



## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4107319/2020**

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**Held in Glasgow on 20, 21 and 22 June 2022**

**Employment Judge F Eccles  
Members I Ashraf and A Grant**

10 **Mr S Grigor**

**Claimant  
Represented by:  
Mr R Clarke -  
Solicitor**

15 **Driver and Vehicle Standards Agency**

**Respondent  
Represented by:  
Ms S Monan -  
Solicitor**

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### **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The Judgment of the Employment Tribunal is that (i) the claimant was not subjected to a detriment on the ground that he refused to return to his place of work under Section 44 (1A) (a) of the Employment Rights Act 1996 and (ii) the claimant was not subjected to a detriment for the sole or main purpose of preventing or deterring him from taking part in trade union activities or penalising him from for doing so under Section 146 (1) (b) of the Trade Union & Labour Relations (Consolidation) Act 1992.

### **REASONS**

#### **Introduction**

1. The claim was presented on 17 November 2020. The respondent was originally identified as the Department for Transport. An application was granted amending the respondent's name and extending the time for presenting a response. A Judgment issued on 2 June 2021 under Rule 21 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 was set aside.

2. The claimant claims to have been subjected to a detriment for refusing to return to his place of work under Section 44 (1A) (a) of the Employment Rights Act 1996 (ERA) and/or for the sole or main purpose of preventing or deterring him from taking part in trade union activities or penalising him from for doing so under Section 146 (1) (b) of the Trade Union & Labour Relations (Consolidation) Act 1992 (TULCRA). The claim was resisted.

3. At the final hearing, the claimant was represented by Mr R Clarke, Solicitor. The claimant gave evidence. The respondent was represented by Ms S Monan, Solicitor. Hamish Kennedy, Local Drive Centre Manager, Melanie Kinsella, former HR Business Partner, Mark Pearson Leach, former Operations Delivery Manager and John Selbey, former Operations Manager gave evidence for the respondent. The Tribunal was provided with a Joint Bundle, Schedule of Loss and agreed List of Issues. Both parties provided the Tribunal with written and oral submissions.

#### **Findings in fact**

4. The Tribunal found the following material facts to have been admitted or proved; the claimant was employed by the respondent as a Driving Examiner from 19 October 1987 until taking full retirement in June 2021. He was based at the Driving Test Centre in Irvine. He worked a three-day week –Wednesday to Friday. On Wednesday and Friday, he conducted up to seven driving tests each day for category B vehicles (“driving tests”). On Thursdays, the claimant undertook trade union activities.

5. On 10 February 2020, in accordance with Regulation 3 of the Health Protection (Coronavirus) Regulations 2020, the Secretary of State declared that the incidence or transmission of coronavirus constituted a serious and imminent threat to public health. From 19 March 2020 the claimant was instructed to work from home. Almost all driving tests were cancelled due to the covid pandemic. A small number of Driving Examiners conducted driving tests for critical workers on a voluntary basis. Working from home involved the claimant continuing to undertake any necessary administrative functions

and attending remote “catch up” meetings with other Driving Examiners and management.

- 5 6. The respondent updated their standard operating procedure (SOP) for driving tests to include protective measures during the covid pandemic. The respondent consulted with the trade union about the proposed changes. They were approved by the Health & Safety Executive, Public Health England, Department of Transport and the Scottish government. From on or about 4 July 2020 the UK government approved the resumption of driving tests. From 6 July 2020 the respondent increased the number of driving tests available for critical workers and from 22 July 2020 driving tests were offered to candidates whose tests were postponed in March 2020.
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- 15 7. From 4 July 2020 the respondent’s standard operating procedure (SOP) included additional time for each driving test – the maximum number of driving tests to be conducted each day by a Driving Examiner was reduced to five. Face coverings were mandatory for Examiner and candidate. Gloves were optional. Waiting rooms were closed and time spent in the car (30 to 40 minutes) was limited to the driving part of the test. At all other times, social distancing was to be observed. Driving tests would not proceed or were to end if the candidate displayed symptoms of covid. In the event of a serious or dangerous fault or if the candidate made sixteen driving faults, the test was to end with the candidate being instructed to return to the Test Centre by the most convenient route. The car had to be well ventilated throughout the test by opening the car’s windows. There were increased levels of personal and vehicle hygiene. The claimant was provided with a copy of the updated SOP
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- 25 (P43/167-171).
- 30 8. On or about 8 July 2020 the claimant was informed by the respondent that he was required to return to work at the Test Centre. On 17 July 2020, the claimant informed his Line Manager, Hamish Kennedy that he did not feel able to return to work because of his concerns about contracting covid. On 17 July 2022, Hamish Kennedy wrote to the claimant (P14) requesting that he confirm in writing why he was unable to return to work. He asked the claimant to identify his concerns and what measures he would want put in place to

enable him to return to work. The claimant was due to return to work on 21 July 2020. The claimant did not return to work on 21 July 2020 or identify in writing his concerns and the measures he wanted to be put in place.

9. Hamish Kennedy wrote to the claimant on 22 July 2020 (P15/79 – 80) requesting that he complete a risk assessment (P15/81-82) to include the measures that he wished to be put in place to facilitate a safe return to work. The claimant replied to Hamish Kennedy (P16/83-84) as follows:

*"I'm writing to you following your request to complete a personal risk assessment form that you sent me attached to an email today 22 July 2020. I'm advised that this form is not suitable for the purpose intended and I understand Cabinet Office are working with the union to agree a personal risk assessment form which is not yet ready. On that basis, I am writing this note to fulfil your request to provide reasons why I am unable to return. The second part of your request is more problematic. Effectively the organisation is asking me to suggest control measures. I believe this is essentially a management function. However, I'm happy to outline my concerns below and discuss control measures separately.*

*As I've already advised, I do not believe that the in-car measures proposed by the Agency mean that testing candidates in close proximity amount to a suitable and sufficient response to the risks involved. Physical distancing remains the primary public health advice and I do not believe this is possible within a category B vehicle. The health minister Hancock is on record that masks only provide a few minutes of protection and more general UK government advice is not to rely on masks to mitigate extended close contact. Driving tests still last about 35-40 minutes and the proximity to candidates is close. While ventilation through open windows may reduce transmission risks, we do not normally conduct tests with open windows due to noise issues interfering with candidate/examiner/sat-nav communications.*

*As you may know, Section 7 of the Health & Safety at work Act requires me to take reasonable care of my own health & safety and there is an obligation on the employer to provide a safe system of work. I do not believe it is*

*possible for such a safe system to be operated on Category B driving tests in the current circumstances. Interestingly, the Australian Government has recently stated that it believes 4 out of 5 new Covid cases are linked to the workplace.*

5 *My understanding of Coronavirus is that it is highly transmissible and experts in the field have said we are still in the early stages of the pandemic – not at the end. Despite the significant resources available to the Department for Transport, test candidates are not tested for the infection before presenting for a driving test. This despite a recent Oxford Vaccine Group study that found*  
10 *90% of infected teenagers were asymptomatic. It is a matter of fact that a high proportion of driving test candidates are teenagers. In summary, I believe the risk of infection is not as low as has been suggested.*

*In addition, although official diagnosed cases of covid 19 in UK stand at just over 293000, the Office of National Statistics estimates real-world cases in*  
15 *the range 2.8 – 5.6 million. In light of this, my belief is that risk of infection is higher than previously assessed and transmission to and from candidates within a category B vehicle is very likely where one party has the infection. I note that despite the significant resources available to DVSA the Agency does not routinely test Examiners for infection in order to protect candidates.*

20 *Although I have no serious underlying health conditions other than hypertension and being overweight, I am 62 years old and very much aware that consequences of Covid 19 infection do start to ramp up with age.*

*The Health Protection Regulations 2020 SI2020/350 were made “in response to the **serious and imminent** threat to public health” posed by Coronavirus.*  
25 *Equally, I am aware that the Scottish Government are not due to revisit the possibility of restarting driving tests until 31 July at the earliest. However I am content to follow the triage process that the Agency has in place to seek a resolution. If such a process fails to find a way to conduct tests safely, I reserve the right to invoke Section 44 of the Employment Rights Act 1996.*  
30 *This permits me to remove myself from **serious and imminent** danger and not be subject to detriment for so doing.”*

10. Hamish Kennedy held a return-to-work discussion with the claimant on 23 July 2020 (P17/90). Referring to his earlier correspondence (P16/83-84), the claimant explained that he had not completed the respondent's risk assessment form as he had been advised by a trade union representative that it was not fit for purpose. The claimant stated that his main concern was the lack of social distancing and that he wanted Driving Examiners and candidates to be tested for covid as close as possible to test dates as a mitigation/control measure. The claimant explained that the control measures in the SOP were not sufficient to convince him to return to work. The claimant referred to his statutory rights under Section 44 of ERA. Hamish Kennedy reminded the claimant that the respondent had consulted with Public Health England and the Health & Safety Executive. He also referred to conversations between the respondent and the Scottish government about revised working practices. The claimant expressed doubt about the UK government's position in relation to the pandemic. He expressed concern about the age demographic of candidates and their increased likelihood of infection. Hamish Kennedy sought to reassure the claimant about the number of people with covid in Scotland. The claimant expressed concern about his increased risk of being seriously ill if infected due to his age and weight. The claimant referred to having hypertension but not suffering from serious ill health.

11. The respondent did not require Driving Examiners who were assessed as clinically vulnerable to conduct driving tests on returning to work. Hamish Kennedy consulted with the respondent's HR who advised him that unless the claimant was clinically vulnerable, he should return to work. Based on the information provided about the claimant's health – overweight and raised blood pressure – the claimant was not considered to be clinically vulnerable.

12. Hamish Kennedy wrote to the claimant on 24 July 2022 (P17/86-87) as follows:

*"I write further to our meeting on 23 July 2020 when we discussed the concerns that you have with returning to work. At the end of the meeting you confirmed that despite the measures that the Agency have put in place you were still unwilling to return to your role as Driving Examiner.*

*As part of the meeting we talked through the measures that the Agency has put in place to provide staff with a safe working environment. I attach a copy of the Individual Assessment Conversation Record, however your main reasons for not returning to work may be summarised as:*

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- 1. Social Distancing in cars*
  - 2. Scottish Government not giving go ahead for car tests*
  - 3. You have stated that under Section 44 of the Employment Act 1996 you have concerns for your safety at work*

10 *There have been a number of measures put in place to ensure your safety; these include:*

- Reducing the number of staff in offices at any one time to allow social distancing to be maintained*
- Controlling access by visitors to buildings and their facilities*
- The issuing, where required, of appropriate PPE and hand sanitiser*
- 15 *• Revised Standard Operating Procedures (SOPs) that take in to account the latest government guidance.*

*In discussing your concerns, I have explained that in developing the changes made to working practises we have been in regular discussions with both Public Health England (PHE) and the Health and Safety Executive (HSE). Scottish and Welsh Governments have been content to accept the advice we have confirmed with PHE and HSE. However, they will refer to their equivalent health and safety bodies if they have any concerns and we will discuss these with them. As a result of those discussions we have measures and controls incorporated into our SOPs and assessments, as advised by*

20 *PHE and HSE, and they are happy with our approach. You may wish to read the information published on DVSA.net about ‘The advice we’re following to help you work safely.’ This will provide you with more detail about how DVSA has reached the decisions that have been made about returning to*

25 *workplaces and work duties.*

*Additional adjustments were discussed with you stating the additional adjustment you would require is for the Candidate and Driving Examiner to be tested for Covid19 as near as possible to the Driving test date. DVSA is not going to be carrying out Covid tests.*

5 *Whilst I understand that you have concerns, I am confident that the measures that the Agency has put in place are sufficient for you to return to work and I do not accept your claim that Section 44 of the Employment Act 1996 is relevant. I appreciate that you may want time to consider this decision, but I do expect you to return to work on Wednesday 5 August 2020. If you choose*  
10 *not to return to work, you will be placed on unpaid leave from that date and I will arrange a meeting for one week after this so that we may review your circumstances. Please note, this period of unpaid leave will not count towards reckonable service for the purpose of your pension.*

15 *You are reminded that advice and counselling is available from the Department's Employee Assistance Provider, Health Assured. If you wish to contact them the details are:*

- *Confidential helpline: 0800 028 0199 (24 hours/7 days a week)*
- *Website: <https://healthassuredeap.co.uk> (login with username: DVSA / password: EAP)*
- 20 • *Managerial support and consultancy: 0800 028 0199 (24 hrs / 7 days a week)."*

13. *The claimant did not respond to Hamish Kennedy's letter (P17/86-87). He did not return to work on 5 August 2020. Hamish Kennedy contacted Melanie Kinsella and Bruce Attwood in HR by e mail at 09.49 on 5 August 2020*  
25 *(P18/94) as follows:*

*"Hi,*

*Just a quick update on Steve, he had said yesterday he would reread the return to work decision letter and would then email me that day regarding him being available to work. I didn't receive anything and I phoned him this*

5 *morning and he said he had asked John Maloney (Assistant General Secretary of PCS) to give him a form of words to use regarding his return to work email but as of yet John hasn't got back to him. Steve stated he would respond to me today and he asked if the Irvine's team catch up was still taking place at 1Pm today – I confirmed it was."*

14. Melanie Kinsella replied at 09.54 by e mail (P18/94) as follows:

*"Morning Both*

10 *It is as we discussed they are planning something, my advice see if he is on the call today at 1pm if he doesn't join today you put him on unpaid leave as of tomorrow until he confirms his attendance.*

*Happy to talk through."*

15. Hamish Kennedy wrote the claimant at 12.08 on 5 August 2020 by e mail (P19/95) as follows:

*"Hi Steve*

15 *As you have not confirmed to us that you are willing to return to testing by today as set out in the return to work letter – I have now placed you on unpaid Special Leave for today and you will remain on unpaid Special Leave until I hear from you stating you are able to return to testing.*

20 *Regarding the Irvine catch up call today you do not need to dial in as you are on Special leave but you are welcome to if you want.*

*I will keep in touch with you on your normal working days while you are off on Special leave.*

*Any questions please call me."*

- 25 16. The claimant wrote to Hamish Kennedy on 6 August 2020 (P20/97) about being placed on unpaid special leave as follows:

*"For the record, I regard this action as breaching firstly my legal right to not work within an unsafe system of work, secondly my right to appeal*

*management decisions as per the staff handbook and finally my duty as a Scottish Citizen to comply with Scottish Government phase 3 requirements for containing the spread of Covid 19.*

1. *I am very concerned about the risk of contracting COVID-19, and the consequence of doing so. As previously discussed, and in my email to you dated 22 July 2020, I do not believe the arrangements put in place by the Agency amount to a safe system of work. Specifically in relation to category B driving tests, it is unacceptable that social distancing cannot be maintained within the test vehicle. Face coverings provide time-limited protection according to the Health Secretary, while I will be expected to carry out 5 tests per day lasting 35-40 minutes with candidates who are not screened or tested for covid 19. You have advised that the Agency will not be carrying out Covid testing of candidates or Examiners. I told you that my risk factors are my age (62), sex (male), over weight (NHS calculates my BMI at 31.5 – obese) and hypertension. In addition, I share caring responsibilities for my mother (85) with my sister who herself is asthmatic. It would appear that the Agency has a closed mind approach to these risks that favour operational matters over personal or community safety.*
2. *I have been following the Scottish Government's guidance, including on social distancing, travel restrictions, hygiene and minimising contact with others strictly.*
3. *I am very aware that, as of July, the daily number of new confirmed cases of COVID in the UK is rising again, which has caused the government to pull back on further easing of the lockdown restrictions. For the reasons outlined at para 1 above, I am concerned that this too may not have been taken into account by decision makers.*
4. *I am also aware of the Public Health England report on Disparities in the Risk and Outcomes of COVID-19. The PHE report included reference to the ONS findings that death rates among taxi drivers, chauffeurs and bus and coach drivers (all occupations not dissimilar to*

*my own in terms of working environment) had significantly higher rates of death from COVID. The PHE report also found that:*

- *Working age males diagnosed with COVID-19 are twice as likely die as females.*
- *Local authorities with the highest death rates are mostly urban. I work within Irvine which is an urban area.*
- *People living in deprived areas have higher diagnosis and death rates. The revised Scottish Index of Multiple Deprivation shows that North Ayrshire is ranked as the fifth most deprived Council area in Scotland.*
- *Increased risk due to obesity. Please see reference at para 1.*

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5. *There are particular features of my working environment inside the confined space of the front seats of a vehicle with different members of the public each day which place me at unnecessarily and significantly increased risk of contracting COVID-19, which in my case amounts to a circumstance of serious and imminent danger. I am not able to maintain 2 metres social distancing (or even be guaranteed that I can maintain 1 metre social distancing). I am not able to guarantee avoiding face-to-face working if the driver turns towards me. Each member of the public will typically be in the vehicle with me for 35 minutes. DVSA has declined to provide face masks, and screens in the vehicle are not feasible. As you are aware, despite my suggestion that candidates and examiners be Covid tested reasonably soon prior to coming for a driving test, this has been ruled out with no explanation. To my knowledge, no risk assessment specific to my workplace has been undertaken by DVSA.*

6. *Weighing up all the evidence and knowledge I have, including consideration of the factors I have described above, I have reached the conclusion that getting into and occupying the confined space of the front seats of a vehicle [and other duties associated with my*

*employment] with multiple different members of the public each day would place me in circumstances of danger which I believe to be serious and imminent.*

5           7.    *I note that you appear not to have considered working whether I can perform alternative duties, including working from home. Can you confirm what work has been taken by the Agency to determine what alternative duties may be available? I cannot think of any other ways of avoiding the dangers of doing my job as a driving examiner.*

10          8.    *Because of the serious and imminent danger, which I cannot otherwise avoid or protect against, I will not therefore be attending to work in the confined space of vehicles as directed, and until further notice. I regard these as appropriate steps to take.*

15          9.    *To be clear, if it was possible for me to work from home, or to undertake duties which did not involve the risks associated with working in the confined space of the front seats of a vehicle, I would willingly undertake that work.*

20          10.   *I regard DVSA placing me on unpaid leave, or taking other action against me, as amounting to their subjecting me to a detriment because, in circumstances of danger which I believe to be serious and imminent, I have taken appropriate evasive and preventative action both for myself and others in line with my statutory rights and obligations. It appears the Agency wishes to deny me access to these legal rights and I do not consent to that. Further, it would appear that the Agency has taken a blanket approach to the section 44 question.*  
25            *In particular, the Agency seems to be relying on a generic risk assessment when judging the risks to me rather than one tailored to take account of my personal circumstances, the nature of the Area I work within and the government approach in Scotland which is currently that no decision has been taken to resume normal driving tests.*

30          11.   *In conclusion, therefore I wish to appeal the decision to place me on unpaid special leave and would be grateful if you would advise me to*

*whom my appeal is to be sent. Alternatively, please explain why DVSA will not allow me an independent appeal process in relation to this decision and what other remedy is available to me.*

17. Hamish Kennedy replied to the claimant on 10 August 2020 (P21/99- 100) to confirm that he would remain on unpaid special leave until he returned to work and that there was no appeal process. Hamish Kennedy reminded the claimant of the measures taken by the respondent to provide employees with a safe working environment and that there had been regular discussion about the changes to working practices with Public Health England and the Health & Safety Executive. In response to the claimant's reference to alternative duties, Hamish Kennedy wrote;

*"You refer to alternative duties within your email and whether this was considered in your particular case. I do not recall us having this conversation and I am unaware of a medical reason why alternative duties would apply in your case. Whilst I understand that you have concerns, I am confident that the measures that the Agency has put in place are sufficient for you to return to work".*

Hamish Kennedy reminded the claimant of the advice and counselling available to employees.

18. The claimant continued to be paid for undertaking trade union activities. Hamish Kennedy was in regular contact with the claimant to discuss returning to work.

19. The claimant was angry on learning that he would be placed on unpaid special leave. He was worried about how it would affect his finances. He felt stressed and experienced poor sleep for about a month after being informed of Hamish Kennedy's decision.

20. On 17 August 2020, the claimant lodged a Grievance (P24) against Hamish Kennedy's decision to place him *"on special leave without pay because I invoked my section 44 rights to protect myself"*. The claimant's Grievance was considered by Mark Pearson-Leach, who at that time was an Operations

Delivery Manager based in Hyde, Cheshire. Mark Pearson-Leach met with the claimant on 20 August 2020 to discuss his Grievance. It was agreed that the Grievance should be considered on the available written evidence. Mark Pearson- Leach prepared a report (P27/110-114) in terms of which he concluded that the evidence did not support the claimant's Grievance. The e mails between Hamish Kennedy and Melanie Kinsella (P18) were referred to and attached to the report (P27/110-114). The report (P27/110-114) was copied to the claimant on 28 September 2020. The claimant and John Moloney, Assistant General Secretary of the Public and Commercial Services Union and the claimant's trade union representative met with Mark Pearson-Leach on 23 September 2020 (P28/120 - 124). During their meeting, the claimant and John Moloney raised concerns about the content of the e mails between Hamish Kennedy and Melanie Kinsella (P18). John Moloney suggested that the reason to place the claimant on unpaid special leave was because of trade union involvement in the claimant's refusal to return to work. Concerns were also raised that Hamish Kennedy did not take into account the claimant's medical concerns and of the influence played by HR in his decision making. Mark Pearson-Leach considered the concerns raised by the claimant and John Moloney. In a letter to the claimant dated 28 September 2020 (P28/116-119), confirming the outcome of the Grievance, Mark Pearson-Leach wrote:

*"A point was made about an email exchange between Mel Kinsella (HRBP) and Hamish Kennedy which included the phrase "they are planning something". Although I find the wording of the email unfortunate and not in keeping with the respectful communication maintained by all parties during this situation I don't consider it to have any bearing on the decisions that have been made. I will speak to those involved as a separate matter.*

*It was discussed that you felt that you may have been treated differently due to your prominence in the PCS union. I can see no evidence of this and conclude that the decision was in-line with policy and guidance and a reasonable decision to make in the circumstances. I can see no reason why someone with less prominence would have been treated any differently.*

*It was expressed that your medical factors were not taken into account and these were not discussed with Hamish. The annexes of the investigation report show that your concerns about blood pressure, BMI and age were well documented and therefore were considered prior to making the decision. The individual risk assessment process would have allowed Hamish to explore these issues further, but you declined to take part in this element.*

*The latter stages of the decision process involves a review of the individual circumstances carried out by the Human Resources Business Partner team, you felt that this took the decision away from Hamish. This part of the process is to help provide a consistent approach across the entire agency which is reasonable considering the nationwide impact of Coronavirus. Each case that is referred to them is considered on its own merits and individual circumstances. The output of the team is then provided to the line manager in the form of advice and further support in drafting a letter to the employee.”*

- 15 21. The claimant lodged an Appeal (P29/125-132) against Mark Pearson-Leach’s decision not to uphold his Grievance. The claimant’s Appeal was considered by John Selbey who at that time was an Operations Manager based in Burton on Trent, Staffordshire. The claimant and John Moloney met with John Selbey on 5 November 2020 (P31(135-144). At their meeting, concerns were discussed about Hamish Kennedy’s decision and the factors he had taken into account. After consulting the respondent’s Head of Health & Safety (P32/146), John Selbey was not persuaded that the decision made to place the claimant on special unpaid should be overturned. He confirmed his decision in a letter to the claimant dated 25 November 2020 (P36/152-154).
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- 25 22. The claimant remained on unpaid special leave until 5 January 2021 when, in accordance with UK government guidance, the respondent stopped providing driving tests. During his period of unpaid special leave the claimant was paid £3,539.96 gross (£3,501.36 net) less than he would have been paid had he returned to work on 5 August 2020. During the same period, had the claimant been at work, the respondent would have contributed £959.33 to his pension.
- 30 The claimant returned to work on 12 May 2021 to undertake a refresher

course before returning to driving tests. The claimant resigned later that day (P38/158).

### The issues

23. The issues to be considered by the Tribunal were identified as follows:

5 **Section 44 complaint**

1. *Did the respondent subject the claimant to the following detriments (a-c) on the ground that 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 Section 44 (1A0) (a) ERA 1996.*

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(a) *Mr Kennedy of the respondent writing to the claimant on the 24 July 2020 stating that "I do not expect you to return to work on Wednesday 5 August 2020. If you choose not to return to work, you will be placed on unpaid leave from that date and that... this period of unpaid leave will not count towards reckonable service for the purpose of your pension."*

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(b) *Mr Kennedy of the respondent placing the claimant on unpaid special leave on 5 August 2020.*

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(c) *Mr Kennedy of the respondent informing the claimant on 5 August 2020 that he would remain on unpaid special leave until 'I hear from you stating you are able to return to testing'.*

2. *What declaration, if any, would be appropriate (Section 49(1)(a) ERA)?*

3. *What financial losses, if any, has the claimant sustained as a result of these detriments (or any of them)?*

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4. *What injury to feelings, if any, has the claimant sustained as a result of these detriments (or any of them)?*

5. *What compensation, if any, should the respondent be ordered to pay to the claimant (Section 49(2) ERA)?*

***Trade union detriment***

- 5 6. *Did the respondent subject the claimant to the following detriments (a-b) as an individual for the purpose of preventing or deterring the claimant from taking part in the activities of an independent trade union at an appropriate time, or penalising him for doing so? (Section 146 (1) (b) of TULCRA)*

10 (a) *Mr Kennedy of the respondent placing the claimant on unpaid special leave on 5 August 2020.*

(b) *Mr Kennedy of the respondent informing the claimant on 5 August 2020 that he would remain on unpaid special leave until 'I hear from you stating you are able to return to testing'.*

- 15 7. *What, if any, declaration would be appropriate (Section 149 (1) TULCRA)?*

8. *What financial losses, if any, has the claimant sustained as a result of these detriments (or any of them)?*

9. *What injury to feelings, if any, has the claimant sustained as a result of these detriments (or any of them)?*

- 20 10. *What compensation, if any, should the respondent be ordered to pay to the claimant (Section 149(2) TULCRA)?*

**Notes on evidence**

24. The Tribunal found the claimant to be a credible witness. He gave his evidence in a straightforward manner. While his perception of danger should he return to work was challenged, there was no material dispute over his recollection of events. The claimant challenged the evidence of Hamish Kennedy and Melanie Kinsella as regards the extent and content of their e mail exchanges (P18/94) concerning his return to work. It was the claimant's
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position that reference to “*they are planning something*” in Melanie Kinsella’s e mail (P18/94) was to trade union activities generally as opposed to providing a “*form of words*” explaining why the claimant would not return to work.

25. When giving her evidence Melanie Kinsella referred to concerns, which she attributed to previous behaviour and experience of the claimant and John Moloney, that there could be delays or attempts to involve more senior management before the claimant confirmed his willingness or otherwise to return to work. Hamish Kennedy had contacted her when he did not receive a reply from the claimant and of being told that he was waiting for a “*form of words*” from John Moloney. When questioned in cross examination, Melanie Kinsella struggled to identify any specific examples of the type of behaviour that caused her concern. Similarly, both Hamish Kennedy and Melanie Kinsella were unable to recall whether they discussed the claimant after Melanie Kinsella sent her e mail at 9.54 (P18/94).
26. While Melanie Kinsella’s evidence in the above respects lacked clarity, which the Tribunal considered to be in part due to the passage of time, overall the Tribunal was persuaded that the decision to put the claimant on unpaid special leave was because he would not return to work. It was Melanie Kinsella who suggested that Hamish Kennedy delay making a decision until the claimant had the opportunity to attend an employee “*catch up*” call later that day. Hamish Kennedy did not follow the above advice and the claimant was placed on unpaid special leave from twelve that day. This was inconsistent with HR determining how the claimant should be treated as opposed to Hamish Kennedy exercising his discretion as the claimant’s Line Manager.
27. The Tribunal did not find that Melanie Kinsella, Bruce Attwood and/or Hamish Kennedy had put the claimant on special unpaid leave to prevent him from undertaking trade union activities or to penalise him for doing so. The claimant continued to undertake trade union activities. The respondent continued to pay the claimant for time spent on trade union activities. Putting the claimant on unpaid special leave was a means by which to continue to employ him while he refused to return to work. The Tribunal did not accept Mr Clarke’s

5 submission that it was entitled to draw an inference from the respondent not disclosing any further e mails between HR and Hamish Kennedy that the true purpose for putting the claimant on unpaid special leave was due to trade union activities. The Tribunal was not persuaded that the respondent had, as submitted by Mr Clarke, deliberately chosen not to disclose e mails that that they knew to be inculpatory. There was no persuasive evidence that any such e mails existed or that, as submitted by Mr Clarke, they would disclose Melanie Kinsella expressing concerns that the claimant and John Moloney were “*in effect union troublemakers*”. The evidence before the Tribunal did not support such a finding or entitle the Tribunal to draw an inference that the reason for putting the claimant on unpaid special leave was not because he would not return to work but, as submitted by the claimant, to deter him from trade union activities or to penalise him for such activities.

### Discussion & deliberations

15 *Claim under section 44(1a) of the employment rights act 1996*

28. In terms of Section 44(1A) (a) of the Employment Rights Act 1996 (ERA) a worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his or her employer done on the ground that;

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

25 29. In terms of Section 48(2) of ERA, it is for the employer to show the ground on which any act or deliberate failure to act, was done.

30 30. In addition to the above statutory provisions, Mr Clarke for the claimant referred the Tribunal to the Health and Safety Directive (Council Directive 89/391 EEC) and to Sections 2 and 7 of the Health & Safety at Work Act 1974 governing the obligations on employer and employee to protect health, safety and welfare at work. Mr Clarke, while acknowledging that this is not a case

in which the claimant was dismissed, referred the Tribunal to the case of **Rodgers v Leeds Laser Cutting Ltd 2002 EAT 69** in particular given the EAT's analysis of Section 100(1)(d) of ERA, the terms of which mirror those of Section 44 (1A) (a) of ERA. In **Rodgers**, the EAT stated (at paragraph 25) that on a natural reading of Section 100(1)(d) of ERA it appears that there is a gateway requirement that, on an objective assessment of fact, there were circumstances of danger. If this is established, the Tribunal will go on to consider the claimant's reasonable belief in whether those dangerous circumstances are serious and imminent and which he could not reasonably be expected to avert. Mr Clarke also referred the Tribunal to the observation of the EAT in **Rodgers** (at paragraph 44) that in principle an employee could reasonably believe that there are serious and imminent circumstances of danger that exist outside his workplace that could prevent him from returning to it.

31. Applying the above analysis to the present case, the Tribunal began by considering whether, when the claimant refused to return to work, there were in fact "*circumstances of danger*". This is an objective test. The claimant refused to return to work during the covid pandemic. Coronavirus had been declared a serious and imminent threat to public health in February 2020 and steps were still being taken in July 2020 to prevent transmission of the disease. It was not in dispute that the respondent was implementing measures to minimise exposure of the workforce to coronavirus given the risk to their health and safety from transmission. In all the circumstances and proceeding on the basis that the "*circumstances of danger*" can exist outside as well as in the claimant's workplace, the Tribunal was satisfied that when the claimant refused to return to work in July 2020 there were, as a result of the covid pandemic, "*circumstances of danger*".

32. On the basis that when the claimant was asked to return to work in July 2020 there were circumstances of danger, the Tribunal went on to consider whether the claimant reasonably believed that they were serious and imminent. The Tribunal did not doubt that the claimant had concerns about returning to work given the nature of his work and that it would involve him having to share a

car with a candidate during the practical part of the driving test. In all the circumstances, the Tribunal was not persuaded however that the claimant's belief was reasonable. The respondent had introduced measures to minimise the exposure of Driving Examiners to candidates and other employees. They had updated their operating procedures to reflect steps taken to minimise exposure to covid. These included limiting face to face interaction and increased hygiene measures. Social distancing in the office area was in place and the waiting room was closed to the public. As social distancing during the driving part of the test was not practicable, the respondent had introduced the requirement to wear facing coverings and to ventilate the vehicle throughout the test. The maximum number of driving tests to be conducted each day was reduced to five and driving tests were to be curtailed if the candidate made a set number of faults. Tests would be cancelled if candidates displayed symptoms of covid. The claimant was provided with a copy of the respondent's updated SOP (P43/167-171) reflecting the measures introduced to minimise exposure to covid.

33. The Tribunal was not referred to any specific government Guidance on minimising exposure to coronavirus at the relevant time. It was not submitted by the claimant that the respondent's operating procedures breached any such Guidance. The claimant was informed by the respondent that when developing the changes made to their working practices, they had been in regular discussions with Public Health England and the Health and Safety Executive who were "*happy with (the respondent's) approach*" (P17/86) and that the Scottish Government had accepted the advice provided by the above statutory bodies. The claimant was provided with various sources of information to reassure him about the steps taken by the respondent to help him return to work safely which included advice and counselling.

34. The claimant's concerns about returning to work were based, for the main part on his age, weight and hypertension. He had concerns that he was at risk of catching covid from a candidate during the practical part of the driving test. The Tribunal did not accept however that the claimant's concerns about his age and health were sufficient for him to reasonably believe that returning to

work placed him in imminent and serious danger. There was no evidence of the claimant obtaining medical advice from his General Practitioner or a health specialist about any particular risk to him of returning to work in July 2020. The claimant accepted that what he described as his “*risk factors*” did not bring him within the category of being clinically vulnerable. The claimant accepted that he was not clinically vulnerable. Had this been the case it was not in dispute, given the steps taken to protect other employees in that category, that it was unlikely the claimant would have been required to return to work to conduct deriving tests. In all the circumstances, the Tribunal was not persuaded that the claimant reasonably believed that circumstances of danger in returning to work during the pandemic were serious and imminent.

35. The Tribunal concluded that in all the circumstances the claimant was not entitled to refuse to return to work on the ground that he had a reasonable belief that there were circumstances of danger that were serious and imminent. The Tribunal was satisfied that the respondent placed the claimant on unpaid special leave from 5 August 2020 on the ground that he would not return to work and undertake the duties that he was contractually obliged to do. The Tribunal did not accept the claimant’s submission that the respondent was contractually obliged to continue paying the claimant in circumstances where he refused to return to work on the ground that he had exercised his statutory rights under Section 44 (1A) (a) of ERA regardless of whether his belief in the severity of danger was reasonable or not.

36. In all the circumstances the Tribunal did not conclude that the claimant was subjected to a detriment in terms of Section 44 (1A) (a) of ERA by being told he would be placed on special unpaid leave if he did not return to work and subsequently being placed on unpaid special leave when he did not return to work.

**Claim under section 146(1) the Trade Union & Labour Relations (Consolidation) act 1992**

37. In terms of Section 146(1) (b) of the Trade Union & Labour Relations (Consolidation) Act 1992 (TULCRA).

5           ‘A worker has the right not to be subjected to any detriment as an individual by any act, or deliberate failure to act, or any deliberate failure to act, by his employer, if the act or failure takes place for the sole or main purpose of –

(a) .....

10           (b) *preventing or deterring him from taking part in the activities of an independent trade union at an appropriate time, or penalising him for doing so....’*

38. Section 148(1) of TULCRA provides that on a complaint under Section 146, “*it shall be for the employer to show what was the sole or main purpose for which he acted or failed to act*”.

15 39. The Tribunal was persuaded that the respondent decided to place the claimant on unpaid special leave because he refused to return to work to undertake the duties that he was contractually obliged to do, in particular driving tests. By being placed on special unpaid leave the claimant could remain in the respondent’s employment in circumstances where he was refusing to return to work.

20

40. There was no persuasive evidence that placing the claimant on unpaid special leave would have resulted in the claimant being prevented from continuing with his trade union activities. He continued to be paid by the respondent for the time taken to undertake trade union activities. The Tribunal did not accept the claimant’s submission that Melanie Kinsella and Hamish Kennedy had, when placing the claimant on unpaid special leave, “*completely overlooked*” that he would continue to be paid for the days he undertook trade union activities. There was no persuasive evidence to support such a finding.

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41. Similarly, and having considered the evidence from the respondents' witnesses as referred to above, the Tribunal was not persuaded that the purpose of putting the claimant on unpaid special leave was to penalise him for taking part in trade union activities. On balance, Melanie Kinsella provided a convincing explanation that reference in her e mail exchange with Hamish Kennedy (P94) to "*they are planning something*" was to concerns over potential delay in confirming whether the claimant intended to return to work or not. In all the circumstances, the Tribunal was satisfied that the main purpose for placing the claimant on special unpaid leave was to continue his employment while he refused to return to work. There was no persuasive evidence that the claimant's trade union activities were a factor when making the decision or for that matter that the decision was made to penalise the claimant for any trade union activities.

42. In all the circumstances the Tribunal did not conclude that the claimant was subjected to a detriment in terms of Section 146(1) (b) of TILCRA 44 (1A) (a) of ERA by being placed on unpaid special leave when he did not return to work.

Employment Judge: Frances Eccles  
Date of Judgment: 22 July 2022  
Entered in register: 27 July 2022  
and copied to parties