Neutral Citation Number: [2023] EAT 62

EA-2022-000182-JOJ

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 28 April 2023

Before :
HIS HONOUR JUDGE JAMES TAYLER
CHARLES EDWARD LORD OBE
EMMA LENEHAN

- -

Between :

Darrell Miles	**Appellant**
- and -	
Driver and Vehicle Standards Agency	**Respondent**

- -
- -

BETSAN CRIDDLE KC AND MADELINE STANLEY
(instructed by Thompsons Solicitors) for the **Appellant**
DANIEL STILITZ KC AND ASHLEY SERR
(instructed by the Government Legal Dept) for the **Respondent**

Hearing date: 15 March 2023

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JUDGMENT

SUMMARY

Disability Discrimination, Health & Safety

The claimant was employed as a driving examiner at the Pontefract office of the DVSA. In November 2018, the claimant was diagnosed with chronic kidney disease. In March 2020, all but critical driving tests ceased due to the Coronavirus pandemic. In July 2020, tests started again. The respondent required driving instructors to return to work, including those, like the claimant, considered to be clinically vulnerable, but not those who were clinically extremely vulnerable. The respondent took advice and instituted several adjustments to its usual practices. The claimant refused to return to work, and his pay was stopped. The claimant resigned on 10 August 2020. The claimant brought claims of health and safety detriment and dismissal, unfair constructive dismissal and disability discrimination. The employment tribunal held that there were circumstances connected with the claimant's work which he reasonably believed were harmful or potentially harmful to health or safety, but that he worked at a place for which there was a health and safety representative or committee (although not based at the Pontefract office) – as a result the ss 44(1)(c) and 100(1(c) ERA claims failed. The employment tribunal did not err in law in that determination. The decision of the employment tribunal that the claimant did not hold a reasonable belief in a serious and imminent danger to himself for the purposes of ss 44(1)(d) and 100(1)(d) ERA was one that was open to it. The employment tribunal did err in law in concluding that the claimant was not disabled because his decision not to return to work was not an effect of his impairment, but resulted from an "unreasonable belief", in circumstances in which it had held that the claimant did reasonably believe there were circumstances connected with his work which were harmful or potentially harmful to health or safety, when considering the section ss 44(1)(c) and 100(1)(c) ERA complaints, albeit that that he did not hold a reasonable belief in serious and imminent danger. The case was remitted.

HIS HONOUR JUDGE JAMES TAYLER

Introduction

1. This is an appeal against the judgment of Employment Judge D N Jones, sitting with members, dated 7 February 2022, after a hearing on 18 to 21 January 2022, and in chambers on 4 February 2022. The employment tribunal found that the claimant had not been subject to "detriments for raising health and safety concerns", that he had not been constructively dismissed and that he was not a disabled person.

2. We take the facts from the judgment of the employment tribunal.

3. The respondent is an executive agency of the Department of Transport. The employment tribunal noted that the Ministry of State was the correct named respondent, although the title was not changed, and so the title remained the same in the EAT.

4. The claimant commenced employment as a driving examiner with the respondent on 6 January 2016. He was based at the Pontefract Driving Test Centre.

5. The employment tribunal held that "there was a health and safety committee and representative for the Pontefract office" and that this person was "a union member" who was "recognised by the respondent" to whom the claimant had sent a collective grievance although he had not "appreciated it was destined for the designated Health and Safety committee".

6. On 12 November 2018, the claimant was told by his GP that he had stage IV chronic kidney disease (CKD). The employment tribunal recorded that "Stage IV is severely reduced kidney function with a plan for end stage kidney failure". The diagnosis was erroneous. The proper diagnosis was of Stage II CKD which the employment tribunal stated is "mildly reduced kidney function which is managed by patient control of blood pressure and risk factors". The employment tribunal found that the claimant did not discover the misdiagnosis until after he had commenced the proceedings - and that he had not known the difference between the stages of CKD while still employed by the respondent.

7. The claimant was managed by Lee Mitchell, Local Driving Test Centre Manager at Pontefract

and Doncaster. In March 2019, the claimant informed Mr Mitchell about his diagnosis. The claimant told Mr Mitchell that he used the toilet more often than before but did not raise any other issue.

8. The claimant later raised concerns about his diagnosis and how he might be affected by the Coronavirus pandemic. Mr Mitchell instructed the claimant to stop work on 17 March 2020. On 18 March 2020, driving tests ceased, save for critical tests. Those examiners, like the claimant, who were not conducting critical tests, were placed on paid leave.

9. On 5 June 2020, the claimant attended an individual assessment meeting with Mr Mitchell to discuss a proposed return to work. The claimant said that he believed that he fell within the clinically vulnerable category. He said he was worried about catching the virus. The claimant said he felt that it was not safe for him to return to work. Mr Mitchell told the claimant that people who fell within the clinically vulnerable category would be expected to return to work, in line with Government guidance, when driving tests recommenced. Mr Mitchell said that measures to protect the health and safety of staff would be taken. The claimant said he would speak to his doctor to find out what risks there were to him in returning. The claimant said that there were no adjustments he felt could be made by the respondent.

10. On 25 June 2020, the respondent announced the decision of the Department of Transport that driving tests would recommence the following month. Those in the clinically vulnerable category were expected to return to work, but those in the clinically extremely vulnerable category remained on paid leave.

11. That day, Mr Mitchell undertook a workplace induction meeting with the claimant by telephone to explain the proposals. Mr Mitchell spoke to the claimant again on 2 July 2020. The claimant said that he did not consider it was possible to comply with Government guidance about social distancing in a car. The claimant stated that he wanted a further discussion after he had spoken to his GP.

12. The claimant contacted his GP practice. The claimant was told that he should speak to occupational health at work because his GP could not advise, not being in a position to know if the

claimant's working environment was safe. The claimant said that he wanted to be signed off sick for stress. He was advised to self-certify for 7 days.

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

14. On 8 July 2020, Mr Mitchell replied to the claimant's trade union representative and stated that he had taken advice from HR and been told that those in the clinically vulnerable category were expected to return to work. He stated that the decision 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. Mr Mitchell stated that the claimant could take annual or special unpaid leave if he chose not to return.

15. The claimant replied on 10 July 2020. He confirmed he would not be returning to work because he did not think it was safe to do so. On 13 July 2020, Mr Mitchell spoke to the claimant who said that he believed he was at serious risk because of his CKD and that no adjustments would resolve his concerns. The claimant said that he believed the respondent was not following Government guidance.

16. On 30 July 2020, Mr Mitchell wrote to the claimant and confirmed the respondent's position. Mr Mitchell said that the claimant's concerns about the risks to his health had been considered, but the respondent regarded the measures they had taken as sufficient to safeguard him. If the claimant did not return on 6 August 2020, he would be placed on special unpaid leave.

17. On 10 August 2020, the claimant resigned giving 4 weeks' notice during which he took his outstanding holiday leave.

The claims

18. By a claim form received by the employment tribunal on 16 November 2021, the claimant brought complaints of: discrimination because of something arising in consequence of disability;

section 15 the Equality Act 2010 ("EQA"); failure to make reasonable adjustments; section 21 EQA; health and safety detriment; sections 44(1)(c), (d) and (e) Employment Rights Act 1996 ("ERA"); unfair dismissal; "ordinary"; section 94 ERA and health and safety; sub-sections 100(1)(c), (d) and (e) ERA.

19. The employment tribunal dismissed all of the claims. We will deal with them in a different order to that in the judgment because it assists in understanding our analysis. In summary, the employment tribunal concluded that:

19.1. the claimant had 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: sections 44(1)(c) and 100(1)(c) ERA

19.2. however, sections 44(1)(c) and 100(1)(c) ERA did not apply because there was a health and safety representative and safety committee for the Pontefract test centre at which the claimant worked

19.3. sections 44(1)(d)/(e) and 100(1)(d)/(e) ERA did not apply because the claimant did not hold a reasonable belief in a serious and imminent danger to himself

19.4. accordingly, the claims under sections 44 and 100 ERA failed

19.5. the claimant was not disabled, so the claims of discrimination because of something arising in consequence of disability and failure to make reasonable adjustments failed

19.6. the claimant had not been constructively dismissed and so the claim of "ordinary" unfair dismissal failed

20. We will consider the reasoning of the employment tribunal on these issues, the related grounds of appeal, and set out our conclusions in respect of them.

Health and Safety

Section 44(1)(c) and 100(1)(c) ERA

21. So far as is relevant to this appeal, the iteration of section 44 ERA at the relevant time provided:

> 44.— Health and safety cases.
>
> (1) An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that—
>
> (b) **being a representative of workers on matters of health and safety** at work **or member of a safety committee**—
>
> (i) in accordance with arrangements established under or by virtue of any enactment, or
>
> (ii) by reason of being acknowledged as such by the employer,
>
> the employee performed (or proposed to perform) any functions as such a representative or a member of such a committee,
>
> (c) being **an employee at a place where**—
>
> (i) there was **no such 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**, [emphasis added]

22. Section 100(1)(c) ERA is in similar terms.

23. The employment tribunal held that the claimant **did** reasonably believe that there were circumstances connected with his work that were harmful or potentially harmful to health or safety. The employment tribunal held:

> 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. …
>
> 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. [emphasis added]

24. We consider that this finding is of considerable significance, for reasons we shall return to later in this judgment.

25. The section 44(1)(c) and section 100(1)(c) claims failed because the employment tribunal held that there was a health and safety committee and representative for the Pontefract office with whom the claimant could have raised his concerns:

> 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.

26. That determination is challenged by the claimant by ground 3, in which it is asserted:

> The ET erred in concluding that the appellant fell outwith the scope of s.100(1)(c) of the Employment Rights Act 1996, when it was common ground that **there was no health and safety representative or safety committee <u>at</u> his place of work**, which was Pontefract Driving Test Centre

27. Section 44(1)(c) ERA applies if the claimant was "**an employee at a place where**— (i) there was no such representative or safety committee" and **"**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".

28. The claimant contends that the representative or safety committee must be **at** the place where he works. The representative was not based at Pontefract and so the claimant asserts that he came within section 44(1)(c) ERA. The employment tribunal rejected this argument on the basis that there need only be a representative or safety committee **for** the place at which the claimant worked.

29. We consider that the employment tribunal was correct to reject the claimant's argument based on the case of **Castano**. In that case it was, rather optimistically, asserted that the place at which a bus driver worked was his bus, so he came within the provision because none of the passengers on the bus he was driving was a safety representative. Eady J rejected that analysis on the basis that the claimant's place of work was the bus garage, where there was a safety representative. That does not answer the question of whether a safety representative or committee must be at the place of work where the claimant works or may be based at some other location, provided there is cover for the place at which the claimant works.

30. We consider that the employment tribunal applied the correct analysis in holding that it was sufficient that there be a safety representative or committee for the place at which the claimant worked. Section 44(1)(c) ERA refers to the place at which the employee works. It is the employee who must work **at** that place, even if absent from time to time. Once the place at which the claimant works has been identified one has to determine whether it is a place **where** there is such a representative. While the most literal reading of section 44(1)(c) ERA would require the safety representative or committee to be **at** the same place where the employee works, we consider that the section can also be sensibly interpreted to require that the place at which the employee works is one where there is such a representative or committee, albeit that the representative or committee is based at some other location, provided they cover the place at which the employee works. We consider that

the latter interpretation avoids absurdity and is consistent with the purpose of the provision. As the employment tribunal noted, the claimant's construction would mean that the respondent would have to have a safety representative or committee at each of its 1000 testing centres, even if there is a safety representative for the test centre who is easily contactable. Part of the purpose of the provision is to encourage employers to have safety representatives or committees and to encourage employees to raise straightforward health and safety concerns with them in the first place. On the claimant's literal reading of the provision, the existence of a safety representative or committee would not assist the employer if, for example, on the day in question the safety representative was working from home, as might commonly have been the case during the Coronavirus pandemic or was on holiday. It should be remembered that there is always the fall back of raising the matter with the employer even if there is a safety representative or committee if it was not reasonably practicable for the employee to raise the matter with the representative or committee, because, for example, they could not be contacted or were absent.

31. If, for example, an employer had a number of shops in a small town, all in easy walking distance of each other, with only a handful of employees at each, it would not be in accordance with the purpose of the provision for it not to be applicable because there was only one easily accessible safety representative or committee for the whole town, rather than a representative at each shop.

32. We consider that the employment tribunal's interpretation was correct and it was entitled to conclude that the place at which the claimant worked was one where there was a safety representative or committee. Accordingly, the claims under section 44(1)(c) and 100(1)(c) ERA were properly dismissed, and so ground 3 fails.

Sections 44(1)(d)/(e) and 100(1)(d)/(e)

33. So far as is relevant to this appeal, the iteration of section 44 ERA at the relevant time provided:

> 44.— Health and safety cases.
>
> (1) An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground

that—

> (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) r**efused to return to his place of work** or any dangerous part of his place of work, or
>
> (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.

34. Sub-sections 100(1)(d) and (e) are in equivalent terms.

35. In **Rodgers v Leeds Laser Cutting Ltd** [2022] EAT 69, [2022] I.C.R. 1187 I set out, at paragraph 22, my analysis of why I consider that conduct could not come within both subsections (d) and (e). The parties agreed and that case was only advanced on the basis that the conduct fell within subsection 1(d) because it involved not returning to the claimant's place of work. While not formally conceding the point, Ms Criddle, for the claimant, stated that the distinction was of no relevance in this appeal. We agree that it is not necessary to determine the point in order to determine this appeal. We also consider that the employment tribunal on a fair reading of the judgment considered this was also a case about not returning to a place of work.

36. Another question that arose in **Rodgers** was whether there must objectively be circumstances of danger that the claimant subjectively believes are serious and imminent. For reasons set out at paragraphs 25 to 30 I concluded that it is only necessary that the claimant reasonably believes that there are circumstances of danger that are serious and imminent. Underhill LJ agreed with my analysis: **Rodgers v Leeds Laser Cutting Ltd** [2022] EWCA Civ 1659, [2023] I.C.R. 356:

> I think I should say that in my view the subsection should indeed be construed purposively rather than literally and that it is sufficient that the employee has a (reasonable) belief in the existence of the danger as well as in its seriousness and imminence.

37. In this case it appears that the employment tribunal thought that the section required that on

an objective basis there be circumstances of danger, although it then answered the correct question of whether the claimant held a reasonable belief that there were circumstances of danger that were serious and imminent.

> 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***. [emphasis added]

38. The employment tribunal correctly concluded that the 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".

39. The employment tribunal presciently asked itself the first two questions that Underhill LJ subsequently set out at paragraph 21 of **Rogers**:

> (1) Did the employee believe that there were circumstances of serious and imminent danger at the workplace? If so:
>
> (2) Was that belief reasonable?

40. The employment tribunal carefully considered the Government guidance and legislation in place at the time. The employment tribunal also considered the contemporaneous material produced by Public Health England.

41. The employment tribunal took into account the steps that the respondent had taken to minimise risks:

> 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.

42. The employment tribunal was somewhat critical of what it saw as a blinkered approach adopted by the claimant:

> 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.

43. The employment tribunal also noted that the claimant did not take steps to obtain occupational health advice:

> 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.

44. The employment tribunal held:

> 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. …
>
> 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.**
>
> 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. [emphasis added]

45. The determination of the employment tribunal is challenged by ground 4:

> The ET erred in concluding that the appellant fell outwith the scope of s.44(1)(d) and/or (e) of the Employment Rights Act 1996. In particular, the ET erred in concluding that … the appellant could have no reasonable belief in serious and imminent danger because of the numbers of those affected [§89]. The numbers of those affected could not be determinative (or even logically probative) of whether there were circumstances of serious and imminent danger or whether the appellant could reasonably conclude that there were. Further, the evidence before the ET [§79] supported the reasonableness of the appellant's belief in the existence of serious and imminent danger.

46. This is essentially an assertion of perversity. The employment tribunal did mention the number of people affected by the Coronavirus pandemic, but that was not the basis for it determining that the claimant did not have a reasonable belief in a serious and imminent risk to his health and safety. The employment tribunal took a range of factors into account in reaching its conclusion. The employment tribunal did record information that supported the claimant's case at paragraph 79 as asserted in the ground of appeal, but weighed it against other material in reaching an overall determination, as it was entitled to do.

47. In argument the claimant relied on **Kerr v Nathan's Wastesavers Ltd** EATS/91/95 in which Lord Coulsfield said of the predecessor provision to section 100 **ERA**:

> in considering what is reasonable, care should be taken not to place an onerous duty of enquiry on an employee in a case such as this. The purpose of the legislation is to protect employees who raise matters of safety about which they are concerned; and the fact that the concern might be allayed by further enquiry need not mean that it is not reasonable

48. We do not consider that in determining what was reasonable for the claimant to believe, the employment tribunal placed an excessive burden on him to investigate matters. While the employment tribunal was critical to some extent of the claimant's failure to seek a referral to occupational health and because he became fixated with his view that the only possible approach was to maintain a distance of at least two meters from other people, this was only a part of the multifactual analysis the employment tribunal applied in determining that the claimant did not hold a reasonable belief in a serious and imminent risk to his health and safety. We do not consider that the decision can be said to be perverse or involved any error of law, and so dismiss ground 4.

Disability

49. The employment tribunal held that the claimant was not a disabled person at the relevant time.

50. Section 6 the Equality Act 2010 ("EQA") provides:

> "6 Disability
>
> (1) A person (P) has a disability if—
>
> (a) P has a physical or mental **impairment**, and
>
> (b) the impairment has a **substantial** and **long-term adverse effect** on P's **ability to carry out normal day-to-day activities**. …"[emphasis added]

51. In **Goodwin v Patent Office** [1999] ICR 302 Morison J said of the equivalent provision in the predecessor legislation:

> "3. Section l(l) defines the circumstances in which a person has a disability within the meaning of the Act. The words of the section require a tribunal to look at the evidence by reference to four different conditions.
>
> (1) **The impairment condition**. Does the applicant have an impairment which is either mental or physical?

> (2) **The adverse effect condition**. Does the impairment affect the applicant's **ability to carry out normal day-today activities** …, and does it have an adverse effect?
>
> (3) **The substantial condition**. Is the adverse effect (upon the applicant's ability) substantial?
>
> (4) **The long-term condition**. Is the adverse effect (upon the applicant's ability) long-term?
>
> Frequently, there will be a complete overlap between conditions (3) and (4) but it will be as well to bear all four of them in mind. **Tribunals may find it helpful to address each of the questions but at the same time be aware of the risk that disaggregation should not take one's eye off the whole picture**." [emphasis added]

52. Section 212 EQA defines the word "substantial":

> "212 General interpretation
>
> (1) In this Act— …
>
> "substantial" means more than minor or trivial; … "

53. In **Goodwin** Morison J held that the focus is on what a disabled person cannot do, stating at 309D:

> The focus of attention required by the Act of 1995 is on the things that the applicant either cannot do or can only do with difficulty, rather than on the things that the person can do."

54. The comparison is with what a person would be able to do absent the impairment: see **Elliott v Dorset County Council** [2021] IRLR 880 and **Paterson v Commissioner of Police of the Metropolis** [2007] ICR 1522, per Elias J at paragraph 68:

> In our judgment, the only proper basis, as the Guidance makes clear, is to compare the effect on the individual of the disability, and this involves considering how he in fact carries out the activity compared with how he would do if not suffering the impairment.

55. The employment tribunal considered the Equality Act 2010: Guidance on Matters to be Taken into Account in Determining Questions Relating to the Definition of Disability ("the Guidance"). Section 6(5) EQA provides for the Minister to issue such guidance. Paragraph 12 of Schedule 1 EQA requires that an adjudicating body, which includes a tribunal, "must take account of such guidance as it thinks is relevant". The employment tribunal considered, in particular, paragraphs B7 and B9 of the

Guidance:

> B7. Account should be taken of how far a person can reasonably be expected to modify his or her behaviour, for example by use of a coping or avoidance strategy, to prevent or reduce the effects of an impairment on normal day-to-day activities. In some instances, a coping or avoidance strategy might alter the effects of the impairment to the extent that they are no longer substantial and the person would no longer meet the definition of disability. In other instances, even with the coping or avoidance strategy, there is still an adverse effect on the carrying out of normal day-to-day activities. …
>
> B9. Account should also be taken of where a person avoids doing things which, for example, cause pain, fatigue or substantial social embarrassment, or avoids doing things because of a loss of energy and motivation. It would not be reasonable to conclude that a person who employed an avoidance strategy was not a disabled person. In determining a question as to whether a person meets the definition of disability it is important to consider the things that a person cannot do, or can only do with difficulty.

56. The employment tribunal accepted that the claimant has a physical impairment; stage II CKD. The impairment condition was met. The employment tribunal considered the adverse effect and substantial conditions together. The tribunal noted that the claimant avoided going shopping in person but instead relied on online shopping. He also did not go into work. The employment tribunal did not specifically address the long-term condition.

57. In respect of shopping the employment tribunal held:

> 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.

58. In respect of the claimant's decision not to return to work the employment tribunal held:

> 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 <u>not an unreasonable belief</u>.** 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 causal 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.** [emphasis added]

59. The claimant challenges the determination that he was not a disabled person at the relevant time by ground 1:

> The ET erred in:
>
> 1 Failing to focus on the difference between the way in which the appellant carried out day-to-day activities if not impaired. Instead, the ET addressed a series of erroneous considerations, namely:
>
> > 1.1 whether the appellant was employing reasonable avoidance measures [§54] rather than asking whether any avoidance measures prevented the effect of his condition from being substantially adverse;

> 1.2 focussing on the fact that other people may apply the same measures as the appellant and concluding that this meant that the effect of his condition on him could not be substantially adverse.
>
> 2 **Concluding that the appellant had not established that he did not go to work (which it rightly characterised as a substantial adverse effect) was not because of his condition but because of an 'unreasonable belief'** [§55]. The ET impermissibly drew a distinction between the appellant's perception of the risk to him of returning to work with his condition and the condition itself. Further and alternatively, there was evidence before the ET to support the appellant's belief as to risk [§79].

60. In **Da Silva Prima v Carl Room Restaurants Limited** [2022] IRLR 194, HHJ Auerbach considered a situation in which a person had a genuine but irrational belief that she had to avoid certain activities because of her existing and previous medical conditions:

> 62. **I agree with Ms Anderson that the test is objective**, as it is one of causation. **The impairment has to be found by the tribunal to, in fact, have had the requisite effect. In many cases, the answer will be straightforward and uncontroversial. But where there is a dispute about it, then whether the impairment does or not does not have the claimed effect must be determined by the tribunal on the evidence before it. It is not enough that the claimant truly believes that it does.** The tribunal must decide for itself. This means that, in a case where the claimant asserts that engaging in a certain activity will risk triggering or exacerbating some adverse effect of the impairment itself, such as bringing on a seizure or an adverse skin reaction or something of that sort, and that is disputed, the tribunal must consider whether it has some evidence that objectively makes good that contention.
>
> 63. Ms Anderson makes the submission that the tribunal in this case did not find that there was, in fact, any risk to the claimant from indulging in any of the activities which she avoided or abjured on account of a risk of triggering some adverse reaction or interaction with her epilepsy or vitiligo. The tribunal properly concluded that the claimant's case, put that way, did not succeed.
>
> 64. Mr Brown accepted that the test of causation is, in itself, objective, in the sense that it is a matter for the tribunal to decide. He also accepted that in this case the tribunal did not find that the claimant would have risked any harm or adverse health consequences on account of her epilepsy or vitiligo by way of a reaction or flare up or something of that sort had she, for example, drunk coffee, or used make up. He argued, however, that the tribunal had properly found that the requisite causation was found to have been established in this case by a different route, as follows.
>
> 65. The tribunal accepted that the claimant had adopted her various behaviours because she genuinely believed that to indulge in them would cause or risk harm on account of how they would or might exacerbate or

> trigger her epilepsy or vitiligo. Those were, as such, subjective beliefs. But the tribunal itself properly concluded that those conditions had, through the route of her acting on those beliefs, caused her to refrain from those activities. That conclusion was not dependent on whether those subjective beliefs were well founded. The tribunal had properly concluded that her beliefs caused her to refrain from those activities, and so had adversely affected her ability to carry them out, and that these were, in turn, beliefs about her epilepsy and her vitiligo. So the chain of causation was established.
>
> 66. This line of argument gave me some real pause for reflection. But ultimately I have concluded that it is not sustainable. That is for the following reasons.
>
> 67. **Firstly, to be clear, I do not think that it would always follow that, because the complainant has taken a decision to refrain from a particular activity on account of their impairment, such a decision will in every case, as it were, break the chain of causation. That would not be so where, for example, the complainant was following sound medical advice that indulging in the activity would, indeed, risk or cause some harmful exacerbation or reaction of their condition. But in a case of that sort, the underlying basis of causation would be established by the evidence that, objectively, the impairment does affect the ability to engage in that activity.** But in a case such as the present, where the claimant relies purely on their own belief, but there is no evidence accepted by the tribunal that they are right in what they believe, causation cannot be established by that particular route.
>
> 68 I also agree with Mr Brown that the complainant does not necessarily have to demonstrate to the tribunal that they have tried indulging and experienced adverse consequences. The fact that the individual has avoided the activity and has not experienced any harmful effects in fact, would not matter, if the tribunal were satisfied, for example by appropriate medical evidence, about the harmful impact that would have ensued, had they indulged. But if the tribunal is not satisfied of that, then the individual's decision to abstain out of conviction cannot, by itself, make good that evidential gap. [emphasis added]

61. We consider that the employment tribunal was entitled to reach the decision that it did in respect of the claimant's decision to shop online. It was open to the employment tribunal to conclude that by modifying his behaviour the claimant was able to prevent his impairment having a substantial adverse effect on that normal day-to-day activity.

62. We consider that the employment tribunal did err in its approach to the claimant's decision not to return to work. In the section of the judgment considering disability, the employment tribunal stated that the claimant did not return to work because of an "unreasonable belief". The employment

tribunal did not specify what the belief was or why it was unreasonable. In considering the health and safety claims, while the employment tribunal concluded that it was unreasonable for the claimant to believe that there was a serious and imminent risk to his safety in returning to work (for the purpose of section 44(1)(d) ERA), the employment tribunal accepted that he did have "a reasonable belief of circumstances connected with his work which were harmful to health" (for the purpose of section 44(1)(c)ERA.

63. We do not consider that the reasoning of the employment tribunal is sufficient to support the conclusion that the claimant's decision not to return to work was not a substantial effect on his day-to-day activities resulting from his impairment. The fact that an employee with CKD cannot establish that a refusal to return to work resulted from a reasonable belief in serious and imminent danger to safety, does not mean that if the employee reasonably believes that a return to work could be harmful to health, he cannot establish that the effect on his normal activities results from the impairment. If the claimant is found to be disabled because he had sufficient reason not to return to work as a driving examiner because of the increased risk he faced as someone with CKD by being in a car with those undertaking driving tests, so that his impairment had a substantial adverse effect on his day-to-day activities (subject also to fulfilling the long-term condition) it does not follow that his claims of disability discrimination would necessarily succeed. Even if thetreatment of the claimant was found to be because of something arising from disability it would still be open to the respondent to argue that the treatment was a proportionate means of achieving a legitimate aim. It would also be open to the respondent to argue that there were no adjustments that it was reasonable for it to make that would facilitate the claimant's return to work.

64. We are aware of the danger of importing tests from one statutory provision into another. That is not what we are doing. We consider that there is a fundamental inconsistency between the factual findings made in respect of the different statutory provisions in the employment tribunal concluding both that the claimant did not return to work because he had a reasonable belief of circumstances connected with his work which were harmful to health but also that he failed to return because of an

"unreasonable belief".

65. We appreciate that the employment tribunal did not have the advantage of HHJ Auerbach's analysis in **Da Silva Prima** when it reached its decision. We consider that the matter should be remitted so that the employment tribunal can decide, having considered the analysis in **Da Silva Prima**, whether there was a break in the chain of causation that prevented the claimant's decision not to return to work being a substantial adverse effect that resulted from his impairment. If the chain of causation is not broken the employment tribunal would then have to consider the long-term condition and, if appropriate, the claims of discrimination because of something arising in consequence of disability and failure to make reasonable adjustments.

Further consequences of allowing the appeal in respect of disability

66. If on remission the disability discrimination claim succeeds it could potentially result in the conclusion that the claimant was constructively dismissed. Accordingly, the determination that the claimant was not constructively dismissed is set aside and is also remitted. It would potentially be open to the employment tribunal to conclude that the claimant was constructively dismissed in a manner that was unfair for the purposes of section 98 (but not 100) ERA and/or so as to amount to disability discrimination, should the claim of discrimination because of something arising in consequence of disability succeed.

67. The claimant challenged the determination that he had not been subject to detriment for the purposes of section 44 ERA. Because the appeal in respect of sections 44(1)(c), (d) and (e) ERA failed that aspect of the appeal does not require determination. However, as the claim of disability discrimination and constructive unfair dismissal are to be remitted, we consider it appropriate to set out briefly our view as to the detriment issues. We consider that the employment tribunal was entitled to conclude that the contact with the claimant discussing, or seeking to discuss, his condition and his possible return to work did not constitute detriments. That conclusion was obviously correct. However, if relevant, the employment tribunal may need to consider again the question of whether there was any alternative work available for the claimant with adjustments in place. The employment

tribunal may also need to consider again whether withholding payment was appropriate. If the employment tribunal were to conclude that the claimant was disabled and/or because it did conclude that he did not return to work because he reasonably believed that there were circumstances connected with his work which were harmful to health, albeit not such that he had a reasonable belief that there were circumstances of serious and imminent danger, the employment tribunal may have to consider again whether the respondent was entitled to refuse to pay him. The employment tribunal might conclude that the claimant was not merely refusing to work but felt unable to work because of the risk to his health. Such a determination could be relevant to the constructive dismissal claim.

68. We have considered the parties submissions as to disposal. We consider that remission should be to the same employment tribunal. Many of the employment tribunal's findings were upheld. Overall, this was a careful judgment. We consider that remission to the same tribunal is likely to be more efficient than remitting the matter to a new employment tribunal despite the passage of time. We can rely on the professionalism of the employment tribunal properly to consider the remitted matters. We do not accept the claimant's submission that we should substitute a decision that the claimant's impairment had a substantial adverse effect on normal day to day activities, only remitting, in respect of the definition of disability, the long-term requirement. We upheld the appeal because of the inconsistency between the finding that the claimant did have a genuine belief about a risk to his safety at work and the finding that he did not return to work because of an "unreasonable" belief. This is essentially a point about inconsistent reasoning. We do not consider that it can properly be said that there is only one possible answer to the question of whether the claimant's impairment had a substantial adverse effect on normal day to day activities. The fact that the claimant did have a reasonable belief that there were circumstances connected with his work which were harmful to health does not necessarily mean, to the extent that there can only be one right answer, that the necessary causal connection is made between his disability and not returning to work.