Shanks v Lothian Health Board [2023]

Covid
PPE
Dismissal

Summary

The case concerned an appeal by the claimant, who worked as a catering assistant at Edinburgh Royal Infirmary during the COVID-19 pandemic.

The respondent, Lothian Health Board, required employees to wear face masks in line with Scottish Government guidance and regulations under the Coronavirus Act 2020.

The claimant objected to this requirement, questioning the scientific basis for mask-wearing and providing her own research suggesting masks were unnecessary.

She requested the employer to provide evidence supporting the mandate but continued to refuse to comply. This led to disciplinary proceedings and ultimately her dismissal.

Claim

The claimant brought an unfair dismissal claim before the Employment Tribunal (ET), which was dismissed. She then appealed to the Employment Appeal Tribunal (EAT), arguing that the Scottish Government lacked authority to mandate mask-wearing because such measures constituted "prophylactic treatment" under paragraph 3 of Schedule 19 to the Coronavirus Act 2020. This provision prohibits regulations requiring medical treatment, and she contended that masks fell within that definition. Therefore, she claimed the respondent's reliance on such guidance was unreasonable and ultra vires.

EAT's Reasoning and Analysis

Interpretation of the Coronavirus Act 2020

The claimant contended that wearing masks constituted "medical treatment" as defined in paragraph 3 of Schedule 19, which forbids regulations mandating such treatment. However, the EAT dismissed this interpretation, clarifying that the provision aimed to prevent compulsory medical interventions, such as vaccinations or medications, rather than general health and safety measures. Masks were classified as a preventive measure, not a therapeutic one.

Legality of Government Guidance

The EAT affirmed that the Scottish Government's guidance requiring masks was lawful and within its authority. This guidance was issued under emergency health regulations to safeguard public health during the pandemic. Employers who adhered to this guidance were acting reasonably and lawfully.

Employer's Instruction Was Reasonable

The tribunal highlighted that the employer's directive to wear masks was a reasonable management decision, especially in the context of a global health crisis and the necessity to protect both staff and patients. The claimant's refusal to comply compromised workplace safety and the organisation's compliance obligations.

Fairness of Dismissal

In accordance with section 98 of the Employment Rights Act 1996, the EAT determined that the dismissal was fair. The employer had a legitimate aim—ensuring health and safety—and the dismissal fell within the range of reasonable responses. The claimant was provided with opportunities to comply and voice her objections, but her ongoing refusal justified her termination.

Proportionality and Human Rights Considerations

The EAT examined whether mask-wearing infringed on personal autonomy or human rights. It concluded that any interference was minimal and proportionate to the significant public health threat posed by COVID-19. This measure was temporary and focused on safeguarding vulnerable individuals.

Key Legal Principles

SCOPE OF "MEDICAL TREATMENT" UNDER THE CORONAVIRUS ACT 2020

The EAT clarified that the prohibition on requiring medical treatment in paragraph 3 of Schedule 19 does not extend to health and safety measures such as mask-wearing. Masks are considered precautionary, not therapeutic.

EMPLOYER'S DUTY TO FOLLOW PUBLIC HEALTH GUIDANCE

Employers are entitled—and expected—to implement measures aligned with government guidance during public health emergencies. Compliance with such guidance is a reasonable management instruction.

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FAIRNESS OF DISMISSAL FOR NON-COMPLIANCE
Refusal to comply with lawful and reasonable instructions, particularly those aimed at safeguarding health, can justify disciplinary action and dismissal. The fairness test under section 98 of the Employment Rights Act 1996 was satisfied.

PROPORTIONALITY AND REASONABLENESS
The tribunal emphasised that measures must be proportionate to the risk. In this case, mask-wearing was a minimal intrusion compared to the significant health risk posed by COVID-19.

Similar Cases

KUBILIUS V KENT FOODS LTD [2021] ET
Facts: Lorry driver refused to wear a mask at a client site, claiming his cab was his workplace and masks were not legally required.
Decision: Tribunal upheld dismissal. Employer acted reasonably to maintain client relationships and enforce health and safety.
Key Principle: Compliance with client health and safety rules is a legitimate expectation; refusal can amount to misconduct.

FORDHAM V COMPASS GROUP (2024 ET)
Facts: Hospital porter refused to wear a mask due to anxiety and claimed disability discrimination.
DECISION: TRIBUNAL FOUND DISMISSAL FAIR; EMPLOYER EXPLORED ALTERNATIVES BUT MASK-WEARING WAS ESSENTIAL IN CLINICAL SETTINGS.
Key Principle: Legitimate aim of protecting health and safety outweighs individual objections when no reasonable adjustments are feasible.

AB v CD Ltd [2025] EAT
Facts: Employee refused to attend office due to mask mandate, citing disability and philosophical belief.
Decision: EAT dismissed appeal; no evidence of disability and belief lacked cogency under Grainger test.
Key Principle: Personal objections or loosely held beliefs do not qualify for Equality Act protection; employers can enforce mask policies.

RODGERS V LEEDS LASER CUTTING LTD [2023] CA
Facts: Employee refused to return to work during lockdown, citing general COVID fears.
Decision: Court of Appeal held dismissal was not automatically unfair; belief in danger must be workplace-specific and reasonable.
Key Principle: Section 100 ERA protection applies only where there is a reasonable belief of serious and imminent workplace danger, not general pandemic fears.

ACCATTATIS V FORTUNA GROUP [2021] ET
Facts: Employee requested furlough or remote work due to COVID concerns.
Decision: Tribunal held dismissal was not automatically unfair; requests were not "appropriate steps" under ERA s.100.
Key Principle: Employees must take proportionate steps to protect themselves; employers retain discretion on operational needs.

Overall Themes

Tribunals consistently uphold dismissals where employers follow government guidance and act reasonably.

Health and safety measures (e.g., masks) are not "medical treatment" and can be enforced.
Disability and belief claims require strong evidence; personal discomfort or political views are insufficient.

Section 100 ERA protection is narrow—employees must show specific, imminent workplace danger.

PERCEPTION OF MASK-WEARING
Shanks viewed the requirement to wear a face mask not as a simple health and safety measure but as a form of "medical treatment". She believed that masks were ineffective and potentially harmful, relying on her own research rather than official guidance. This perception led her to challenge the legitimacy of the Scottish Government's mandate and the employer's reliance on it.

PERCEPTION OF EMPLOYER'S AUTHORITY
She perceived the employer's instruction as unreasonable and unlawful because, in her view, the government lacked authority to impose mask mandates under the Coronavirus Act 2020. This belief shaped her refusal to comply and her insistence on scientific justification from the employer.

> The term **ultra vires** is a Latin phrase meaning "beyond the powers." In legal and administrative contexts, it refers to actions taken by a person, organisation, or public authority that exceed the scope of their lawful authority.

The claimant argued that the Scottish Government acted ultra vires by mandating mask-wearing, claiming this was prohibited under the Coronavirus Act 2020. The EAT rejected this, holding that mask requirements were within the government's powers as health and safety measures, not "medical treatment."

The Coronavirus Act 2020 has been withdrawn from the Statute table 20th October 2023

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