



EMPLOYMENT TRIBUNALS

Claimant: Mr C Butler

Respondent: Caretech Community Services Limited

Heard at: By CVP (video hearing)

On: 23 September 2022

Before: Employment Judge Anderson

Representation

Claimant: In person

Respondent: Miss Ismail (counsel)

RESERVED JUDGMENT

1. The claim of unauthorised deductions from wages is not well founded and is dismissed.
2. The claim for failure to pay holiday pay is not well founded and is dismissed.

REASONS

Introduction

1. This was a claim brought by the claimant, Mr Butler, against his employer, Caretech Community Services Limited. The claimant appeared in person. The respondent was represented by Miss Ismail of counsel.
2. The respondent is a member of the CareTech Group of companies, which provides care and support for children and adults with social care and complex mental health requirements. The claimant is employed as a Support Worker. He began working for the respondent on 30 March 2021.

3. The claim is one of unauthorised deductions from wages. There is no dispute that the claimant has not been paid any wages or holiday pay for the period following the date he last worked, which was 8 September 2021. The dispute is whether he ought to have been paid.
4. Early conciliation started on 17 November 2021 and ended on 23 December 2021. The claim was presented on 25 January 2022.

Evidence

5. There was an agreed bundle of documents ultimately running to 291 pages. I also had a witness statement from the claimant and a witness statement from the respondent's witness, Ms Cashmore (HR Business Partner).

The Claims and Issues

6. As set out above, the claim is one of unauthorised deductions from wages. There is no dispute that the claimant has not been paid any wages for the period following the date he last worked. What is in dispute is whether these ought to have been paid, i.e. were they properly payable.
7. The claimant also complains that he has not been paid holiday pay during the same period.
8. The issue centres around the wearing of face masks in the context of the Covid-19 pandemic.

The Facts

9. The tribunal made the following findings of fact:

Background/Context

10. The claimant commenced employment with the respondent on 30 March 2020. He signed a contract of employment on 31 March 2020.
11. The contract is in a 'standard' format and sets out that various specific details, such as the job title, place of work, and pay, are set out in the offer letter.
12. The offer letter is dated 16 March 2021. It details where the claimant will be working and the name of his manager. It also sets out:

Your annual holiday entitlement is 28 days per full holiday year (including bank holidays)...; the Company holiday year runs January to December.

and

Your pay will be £8.21 per hour and you will be required to work 37.5 hours.

13. The claimant confirmed that he was paid by the hour and that this was 'timesheet based'.

14. There is a job description, which was also signed by the claimant on 31 March 2020. That document contains (amongst other things), the following descriptions of duties:

To provide appropriate support in all areas of (sic) the people we support, as outlined in their plans, including daily living skills, social activities, emotional support, personal finance, relationships, health, medication and personal care etc.

Support individuals in the preparation of meals, laundry duties and cleaning

Have respect for the personal welfare and well-being of service users and inform the service manager or senior staff of any concerns or disputes

Recognise, observe and follow the company's policies and procedures. To have an understanding of current and relevant legislation including care standards and the best practice guidance as advised by government guidelines

15. Within the contract, it provides (amongst other things):

6.3. You are responsible for ensuring that timesheets are accurately prepared, submitted on time and signed by both your home manager and yourself. You must be aware that late/inaccurate/unsigned timesheets may result in delayed payments, until such time as there is a time and attendance system in place. You will then be required to clock in and clock out of your service to record your working hours. Failure to do so accurately and consistently may result in delayed payments or disciplinary action.

10.1. Your Normal Hours of work are as per your offer letter.

12.5 You may not carry over any unused holiday entitlement into a new Holiday Year (except by prior written agreement by your Operations Manager). If for any reason you do not take all of your holiday entitlement in any holiday year, the Company shall not make any payment in lieu or increase your holiday entitlement in any subsequent year.

25.1 You are required to work within the stated guidelines, policies and procedures of the Company at all times, having the highest regard for safety and well being. Any person in breach of this requirement will be subject to disciplinary action and may be dismissed.

16. The claimant was asked about the last of these clauses (25.1) and whether, by signing the contract, the claimant was aware he was bound by the guidance and polices. He replied "yes absolutely, definitely." He also confirmed he was 'definitely' bound by his job description.

17. The claimant said that at the time he commenced employment, he did not have to wear a face mask (due to Covid-19). He said that he believed he was in a 'bubble' with those at his place of work. The claimant said he was unable to provide evidence to support his evidence in this regard, as he had been unable to return to site to obtain it.
18. Ms Cashmore told the Tribunal that Covid-19 guidance had changed frequently, both within and outside work environments. She referred to social bubbles outside of work, but said to her knowledge there weren't social bubbles at work. Ms Cashmore said that the respondent is regulated by the Care Quality Commission (CQC) and is a registered service; therefore they have to follow CQC requirements. Ms Cashmore confirmed that to the best of her knowledge, CQC had never referred to social bubbles and she did not recall seeing anything about this. I had no documentary evidence as to what rules and guidance were in force or being applied at the time the claimant began employment, including in relation to the use of bubbles.
19. The site at which the claimant is employed to work is a five-bedroomed house, which accommodates adults with physical and/or mental impairments. The focus of the placement appears to be to encourage independent living skills; the claimant described that the support workers give direction and support around activities of daily living, as well as administering medication and providing 1:1 support at activities, including, physical activities such as swimming. He said they do not provide direct personal care.
20. The respondent has produced a document called 'Guidance on the use of PPE', with a sub-heading 'This guidance is subject to change at short notice- please check the portal for updates daily'. There were two versions of this document in the hearing bundle: Version 9 (dated 2 February 2021), and Version 14, (dated 16 July 2021).
21. The respondent operates a suspension policy, which states:

When a disciplinary issue is being looked into you may be suspended from work. This does not happen very often, but if it does it will always be with pay and you will always be told why you have been suspended.

September 2021

22. On 6 September 2021, the respondent's Registered Service Manager, Ms Rogers, sent an email to a number of email addresses, including the dedicated email address for the site at which the claimant is employed to provide support. That email states:

Good afternoon all,

Please remember even though you have had your vaccines and our service users have too, you are still required to wear PPE at all times. The regulations within care are very different to being outside of work in your personal time.

I have attached the guidance from our COVID website again.

23. The claimant confirmed that this email had been sent to the generic email address at the service at which he worked. He told the Tribunal how the system worked: All staff have access to that email inbox. If he was on shift, he would deal with the correspondence sent that day, and anything that needed to be updated or was relevant would be recorded in the communications book, and raised at staff handover.
24. The claimant said that the email of 6 September 2021 should have been printed off and written into the communications book so that all staff were aware. He confirmed there is an expectation that information sent to that inbox is shared with all staff through the communications book. The claimant said he had not found any evidence of that happening in respect of the 6 September 2021 email and he was unaware of the email at the time. The claimant told the Tribunal that he did not receive the guidance document until February 2022, which was a different version.
25. It is clear the claimant should have seen this email and guidance document, if procedures had been properly followed.
26. The claimant accepts that he had a conversation with Ms Rogers on 7 September 2021 during which she asked him to wear a face mask. He told the Tribunal that he responded by saying he would not be able to, as he was going swimming with a service user. He said he told Ms Rogers that he would be willing to wear a mask in accordance with guidance when this was provided, but he would/could not when swimming.
27. An email was sent by Ms Cashmore on 8 September 2021 to Ms Dube (Locality Manager) and another individual, with the subject line 'PPE - Requirement to Wear Masks'. The content of that email is as follows:

Further to our discussion this morning I am writing to confirm that it remains a requirement of the role for our staff to wear masks within services. Where staff are medically exempt we follow a standard process and look at any reasonable adjustments that can be made.

However, my understanding at this time is that (the claimant) is not willing to wear a mask through choice rather than a health condition.

We have offered (the claimant) shifts and the work is available for him. However, he must follow guidance re PPE to attend the service. If (the claimant) chooses not to wear a mask then he cannot attend site and cannot do the work being offered and therefore would not be paid.

If you could print the policy/guidance as well for (the claimant) so that he has all relevant information that would be helpful. I am happy to provide any further guidance for (the claimant) and if it is the case that we should be looking at reasonable adjustments/alternatives then I am available to support those discussions.

28. Ms Dube attended the claimant's place of work on 8 September 2021 and provided him a copy of this email, which he was asked to sign. He refused. There is a difference of opinion as to whether the claimant was then asked to leave the site, escorted from it, or removed from it. This is not material for the purposes of my decision.
29. The claimant confirmed he had been shown the email dated 8 September 2021 and had refused to sign it. He stated that it had not been addressed specifically to him.
30. When asked what he understood or took from this email, the claimant replied "*very little. I didn't understand it. It was incomprehensible, addressed to someone else. I hadn't declined work. Nobody said offer of work. I was quite confused.*" I don't accept that evidence. I have no doubt that the claimant read this email and understood that the respondent required him to wear a mask to attend the site and provide support. The content and language of the email are plain. Having heard directly from him, the claimant is clearly an intelligent and articulate man. Furthermore, when asked during the hearing if he knew then (i.e. on 8 September 2021) that he would be able to work if he wore a mask, he replied "yes".
31. The claimant accepted that he took a copy of the 8 September 2021 email, along with the FAQ document, on that date.
32. The FAQ document has the CareTech header. The first question is:
 1. *Do all staff need to wear a face mask?*
Yes. All staff - clinical or non-clinical - need to wear a face mask when at work, and when moving between different areas. This applies to staff working in all of our service sites....
33. The claimant told the Tribunal that this document had been available for some time, but had been superseded. Ms Cashmore confirmed in her oral evidence that the document had remained in force and continued to be in force at the time of the hearing.

Suspension

34. The claimant states that he was suspended from work. In his evidence, he said that during the conversation with Ms Rogers on 7 September 2021, he was told he 'would be' suspended if he did not comply with wearing a mask at all times. The respondent admits that Ms Rogers referred to the claimant as being suspended, but says this was rectified.

35. In his claim form, he states that:

On the 10th (sic) September 2021, whilst on shift. I was suspended from work by (Ms) Dube (caretech director) The reason given was I would not sign a memo which was not addressed to me. It stated I had been offered work and declined work, since I had chosen to not wear a face mask at all times whilst with a service user. This is untrue and I did not sign. It was not addressed to me and not factual. No relevant policy was provided to say face masks are mandatory policy.

36. The claim form also states that two other employees had provided statements confirming the claimant was suspended. Two statements were presented to the Tribunal, though neither author attended the hearing. One of those individuals makes no reference to the claimant being suspended. The statement from the is seven-lines long; it states the author was on shift when Ms Dube arrived on 8 September 2021. This individual says that he was stood with another colleague when Ms Dube “*insisted (the claimant) attend the site office after his one to one support swimming with service user... (the claimant) was escorted to the Office alone, then removed and suspended from site by Ms Dube.*” I cannot attach any weight to this statement. It is far from clear whether this individual was present and/or heard anything specific, even on the written account provided. This individual did not attend the hearing and it was not possible to clarify or challenge his account.

37. It was put to him that he was not suspended at any point during the exchange with Ms Dube. The claimant replied that Ms Dube “*told me I would be removed from site pending*”. When asked “*Pending what?*”, the claimant replied “*Not sure, just pending.*”

38. In the claim form, the claimant says that during the investigation meeting on 14 January 2022 (see below), he was first told he wasn’t suspended, then later told that he was. I found the claimant’s evidence on this point very confusing. He was asked in cross examination whether he was told at any point during this meeting that he was suspended; the claimant replied “*not to the best of my knowledge.*” He later said that “*They had stated even though I was told I had been suspended, the meeting was not about suspension. In the meeting, she said I was suspended. Really confused. I don’t know where I stand. What I understand was that I was suspended. When the meeting was issued, it was stated I wasn’t suspended.*” The claimant suggested he at the meeting on 14 January 2022, he was initially told he was not suspended, then later told that he was.

39. I have carefully reviewed both the notes and the transcript of the meeting on 14 January 2022. Both record that the claimant was explicitly told twice that he had not been suspended. I cannot see anywhere within the notes or the transcript of this meeting that the claimant was told he was suspended.

40. The respondent says the claimant was not suspended and could work if he agreed to wear a mask. This is consistent with the email dated 8 September

2021, what the claimant was told in the meeting on 14 January 2022, and the oral evidence from Ms Cashmore. The claimant's evidence on suspension is confused and unclear.

41. The claimant did not receive a written notice of suspension at any time.
42. Based upon the evidence as set out above, I do not find that the claimant was suspended.

Subsequent Events

43. The claimant wrote to the respondent on 22 September 2021. He noted there have been no correspondence sent to him. He set out:

You are assuming that I choose not to wear a face mask out of choice. This is not the ease and not factual representation.

Having to always wear a face mask, I could consider to be a health condition for myself.

Although I am not a doctor and would have to wait for an assessment, to which I am seeking advice on.

Not needing it to be of a concern until I am asked to wear one for hours at a time whilst with a service user.

To wear one when it becomes unsafe or impracticable and hinders progression and promotes regression in certain areas. For example, to wear a face mask while swimming, or to practise annunciation and pronunciation. Besides its importance for communication face to face.

...

I am willing to work and always have been.

...

I have also tried multiple attempts to access your latest FAQ online unsuccessfully.

The only guideline I could find was by PHE, PPE Guide. Version 2, 28-05-2021 which does not states a face mask is mandatory.

Please provide me your latest published Policy and Guidelines.

I looked at V6 20/08/2020 which deals with the managing of COVID- 19 Pandemic.

This also states these are guidelines with no mention of mandatory face mask as policy.

You did ask (Ms Dube) to print Policy/Guideline out for me.

I am still waiting for Caretech to address me and provide company policy pertaining to the mandatory face mask at all times with a service user. I

I had a look at online advice and guidelines, but nothing is mandatory regarding caretech madatory (sic) face masks unless administering physical care. We do not provide physical care in supported living.

44. The claimant sent a further letter dated 23 October 2021, in which he formally raised a grievance. He set out six issues of complaint, which included:

- Suspended from work with two company witness present whilst I was physically removed from site, whilst on already on duty.
 - No written notice of suspension or any correspondence at all in writing. Instead asked to sign a memo addressed to someone else.
 - Policy requested 22 09 2021, pertaining to mandatory face mask at all times with a service user. This has not been provided and is not stated in the employment policy. In fact no correspondence at this time.
 - Withholding wages with incorrect insufficient amounts. Providing no notice of reduction of hours or termination of contract.
 - Unlawful deduction of wages. I have not been paid for my contractual hours of 37.5 hours per week;
45. An investigation meeting took place on 14 January 2022, in respect of four allegations made against the claimant, which related to unprofessional and attitude concerns. This related in part to 8 September 2021 when the claimant left the site. One allegation related to an alleged failure to follow health and safety guidelines to protect colleagues and service users, specifically relating to wearing a mask.
46. The claimant takes issue with the minutes of the meeting. He further takes issue with the transcript of the meeting. He states, for example, that his name is not recorded on the transcript and that some of the content of the transcript is unintelligible. He refused to accept any part of the notes was accurate and stated there was a conflict as Ms Cashmore was the notetaker.
47. Ms Cashmore explained that the transcript was automatically generated by Microsoft Teams and as an 'external guest' to the meeting, the claimant's name would not necessarily appear. I accept that evidence.
48. There are errors in the transcript in the form of incorrect words with similar sounds having been recorded. However, on a comparison with the written notes produced by the respondent, I am satisfied that the notes, which are comprehensive, are an accurate reflection of the meeting.
49. The contents of that meeting, as far as they relate to the discussion around the claimant wearing a mask, read as something of a debate or argument. The claimant asserted a number of things, including that masks are not PPE. He also said in the meeting that the guidance did not apply to him because he did not provide direct personal care.
50. Within that meeting, the claimant said:

I'm in their social bubble...I'm not providing any clinical care...when I have requested policy, pertaining to face masks, all I was given was an advisory on face coverings. When I put into writing to request the relevant policy and documentation to show that it was a mandatory requirement of PPE, nothing has been provided and through my own research on your own websites, it does state that face masks are not part of PPE, and they're not mandatory. Now, if it's an advisory or guideline, then surely the employee has a choice. It's not mandatory. It's not policy. Second of all, it's not multiple house occupancy, so

it's not HMO, so we live in their bubble...We are pretty much in contact with each other all of the time, which would really not make a face mask of any benefit, the second of all, nobody asked the people in the house whether or not that would of their part of their preference. But if I was to provide the best level of care on one to one support, for example, being able to go swimming with or to the gym, or basically provided better standard of care and a better standard of living for that individual. Face mask cannot be worn at those times then I'm not able to adhere to what the company states as a guideline or in advisory.

51. The claimant also said that he was being singled out, and that others in the company were not always wearing masks. He was asked to provide their names.

52. The claimant was informed during the meeting that:

(T)he current guidance that you're working under is and this was on the 16th of July (inaudible) the risk to our service users remain high. Some of our service users remain unvaccinated and at higher risk of illness. As we continue following government guidance on testing, arising COVID cases in the community may have a significant effect on staffing levels. Staff must wear appropriate masks at work in health and social care. We will continue to our PPE and follow stringent infection potential prevention and control measures. That was our policy at the time

53. The following exchange is also recorded:

Claimant: If I choose not to wear a face mask that is my choice.
Ms Fisher: It isn't your choice
Claimant: It is. If it gives me health issues and I don't feel comfortable wearing one and it makes me feel that I'm unable to breathe, then I have the right not to wear a face mask. I spoke to my doctors about this. They backed me up and said that I do not have to wear a face mask. It is not a legal requirement.
Ms Fisher: Let me be very clear, it's Caretech's requirement that you wear PPE including face masks in all of our services.

54. Throughout that meeting, the claimant continued to argue that the requirement to wear a face mask was not policy. He stated:

That's a guideline. There is a difference between a guideline and an advisory and a policy and procedure. There are fundamental differences. One is a legal requirement, and in a contract that is binding. That would be policy. Whereas a guideline or advisory is something an employee should take into consideration

55. I have no doubt that the claimant was aware:

- a) It was a requirement of the respondent (his employer) that he wear a face mask at all times in the service
- b) It was his responsibility to meet with the GP and send the respondent the outcome of that meeting. However, that wouldn't mean that he wouldn't have to wear any face covering, as a risk assessment would be

carried out, with the potential of visors, or clear masks (as Ms Fisher set out in the meeting)

56. I also have no doubt that the claimant did not accept that the respondent's requirement to wear a face mask was a 'valid' one.
57. A meeting relating to the claimant's grievance took place on 23 February 2022. I have seen the notes of that meeting, which record the claimant stating he had only been provided with documents two weeks previously and confirming these were the documents he had requested.
58. During the 23 February 2022 meeting, the claimant referred to having been given an ultimatum by Ms Dube: to either put a face mask on or leave site. Within the meeting, he stated "*I don't have to wear a face mask – it's not PPE*" and that he did not provide personal care. He also stated:
- "You can't force across the board something that is detrimental to the health of other people".*
- "I didn't say that I was refusing to wear one, I said I would wear one where reasonable."*
- "I said that I wouldn't be able to wear a facemask all of the while. I can maintain a 2 metre distance. I was still within the company guidelines."*
59. Within the meeting, he was asked to reflect whether if he'd worn a mask, he could have remained on site. The claimant replied that "*I don't think that's relevant.*"
60. The claimant was told on 23 February 2022 that guidance had come out that day, which would refer to communal space, though not swimming. The claimant was asked if he was ok with that. He replied "*I don't know until I look at it.*" This is a clear example of the claimant demonstrating that he considered a management instruction was not sufficient, that a guidance document of itself was not sufficient, and that he himself would determine whether he would comply with wearing a face mask.

The Guidance

61. The 'guidance' is a document called 'Guidance on the use of PPE'. It has a Caretech header and it states at the top *This guidance is subject to change at short notice – please check the portal for updates daily*. The guidance refers to those providing direct personal care wearing fluid repellent surgical masks. It sets out that office staff should put on surgical masks when moving through care home environments (but are not required if working alone in an office). There are references to shared offices where robust risk assessments have been carried out; the guidance states that *if a workplace risk assessment has not been done then you should wear a surgical mask*.
62. Version 9 contains the following:
Type II Surgical Masks are now required in the following instance:

When within 2 metres of a resident but not delivering personal care or needing to touch them, and there is no one within 2 metres who has a cough

These recommendations apply:

- for tasks such as: performing meal rounds, medication rounds, prompting people to take their medicines, preparing food for residents who can feed themselves without assistance, cleaning close to residents*
- when working in communal areas such as dining rooms, lounges, corridors with residents*
- whatever your role in care (i.e. applies to all staff, care workers, cleaners etc.)*

*Type I or II surgical masks are required for the following**

When performing a task in a care home even with no direct contact with resident(s). Any other situation when in a care home and at a distance of 2 metres or more away from residents

These recommendations apply:

- when in a care home and not meeting conditions set out in 1 or 2*
- e.g. when working in staff only areas, such as staff common rooms, office, laundry room, kitchen.*
- whatever your role (i.e. applies to all staff, care workers, cleaners, receptionists etc.) even if you do not deliver care to residents*

63. Within Version 14 (16 July 2021), it sets out that *Staff must wear the appropriate masks at work in Health and Social Care, and We will continue to wear PPE and follow stringent infection prevention and control measures.*

64. Version 14 also contains a table, which sets out the type of mask required in different situations where an individual is carrying out personal care. It requires that anyone else entering the care environment, regardless of their role, is required to wear a surgical mask (type I or II). There is a footnote that that this is not considered to be PPE, as it is not for the purpose of protecting the staff member, but to prevent transmission (and therefore protect service users, rather than the wearer). This is the same footnote as indicated by the ‘*’ in the Version 9 guidance.

Medical Exemption

65. When asked about his email dated 22 September 2021, and the reference to the claimant choosing not to wear a mask, the claimant stated that he struggles wearing a mask all of the time, and this gives him ‘hot cognition’. He said he mentioned this to three individuals, including Ms Rogers and Ms Dube. He confirmed that he has spoken to the doctor about this, and the GP had recommended he look at a hidden disabilities website. The claimant said that he was not aware at the time that he would have required a medical exemption, as no guidance had been provided. Whilst the claimant may not have been

aware in September 2021, there can be no doubt that he was aware of the position on 14 January 2022, as set out above.

66. Ms Cashmore confirmed there was a process of considering adjustment or difficulties people have with mask-wearing and referred to possibilities such as more breaks, or an alternative mask. The claimant questioned why this hadn't been offered previously. Ms Cashmore replied that he had not mentioned physical difficulties with wearing a mask. Ms Cashmore also gave evidence that every time she had spoken to the claimant (which was 3-4 times between September and January), he had refused to wear a mask and had not referred to a disability, but had raised the argument related to the policies/guidance. I accept that evidence and consider it entirely consistent with everything I have read and heard.

Holiday Pay

67. There is no dispute that the claimant has not been paid holiday pay since 8 September 2021.

68. It is not in dispute that the claimant did not request to carry over any annual leave from 2021 to 2022.

69. The claimant is still employed by the respondent and is therefore still entitled to take paid annual leave during 2022.

Legal Principles

70. Unauthorised deductions are dealt with in the Employment Rights Act 1996 (ERA) as follows

13.— Right not to suffer unauthorised deductions.

(1) An employer shall not make a deduction from wages of a worker employed by him unless—

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

(2) In this section "*relevant provision*", in relation to a worker's contract, means a provision of the contract comprised—

(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation

to the worker the employer has notified to the worker in writing on such an occasion.

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

...

(7) This section does not affect any other statutory provision by virtue of which a sum payable to a worker by his employer but not constituting "wages" within the meaning of this Part is not to be subject to a deduction at the instance of the employer.

71. An employment contract is usually made up of both express and implied terms. Implied terms form a binding part of the contract and are those which the parties are taken to have agreed by virtue of the circumstances in which the contract has been made or performed.

72. A term can only be implied if the Tribunal can presume that it would have been the intention of the parties to include it in the agreement at the time the contract was made. In order to make such a presumption, the court must be satisfied that:

- the term is necessary in order to give the contract business efficacy
- it is the normal custom and practice to include such a term in contracts of that particular kind
- an intention to include the term is demonstrated by the way in which the contract has been performed, or
- the term is so obvious that the parties must have intended it.

73. In the absence of any contractual right to suspend without pay, a worker's wages are 'properly payable' while he or she is suspended from work, so long as the worker is ready and able to work as required (Kent County Council v Knowles EAT 0547/11).

74. In Gregg v North West Anglia NHS Foundation Trust 2019 ICR 1279, CA, the Court of Appeal offered guidance on pay during disciplinary suspension. An employee who does not work must show that he or she is ready, willing and able to perform work to avoid a deduction from pay. An 'involuntary' inability to work, or one resulting from an 'unavoidable impediment', may render the deduction of pay unlawful.

75. The Working Time Regulations (WTR) 1998 specifically provide that the right to statutory holiday pay under Regulation 16 does not affect any right of a worker to remuneration under his or her contract. The WTR specifically prohibit carry-over of basic annual leave (but not the 1.6 weeks' additional leave) into a subsequent leave year (Reg 13(9)(a)).

76. The Working Time (Coronavirus) (Amendment) Regulations 2020 enabled workers to carry holiday forward where the impact of COVID-19 meant that it

had not been reasonably practicable to take it in the leave year to which it related.

Application of the Law to the Facts

77. The claimant asserts that because his contract is for 37.5 hours, he is entitled to be paid for those hours, despite not physically working since September 2021. I have to determine whether the claimant's wages were properly payable in the circumstances.
78. One of the fundamental principles of an employment relationship is consideration (payment) for work done i.e. a wage for work. There is also an implied term that an employee will follow a reasonable management instruction; I consider this to be so obvious that a reasonable bystander would expect such a term to form part of an employment contract.
79. The respondent's case is that the claimant could and can work if he wears a mask, in accordance with the respondent's guidance and requirements. The respondent says the claimant repeatedly refused to wear a mask, despite being asked to do so, stating that the basis on which the request was being made was 'only' guidance and he did not therefore need to comply. In his evidence, the claimant denied this and said that he would be willing to wear one in accordance with guidance when this was provided, but not when he accompanied a service user swimming. As set out above, I do not accept that this is a true reflection of the claimant's position. The evidence is consistent that the claimant believed and continues to believe that he is not required to wear a mask, and that the guidance does not raise a requirement to wear a mask. The claimant has been provided with the guidance documents and has remained of the view that he does not need to wear a mask.
80. In my judgment, the claimant's arguments around policy vs guidance and what amounts to PPE all miss the fundamental point that he had been instructed by his employer to wear a mask, in accordance with its guidance. Furthermore, it is an explicit, express term of the claimant's contract that he is required to *work within the stated guidelines, policies and procedures of the Company at all times, having the highest regard for safety and well being*. He was not willing to do so, again as demonstrated by his continued and ongoing disagreement with the applicability of the guidance.
81. Notwithstanding the claimant's statements at various points that he has not refused to wear a mask, I reject that these reflect his position. It is abundantly clear from the contents of the meetings, and from the oral evidence, that he does not accept the requirement or instruction from his employer; this is evident from his ongoing debates and arguments about policy vs guidance, the government mandates and whether masks constitute PPE. He has also raised an issue as to his ability to wear a mask, without providing any evidence of the same.
82. I add here, for the sake of clarity, that I accept the requirement by the respondent that the claimant wear a mask was an objectively reasonable

management instruction. I note that although society-wide restrictions had eased by September 2021, health and care providers continued (and continue) to impose different rules and standards. I also accept that the respondent provides support to individuals with physical and mental difficulties, and there was guidance in place at the time to protect those individuals from Covid-19. The instruction therefore cannot be said to be arbitrary or wholly unreasonable. In any event, the claimant's contract of employment requires him to work within the company's stated guidelines, policies and procedures. I also make the observation that what the claimant alleges others were doing, or not doing, does not render the instruction to him null and void.

83. I therefore conclude that the claimant was not ready, able and willing to work, and that this was not due to an involuntary inability or an unavoidable impediment; rather, it was a definite and conscious choice made by the claimant on the basis that he did not consider the guidance was sufficient to impose a requirement upon him, nor did he consider it applied to him.
84. The claimant was required to attend work wearing a mask, which he was not prepared to do. I accepted the evidence that he could (and can) attend work if wearing a mask, and that there was no suspension. The claimant did not attend work because he had chosen not to comply with the instructions and requirements of the respondent, not because he had been prevented from going to work by any suspension.
85. The claimant is not entitled to holiday pay for the year 2021, as he did not request to carry any forward, as is required by the contract. I did not hear any evidence that it was not reasonably practicable for the claimant to take leave in 2021.
86. The claimant remains an employee of the respondent and so is entitled to paid holiday pay in 2022. He is not entitled to any accrued holiday pay, as he remains employed.

Employment Judge Anderson

24 October 2022