EMPLOYMENT TRIBUNALS

Claimant: Mr Darrell Miles

Respondent: Driver and Vehicle Standards Agency

Heard at: Leeds

On: 14 February 2024.
15 and 16 February 2024 (in chambers).

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

REPRESENTATION:

Claimant: Ms B Criddle, King's Counsel
Respondent: Mr A Serr, Counsel

JUDGMENT

1. The physical impairment of Stage II chronic kidney disease did not have a substantial adverse effect on the ability of the claimant to undertake the normal day to day activity of returning to work.

2. The claimant was therefore not disabled within the meaning of section 6 of the Equality Act 2010.

3. The claims for disability discrimination are dismissed.

4. The claim for constructive unfair dismissal is dismissed. A reassessment of that complaint was conditional upon a finding the claimant was disabled, within the scope of the remittance of the case from the Employment Appeal Tribunal.

REASONS

1. The findings of the Tribunal are unanimous.

Introduction

2. This is the remitted hearing following the successful appeal of the claimant in respect of the claims of disability discrimination and ordinary unfair dismissal. The appeal was allowed because of inconsistency in reasoning (para 68 EAT Judgment): on the one hand with respect to the a claim under section 44(1)(c) of the Employment Rights Act 1996 (ERA), that he had brought to his employer's attention circumstances connected with his work which he reasonably believed were harmful to his health, para 69 ET Reasons and, on the other in respect to the issue of whether the claimant was a disabled person within section 6 of the Equality Act 2010 (EqA), that the claimant did not go back to work because of an unreasonable belief about risks to his health during the pandemic because of his CKD.

3. The EAT did not consider the reasoning was sufficient to support the conclusion that the claimant's decision not to go back to work was not a substantial effect on his day-to-day activities, para 63 EAT Judgment. The EAT stated that, under the section of its reasoning in respect of disability, the ET did not specify what the belief was or why it was unreasonable, para 62 EAT Judgment. The EAT did not substitute the finding to one that the claimant was disabled. It remitted that for further consideration in the light of the recent authority of ***Da Silva Prima v Carl Room Restaurants Limited [2022] IRLR 194***. That was so the Tribunal could consider 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, para 65 EAT Judgment. If the claimant was a disabled person, the complaints of disability discrimination and constructive unfair dismissal would have to be determined in the light of that, para 66 EAT Judgment.

4. We shall not repeat our findings of fact from the first decision sent to the parties on 3 March 2022. They were not overturned by the EAT and, subject to our comment, alteration or explanation below, remain the basis for the determination on the matters which remain to be decided.

Submissions

5. The Tribunal received written submissions from Ms Criddle KC and Mr Serr. Both made oral submissions.

6. No further witness evidence was admitted, following the decision at a preliminary hearing in respect of the remitted hearing on 6 October 2023, but the representatives drew the Tribunal to findings of fact and any material parts of the hearing bundle and witness statements.

7. In the light of our Judgment, we shall address only the issues in respect of disability and a further submission of Ms Criddle in respect of constructive unfair dismissal.

The Law

Discrimination
Disability

9. By section 6 of the Equality Act 2010
(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.

10. By section 212(1) of the EqA substantial means more than trivial or minor.

11. Guidance on the definition of disability has been issued by the Secretary of State pursuant to section 6(5) of the EqA. This includes guidance with respect to avoidance measures taken because of the condition.

> 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.
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> 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.

12. In ***Da Silva Prima v Carl Room Restaurants Limited [2022] IRLR 194*** the EAT considered the proper approach to evaluating avoidance measures in a situation in which the disability was a physical impairment. HH Judge Auerbach said:

> *"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".

Findings and Analysis

Disability

13. The claimant had a physical impairment in the form of chronic kidney disease (CKD). For the original hearing the claimant submitted a document produced by the organisation Kidney Care UK, a national kidney patient support group. Its title is Coronavirus (Covid 19) Guidance for patients with kidney disease. It is informative in a number of respects. One of those concerns the different categories of CKD, which are set out below in a table.

Stage (also referred to as G1-G5)	GFR*	Description	Treatment
1	90+	Normal kidney function, but urine findings, structural abnormalities or genetic traits suggest kidney disease	Observation, control of blood pressure
2	60–89	Mildly reduced kidney function and other findings (as in Stage 1) point to kidney disease	Observation, control of blood pressure and risk factors
3a	45–59	Moderately reduced kidney function	Observation, control of blood pressure and risk factors
3b	30–44	Moderately reduced kidney function	Observation, control of blood pressure and risk factors
4	15–29	Severely reduced kidney function	Planning for end stage kidney failure. Management of CKD complications such as anaemia
5	<15	Very severely reduced kidney function, called end stage kidney failure	Planning for end stage kidney failure

14. As explained in our earlier decision, the claimant believed he had Stage IV CKD. That is what he had been told by his doctor. He only discovered that was incorrect after these proceedings were issued when he spoke to his GP who clarified that he had Stage II. His granular filtration rate was 74, falling within the Stage II range as can be seen above. Until he brought this claim the claimant did not know the significance of the different categorisations.

15. This physical impairment satisfies the first part of the definition of disability in section 6 of the EqA.

16. The next question is whether that physical impairment had a substantial and long-term adverse effect on the ability of the claimant to undertake normal day to day activities. The activities which the claimant says were affected were considered in our previous decision. The one that remains for this remitted hearing is not attending work. We found that not working was a substantial adverse effect on the claimant's ability to undertake normal day to day activities. The question was whether it was the physical impairment which had that effect or, as the respondent suggests, it was the claimant's choice not to work.

17. We found that the reason the claimant did not go to work was that he believed that as a person with CKD he had significantly enhanced risks from Covid 19, para 55 of ET Reasons. There was no question but that the claimant genuinely believed that. Section 6 of the EqA is not about beliefs, in contrast to sections 44(1)(c)(d) and (e) of the ERA. HH Judge Auerbach explained the necessary analysis in respect of section 6 of the EqA in ***Da Silva.*** It is a question of whether there *was* a risk of triggering or exacerbating a condition. That must be decided on the available evidence, on a balance of probabilities. It is a question of causation.

18. We considered causation in our earlier decision and found it not to have been established. At paragraph 55 we posed the issue in this way: "*Not going to work would be a more than a minor or trivial (substantial) adverse effect on normal day to day activities, but we must be satisfied it was the CKD, a physical impairment, which caused that and not an unreasonable belief*". To have omitted the last few words '*and not an unreasonable belief*' would have been advisable. It was the belief that led to the avoidance measure of not going to work, but its reasonableness had no relevance to the causation question, *viz* was the claimant at an enhanced risk of catching Covid or enhanced illness because of the physical impairment of CKD. As the EAT pointed out, the finding that the belief was unreasonable was not compatible with an earlier finding that the claimant had a reasonable belief that there were circumstances connected with work which were harmful to health. The claimant had drawn attention to the those in the CV category and the contemporary Government guidance. We had found that belief to be reasonable and both the claimant and the respondent considered the claimant to be in the CV category at the time.

19. Working in close proximity to a person who was taking a driving test several times a day precluded the level of social distancing recommended by the Government. This was a disease which is understood to be contracted through air born transmission. Even with the mitigating measures the respondent had introduced, it seems likely that there was some enhanced risk of catching the virus to any driving examiner. We must address whether that risk was further enhanced for the claimant or that if he caught the disease he may suffer more serious ill health than others because of Stage II CKD. Focusing on his belief or the reasonableness of it is a distraction from the question. Genuine and reasonably held beliefs may be mistaken, as illustrated by HH Judge Tayler in ***Rogers v Leeds Laser Cutting Ltd [2003] ICR 1187***. Workers who saw a green gas escape at work could genuinely and reasonably believe it posed a serious and imminent risk to health, even though unbeknown to them the gas was inert. They would still receive the protection of the legislation of section 44(1)(d) of the ERA. That type of analysis is not required for section 6 of the EqA, because unlike the ERA provisions, belief is not an ingredient which requires determination. We must consider the issue of causation again in the

light of the guidance in ***Da Silva***. That puts into context belief in avoidance measure situations.

20. What is the evidence about enhanced risks? Ms Criddle says the Government guidance was clear. It stated those with CKD were in a category of the Clinically Vulnerable (CV). That categorisation was a creation of the Government, the Cabinet Office, for the very purpose of protecting sections of the public from the pandemic. Different versions of the guidance were issued from June 2020 through to March 2021. One version states, "*If you have any of the following health conditions, you may be clinically vulnerable, meaning you could be at higher risk of severe illness from coronavirus".* Another more emphatically states, "*If you have any of the following health conditions, you are clinically vulnerable, meaning you are at higher risk of severe illness from coronavirus.* Ms Criddle says that statistics published by PHE highlighted higher risk factors such as sex, age, occupation and having CKD. She says this is not like the claimant in ***Da Silva****,* because the claimant, Mr Miles, did not have an irrational belief in the existence of the risk, unlike Ms Da Silva Prima.

21. Mr Serr says that this is a case like ***Da Silva*** because it is not about beliefs but about what evidence there is about enhanced risks arising from the type of CKD the claimant had. He says there was no medical evidence from a doctor or anyone else in respect of the claimant's predisposition to greater harm because of his condition. He says the Government guidance is too general to assist on the causation question because it does not differentiate between a condition which is broad ranging in nature. Furthermore, he says the guidance the claimant introduced into the case from Kidney Care UK contradicts his claim of enhanced risk. It explains that the condition at Stage II is of mildly reduce kidney function which is managed by observation and control of blood pressure and risk factors. He says it is a benign condition and that this guidance places it, at that level, outside the CV category and at no significantly greater risk than anyone else.

22. Both Mr Serr and Ms Criddle blame the opposite party for the absence of occupational health advice. Its absence, however, leaves us no further forward and we have no information from a qualified or experienced medical advisor to resolve the vexed question as to whether the claimant was at any enhanced health risks on exposure to Covid 19 because of his CKD in going back to a job which, by its very nature, would enhance the risk of contraction to any driving examiner because of the absence of social distancing. That is notwithstanding many mitigating measures had been introduced by the respondent to minimise them.

23. Unlike some tribunal jurisdictions such as mental health and, in some cases social entitlement, one of our members is not a qualified medical practitioner. In a number of authorities, the higher courts have cautioned about making findings on questions arising under section 6 and Schedule 1 of the EqA in the absence of medical evidence of how the particular medical condition affected the claimant. In our previous decision we referred to the observations of Underhill J in ***RBS v Morris [2012] UKEAT/0436/10 MAA*** in respect of what are known as the deduced effects of a condition or a likelihood of recurrence of adverse effects under Schedule 1. In the ***Da Silva*** decision, on a separate point under consideration concerning diagnosis of cancer, the EAT stated, "*The process of diagnosis requires appropriate expertise, and so the expression of a diagnostic opinion ordinarily should come from some*

expert source, whether in the form of primary clinical records or expert evidence produced for the purposes of the litigation. The tribunal in the present case was also right in principle to highlight at 68 the significance of the difference between generalised material relating to medical conditions, and material in relation to a particular individual that is the product of direct investigation of their condition and/or the expert assessment of primary clinical evidence specifically relating to them" [emphasis added]. That was not an insurmountable obstacle on the facts of that case because the EAT considered that the website material of PHE could be regarded as reputable and reliable though not necessarily always infallible but read alongside a pathology report of the claimant's condition was sufficient to make good the claimant's case she had cancer.

24. We are left with on-line publications of Government guidance in the pandemic, an analysis from PHE on disparities on the risks and outcomes from Covid 19 and the charity Kidney Care UK guidance for patients with kidney disease to resolve the causation question. These are reputable and reliable resources, but they do not appear to speak with one voice when applied to the claimant's situation.

25. Applying the Government guidance at the time, this looks like an open and shut case. It stated those who have CKD are in the CV category and that category of persons are at increased risks of serious illness. The criticism of it is that, for our purposes, it is too generalised. It does not differentiate between the spectrum of cases of CKD from the mild to the very serious. In respect of all its categories of CV it covers millions of the population and not all will be disabled, such as many in the vast group over the age of 70. We recognise the strength of that submission. We have regard to the purpose behind the guidance. The Government was seeking to provide advice to protect certain sections of society during a health crisis which was unknown in modern times. If the guidance had not covered broad categories, but broken them down into a more refined analysis, it would have been overly complex for the purpose of public messaging and more difficult practically to understand and implement.

26. The PHE analysis on risks and outcomes of August 2020 includes those with CKD at greater risk on analysis of the statistics, as with other characteristics some of which the claimant shared and some of which he did not. We summarised them in our earlier decision. However, it does not differentiate between the different categories of those with CKD in respect of outcomes and risk.

27. The Kidney Care UK guidance is more informative because it identifies the different types of CKD and the respective effects of the condition, illustrated in the table above. It differentiates between risk factors and the precautions which should be taken in the prevailing pandemic. The nature of the claimant's condition is outside the CV category. It states that those in Stage 3+ will be in the CV or CEV groups depending on the severity of their condition and it is they who are at greater risk from severe complications from Covid 19.

28. Ms Criddle says that it was the Government which created the CV and CEV categorisations and Kidney Care UK has no status to redefine them. Technically that is doubtless correct. That does not render the information in the publication of no value on the matter. Our task is about evaluation of the risks to the claimant in

returning to work in the pandemic and the degree to which they were enhanced because of his CKD. In that respect, the information is more helpful than the generalised information in the Government and PHE materials. It considers the broad nature of the condition in its different stages and advises those with CKD of where that places them in respect of risk to their health and the caution they must exercise. It is different for those with the higher stages of the CKD. The use of the Government's CV and CEV categorisation is a means of terminology deployed by the charity to convey that information. It places the more generalised Government guidance and PHE analysis into a different context.

29. For these reasons we prefer the submissions of the respondent. We did not have the assistance of a medical practitioner's opinion about the claimant's particular situation and susceptibilities. What we have, in the above publications, did not satisfy us, on a balance of probabilities, that the stage II CKD placed the claimant at greater risks of contracting or suffering more serious complications from Covid 19 at work. The physical impairment did not have a substantial adverse effect on the claimant's ability to undertake the normal day to day activity of going to work.

30. It is not necessary to address whether the effects were long term. Disability is not established.

Constructive unfair dismissal

31. Ms Criddle says that even were we to find the claimant was not disabled we must reconsider the constructive unfair dismissal case because it was remitted as a self-standing issue by the EAT. She says this is the natural reading of the language used by the EAT at paragraph 66 of its Judgment: "*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*" and paragraph 67, "*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*". She says the use of the term *and/or* makes it clear that the EAT envisaged the need to consider unfair dismissal as an alternative to the question of disability and the claims which flow from that. She cites the authority of ***Gregg v West Anglia NHS Foundation Trust [2019] ICR 1279*** with respect to the circumstances in which an employer may lawfully withhold pay.

32. We agree with Mr Serr, that it is not open us to readdress the finding in respect of unfair dismissal unless we find the claimant was a disabled person. The opening sentence under the section "*Further consequence of allowing the appeal in respect of disability"* restates the point that it was the approach to disability which was successfully appealed, not the ordinary unfair dismissal claim. The opening words of paragraph 66 reaffirm this: "*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 also remitted"*. The reassessment of the unfair dismissal question is conditional upon a finding of disability being made. In paragraph 67 the phrase *and/or* is also conditional upon a finding the claimant was disabled, as is clear from the opening clause and the use of the word *because* immediately after it.

33. In the light of these findings, it is not necessary to address the further submissions which we received about the reasonable adjustments and discrimination arising from disability claims.

Employment Judge D N Jones

Date: 21 February 2024

RESERVED JUDGMENT AND REASONS SENT TO THE PARTIES ON

21 February 2024

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