


Employee who refused to wear a face mask fairly dismissed

02 February 2023  Helen Badger

In a recent decision, the Glasgow Employment Tribunal held that an employee who suffered from vertigo and consequently refused to comply with the employer's policy of requiring the wearing of face coverings in the workplace, was dismissed fairly and without discrimination.

The employer operates a number of warehouses which produce and distribute lifesaving medication for use in hospitals, NHS health services and pharmacies. During the pandemic demand for products increased significantly and the staff employed were classed as key workers.

The claimant was employed as a warehouse operative.

Given the nature of the product manufactured (which was likely to be taken by vulnerable patients), it was essential that the employer took as many precautionary steps as were practicable to minimise (if not extinguish) the risk of COVID-19 in the workplace. The employer therefore took COVID-19 and risk seriously and expected staff to do so the same. As part of this mandatory wearing of face masks was introduced.

The claimant refused to wear a face mask and was therefore sent home. The claimant subsequently reported as sick and disclosed that she suffered from vertigo, meaning that she was unable to wear a facemask. The employer consulted with the claimant in an attempt to find an alternative and facilitate a return to work. Lone working was not possible and given the nature of the claimant's role she was unable to work from home. Staggered start and finish times were not feasible as staff needed to pass through communal areas to get to their workstation. The employer suggested different types of face coverings, but the claimant refused to trial them. After being absent for 12 months, the claimant resigned and brought claims of constructive unfair dismissal, indirect disability discrimination and failure to make reasonable adjustments.

The tribunal found that the claimant's vertigo amounted to a disability. However, they were satisfied that, although the employer had applied a policy requiring the mandatory wearing of facemasks in the workplace, it was justified. The policy had a legitimate aim to protect the health and safety of the workforce by reducing the risk of the virus spreading, which in turn also protected the supply chain and the vulnerable people who depended on their products. Further, there were no other options which could have been adopted which would achieve this aim.

The tribunal were also satisfied that the employer had done all they reasonably could to consult and work with the claimant to remove any disadvantage caused to her by the policy. This included offering other types of face masks that were not in contact with her nose or mouth but still reduced the risk of transmission.

In respect of the constructive unfair dismissal claim the tribunal held that the claimant was unable to return to work because she was unable to comply with the employer's policies which had been introduced for cogent, fair and lawful reasons. Accordingly, there was no fundamental breach of contract by the employer.

Therefore, all claims were dismissed by the tribunal.

Whilst only a first instance decision and therefore other tribunals are not bound to follow it, this case gives a level of comfort to employers who may wish to adopt similar policies where the risk of transmission of COVID-19 and other infectious diseases could have serious

consequences, such as for those working in health and care. The decision appears to show that, even in the absence of compulsory government guidance, in appropriate settings, the courts are willing to balance the rights of individuals with the rights of the employer where there are compelling reasons for doing so (such as in circumstances where there is a resurgence of COVID-19 and flu and the need to protect staff in order to maintain staffing levels to provide adequate care). However, this case also highlights the importance of identifying staff who may be disadvantaged by such a policy and consulting with them to seek an alternative solution, as the duty to make reasonable adjustments remains.

If you are a [healthcare employer](#) considering introducing such a policy and would like to discuss the implication of this decision further, please get in touch.

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