# EMPLOYMENT TRIBUNALS

**Claimant:** Mr Darrell Miles

**Respondent:** Driver and Vehicle Standards Agency

**Heard at:** Leeds **On:** 18, 19, 20 and 21 January 2022
4 February 2022 (in chambers)

**Before:** Employment Judge Jones
Mr D Dorman-Smith
Mrs S Robinson

**REPRESENTATION:**

**Claimant:** Ms B Criddle, counsel
**Respondent:** Mr A Serr, counsel

# JUDGMENT

1. The claimant did not resign as a result of a fundamental breach of contract of the respondent. The claims for unfair dismissal are dismissed.

2. The respondent was not subject to detriments for raising health and safety concerns and his complaints under section under section 44(1) of the Employment Rights Act 1996 (ERA) are dismissed.

3. The claimant was not a disabled person. His claims for disability discrimination are dismissed.

# REASONS

1. The findings of the Tribunal are unanimous.

**Introduction**

2. The claimant was employed by the respondent as a driving test examiner. The claimant says that as a clinically vulnerable individual he could not undertake

that work safely. The respondent's view was that he could and that all reasonable steps had been taken in accordance with prevailing guidance to create a Covid safe environment. After the claimant told the respondent on 28 July 2020 that he would not return to work, he was informed that he should return on 6 August or take a period of unpaid leave. The claimant instead resigned on 10 August with an effective date of termination of 7 September 2020.

3. On 16 November 2020 the claimant brought the following claims in respect of these matters:

3.1 Automatic Unfair Dismissal (s.100(1)(c), (d) and (e) ERA);
3.2 Ordinary Unfair Dismissal (s.94 ERA);
3.3 Detriment (s.44(1)(c), (d) and (e) ERA);
3.4 Discrimination arising from a disability (s.15 Equality Act 2010);
3.5 Failure to Make Reasonable Adjustments (s.21 Equality Act 2010)

**The Issues**

4. At a preliminary hearing on 17 February 2021 Employment Judge Maidment identified the issues which arise for determination in the above claims.

**The Evidence**

5. The claimant gave evidence. The respondent called Mr Lee Mitchell, Local Driving Test Centre Manager at Pontefract and Doncaster, Mr Loyd Baker, HR Business Partner, Ms Paula Pitcher, Director of People, Mr Roy Paddon, Head of Health and Safety.

6. The parties submitted a bundle of documents running to 989 pages.

**The Law**

Discrimination

7. By section 39(2) of the Equality Act 2010 (EqA):

*An employer (A) must not discriminate against an employee of A's (B)—*

*(a) as to B's terms of employment;*

*(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;*

*(c) by dismissing B;*

*(d) by subjecting B to any other detriment*.

8. By section 109(1) of the EqA, anything done in the course of a person's employment must be treated as done by the employer and by section 109(3) it does not matter whether the thing is done with the approval or knowledge of the employer.

Disability

9. Section 6 of the Equality Act 2010 defines disability as a physical or mental impairment which has a substantial and long-term adverse effect on a person's

ability to undertake normal day-to-day activities. By section 212(1) of the EqA substantial means more than trivial or minor.

10. Paragraph 2 of Schedule 1 to the Act defines "long-term effect". An impairment will have been long-term if it lasted for at least 12 months or was likely to last for at least 12 months or was likely to last for the rest of the life of the person affected. In ***SCA Packaging Limited v Boyle [2009] UKHL 37*** the House of Lords held that likely, in this context, meant 'could well happen'.

11. By paragraph 2(2) of Schedule 1 of the EqA, if an impairment has ceased to have a substantial adverse effect on a person's ability to undertake normal day to day activities it is to be treated as continuing to have that effect if it is likely to recur.

12. Paragraph 5 of Schedule 1 provides that an impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if measures are being taken to treat or correct it and, but for that, it would be likely to have that effect. In ***RBS v Morris [2012] UKEAT/0436/10 MAA*****,** at para 61 Underhill J said of this provision, "*This is just the kind of question on which a tribunal is very unlikely to be able to make safe findings without the benefit of medical evidence, and the same applies to potential reliance on paragraph 2(2) of Schedule 1… it would be very difficult for the Tribunal to assess the likelihood of risk or the severity of that if it eventuated without expert evidence*."

13. Guidance on the definition of disability has been issued by the Secretary of State pursuant to section 6(5) of the EqA.

Discrimination arising from disability

14. Section 15 of the Equality Act 2010 (EqA) provides:

*(1) A person (A) discriminates against a disabled person (B) if—*
*(a) A treats B unfavourably because of something arising in consequence of B's disability, and*
*(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.*

*(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability*.

The duty to make adjustments

15. By section 20(3) of the EqA, there is a requirement to take such steps as is reasonable to avoid a substantial disadvantage which a disabled person is placed at by a provision, criterion or practice applied by the employer.

Unfair dismissal

16. By section 94 of the ERA an employee has the right not to be unfairly dismissed.

17. A dismissal is defined by section 95 of the ERA and includes the employee terminating the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct, section 95(1)(c). This is known as a constructive dismissal.

18. In order for there to be a constructive dismissal, the employee must have resigned because his employer has committed a fundamental breach of contract and he must not have otherwise affirmed the contract, for example by delaying his resignation and thereby evincing an intention to continue to be bound by the terms of the contract, see ***Western Excavating (ECC) Ltd v Sharp [1978] ICR 221*** and ***Buckland v Bournemouth University [2010] IRLR 445***. The term is not to be equated to a duty to act reasonably. In respect of what is required in the nature of the breach, it is whether the employer, in breaching the contract, showed an intention, objectively judged, to abandon and altogether to refuse to perform the contract, see ***Tullett Prebon PLC v BGC Brokers LP [2011] IRLR 420*** and ***Leeds Dental Team Ltd v Rose [2014] IRLR 8***.

19. There is an implied term in a contract of employment that neither party shall, without reasonable and proper cause, act in a way which is calculated or likely to destroy or seriously undermine the relationship of trust and confidence between the parties, see ***Malik v BCCI SA (in liquidation) [1998] AC 20***.

20. There is an implied term in a contract of employment that an employer shall take reasonable care to ensure that plant, tools, equipment, premises and the system of work used are safe, see ***Wilson v Clyde Coal Co v English [1958] AC 57*** and not to subject the employee to unnecessary risk, see ***Wilson v Tyneside Windows Cleaning Co [1958] 2 QB 110***.

21. Section 100 ERA 1996 provides:

*(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that—*

*(c) being an employee at a place where—*

*(i) there was no such [health and safety] representative or safety committee, or*

*(ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means, he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety;*

*(d) in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work;*

(e) *in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger.*

*(2) For the purposes of subsection (1)(e) whether steps which an employee*

*took (or proposed to take) were appropriate is to be judged by reference to all the circumstances including, in particular, his knowledge and the facilities and advice available to him at the time.*

22. In ***Balfour Kilpatrick v Acheson [2003] IRLR 683***, the Employment Appeal Tribunal held, that to give effect to EU law under the Directive, the words '*or to communicate these circumstances by any appropriate means to the employer*' must be read into the end of subsection 100(1)(e), if the employee could not avail himself of the provision in section 100(1)(c) because it would have been reasonably practicable to communicate with the health and safety representative or the committee.

**Background/findings**

25. The respondent is an executive agency of the Department of Transport. The Tribunal considered that Ministry of State was the correct named respondent as an executive agency has no legal status, but nothing turns on this point. It has the statutory responsibility to administer driving tests.

26. The claimant commenced his employment as a driving examiner at the Pontefract Driving Test Centre on 6 January 2016.

27. On 12 November 2018 the claimant was informed by his GP that he had stage IV chronic kidney disease (CKD). The claimant had had an earlier appointment with another GP who had referred, incorrectly, to him having kidney failure. The claimant was unhappy with that diagnosis which led to the appointment on 12 November 2018 with the senior GP in the practice.

28. The categorisation of the condition as stage IV was incorrect. After commencing these proceedings, the claimant asked for clarification from his GP and was told it was stage II. Stage IV is severely reduced kidney function with a plan for end stage kidney failure. Stage II is mildly reduced kidney function which is managed by patient control of blood pressure and risk factors. The claimant did not know what either stage II or stage IV meant until he issued these proceedings.

29. In March 2019 the claimant informed Mr Mitchell about his diagnosis. He informed Mr Mitchell that he used the toilet more often but did not raise any other issue.

30. There was no guidance in mid-March about how underlying health conditions were affected by Covid 19. The claimant raised his concern about the pandemic and how it might affect him because of his kidney condition with Mr Mitchell. Mr Mitchell instructed him to stop work on 17 March 2020. He was one of the first examiners in his department to be sent home. On 18 March 2020 driving tests ceased, save for critical tests which continued. These were for emergency workers, delivery and HGV drivers. They were undertaken by 376 driving examiners who had volunteered. All other examiners were placed on paid leave.

31. On 5 June 2020 Mr Mitchell had an individual assessment meeting with the claimant to discuss a return to work. The claimant said that he believed he fell within the clinically vulnerable (CV) category in the Government guidance and that

he was worried about catching the virus and the effects it may have on him. He felt that it was not safe for him to return in the current climate. He was advised that people who fell within the CV category would be expected to return to work in line with the Government guidance when tests recommenced. Mr Mitchell said that measures to protect the health and safety of staff would be taken. The claimant said he felt he could not be expected to make a decision about returning to work without guidance from the respondent about how and when. He said he would speak to his doctor to find out what risks there were to him in returning. There were no adjustments he felt could be made at this time. He said he would speak to his doctor after a decision had been made about a date and plan for a return.

32. On 25 June 2020 the respondent announced a decision of the Department of Transport that driving tests would recommence the following month. Those in the CV category were expected to return to work but those in the CEV category would remain on paid leave. The same day, 25 June 2020, Mr Mitchell held a workplace induction meeting with the claimant by telephone to explain the proposals.

33. On 2 July 2020 Mr Mitchell again spoke to the claimant. The claimant said that Government guidance about social distancing in a car was not possible and he wanted a further discussion after he had spoken to his GP.

34. On the same day, 2 July 2020, the claimant telephoned the surgery and spoke to someone who he believes was the receptionist. He asked for his doctor to advise him about his workplace safety because he had to sit next to a candidate in a car for his full shift. He was told that his GP could not advise or provide a letter because the practice was not in a position to know if his working environment was safe. The claimant was advised to speak to occupational health. He said he wanted to be signed off sick for stress. He was advised to self-certify for 7 days after which he could return for a doctor's note.

35. On 6 July 2020 the union representative of the claimant contacted Mr Mitchell and said the claimant had serious concerns about a return due to his 'serious kidney condition' and his wife undergoing diagnosis of a heart condition. He asked for the claimant to be placed on special leave on full pay until the Covid situation improved.

36. On 8 July 2020 Mr Mitchell replied to say he had taken advice from HR and that those in the CV category were expected to return. He stated this adhered to Government guidelines and advice from Public Health England. He explained that safety measures were to be put in place and asked if there were any further adjustments that might benefit the claimant. If the claimant chose not to return, he agreed he could take annual or special unpaid leave with a review.

37. The claimant replied on 10 July 2020 and confirmed he would not be returning because he did not think it was safe. He said the situation was causing him severe stress and anxiety with many sleepless nights. He cited legislation that he said would be breached if he returned, namely Article 8(4) of the Framework Directive and sections 44 and 100 of the ERA and said he was relying on Government guidance. He invited Mr Mitchell to get in touch if he wished to discuss the decision further.

38. On 13 July 2020 Mr Mitchell spoke to the claimant who informed him that he believed he was at serious risk because of his CKD and no adjustments would resolve it. He said he believed the respondent was not following Government guidance.

39. On 29 July 2020 Mr Mitchell spoke again to the claimant. The claimant repeated his view and said he had set it out in his letter of 10 July 2020. He said the situation was causing him stress.

40. On 30 July 2020 Mr Mitchell wrote to the claimant and confirmed the respondent's position which was that his views about the risks to his health had been considered but the respondent regarded the measures they had taken as sufficient to safeguard them and that if he did not return on 6 August 2020 he would be placed on special unpaid leave and the matter reviewed within a week. The unpaid leave would not count towards reckonable service for his pension.

41. On 5 August 2020 the claimant sent an email headed 'forced return to work' and summarised his concerns. He drew attention to the Public Health England Report on Disparity and Risks.

42. On 10 August 2020 the claimant resigned and gave 4 weeks' notice during which he took his outstanding holiday leave.

**Analysis**

Disability

43. The claimant has stage II CKD which was first diagnosed on 18 November 2018. On 22 March 2019 the test results showed a granular filtration rate of 74 (which would have fallen within stage II) and an acute kidney injury reading of 0. He was not prescribed with any drugs. On 6 March 2020 further tests had the same readings.

44. Prior to March 2020 the effect upon the claimant was that he drank up to 2.5 litres of water per day. He said this was to avoid him developing kidney stones. He was prescribed a drug for reducing the need frequently to urinate. It is not clear if the increased micturition was simply because of the extra liquid the claimant consumed or for some other medical condition, there being others in the medical notes. He avoided people who were unwell so as to avoid the risk of catching an infection. He continued to do the shopping but would move away from someone who coughed or sneezed.

45. After March 2020 the claimant's habits have changed because he does his shopping online. He socialises less to avoid contagious people.

46. The claimant has a physical impairment, in the form of stage II CKD. That was apparent from the GP notes. There was no other medical evidence than the medical records with redactions. The claimant produced online publications from the NHS about CKD and guidance for patients with kidney disease, and the significance of Covid 19 from an organisation called Kidney Care UK dated 23 March 2021.

47. We have had regard to the claimant's own evidence. He says that his kidneys function at 67% of normal[1] are manageable and he does not take any medication for the condition. He says he would need to if there was a deterioration. He attends for annual blood tests to monitor his kidneys. He receives free flu and pneumonia inoculations as a result of his CKD.

48. The claimant said that he is at a higher risk of developing serious complications which could result in hospitalisation and he has a weakened immune system. We were anxious not to draw assumptions about such propositions given our lack of medical knowledge, where there was no other supportive material. The NHS overview publication stated that CKD could range from a mild condition with no or few symptoms to a very serious condition where the kidneys stop working. It refers to an increased risk, even in mild cases, of developing more serious problems such as cardiovascular disease but there is no reference to a weakened immune system.

49. The claimant says he has had haematuria on two occasions in July 2020 and October 2020 and that one of the causes is a kidney infection. The GP and ambulance records refer to the CKD as an underlying condition but make no comment about its impact on the haematuria. We have no contemporaneous medical note about the July incident. We are unable to find a connection between the haematuria and CKD in the absence of medical opinion.

50. The claimant said that he had had kidney stones on two occasions one of which was in March 2019. These were very painful episodes but passed. There is no record in the medical notes about kidney stones. We faced the same difficulty about attribution of this problem to CKD.

51. We are not satisfied the physical impairment, CKD, had a substantial adverse effect on the claimant's ability to undertake normal day to day activities. In his evidence to the tribunal the claimant referred to an increase in urination which he controlled by drugs. That seems to contradict his impact statement in which he stated that he took no medication for the CKD and made no mention of a urination problem. We assume the increased micturition has some connection with the additional liquid intake to avoid the risk of kidney stones. The claimant gave no evidence of how frequently he had been to the toilet before he took drugs to control it and to what extent that adversely affected his normal daily activities, if at all. Even disregarding the improvement brought about by the drugs, assuming this is connected to the CKD, for the purpose of paragraph 5 of Schedule 1 of the EqA we could not find the enhanced need to use the toilet had more than a trivial impact on everyday activities. The increased intake of liquid might have been a modification of behaviour to reduce the risk of any impairment on day to day activities. If so, it was of a reasonable type to be expected, as envisaged in paragraph B7 of the Guidance of the Definition of Disability. The good diet the claimant adopts is a similar reasonable lifestyle adaptation given the risks of cardiovascular disease alluded to in the NHS overview.

[1] There is no reference to the extent by which kidney function was reduced in the medical notes.

52. Avoiding people who might be infectious is also such a reasonable strategy, but it was not of particular significance, that is more than minor or trivial. Whilst we are mindful of the fact that we must focus on what the claimant could not do rather than what he could, in assessing his evidence we were left with the impression that there had been no significant (more than minor) reduction in what and how the claimant went about his daily life.

53. When the claimant was referred to the occupational health advisors in September 2019 for a back problem, there was no reference to any issue arising from the CKD. This reflects the fact the condition was asymptomatic and not an interference with the claimant's life.

54. We accept that after the pandemic the claimant became more reluctant to leave the house to do activities, such as by ordering on-line shopping. We have considered paragraph B9 of the Guidance, which advises that account should be taken of where a person avoids doing things which, for example, cause pain, fatigue or substantial social embarrassment or because of a loss of energy or motivation. The example is given of a person who has panic attacks because of a mental health condition who manages going to work by avoiding rush hour. The claimant was cautious about going out in the spring and summer of 2020 as were many people. He was influenced by his anxiety about CKD and his understanding that he was within the CV category. That was a very broad category including all those over 70. His knowledge of his own condition was limited. His impact statement did not disclose anything which we regarded as beyond the reasonable avoidance measures reflected in B7 rather than B9.

55. The claimant did not go back to work because of his belief about the significantly enhanced risks caused by Covid 19 as a person with CKD. We consider the reasonableness of that belief below. Not going to work would be a more than minor or trivial (substantial) adverse effect on normal day to day activities, but we must be satisfied it was the CKD, a physical impairment, which caused that and not an unreasonable belief. We are not addressing a mental health impairment. The claimant did not self-certify as sick on 2 July 2020 for the stress he said he was suffering nor ask for a medical fit for work note for that after 7 days, as advised and then when he contacted the surgery 4 days later made no mention of stress or work related issues. In the absence of more than these medical records, general extracts about CKD in publications and the claimant's opinions, the casual connection of this adverse effect, not returning to work, was not established.

56. There was a paucity of reliable material, some of which was contradictory. The document produced by the claimant from Kidney Care UK did not categorise stage II CKD as falling within the CV category, as it stated only stage III to stage V would be CV or CEV. The tenor of the advice from Kidney Care UK was that those in stage III and above should take particular care, but the advice to others was very similar to general advice to the public. Government guidance, on the other hand, refers simply to kidney disease as being in the CV category, without differentiating between different stages of the condition. At times such guidance says it 'may' do so, but the claimant's managers and the respondent's human resources advisors regarded the claimant as in the CV category and we consider that to be reasonable, given the uncertainties which prevailed. PHE referred to a greater co-morbidity rates

within which those with CKD were included, but there was no satisfactory breakdown to assist us with whether that was across the spectrum of gravity of the condition or at which point the risks became marked on the one hand or not significant on the other. Against this backcloth, we reminded ourselves of the guidance of the EAT in ***Morris.*** It was for the claimant to discharge the burden of proof in respect of being a disabled person and for him to establish the casual connection between the physical impairment and its substantial and long-term adverse effect on activities. He has not done so.

57. The claimant says that his condition is covered by paragraph 8 of schedule 1, which concerns progressive conditions. Paragraph 8(2) provides that P is taken to have an impairment which has a substantial adverse effect if the condition is likely to result in P having such an impairment. In ***Mowat-Brown v University of Surrey [2002] IRLR 235*** the Employment Appeal Tribunal was concerned with a condition of muscular dystrophy in which medical opinion evidence had been adduced. It upheld a ruling that it was not a progressive condition under the provision in that case. In respect of the proper approach to the previous passage under the Disability Discrimination Act, the EAT held, "*the question to be asked is whether, on the balance of probabilities, the claimant has established that the condition in his case is likely to have a substantial adverse effect. It is not enough simply to establish that he has a progressive condition and that it has or has had an effect on his ability to carry out normal day-to-day activities. The claimant must go on and show that it is more likely than not that at some stage in the future he will have an impairment which will have a substantial adverse effect on his ability to carry out normal day-to-day activities. How the claimant does this is up to him. In some cases, it may be possible to produce medical evidence of his likely prognosis. In other cases, it may be possible to discharge the onus of proof by statistical evidence*". The direction about 'balance of probabilities' and 'more likely than not' must now be revised to '*could well happen*' in the light of the Supreme Court decision in ***Boyle***, but otherwise remains valid.

58. Paragraph 8(1) requires P to have a progressive condition and that appears to be a pre-requisite to the further requirements in paragraphs 8(1)(b) and (c). The previous provision in the Disability Discrimination Act 1995 include specific examples ("such as cancer, multiple sclerosis or muscular dystrophy or infection by the human immunodeficiency virus"), but they have been omitted in the Equality Act 2010. In the absence of medical evidence, we have some difficulty in determining that CKD would be categorised as a progressive condition. We assume however, that this provision is intended to cover any condition which could deteriorate, which is seemingly very broad.

59. Assuming CKD is a progressive condition, the deeming provision in paragraph 8 shall apply if as a result of the condition P has an impairment which has or had an effect on P's ability to carry out normal day to day activities whether or not the effect was substantial, paragraphs 8(1)(a)(b) AND if the condition is likely to result in P having such an impairment with a substantial effect, paragraph 8(2). Paragraphs 8(1)(b)(c) and 8(2) do not focus of the general nature of the condition, unlike paragraph 8(1)(a), but on how it affects the claimant.

60. We recognise the changes we have found which have led to adaptions to the claimant's lifestyle are minor or trivial effects of the impairment on the claimant's ability to carry out normal day to day activities, so as to satisfy paragraph 8(1)(b)(c).

61. We are not satisfied the evidence establishes that the condition is likely to result in the claimant having substantial adverse effects in the future, to satisfy paragraph 8(2). We recognise that 'likely' in this context must mean 'could well happen'. The only evidence on this matter is the NHS overview which states, "*Most people with CKD will be able to control their condition with medicine and regular check-ups. CKD only progresses to kidney failure in around 1 in 50 people".* We have no evidence at all as to the claimant's prognosis. Recognising that statistical evidence might be sufficient to discharge this burden, as observed in ***Mowat-Brown***, we are not satisfied this statistical evidence does so.

62. A 2% chance of developing kidney failure expressed in such general terms cannot be interpreted as an outcome which 'could well happen' in the case of the claimant. Although 'could well happen' is a lower test than more likely than not, it involves an assessment of chance or possibilities which is not infinite. The smaller the risk the more remote the chance of the outcome. For the individual with CKD any such risk may be alarming, but we regard 2% as beyond even the revised standard of proof in ***Boyle***. It has to be read with the qualification that most people will be able to control the condition with medicine and regular check-ups. There are many symptoms far less serious than kidney failure, to which the 2% risk refers, which are more than trivial (substantial) which might arise. Moreover, the above qualification involves the use of medication which would be subject to the deduced effects re-evaluation. But we simply have no evidence about those and their possibilities with respect to the claimant.

63. For the above reasons we do not find that the claimant was a disabled person. The disability discrimination claims cannot succeed.

Detrimental treatment

64. The three detriments are [i] having been placed on unpaid leave, [ii] being subject to regular telephone calls and debates surrounding his refusal to return to work on the grounds of health and safety and [iii] not providing the claimant with alternative work from being exposed to members of the public in close proximity.

65. In the absence of specific authority on the meaning of detriment in the ERA, we agree with counsel for the claimant that it has the same meaning as under the EqA, namely being what a reasonable worker would regard as a disadvantage but not an unjustified sense of grievance.

66. On the facts as we found them, there was no detriment. The claimant was on unpaid leave because he chose not to work. We are not satisfied he was exposed to risks which were disproportionate and inappropriate having regard to his health, as explained below. He was not subject to any requirement to report for duty nor threatened with disciplinary action for not discharging his contractual obligations. The respondent recognised the very unusual circumstances which prevailed and agreed to discuss matters with those in the CV group to reassure them and dispel

any worries. In the event any such individual chose not to work he would be entitled to take unpaid leave. A reasonable worker would not regard that arrangement as a detriment. We reject the suggestion that the review constituted inappropriate pressure. The situation could not remain indefinitely. This was a fast-moving situation with respect to the control of the pandemic and the scientists understanding of it. A reasonable employer would be required to review the decision about whether absences should be allowed, having regard to their statutory duties to facilitate driving tests.

67. We reject the allegation that Mr Mitchell behaved improperly in contacting the claimant excessively and placing him under pressure, leading to stress and sleepless nights. We have recorded the contacts above. They were necessary for Mr Mitchell to explain the respondent's position as lockdown was lifted and a return to work facilitated. He carefully recorded the conversations. He and Mr Baker were criticised for not referring the claimant to occupational health, but the claimant had said he would revert to them with his doctor's advice. He never did. He did not ask for a referral to Occupational Health, notwithstanding that is what the GP practice had recommended. He drew no additional medical information to the attention of his employer to justify why his case fell outside the broad categories of those who were to return and those who were not. This was in the context of the respondent having to facilitate the return of a substantial number of staff. We do not doubt the claimant found this was stressful and upsetting, but it was not because of how Mr Mitchell handled the conversations.

68. We accepted the evidence of Mr Baker that there was no alternative work to offer, save for on a very limited short-term basis if the claimant was to return to full duties thereafter. He had to consider those in the CEV group who could not return to ordinary duties and there were very limited opportunities. It was not a detriment to fail to offer work if none was available.

*Did the claimant bring to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety, being an employee at a place where there was no health and safety representative or safety committee, or there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means.*

69. The claimant brought to his employer's attention circumstances connected with work which he believed were harmful to his health. That was in discussions he had with Mr Mitchell, in June and July and his correspondence. The Government guidance on Covid 19 led him to believe that he was in the CV category because of his CKD. PHE advised that such a category of persons, broad though it was, had higher risks of co-morbidity. It was accepted that it was not possible to facilitate social distancing in a car and that remained the preferred means of minimising exposure. None of these points are particularly contentious and the claimant's views were based upon contemporaneous publications of the Government. They were reasonable, because at this time no-one could eliminate the risks which the pandemic brought, but only minimise them. The provision does not require us to quantify the risks, nor evaluate the measures to be taken by the employer to reduce them. It is sufficient if the employee's belief was reasonably held. As counsel points

out, it is not for the tribunal to decide that whether others such as the employer, shared the belief, or even that the belief might have been wrong, see ***Joao v Jury's Hotel Management UK Ltd UKEAT/0210/11/SM***.

70. They were not, however, within this subsection, because there was a health and safety committee and representative for the Pontefract office with whom they could reasonably have been raised. The representative was a union member which was recognised by the respondent. The claimant had written a collective grievance to that representative, amongst others, the previous year although he had not appreciated it was destined for the designated Health and Safety committee. The case of ***Castano v London General Transport Services Ltd [2020] IRLR 417*** does not assist. Although Eady J held that there would have to be a representative or safety committee at the place of work of the claimant, it did not follow that the representative had to be based there. That would in many instances be impracticable, particularly for a large organisation like the respondent which has 1,000 sites of which the Pontefract office was a small one with only 5 staff.

71. It would have been reasonably practicable for the claimant to raise it through these channels. A simple enquiry of his union or employer as to the existence of such a body would have sufficed.

*Were there circumstances of danger which the employee reasonably believed to be serious and imminent, which he could not reasonably have been expected to avert and, if so did he refuse to return to his place of work or any dangerous part of his place of work?*

72. We consider the proper approach to this provision to be that suggested by Employment Judge Maidment at the preliminary hearing, namely to ask firstly whether there were circumstances of danger. That appears to be an objective issue for the tribunal. The next issue would be whether the claimant believed they were serious and imminent and, if so whether that belief was reasonable.

73. We were referred to ***Oudahar v Esporta Group Plc [2001] IRLR 730***. In that case, the Employment Appeal Tribunal rolled these considerations together to pose the question as to whether the claimant reasonably believed there were serious and imminent circumstances of danger. The main point of that case is that it was an error of law for the tribunal to consider the employer's belief of whether there was a serious and imminent danger in preference to the claimant's. We consider the first approach suggested by EJ Maidment more faithfully reflects the statutory language and the Directive, but either test achieves the same outcome. That is because there must be an assessment of the objectivity of the belief. We must abide by the approach in ***Oudahar***.

74. A danger is usually understood to mean a hazard, usually to human health. For it to be serious means it is more likely or grave. To be imminent is about a timeframe, the hazard may arise soon. There is no substitute for the statutory language but taken together the belief might be said to be of something perilous.

75. For the purpose of section 44(1)(c) of the ERA we have found, at paragraph 69, that the claimant had a reasonable belief of circumstances connected with his

work which were harmful to health, against the background of the information published. What is believed to be harmful to health is not the same as a belief in serious and imminent danger. Whilst there may be an overlap, the risk in the latter must be serious and imminent as well as a danger. It envisages the situation to be so serious that an employee will be justified in leaving work or the dangerous part of it. This is specifically raised in Article 8 of the Framework Directive and its gravity is highlighted by its title: *First aid, fire-fighting and evacuation of workers, serious and imminent danger*.

76. The critical time at which the claimant's reasonable belief must be evaluated is at the time the claimant removed himself from the workplace, or more pertinently in this case refused to return. That was any date from 22 July 2020 when tests recommenced, or in the claimant's case 5 August 2020, the date identified for his return.

77. There was no doubt, as Ms Criddle has said, that the public announcements made it clear that Covid 19 was a major risk to public health. The introduction to the Health Protection (Coronavirus) Protection Regulations 2020, first issued on 10 February 2020, referred to the declaration of the Secretary of State for Health that the incidence or transmission of novel Coronavirus constituted a serious and imminent threat to public health. The various iterations of those regulations introduced measures designed to delay or prevent further transmission of the virus.

78. The situation was a fast moving one, from the date of that statutory instrument, such that extreme measures to restrict liberties were introduced and then gradually removed from June 2020, as was perceived proportionate and safe. This required difficult exercises of judgment based upon recommendations from scientists about a relatively new and unknown disease.

79. Was there a serious and imminent danger on 22 July 2020 and in the weeks that followed? The claimant relies upon a document dated August 2020 of PHE which reviews the disparities and outcomes of those who contracted Covid 19. The largest disparity was age group in which those who were over 80 were seventy times more likely to die than those under 40. Men had a higher fatality rate than women as did people of black and ethnic minority backgrounds compared to white people. In respect of occupations the ONS reported that men working as security guards, taxi drivers and chauffeurs, bus and coach drivers, chefs, sales and retail assistants, lower skilled workers in construction and processing plants, and men and women working in social care had significantly high rates of death from Covid 19. With respect to comorbidities, deaths with Covid 19 mentioned on the death certificate, a higher percentage mentioned diabetes (21%), hypertensive diseases, chronic kidney disease, chronic obstructive pulmonary disease and dementia than all-cause death certificates. Several studies, although measuring the different outcomes from Covid19, report an increased risk of adverse outcomes in obese or morbidly obese people.

80. On 24 June 2020 the Government published a document called "Staying alert and safe (social distancing) after 4 July 2020". It announced that the chief medical officers had reduced the alert level from 4 to 3 in the UK and as a result the Government was easing restrictions safely and cautiously. In respect of going to

work it advised that those who could work from home should continue to do so, but employers should undertake a risk assessment and take actions to manage risks of transmission for those who could not. It recommended that employers should ensure that employees socially distanced by 2 metres wherever possible or implement robust mitigation measures where not.

81. At paragraph 7, it is said that those with particular medical conditions *may* be clinically vulnerable, in which case they could be at higher risk of severe illness and from coronavirus and, although they could meet outdoors, they should be diligent and take special care about social distancing and hand hygiene. In a following passage it set out the groups of clinically vulnerable which included CKD. The group covered many categories including those over 70. This is a confusing document by use of the term 'may' and then including CKD in the CV group.

82. Government travel guidance from 4 July 2020 recommended maintaining a 2 - metre distance where possible, or to reduce the risk by maintaining 1 metre distance and taking suitable precautions. It suggested the following:

- limit the number of people or households that you come into contact with, for example avoid peak travel where possible;
- wash or sanitise your hands regularly;
- use a face covering;
-avoid touching your face;
-cover your mouth and nose with a tissue or the inside of your elbow when - coughing or sneezing;
-travel side by side or behind other people, rather than facing them, where seating arrangements allow;
-touch as few surfaces as possible;
-stay outdoors, rather than indoors;
-minimise the time spent close to other people;
-avoid loud talking, shouting or singing;
-dispose of waste safely, including items such as used disposable face coverings.

83. A passage on car sharing included similar recommendations as well as increasing the level of ventilation and cleaning the vehicle.

84. The respondent introduced Standard Operating Procedures which reduced the number of daily tests from 7 to 5, required the use of face coverings by examiner and candidate, the washing of hands and cleansing of the vehicle, avoidance of physical contact and use of a tablet to record results. To this a further precaution of ventilation of vehicles was later added and neither examiner nor candidate were allowed to undertake any test if they were unwell. A series of iterations of the SOP over the coming weeks developed and clarified the safety measures. The respondent consulted with the HSE and PHE with respect to the measure it introduced.

85. Risk to harm is not an absolute but ranges from the trivial to the grave and can arise from many circumstances. Although no evidence was adduced on it, it is common knowledge that road traffic collisions can cause fatality and serious injury,

but exposure to such risks by use of road transport is one taken daily by many employees. The provisions of section 44 require an evaluation of risks from the necessary and tolerable to the unacceptable. For the reasons we have expressed, a serious and imminent danger falls at the unacceptable end of that spectrum.

86. Relying on the public health information which had been disseminated at the time and taking a broad view, the claimant could believe there were enhanced risks to his health in July 2020 in comparison to other groups because of his medical condition of CKD as well some other characteristics, such as gender and occupation. Sitting in a vehicle in which he could not socially distance would expose to him a greater chance of contracting the virus. By how much is an exercise fraught with uncertainties but one which we must address through the standpoint of the claimant's belief and whether it was reasonable.

87. The imminent and serious health risks to which the public were alerted in February 2020 by the Secretary of State for Health had changed, as reflected in the reduced alert level. The prevalence of Covid 19 was substantially less than earlier in the year. With respect to the return to driving tests, the respondent had implemented measures which reflected the Government guidance which we have summarised, in circumstances in which social distancing was not possible and had consulted with HSE and PHE.

88. The claimant had formed a fixed view, by 10 July 2020, that nothing less than social distancing of 2 metres would be safe for him. He regarded any other measure as insufficient. He made that clear in his email of 10 July 2020 and maintained it in all further discussions. From this point his assessment of the risk levels lost objectivity.

89. The CV category comprised of millions of people. The respondent had promoted a plan for a return of those in that group. A series of on-line meetings called 'Directors Live' had been arranged and held at which employees could raise their concerns and obtain information and updates. The dissemination of the plan with individual meetings had been coordinated and put into effect. Within those meetings the claimant had indicated he would by reverting to his GP, but never fed back to Mr Mitchell the outcome of his discussion on 2 July 2020 and that medical information about his CKD would not be forthcoming. From then the claimant placed all his reliance upon public documents and shut his mind to enquiring into and understanding his particular circumstances. His acknowledgment in evidence that the difference in categorisations of the condition meant nothing to him, reflected only the broadest of appreciations of his condition. He never thought that the danger of imminent and serious risk applied to all examiners, but to himself. That necessitated understanding his particular condition, when it was made clear that a view had been taken that his workplace would be safe for those in the CV Group. It was not reasonable to conclude all who had CKD faced imminent and serious dangers as driving examiners.

90. The claimant obtained no medical opinion about the extent of his physical impairment and incidence of risk specifically to him, either in July 2020 for his employer or in these proceedings. He did not ask Mr Mitchell for an occupational health referral as suggested in his discussion with the practice on 2 July 2020. He

did not query the matter further with his GP, rather than relying on the comments of the receptionist, 4 days later when he made an appointment for another matter. From the material produced from the Kidney Care UK organisation, that information would have been likely to have established that he fell at the lower end of risk of those with CKD; at stage II he would not even have been in the CV category. That alone, would have driven him, reasonably, to review the opinion he had reached.

91. In conclusion, the opinion which the claimant held of a serious and imminent danger to himself if he returned to work was not a reasonable one. The various mitigating measures which had been put in place would have provided reasonable protection and, had he informed himself properly rather than reached a premature conclusion, he would have reasonably formed that view. In these circumstances the claims under section 44(1)(d) and (e) cannot succeed.

Unfair dismissal – general principles

93. The three matters which are said to constitute a breach are not providing the claimant with an alternative role or duties to avoid being in vehicles with members of the public; requiring the claimant to return to work or be placed on unpaid leave amounting to an ultimatum; and regularly telephoning the Claimant and engaging in debates.

94. These are said to be a breach of the implied term of trust and confidence or the implied term to take reasonable steps to keep the claimant's place of work safe.

95. We have addressed these allegations above, in the context of the detriment claims and rejected them. The respondent has not, objectively, done an act calculated or likely to destroy or seriously undermine trust and confidence in respect of any of these matters. The ultimatum for the claimant to work as an examiner or take unpaid leave was based upon risk assessments and consultation with other bodies charged with protecting public health or health and safety at work. There was no evidence that the claimant was exposed to unacceptable risks. There was no alternative work to offer. We do not regard the phone calls as anything less than was necessary to discuss the situation and Mr Mitchell conducted them appropriately. Moreover, there was reasonable and proper cause for the respondent to act as it did. There was no breach of the implied term of trust and confidence.

96. There was an enhanced risk to health to the public throughout this period because of the pandemic and people in particular categories were believed to be at greater risk if they contracted the virus to others. The employers' responsibilities were to minimise the risks of contracting the virus having regard to these considerations and the public information which was available at the time. We are satisfied that was done by the respondent. There was no breach of the implied term to take reasonable steps to keep the workplace safe.

97. Ms Criddle referred to violations of Articles 2 and 8 of the European Convention which apply to the respondent as a public authority under section 6 of the Human Rights Act 1998. In the light of our findings, those articles were not engaged.

98. As there was no constructive dismissal, the unfair dismissal claim cannot succeed.

Unfair dismissal (section 100(1) of the ERA

99. With respect to the complaint of automatically unfair dismissal, the reasons for the fundamental breach of contract must arise from an infringement of section 100(1)(c) or section 100(1)(d) or (e) of the ERA.

100. For the reasons we have provided in respect of section 44(1)(c), (d) and (e) of the ERA there was no such infringement and this claim must fail.

Employment Judge D N Jones

Date: 7 February ~~2020~~ **2022**