwater and he would drown. Attempting to wear a mask has brought back these trauma memories along with a re-occurrence of nightmares about the experience.

18. The claimant participated in a telephone private preliminary hearing before Employment Judge Livesay on 28 October 2021. During that hearing, it is recorded at paragraph 47 of the case management summary that the claimant stated that his medical and other records did not reveal any earlier diagnosis of PTSD prior to Ms Humphries' letter of 15 July 2021. Furthermore, he is recorded as saying that the diving accident occurred approximately 25 years ago, and he did not seek medical advice at the time.

19. Under cross-examination, the claimant was asked about the discrepancy about the timing of the scuba-diving accident. He admitted that he did not have the scuba-diving accident 10 years ago. The incident in question was 25 years ago. He said that he had made a mistake. He had been involved in a road traffic accident 10 years previously but was not relying on this as triggering his PTSD. Furthermore, he admitted under cross-examination that he had got over his symptoms about two years after the diving accident (i.e. 23 years ago). He said that he had self-managed his symptoms, he had not sought medical help and he said, "I manned up and eventually the symptoms and the nightmares, for the most part stopped". He further admitted that he had been mostly symptom-free before joining the respondent in September 2020. Prior to the respondent introducing the mask wearing policy on 12 October 2020 when he was asked if he had any recurring symptoms he answered "only very irregularly, though I have not, fair to say no".

20. On 5 October 2020, the claimant attended a six-week probation review which was conducted by Mr Bell. A copy of the review has been produced in the

bundle [115]. But this provides assessment gradings against a number of benchmarks. The gradings are:

a. (1) above requirement;

b. (2) requirement achieved;

c. (3) below requirement (improvement needed).

In the category "Work Performance", the claimant was scored with grade 3 in respect of performance of duties and responsibilities and initiative in carrying out duties [116]. In the category "Supervisory/Management Responsibility (if applicable)" under 3.2 "Commitment to undertaking (e) Day to day supervision" the claimant was scored with grade 3. In the category "Overall Performance grading (please tick) the claimant was graded as being below requirement and in need of improvement.

21. On 9 October 2020, Mr Bell, issued an email to be sent to all parents stating that following the confirmation of a further positive coronavirus test, all students and staff would be required to wear face masks in communal areas and corridors from Monday, 12 October 2020 [118].

22. On 15 October 2020, Mr Bell emailed the claimant [119]. He stated, amongst other things:

> *Colleagues raised concerns that you are not wearing a face mask and corridors and when coming into close contact. Please could you advise there is a medical reason that I need to be aware of.*
>
> *Many Thanks*
>
> *Jon*

23. The claimant replied to that email on the same day [119]. He said, amongst other things:

> *I appreciate that it has become necessary for you to ask me about face coverings. I can confirm that I do not need to wear one for circumstances as set out here [hyperlink] in the Government's advice on the matter. I accept also that it may become necessary for you to convey this to colleagues who may enquired, and I have faith that this will be respectfully understood by all.*
>
> *Best regards*
>
> *<u>James Linton</u>*

24. Mr Bell replied to the claimant by email later on 15 October 2020 [120]. He stated amongst other things:

> *Thank you but are you able to confirm which criteria for not wearing a mask you meet?*
>
> *I can assure you that this will remain in the strictest confidence.*

25. On 17 October 2020, the claimant replied to Mr Bell in another email [120]. He stated amongst other things:

    Thank you for your eMail. After careful consideration, I respectfully decline your request for specific information. I am advised that the Government guidance is that there is no requirement for evidence for exemption. Moreover that it should be sufficient for me to have informed you that I'm eligible for exemption, in turn for you to pass this on to those colleagues who have enquired and to whom you refer.

    I am a reasonable individual by nature, and willing to fit in as best I can. In the event you feel it necessary to have a further discussion as to how we can accommodate my exemption, I would be pleased to partake.

    I trust you understand, and have empathy with, my position in the matter.

26. On 4 November 2020, Mr Bell replied to the claimant in an email [121]. He said, amongst other things:

    I full [sic] acknowledge the guidance that there is no requirement to provide evidence for not wearing a face mask. As this term becomes increasingly challenging in relation to a national lockdown and schools remaining open, I would like to discuss this with you and agree a way forwards that supports you and all colleagues across the school.

    Please let me know when we can discuss either today or tomorrow?

27. On 4 November 2020, the claimant replied to Mr Bell by email [122]. He stated amongst other things:

    I appreciate your position as Head in respect of the virus and would very much welcome a discussion with you along the lines which you set out. I recall you informing me about the school's inclusive policy during our initial meeting and so I am most confident it'll be possible to satisfactorily accommodate my exemption.

    …

    Whilst writing, when we last met on 5 October you mentioned that we would have a regular management review every two weeks. Also you made some notes in respect of my concerns which I'd initially brought to Jacqui's attention about outstanding IT issues which require attention, also a "communication problem" in respect of my role in liaising with Dave Cox. You said that you would bring those IT matters to Dave's attention and would hope they may be resolved within two weeks time. The matters are still outstanding and since then the list has grown somewhat. I still appear to have a problem in pinning Dave down to meet/discuss/resolve those issues. Moreover, I am sensing a rather abrasive attitude which is particularly worrisome; I am confident I have not done anything at all which might have given cause for this.

Indeed, as I said, I've hardly seen him since my first day and a half spent with him when I commenced working with SWR on 7 September. Typically when I do bump into Dave by chance, I mentioned to him that I wish to discuss outstanding issues which require attention, or that I need his assistance with a problem, he says he will get back to me later that day, but doesn't. And with no explanation forthcoming or setting up an alternative time instead. As I said to you during our last meeting, after seeing this pattern I had taken the initiative to commence documenting those occasions. I stress, this does concern me, Jon

28. On 6 November 2020, Mr Bell wrote to Mr Gilson the CEO of the respondent [125]. He said, amongst other things:

> *I will unfortunately be firing James Linton at the start of next week. Strictly have suggested that the only risk is an appeal on the basis of discrimination.*
>
> *I do not feel that this is a huge risk but would really appreciate your thoughts and advice before I proceed.*

29. Mr Gilson replied to that email later the same day [125]. He said, amongst other things:

> *That is absolutely the right thing to do. I'm happy to come in on the meeting with him if you like. I agree the risk is very low and the cost/harm of keeping him to hide.*
>
> *I suggest that you produce a list of bullet points with your evidence/reaosn [sic] before seeing him-I'm happy to have a look over that if it would help.*

30. Under cross-examination, the claimant admitted that between 12 and 15 October 2020, he had not worn a facemask at the School. He also accepted that on 17 October 2020, he gave no explanation for not complying with the mask wearing policy because he thought he didn't need to. He said he was unhappy about doing this via email and would have discussed it face-to-face. He also accepted under cross examination that the respondent had no idea about the difficulties that he claimed to have if he was asked to wear a mask. He also accepted that throughout his employment with the respondent he never told it about his phobia of wearing masks and the difficulties that were triggered by wearing a mask.

31. On 7 November 2020, the claimant attended a rally in Stroud. He explained under cross examination that the rally was to protect free speech and people including himself who participated believe that Covid was controlling. The claimant was photographed at the rally holding up a placard with the words "Covid 19 Equals Control" [197 & 198]. These photographs were posted on social media. The claimant told me that the demonstration was organised by a local person in Stroud. He said that he got involved in certain political things and the rally was about freedom of speech. I asked the claimant to explain what he understood by "Covid 19 Equals Control". He said "I was pressurised

into wearing a facemask in my employment. I could see I was pressurised into having to wear one. It was against my ability to be able to do it". I asked the claimant if he was objecting to being told to wear a facemask and he told me that he was. He said that he had attended the rally because he objected to government guidelines which included the banning of rallies. The claimant did not speak at the rally.

32. The claimant was suspended on 9 November 2020. He attended a suspension meeting with Mr Bell at 8:35 AM. The claimant covertly recorded the meeting without Mr Bell's knowledge or consent. A transcript of the recording was included in the hearing bundle [129]. I note the following:

> *[JB] I'm going to explain why. We've been made aware by parents are made aware on social media you attended a protest on Saturday which was in breach of Covid lockdown measures which was against the law. It's endangering the staff and students at the school. Also, on top of that it could bring our organisation into disrepute because you did attend that protest in Stroud. And we have got…*
>
> *[C] Jon, you're removing your muzzle.*
>
> *[JB] Yeah I know… Some ongoing concerns about your performance at work as well so we are going to be suspending you immediately.*
>
> *[C] Really? I'm most surprised Jon.*
>
> *[JB] Yes I know. That's what I've got to do. I consider this to be a breach of conduct.*
>
> *[C] Of conduct?*
>
> *[JB] Of endangering staff and students in the school.*
>
> *[C] You're saying I'm endangering staff and students in school?*
>
> *[JB] That's what the suspension is for. We will then conduct an internal investigation which will be completed by the school and we will then contact you. We'll confirm all this in a letter to you. There will be a hearing once I have managed to ascertain what happened on Saturday and what the impacts on the school, the students and the staff are.*
>
> *[C] I'm going to be very interested to hear what the findings of any such hearing will be.*
>
> *…*
>
> *[C] But you have insinuated that I have, in your words, breached their safety… Put their safety at risk.*
>
> *[JB] Put their safety at risk.*
>
> *[C] On the grounds that I attended what you refer to as a protest?*

[JB] Yes, a mass gathering where we shouldn't be having any mass gatherings at the moment.

[C] We shouldn't be having any mass gatherings?

[JB] That's the law.

[C] I wasn't attending any such event on those grounds at all.

[JB] You were still there.

[C] I was in the park yes. I had a most interesting conversation with a policeman also which I'm quite happy to tell you about. But I wasn't putting anyone at risk. I would defend my right to disagree with anything political and to voice my opinion. I am hoping that the school wouldn't deny me that right?

[JB] It was a breach of Covid lockdown measures. It did endanger or have the risk of endangering staff and pupils in the school.

[C] But John you've just removed your muzzle here in front of me.

[JB]Hmmm [in agreement]. I'm not going down that road James.

[C] But you have. I could quite easily say you've just broken the school policy as well. At the end of the day I do not understand why you would have a problem with me attending an event about free speech which is what this was.

[JB] You were at a mass gathering when we shouldn't have been having mass gatherings of six people maximum and therefore when everybody else presumably has not… And you attended a protest or a gathering at least which is against the law and the police advise the protest not to happen. That is endangering.

33. The accuracy of the transcript is not in dispute. Indeed, under cross examination, the claimant admitted that it was an accurate transcript. At no point during the discussion with Mr Bell did the claimant refer to his PTSD or any medical reason why he did not wear a mask.

34. On 10 November 2020, Mr Bell wrote to the claimant confirming his suspension [132]. Mr Bell wrote a separate letter to the claimant dated 10 November 2020 inviting the claimant to attend a probation review meeting to discuss the allegations and ongoing concerns about his work, performance and abilities. The meeting was scheduled to take place at the School on 12 November 2020 at 11:30 AM [134]. On the 11 November 2020, the claimant wrote to Mr Bell confirming that he was experiencing at least one of the main symptoms of coronavirus and the NHS had requested him to remain at home with immediate effect. He confirmed that he would not be able to attend the meeting scheduled for 12 November 2020 [135].

35. On 19 November 2020, Mr Bell wrote to the claimant rearranging the meeting for 26 November 2020 at 11 AM at the School [140].

36. On 24 November 2020, the claimant wrote to Mr Bell raising various concerns connected to his suspension and issues about his performance at work [141]. He said, amongst other things:

> …
>
> *<u>Probationary Review Meeting</u>*
>
> *I note that you also wish to conduct a review meeting in consideration of my six month probation. I would remind you that the first review meeting took place on Monday 5 October 2020. This was arranged as a direct consequence of my discussions with the HR Manager, Jacqui Green, the previous Friday. Jacqui had approached me and asked me how things were going and whether I had any concerns at all. Given her capacity as HR manager, I felt comfortable in confiding with her. I expressed my experiences and concerns in respect to my interaction with Mr Cox of the Athelstan Trust, particularly in respect to IT problems which staff and teachers had sought my assistance, but also various IT matters which I had identified within the school and which required urgent attention. I explained that I had been continually let down by Mr Cox with failures to respond to my eMails, and 100% failure rate to keep to arrangements for a meeting to address those matters and to explain the expectations and options to resolve them. As I explained to Jacqui, it had not yet been made clear to me by Mr Cox how he wished me to resolve certain issues [e.g. two projectors which were barely visible-do I replace the bulb or the projector?]. Also discussed was Mr Cox's reluctance to provide me with access to the various systems in order to assist staff with resolving matters, together with a discussion about processes and procedures in order that I may diligently perform my role. We discussed this at length and Jacqui was most sympathetic. She said that she had feared something like this would happen when appointing a replacement of the former IT Manager and the handover of roles with the newly appointed Trust personnel. She had also voiced her concerns in respect to the school having no funds. She assured me that she would bring those matters which we had discussed to your attention, and she arranged a meeting for the following Monday so that you and I could discuss this together.*
>
> *During our meeting I had repeated my worries which I had previously discussed with Jacqui, particularly about my interaction with Mr Cox. I said that I was so concerned about this that I had commenced a daily record keeping/diary to record various incidents. (1) You took notes and said that you would investigate it and come back to me within two weeks to discuss your findings; (2) We also reviewed my work to date. You were most positive about my performance and gave me full marks on the review document which you were working through. You said that you would forward a copy of the updated review document to me immediately after the meeting; (3) You said that we would have a meeting every two weeks; (4) You said that I would need to attend to health and safety/safeguarding training. To date none of the above 1-4 has been fulfilled.*
>
> *Since that meeting I have brought further areas of concern to your attention; specifically my eMail to you of 4 November 2020 and a*

follow-up email to you on the morning of 9 November 2020 (before you suspended me), neither of which you have responded to.

Whilst writing, I have to say that I'm particularly distressed about your constant references and letters in respect of my legitimate exemption over the wearing of face coverings/masks, including challenging me to provide the reason for my exemption 15 October 2020. Following which, on 4 November 2020 you again raised the matter and requested a meeting to discuss it. This on-going discussion served to cause me further angst. I replied that same day and confirmed that we could discuss this and provided you with my availability as you had requested I should. However you have failed to acknowledge that or follow-up since, leaving me with the impression that this matter is not finalised and feeling extremely vulnerable is a consequence of the open-ended nurse of this troubling issue.

37. On 25 November 2020, Mr Bell emailed the claimant stating, amongst other things that the meeting would focus on performance and not the wearing of face masks [144].

38. The claimant attended a meeting with Mr Bell and members of the respondent on 26 November 2020. He covertly recorded that meeting without Mr Bell' knowledge or permission. A transcript has been produced in the hearing bundle [145]. The claimant did not mention his disability during that meeting.

39. On 30 November 2020, Mr Gilson wrote to the claimant terminating his employment with effect from 26 November 2020 [153]. In that letter, Mr Gilson referred to the letters of 10 & 19 November 2020 and the probationary review meeting on 5 October 2020 during which Mr Bell had raised concerns regarding his performance. He goes on to say that the claimant had not met the standards required. Consequently, the decision was taken to terminate his employment. He notified the claimant of his right to appeal the decision.

40. On the 14 December 2020, the claimant wrote to Mrs Green, the personnel manager at the School, to appeal his dismissal [163]. He stated amongst other things:

<u>2. Discrimination and harassment in respect to my exemption from wearing a face mask</u>

I have previously informed Mr Bell that I'm particularly distressed about his constant references and letters in respect to my legitimate exemption over the wearing of face coverings/masks. This was exacerbated when, 15 October 2020, he challenged me to provide him with the reason for my exemption. I politely declined Mr Bell's request on the grounds that Government guidance stipulates there is no requirement for me to provide evidence for my exemption. Moreover I informed Mr Bell that it should have been sufficient for me to have informed him of my exemption without suffering any further questioning. Following which, on 4 November 2020 Mr Bell again raised the matter and requested a meeting to discuss and agree a way forward is that supported me and all colleagues across the school. I replied that same day and I provided him with my availability as he had requested I should adding that I was sure the matter could be resolved, particularly in consideration of the school's policy of inclusivity.

To date he has failed to acknowledge my response or to follow up on his request for a meeting, leaving me with the impression that the matter was not finalised and feeling extremely vulnerable as a consequence of the open-ended nurse of the situation. Naturally this has caused me ongoing distress.

…

5. Summary

It is my position that Mr Bell is discriminated against me in respect to my exemption to wearing a face mark in school [item 2 above]. Rather than accepting my exemption, Mr Bell challenged me to provide him with personal medical information. When I politely declined, he later went on to request a meeting to discuss the matter and agree reasonable adjustments for accommodating my exemptions, and I informed him I was happy to do so. He has failed to follow up on that meeting though. Following which, Mr Bell suspended me. He told me his grounds for doing so were based on mine not wearing a facemask, and not "social-distancing" whilst at an outdoor event, and this was accompanied with serious allegations that, in so doing, I was endangering staff and pupils at the school and bringing it into disrepute [item 3 above]. However during the hearing, Mr Bell provided the actual reason which he said went to the "heart of the suspension"; there were ongoing concerns about mine not wearing a facemask and that I had provided evidence to support my exemption [item 4 above].

…

Prior to the hearing, by way of an eMail dated 25 November 2020, Mr Bell had informed me that the focus of the meeting would not be the wearing of face masks. However, as it turned out, the discussions were very much centred on Mr Bell's discrimination towards me in respect of my exemption to wearing a facemask, whilst revealing the actual reason for the suspension, culminating in a sham dismissal. It is clear that the dismissal was trumped up as a result of the discrimination, and I have suffered a detriment by being dismissed and what a wholly unsubstantiated grounds. As such the school is in breach of the Equality Act 2010.

Although this section of the letter refers in its heading to "Discrimination" the claimant does not refer to the type of discrimination that he believes he was suffering. He does not refer to his disability. Furthermore, the claimant does not refer to his disability in the summary. He simply claims that he's been discriminated and the respondent is in breach of the Equality Act 2010. He does not refer to any protected characteristic, let alone disability.

41. The claimant attended his appeal hearing on 7 January 2021. His appeal was not upheld in the decision confirmed in a letter to him dated 13 January 2021 [170]. In that letter, I note the following:

During your appeal you explained that you are exempt from wearing a mask. You explained that you believed your refusal to wear a mask and contributed to the decision to dismiss you. You have inferred that the school has discriminated against you.

You are a questioned during the appeal panel as to whether you had provided the school with evidence of your exemption or explained why you were exempt. You acknowledge that you had not provided evidence of your exemption is the law did not require you to do this. You also confirmed that you did not provide details of the pre-existing medical condition that gives rise to your exemption. You acknowledged that the school had ask for this information, but you would not replied because you were "taken aback by the tone".

As part of our investigation into your grounds for appeal we have checked all your application documentation, and at no point did you disclose any information on health condition that would indicate that you are exempt from wearing a mask.

We believe the Trust, as your employer, and given the current conditions of the pandemic were entirely within their right to ask all staff to wear a mask or provide evidence of exemption. This is both fair and reasonable.

Findings

We do not uphold your allegation that you were discriminated against for not wearing your mask. We are satisfied that you were dismissed due to your poor performance as evidenced in the earlier part of this letter.

We find no evidence of discrimination. The school had no knowledge of your medical condition and he did not explain the reason for your exemption. Given that the school is operating during a national pandemic, with responsibility to keep both staff and pupils safe, their actions were entirely rational and reasonable are not linked to any prior knowledge of any possible disability you may have. As at the date of writing this letter the school still has no knowledge as to any disability you may have.

42. Under cross-examination, the claimant admitted that he had not provided the respondent with details of the exemption or any pre-existing medical condition and that he had not raised the issue of disability or phobia of masks.

43. Under cross-examination, the claimant admitted that it was only after that he had been dismissed and he had become appeal rights exhausted that he went to see his doctor.

44. On 28 December 2021, the claimant attended Dr S B Nabavi, a Consultant General Adult Psychiatrist. A copy of his report dated 6 January 2022 was produced in the hearing bundle [224]. Although the report indicates "current symptoms of post-traumatic stress disorder" I give it little weight for the following reasons:

    a. In paragraph 2.16 of the report, Dr Nabavi states:

       In my opinion, on the balance of probabilities, following Mr Linton was exposed to a similar situation (wearing face masks), as

requested by the Respondent last year, which make him feel anxious and agitated. This was a likely trigger for Mr Linton revoking his suppressed memories of traumatic scuba-diving incident some 25 years ago, during which he felt breathless, agitated and distressed.

Dr Nabavi was obviously relying on the claimant's self-reporting. He based this opinion on a fundamental factual inaccuracy. At no time during the claimant's employment did he wear a facemask. Under cross-examination, the claimant accepted that.

b. In paragraph 9.7, Dr Nabavi quotes from a letter from Ms Humphries dated 28 October 2021 where she states

In particular, we focused on the frequent nightmares you are having about a scuba-diving incident in the past, as these appear to have been re-triggered by mandatory mask wearing. As a result of the difficulties, you were experiencing wearing a mask, you lost your job.

Under cross-examination, the claimant admitted that this could not be correct as he hadn't worn a mask. He also accepted that people were making diagnoses on information that was not correct.

c. I also note that the report suggests that any symptoms suffered by the claimant had increased in the period since he was dismissed.

Applicable law

45. The Equality Act 2010 ("EQA"), section 6 defines a 'disabled person' as a person who has a 'disability'. A person has a disability if he or she has 'a physical or mental impairment' which has a 'substantial and long-term adverse effect on [his or her] ability to carry out normal day-to-day activities.' The burden of proof is on the claimant to show that he this definition.

46. The Government has issued 'Guidance on matters to be taken into account in determining questions relating to the definition of disability' (2011) ('the Guidance') under EQA, section 6(5). This Guidance, which came into force on 1 May 2011, replaces the previous Guidance on the same matters issued under the Disability Discrimination Act 1995 ("DDA") in 2006. The Guidance does not impose any legal obligations in itself, but courts and tribunals must take account of it where they consider it to be relevant, (EQA para 12, Sch 1). Indeed, in **Goodwin v Patent Office 1999 ICR 302, EAT**, the EAT's then President, Mr Justice Morison, stated that tribunals should refer to any relevant parts of the Guidance they have taken into account and that it was an error of law for them not to do so. However, more recently, in **Ahmed v Metroline Travel Ltd EAT 0400/10** the EAT qualified the **Goodwin** approach, noting that the observations made in that case were now long-standing, well established and well understood by tribunals. Mrs Justice Cox said that it was especially important for the correct approach to using the Guidance to be understood in the early years of the DDA. However, it was more than 15 years since disability discrimination legislation had been introduced. In this particular case the employment judge had understood the potential relevance of the Guidance and the importance of using it correctly, and no error of law

was disclosed by his failure to refer to the Guidance in more detail, particularly when his attention had been drawn to it so extensively in written submissions. Furthermore, where, as in the instant case, the lack of credibility as to the claimant's evidence of his disability was the main reason for concluding he was not disabled within the meaning of the DDA, there could be no error of law if the tribunal failed to refer to the official Guidance.

47. Appendix 1 to the EHRC Employment Code states that 'There is no need for a person to establish a medically diagnosed cause for their impairment. What is important to consider is the effect of the impairment, not the cause' (para 7). This endorses the decision in **Ministry of Defence v Hay 2008 ICR 1247, EAT**, where the EAT held that an 'impairment' under section1(1) DDA could be an illness or the result of an illness, and that it was not necessary to determine its precise medical cause. The statutory approach, said the EAT, 'is self-evidently a functional one directed towards what a claimant cannot, or can no longer, do at a practical level.'

48. The time at which to assess the disability (i.e. whether there is an impairment which has a substantial adverse effect on normal day-to-day activities) is the date of the alleged discriminatory act (**Cruickshank v VAW Motorcast Ltd 2002 ICR 729, EAT**). This is also the material time when determining whether the impairment has a long-term effect. An employment tribunal is entitled to infer, on the basis of the evidence presented to it, that an impairment found to have existed by a medical expert at the date of a medical examination was also in existence at the time of the alleged act of discrimination (**John Grooms Housing Association v Burdett EAT 0937/03 and McKechnie Plastic Components v Grant EAT 0284/08**).

49. Evidence of the extent of someone's capabilities some months after the act of discrimination may be relevant where there is no suggestion that the condition has improved in the meantime (**Pendragon Motor Co Ltd t/a Stratstone (Wilmslow) Ltd v Ridge EAT 0962/00)**. That case involved the admissibility of a video recording taken of the claimant six months after he had left work. The tribunal refused to admit the evidence but was overturned on appeal by the EAT, which remitted the case to a different tribunal for a rehearing on all the evidence, including any properly adduced and proved video evidence. In the EAT's view, video evidence taken at a later date may be relevant to the question of the extent of the claimant's actual capabilities at the time of the discriminatory act, especially where there is no suggestion that the condition has improved in the meantime. The video evidence may also be relevant when determining the reasonableness or otherwise of any adjustments that might need to be made.

50. In particular, where an individual is relying on an impairment that may not manifest itself consistently, a tribunal will not necessarily err if it considers evidence at around the time of the alleged discriminatory act, albeit not on the specific date in question. In **C and ors v A and anor EAT 0023/20** the EAT did not accept that it was illegitimate to examine evidence arising before and after the acts of discrimination in order to determine whether it shed light on the existence of the impairment at the material time. Given that the alleged impairment was stress, an anxiety disorder and depression, the EAT did not expect every day to offer evidence of disability. Thus, while the EAT accepted that the tribunal did not focus on the dates of the relevant acts, the tribunal's enquiry necessarily embraced them.

51. However, the Court of Appeal has now allowed an appeal against the EAT's decision in **C v A. In All Answers Ltd v W 2021 IRLR 612, CA**, the Court held that the EAT was wrong to decide that the tribunal's failure to focus on the date of the alleged discriminatory act was not fatal to its conclusion that the claimants satisfied the definition of disability. The Court held that, following **McDougall v Richmond Adult Community College 2008 ICR 431, CA**, the key question is whether, as at the time of the alleged discrimination, the effect of an impairment has lasted or is likely to last at least 12 months. That is to be assessed by reference to the facts and circumstances existing at that date and so the tribunal is not entitled to have regard to events occurring subsequently. The Court held that it was clear that the tribunal did not ask the correct question and so its decision could not stand. The Court noted that the EAT had identified the tribunal's failure in this regard but had considered that this was not fatal as the tribunal had focused on the position before and after the relevant date. That, however, was not an answer to the difficulty and the EAT was wrong to overlook the tribunal's error.

52. Rule 53 (1) (c) of the Rules of Procedure confirms that a Tribunal has the power to consider the issue of strike at out a preliminary hearing. Rule 37 sets out the grounds on which a Tribunal can strike out a claim or response (or part). A claim or response (or part) can be struck out on a variety of grounds including that it is scandalous or vexatious or has no reasonable prospect of success (rule 37 (1) (a)).

53. The Tribunal must take a view on the merits of the case and only where it is satisfied that the claim or response has no reasonable prospect of succeeding can it exercise its power to strike out. In **Balls v Downham Market High School and College 2011 IRLR 217, EAT** Lady Smith stated that where strike out is sought or contemplated on the ground that the claim has no reasonable prospect of success the Tribunal must first consider whether, on a careful consideration of all the available material, it can properly conclude that the claim has no reasonable prospect of success. The test is not whether the claim is likely to fail; nor is it a matter of asking whether it is possible that the claim will fail. It is not a test that can be satisfied by considering what is put forward by the respondent either in the ET3 or in submissions and deciding whether their written words or assertions regarding disputed matters are likely to be established as facts. It is a high test. The Tribunal should have regard not only to material specifically relied on by parties but also to the employment tribunal file. There may be correspondence or other documentation which contains material that is relevant to the issue of whether it can be concluded that the claim has no reasonable prospect of success, or which assists in determining whether it is fair to strike out the claim. If there is relevant material on file and it is not reflected by the parties an employment judge should draw their attention to it so that they have the opportunity to make submissions regarding it. It is unfair to strike out a claim where crucial facts are in dispute and there has been no opportunity for the evidence in relation to those facts be considered.

54. Special considerations arise if a tribunal is asked to strike out a claim of discrimination on the ground that it has no reasonable prospect of success. In **Anyanwu and anor v South Bank Student Union and anor 2001 ICR 391, HL**, the House of Lords highlighted the importance of not striking out discrimination claims except in the most obvious cases as they are generally

fact-sensitive and require full examination to make a proper determination. With this guidance in mind, the Court of Appeal in **Community Law Clinic Solicitors v Methuen 2012 EWCA Civ 571, CA**, held that an employee's claim for age discrimination should not be struck out because the case required further examination of the facts so as to properly consider whether age discrimination could be inferred.

55. In **Ezsias v North Glamorgan NHS Trust 2007 ICR 1126, CA**, the Court of Appeal held that the same or a similar approach should generally inform protected disclosure ('whistleblowing') cases, which have much in common with discrimination cases, in that they involve an investigation into why an employer took a particular step. The Court stressed that it will only be in an exceptional case that an application will be struck out as having no reasonable prospect of success when the central facts are in dispute. An example might be where the facts sought to be established by the claimant are totally and inexplicably inconsistent with the undisputed contemporaneous documentation.

56. In **Cox v Adecco and ors 2021 ICR 1307, EAT** the EAT stated that, if the question of whether a claim has reasonable prospects of success turns on factual issues that are disputed, it is highly unlikely that strike-out will be appropriate. The claimant's case must ordinarily be taken at its highest and the tribunal must consider, in reasonable detail, what the claim(s) and issues are:

    Put bluntly, you can't decide whether a claim has reasonable prospects of success if you don't know what it is.

    Thus, there has to be a reasonable attempt at identifying the claim and the issues before considering strike-out or making a deposit order. In the case of a litigant in person, the claim should not be ascertained only by requiring the claimant to explain it while under the stresses of a hearing; reasonable care must be taken to read the pleadings (including additional information) and any key documents in which the claimant sets out the case. When pushed by a judge to explain the claim, a litigant in person 'may become like a rabbit in the headlights' and fail to explain the case he or she has set out in writing. In some cases, a proper analysis of the pleadings, and of any core documents in which the claimant seeks to identify the claim, may show that there really is no claim and therefore no issues to be identified. More often, however, a careful reading of the documents will show that there is a claim, even if it might require amendment. The EAT went on to note that respondents, particularly if legally represented, should, in accordance with their duties to assist the tribunal to comply with the overriding objective and not to take procedural advantage of litigants in person, aid the tribunal in identifying the documents in which the claim is set out, even if it may not be explicitly pleaded in a manner that would be expected of a lawyer. Finally, if the claim would have reasonable prospects of success had it been properly pleaded, consideration should be given to the possibility of an amendment, subject to the usual test of balancing the justice of permitting or refusing the amendment, taking account of the relevant circumstances.

Discussion and conclusions

57. Having considered the evidence, I do not accept that the claimant was disabled at the material time for the following reasons:

    a. I accept that he suffered a traumatic episode as a result of the scuba-diving accident 25 years ago. However, this is not a case where his alleged impairment has manifested itself inconsistently. On his own evidence, the problems that he was suffering, and which were triggered by that accident had, to all intents and purposes, resolved themselves approximately two years after the accident. This means that he was essentially living symptom-free for 23 years. His problems seem to have recurred after he was dismissed.

    b. If the claimant was still experiencing symptoms of PTSD, he had the opportunity to draw that fact to the respondent's attention on several occasions during his brief period of employment with them. His first opportunity was in the application form. When asked, he declared that he did not suffer from a disability. He could have explained to Mr Bell why he wasn't wearing a mask when asked. He simply referred to government guidance and expected Mr Bell to take him at face value. He could have revealed his disability during the suspension meeting with Mr Bell and at the subsequent probationary review meeting. Although he mentioned discrimination in general terms in his appeal against the dismissal and referred to the EQA, he did not identify any protected characteristic under that statute, let alone disability. At no stage during his employment did the claimant specifically refer to PTSD or any medical condition. His own evidence pointed to the fact that any problems that he had suffered from his PTSD had been resolved and that is consistent with his not referring to that condition when he applied for the job and whilst he was employed.

    c. There was no formal diagnosis of PTSD prior to the time of the alleged discriminatory act. Instead, the claimant relies upon the letter from Ms Humphries, and the consultant psychiatrist report prepared by Dr Nabavi. Both of these postdate the claimant's dismissal. Furthermore, they rely upon factual inaccuracies provided by the claimant when he suggested that he had to wear a mask which triggered his symptoms of PTSD. That is simply not true. He never wore a mask during the time that he was employed at the respondent. When he was re-examined on why he did not wear a face mask, it was suggested by him that he was embarrassed. There is no contemporaneous evidence to substantiate that. There is no medical evidence to point to his alleged embarrassment.

    d. The only contemporaneous evidence concerning his difficulty with wearing a face mask comes from what he said about his reasons for attending the rally in Stroud on 7 November 2020. It was a rally to protest about government Covid controls. He felt strongly about the matter in that he carried a placard to protest, and he publicized his presence at the rally on social media. Although he did not organise the rally or speak at it, he was more than a bystander. He felt he was pressurised into having to wear a mask. It was against his ability to be able to do it. He objected to being told to wear a facemask. He said

that he had attended the rally because he objected to government guidelines which included the banning of rallies. On his own evidence, I believe that the operative reason why he did not want to wear a face mask at work was because he objected to it on ideological grounds. For the claimant, this was a matter of freedom of expression and not resisting being told what to do by government.

58. Given that I do not accept that the claimant was disabled at the material time, it follows that his claim for discrimination arising from disability under EQA, section 15 has no reasonable prospect of success. Consequently, I uphold the respondent’s application to strike out that claim.

59. I now turn to the application for a strike out order relating to the claim for unfair dismissal based on whistleblowing. I am not satisfied that the test for a strike out order has been met for the following reasons:

    a. The bar for striking out a claim is high. It is a draconian measure which if taken erroneously will deny the claimant access to justice.

    b. The claimant is a litigant in person and must be given some leeway in how he has presented his claim. He is not familiar with drafting pleadings as amply exemplified by the fact that what he calls his “First Witness Statement of James Linton” is in reality his particulars of claim.

    c. He alleges that the protected disclosure that he made arose from his concerns about the state of various classrooms that he visited. In paragraph 20 of his particulars of claim [21] he asserts that he was struck by the untidiness of computer installations on the teachers’ workstations particularly the 240 V mains electrical cabling and multiway mains distribution strip serving power to various devices in each classroom. He further refers to smart board, desktop computer, screen, projector, speakers, screen selector switches, cameras and other ancillary equipment which resides on those teacher workstations at the front of each classroom. He states that he noted that in some instances tangled cabling was haphazardly stretched across the floor because it was too short and other cases passing under the teacher’s chair/castors, to the various sockets. Where he judged this to be in immediate danger to the safety of staff and children in those areas, he took the initiative to strip out the tangled cables from all of the various devices, and methodically installing again from scratch in accordance with basic health and safety principles. He says that he brought various consumables in from his own home stock to provide for a neat and safe installation. On the face of it, this sounds like a health and safety concern. However, this is based on oral evidence (i.e. who said what and when) and at this juncture the Tribunal does not have the benefit of Mrs Green and Mr Bell’s evidence on the matter. The Tribunal will undoubtedly benefit from this before any findings if fact can be made. Consequently, the most appropriate way for this evidence to be assessed is at a final hearing.

    d. The claimant then narrates in paragraph 21 of his particulars of claim that on 2 October 2020 he spoke to Mrs Green and during that discussion he raised a serious complaint concerning Mr Cox. The substance of his complaint was lack of communication between himself

and Mr Cox and being let down by arrangements for his training. He also refers to being denied access to specific processes and protocols for resolving matters in accordance with the duties of his post. He talks about being denied access to systems that were necessary for him to perform his role. There is a brief reference to resolving health and safety issues on his own initiative and he specifically identifies the safety issues in the classrooms. In paragraph 22, the claimant then refers to his meeting with Mr Bell on 5 October 2020 during which he says he repeated his concerns that he had raised with Mrs Green. It is also alleged that Mr Bell acknowledged the untidiness of the electrical and signal cabling at the workstations in the classrooms and it is alleged that Mr Bell had also noticed this himself. This is potentially a public interest disclosure in terms of Employment Rights Act 1996, section 43B (1)(e) and that could potentially be a disclosure of information.

60. Whilst striking out the claim is inappropriate, taken at its highest, the claimant has little reasonable prospects of success. I say this for the following reasons:

    a. In a claim of ‘ordinary’ unfair dismissal, the employer bears the burden of showing that the reason for dismissal was one of the potentially fair reasons in Employment Rights Act 1996, section 98(1) and (2) (“ERA”). In a claim of automatically unfair dismissal such as this one, the issue is somewhat more complicated and hinges on the question of whether the claimant has enough qualifying service to claim unfair dismissal in the normal way or is instead relying on the exception to the two-year qualifying period for automatically unfair dismissal claims.

    b. Where an employee who alleges that he or she was dismissed for an ‘automatically unfair’ reason has sufficient qualifying service to claim unfair dismissal in the normal way, then the burden of proving the reason for dismissal is on the employer, as it is in an ordinary unfair dismissal claim under section 98 ERA.

    c. As the claimant does not have the requisite qualifying period of service for making a complaint of ordinary unfair dismissal, he must establish that the principal reason for his dismissal was the making of a protected disclosure. The only basis upon which his claim can succeed is if the claimant demonstrates that. If it was, the dismissal is automatically unfair. He has to establish his claim on a balance of probabilities.

    d. The decision to dismiss him may have crystallised when Mr Bell emailed Mr Gilson on 6 November 2020. At that juncture, Mr Bell had conducted the probationary review meeting on 5 October 2020 where the overall assessment was that the claimant’s performance was below the required standard and needed to improve. This might point to performance as the operative reason for dismissal and that it had nothing to do with any protected disclosure that the claimant might have made. Furthermore, the claimant’s performance grading is set out in the review document of 5 October 2020 and is contemporaneous evidence. There is also a reference to discrimination in Mr Bell’s email suggesting that he believed the risk associated with the dismissal lay

elsewhere. This might suggest that there was no causal link between the decision to dismiss and the alleged protected disclosure and that Mr Bell was dissatisfied with his performance as set out in the six-month performance review. Given that the claimant must prove the that he made a qualifying disclosure and that he was dismissed because of it he may have difficulties. I have, therefore, made a deposit order.

Employment Judge Green
Date: 3 February 2022

Reserved Judgment & reasons sent to parties: 3 February 2022

FOR THE TRIBUNAL OFFICE