



EMPLOYMENT TRIBUNALS

Claimant: Mr P Ennis

Respondent: DPD Group UK Ltd

Heard at: Midlands (East) Region by Cloud Video Platform
On: 5, 6, 7 January 2022, 10, 11 February 2022

Before: Employment Judge M Butler
Members: Mrs J Barrowclough
Ms G D Turner

Representation

Claimant: In person
Respondent: Mr J Gidney, Counsel

This was a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V – video.

RESERVED JUDGMENT

The unanimous Judgment of the Tribunal is that the claims of detriment under Section 44(1)(d) and (e) of the Employment Rights Act 1996, direct discrimination by association under Section 13 of the Equality Act 2010 and harassment under Section 26 of the Equality Act 2010 are not well-founded and are dismissed.

RESERVED REASONS

The claims

1. By a Claim Form submitted on 17 June 2020, the Claimant brought claims under Section 44 of the Employment Rights Act 1996 (ERA), Section 13 of the Equality Act 2010 (EqA) and Section 26 EqA. His Claim Form referred to other claims which at a Closed Preliminary Hearing before Employment Judge Dyal he confirmed he was not pursuing. The claims are complicated by the fact that this is the second Claim Form submitted by the Claimant. The first was for disability discrimination which was dismissed by Employment Judge Hutchinson on the ground that the Claimant was not disabled. The Claimant has appealed this Judgment to the Employment Appeal Tribunal but to date it has not been progressed. The Claimant has

brought a further claim for, inter alia, unfair dismissal and disability discrimination, which cannot be pursued until his appeal in the first claim has been dealt with by the Employment Appeal Tribunal.

2. Briefly, the claims before the Tribunal in this case arise out of the Claimant's allegations that the Respondent failed to take adequate measures to protect him and, therefore, his clinically extremely vulnerable partner during the covid-19 pandemic. As a consequence, he refused to attend work and was ultimately dismissed. His argument is that he should have been furloughed. In respect of direct discrimination under Section 13 EqA he claims he was treated less favourably than a relevant comparator would have been treated because of his partner's disability. His claim under Section 26 EqA relates to the Respondent's threats of disciplinary action against him for refusing to attend work because of his partner's disability.
3. The Respondent concedes that the Claimant's partner is disabled for the purposes of Section 6 EqA but denies the claims in their entirety.

The issues

4. The issues were agreed between the parties, although the Claimant indicated at the commencement of the hearing that, as well as Section 44(1)(d) ERA, he wished to pursue a claim under Section 44(1)(e) ERA. The issues before the Tribunal are:

Section 44(1)(d) ERA

- 4.1 In April 2020, were there circumstances of serious and imminent danger in the Claimant's workplace?
- 4.2 Did the Claimant have a reasonable belief of circumstances of serious and imminent danger in his workplace?
- 4.3 Could the Claimant reasonably be expected to avert those circumstances?
- 4.4 Was the Claimant subjected to a detriment:
 - (i) by being threatened with disciplinary action on 21 and 23 April 2020; and
 - (ii) by suffering a loss of pay between 20 April and 30 June 2020?
- 4.5 What was the reason for the detrimental treatment? Was it because he refused to return to the workplace because of a reasonable belief of serious and imminent danger at his workplace?
- 4.6 Was it because of unrelated reasons, namely:
 - (i) his reluctance to state how his leave should be categorised; and

- (ii) his own wish to remain off work?

Discrimination by association (Section 13 EqA)

4.7 Was the Claimant treated less favourably by the Respondent in:

- (i) refusing to accept his partner, Claudette Lewis, had been asked to shield from 24 March 2020;
- (ii) not furloughing the Claimant from 20 April;
- (iii) not granting the Claimant's special paid leave from 20 April; and
- (iv) threatening disciplinary action in letters dated 21 and 23 April 2020,

than a relevant comparator would have been treated and, if so, was that because of his partner's disability?

4.8 Hypothetical comparators are relied upon, including employees given special leave by the Respondent (ie shielders).

4.9 If such detrimental treatment is established, what was the reason for it? Did it have nothing whatsoever to do with Claudette Lewis's accepted disability of severe asthma?

4.10 The Respondent relies on the following non-discriminatory explanations:

- (i) the Claimant did not provide Claudette Lewis's NHS shielding letter until 20 June 2020;
- (ii)-(iii) furlough and/or special leave was only available to shielders, not people who live with shielders, pursuant to often repeated government guidance;
- (iv) disciplinary action was threatened if the Claimant did not state how he wanted his leave to be categorised.

Harassment (Section 26 EqA)

4.11 Did the conduct at .7 above occur?

4.12 Was it related to Claudette Lewis's asthma?

4.13 Could it reasonably have had the effects set out in Section 26 EqA upon the Claimant?

The Law

5. Section 44 ERA provides:

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—

(a) ...

(b) ...

(c) ...

(d) in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonable 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, 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 the steps which the 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.

6. Section 13 EqA provides:

13 Direct discrimination

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

(2) ...

(3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.

7. Section 26 EqA provides:

26 Harassment

(1) A person (A) harasses another (B) if—

- (a) A engages in unwanted conduct related to a relevant protected characteristic, and
- (b) the conduct has the purpose or effect of—
 - (i) violating B's dignity, or
 - (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

8. We were referred to the following cases:

- ***Oudahar v Esporta Group Ltd [2011] IRLR 730 EAT***
- ***Rodgers v Leeds Laser Cutting Ltd ET case 1803829/2020***
- ***Harvest Press Ltd v McCaffrey [1999] IRLR 778***
- ***Nagarajan v London Regional Transport [1999] IRLR 572 HL***
- ***Igen Ltd & others v Wong [2005] IRLR 258 CA***
- ***Advance Security UK Ltd v Musa [2008] UKEAT/0611/07***
- ***Ladele v London Borough of Islington [2009] IRLR154***
- ***Madarassy v Nomura International plc [2007] IRLR 246 CA***
- ***Shamoon v Chief Constable of The Royal Ulster Constabulary [2003] IRLR 285 HL***
- ***Balamoody v UK Central Council for Nursing, Midwifery and Health Visiting [2002] IRLR 288***
- ***Richmond Pharmacology v Dhaliwal [2009] IRLR 336***
- ***Reverend Canon Pemberton v The Right Reverend Richard Inwood, former Acting Bishop of Southwell and Nottingham [2018] IRLR 542 CA***
- ***Grant v Land Registry [2011] IRLR 748CA***

The evidence

9. We heard oral evidence from the Claimant and, for the Respondent, from Mr Lee Malyan, Distribution Centre Manager - Nottingham, Mrs Jacqueline Whittle, General Manager - Durham Depot and Mr Mark Edwards, Regional Manager. There was an agreed bundle comprising 472 pages, which were supplemented by a few further documents as the hearing progressed. References to page numbers in this Judgment are to page numbers in the bundle.

The factual background

10. In order to consider the factual background in this case, we first address the Claimant's evidence. It is fair to say we had considerable difficulty in accepting much of his evidence. Throughout his evidence, the Claimant misinterpreted government guidance, did not understand it or simply said he did not agree with it. We refer below to a number of examples.

11. At the beginning of his evidence, the Claimant was taken to the first government guidance issued in respect of social distancing when the country

went into lockdown as a result of the covid-19 pandemic, which is dated 20 March 2020 (page 83). The Claimant refused to accept that this guidance did not say he should shield if he lives with someone who is shielding. He was, however, unable to point to any part of the guidance which said he should shield if he lives with someone who is shielding. That is no doubt because it does not say this. The guidance was updated on 21 March 2020 (page 90) and the Claimant was taken to page 93, which says in relation to those shielding because of an underlying health condition: *“If you have someone else living with you, they are not required to adopt these protective shielding measures for themselves”*. He acknowledged that this was what the guidance says, as does the guidance dated 24 March 2020 (page 102), the guidance dated 30 March 2020 (page 112) and the guidance dated 17 April 2020 (page 139). At this point, the Claimant accepted that the guidance was consistent in that a person living with someone who is shielding did not have to shield themselves. Notwithstanding this evidence, the Claimant subsequently persisted in his view that he should not have to work for fear of contracting covid-19 and passing it on to his partner.

12. The Claimant's evidence was also at odds with the guidance in relation to key workers. He was referred to the guidance dated 11 May 2020 (page 148) which states: *“All workers who cannot work from home should travel to work if their workplace is open. Sectors of the economy that are allowed to be open should be open - such as food production, construction, manufacturing, logistics, distribution and scientific research.”* The Claimant was a driver for the Respondent responsible for making between 80 and 100 deliveries and collections each day. He was, therefore, indisputably involved in the logistics and distribution industry. Clearly, he could not work from home. He accepted this guidance but said he did not agree with it in his particular circumstances. When he was referred to the letter dated 30 March 2020 from the Department for Transport (page 274), he did not agree that all workers within the logistics sector were key workers. The letter states: *“Haulage drivers, managers, warehouse staff and all other logistics professionals need to continue to go about their business to keep supply chains moving, and government policy is clear that this applies to all supplies chains and not only those for food and medical supplies.”* The Claimant disputed that he was a key worker required to continue working because he said of the guidance: *“It's only guidance and it's open to interpretation as to what is essential supplies”*. His argument is that he was not a key worker because he was not involved in only delivering medical supplies.
13. Continuing in relation to the same guidance, it was pointed out to him that being furloughed applied if a worker was unable to work from home and would otherwise be made redundant. He accepted that during lockdown the Respondent's business saw an increase of over 30% so making him redundant was not an option but his evidence was: *“From what I've heard you could be furloughed rather than be made redundant”*. He believed, he said, that an employer could furlough an employee who was not otherwise at risk of redundancy. The basis of his argument in this respect was an article written by a firm of solicitors (page 468) which is a summary of caring responsibilities and which, it has to be said, is inaccurate.

14. There were numerous other instances in the Claimant's evidence of his rather obdurate approach to his dealings with the Respondent and Mr Malyan in particular. Having been asked to explain his absence and whether he wished to take it as holiday, the Claimant freely admitted that he ignored Mr Malyan's letters. This is illustrated at page 309 in an email from the Claimant to Mr Malyan where, inter alia, he said: "*The fact I have not as you previously suggested notified/requested a period of unpaid leave or holiday is because I deem neither to be appropriate or justified for reasons already identified*".
15. Remarkably, the Claimant admitted in evidence that, although he recognised it was his duty to advise his line manager of any absences and the reasons for them, he did not at any time read the Respondent's absence management policy. It seemed to the Tribunal that the Claimant was intent on interpreting government guidance to suit himself and to ignore documents which did not support him.
16. The Claimant also displayed a somewhat unreasonable approach to the provision of PPE. In his evidence, he suggested that one pair of gloves per day was inadequate and he should be provided with one pair for each delivery or collection he made. This would amount to some 400 pairs of gloves in a week at a time when everyone can recall there was a dire national shortage, indeed a worldwide shortage, of PPE.
17. For the above reasons, the Tribunal concluded that the Claimant's evidence was not credible, and his views and arguments were self-serving based upon his disagreement or misinterpretation of government guidance.
18. We add at this stage that we found the evidence of the Respondent's witnesses to be entirely credible. As appropriate, they were conscious of and well versed in the government guidance during the pandemic and made significant efforts to appease the Claimant's stated concerns about dangers to his partner in him having to attend work and carry out deliveries and collections. At no time, however, did the Claimant set out specifically what his caring responsibilities for his partner were and their overall impression was that he did not wish to attend work under any circumstances but expected to be paid for staying at home.
19. In relation to the issues before us, we find the following facts:
 - 19.1 The Claimant was employed by the Respondent as a Collection and Delivery Driver from 9 January 2017. The Respondent is an international parcel delivery business operating in the UK from a number of regional sites and employing several thousand people on an employed and self-employed basis. The Claimant lives with his partner and her son from a previous relationship. His partner suffers from severe asthma and is prescribed a high dose of steroids as a consequence.
 - 19.2 The Claimant's role involved delivering parcels to customers and collecting any returns within Nottinghamshire and surrounding areas.

Typically, this would involve between 80 and 120 stops each day to both residential and commercial premises.

- 19.3 In around mid-March 2020, after the emergence of covid-19, the Respondent began preparations in order to be able to continue its delivery and collection service. Throughout the pandemic, the Respondent gave advice and guidance to its employees in accordance with government guidance and it was updated from time to time. It considered that its employees who were involved in deliveries and collections, amongst others, were key workers whose jobs were not able to be undertaken from home.
- 19.4 On 23 March 2020, the Claimant informed the Respondent's Operations Manager at the Nottingham site, Andrew Freckleton, that he was self-isolating due to his partner being at risk. This followed after the Respondent's letter to its workforce dated 11 March 2020 (page 248) setting out a number of frequently asked questions and its response to them. This document was updated regularly. In particular, at page 260 it confirms that if an employee lives in the same household as someone who is considered as "high risk vulnerable" they should still attend work and there was no need for them to shield or self-isolate.
- 19.5 When told by the Claimant that he would not attend work due to his partner's medical condition, the Respondent wrongly assumed that his partner had covid-19 symptoms and that the Claimant was (as he himself put it) self-isolating. The Claimant remained absent from work for 14 days and was paid Company sick pay whilst absent.
- 19.6 The Claimant returned to work on 6 April 2020 when information was given to employees that PPE was available for them and should be collected. The Claimant did not collect his PPE. On his return to work, the Claimant was given covid-19 risk training. He spoke to Mr Freckleton asking if he could start his shift each day at 9 am to avoid the "rush" of drivers arriving at the depot and beginning their daily runs. In order to support the Claimant, this was agreed with effect from 9 April 2020. He was also given a delivery van and parking space for his exclusive use. The Claimant worked this shift pattern without any further issues until 17 April 2020.
- 19.7 On that date, the Respondent announced to its workforce that those employees who were furloughed would receive their 80% furlough pay and this would be topped up to their full pay by the Company (page 283). The Claimant emailed Mr Malyan on that day stating that his partner was shielding and requesting to be placed on furlough (page 285). In this email, the Claimant also complained about the increase in the volume of work, that he had observed some people not adhering to social distancing guidance and disputing that he was a key worker. The Claimant attached to that email an incomplete template letter, presumably sent in response to a request from the Claimant's partner's employer for medical

certification for her absence from work due to the pandemic (page 287 - 289). Apart from stating the Claimant's partner's name, it merely noted that she suffered from asthma, was overweight, made some reference to contraception, arthroscopic subacromial decompression, gestational diabetes mellitus and the normal delivery of her son.

- 19.8 Mr Malyan replied to the Claimant's request by letter dated 20 April 2020 (page 290). In this letter he set out an extract from the government Shielding Guidance and also the efforts taken by the Respondent to reduce the risk of spreading the covid-19 virus. These included daily checks, remote monitoring of CCTV to observe social distancing, shift managers to walk the floor and enforce strict social distancing; issuing PPE, namely, gloves, face masks and hand sanitiser; introducing a wave system to limit the number of people on site at any one time; daily cleaning of equipment and vehicles and giving guidance regarding measures to be taken whilst carrying out deliveries and collections. Mr Malyan pointed out to the Claimant that his contracted hours had been temporarily changed so he could attend the depot when there were fewer people there. He confirmed that the Respondent did not propose to put the Claimant on furlough leave but said: *"If you wish to take a period of unpaid leave or annual leave, we would consider this request"*.
- 19.9 The Claimant replied on 21 April 2020 (page 301). He complained about the lack of social distancing at the Respondent's depot and again disputed the interpretation of the government guidance. He said there remained little or no effort to enforce social distancing and, we find, wrongly claimed he had only been given PPE and a change to his contracted hours after he had made a telephone complaint to the Health and Safety Executive. The Respondent produced photographs of the health and safety measures in place at the depot (pages 292 - 300).
- 19.10 On 21 April 2020, Mr Freckleton, Operations Manager, wrote to the Claimant (page 302) in reference to his unauthorised absence from work. He asked the Claimant to make immediate contact to discuss his absence and said that if he failed to make contact he would be required to attend a disciplinary hearing which could result in a sanction up to and including summary dismissal. A further letter in the same terms was sent to the Claimant on 23 April 2020 (page 304).
- 19.11 On 24 April 2020, Mr Malyan sent an email to the Claimant (page 305) repeating the Respondent's view that he would not be furloughed because he was not in the category of employees who needed to be furloughed and government guidance was being followed within the business. He repeated that the Claimant had not notified the Company whether he wished to take a period of unpaid leave or holiday and if he failed to attend work and did not confirm whether he wished to take unpaid leave by the following Monday, his

absence would be treated as absence without leave, which may result in disciplinary action. The Claimant replied on 27 April 2020 (page 309) effectively repeating his previous comments. There were further email exchanges between Mr Malyan and the Claimant which, it has to be said, in the main covered the same ground. In his email of 24 April 2020 to the Claimant (page 306), Mr Malyan confirmed to the Claimant that the Respondent had been unaware of his complaint to the Health and Safety Executive when his contracted hours were amended and he had been advised PPE was available for him. We find as fact that this was the case and the Claimant's view that it was not is not credible.

- 19.12 During the pandemic, the Respondent did give special paid leave to its employees who were extremely clinically vulnerable. It did not grant such leave to those who lived with clinically vulnerable members of their family, which was in line with government guidance.
- 19.13 Although a meeting between Mr Malyan and the Claimant was mooted, for various reasons this did not happen. However, on 4 May 2020, the Claimant visited the depot unannounced requesting a meeting with Mr Malyan. Mr Malyan had prescheduled meetings all day due to major initiatives being implemented by the Respondent and the Claimant emailed Mr Malyan after being told he was unavailable on the same day (page 317) beginning his email with the words: "*Thank your for turning me away this morning embarrassing me yet again. I am still not on suspension nor am I isolating*". The approach taken by the Claimant to his correspondence was consistent with his views expressed in that correspondence and amounted to him putting his own false interpretation on events which had occurred. The Claimant did, however, suggest that his leave be taken as unpaid. He asked that his correspondence be treated as a grievance, which was actioned by Mr Malyan. He was invited to a grievance hearing on 13 May 2020 to be held by Jacki Whittle, Depot Manager of the Respondent's Teesside operation.
- 19.14 The notes of the grievance meeting are at pages 323 - 333. In the minutes at page 331, the Claimant insisted he had been put at a disadvantage because of his partner's condition and had been intimidated into making a choice of unpaid leave or holiday by the threat of disciplinary action and dismissal. He also (page 332) complained that he had been forced to use up two weeks of Company sick pay when he had initially been off work and the Respondent thought he was self-isolating. Somewhat pedantically, the Claimant complained that this meant that, although he had been paid full pay whilst off sick: "*It has come out of my company sick pay I am entitled to*". This is illustrative of the Claimant's mindset that he should be paid the full amount he could conceivably receive for the maximum period of time and he had lost two weeks of this. Ms Whittle investigated the Claimant's grievance but did not uphold it and this was confirmed in a letter from her dated 22 May 2020 (page 338). She confirmed in her decision letter the Claimant had provided

no evidence to confirm his partner was extremely clinically vulnerable. She further stated that he had not been “*threatened*” with disciplinary action and this had only been raised after his continued refusal to return to work. In relation to PPE, Ms Whittle confirmed she was satisfied that the Claimant had been advised to collect PPE before his referral to the Health and Safety Executive. Ms Whittle ended the letter by offering the Claimant a further change of start time of his shift to 10 am so he would arrive at the depot when it was quieter.

- 19.15 The Claimant returned to work on 2 June 2020 and was provided with hand sanitiser, hand wipes and face masks. He was given some pairs of disposable gloves as they were not mandatory PPE and the Claimant complained about this and the fact that he did not feel social distancing was being followed. The Claimant left to begin his deliveries but ‘phoned the depot 30 minutes later to say he did not feel safe and returned to the depot before leaving work.
- 19.16 On 15 June 2020, the Claimant attended the Respondent’s depot without his uniform. He had a meeting with Mr Malyan and Ms Hannah Clifford, People Business Partner, during which he became verbally aggressive and threatened legal action against the Respondent. As the meeting had become heated, Mr Malyan had to ask the Claimant several times to leave the depot, which he ultimately did.
- 19.17 The Claimant went through the Respondent’s grievance appeal procedure by attending a first and second grievance appeals, both of which were not upheld.
- 19.18 The Respondent had installed CCTV in all of its depots, which was monitored from a central hub. Any employees breaching social distancing regulations were spoken to accordingly. It was not possible to monitor all of the CCTV on a 24/7 basis and the various depots were monitored randomly by an independent third party.
- 19.19 After leaving work the Claimant had a telephone conversation with Ms Clifford asking the Respondent to consider a settlement. This was not pursued by the Respondent.
- 19.20 After the Claimant’s complaint to the Health and Safety Executive, the Respondent’s measures to combat covid-19 were investigated and found to be in accordance with the relevant guidance.
- 19.21 On 22 June 2020, the Department of Health and Social Care wrote to the Claimant’s partner to advise she had been identified as being clinically extremely vulnerable (page 415). The Claimant says he forwarded this letter to the Respondent on 24 June 2020 which we find he did.
- 19.22 As the Claimant was still refusing to attend work, he was dismissed

on capability grounds with effect from 1 July 2020. (The Claimant's dismissal is not a claim before this Tribunal and is part of the third claim he has submitted against the Respondent.)

- 19.23 On 29 September 2020, the Claimant wrote to the Health and Safety Executive complaining that their inspection of the Respondent's premises had been inadequate (page 450). They replied on 7 October 2020 (page 449) explaining that in their view the Respondent's measures were covid compliant.

Submissions

20. Both parties provided written submissions and supplemented these with oral submissions. We do not rehearse those submissions further but confirm that we considered them fully and took them into account in reaching our conclusions.

Discussion and conclusions

21. We first discussed the claims under Section 44 ERA. This involves a five-stage analysis whereby we must be satisfied:
- 21.1 that there were circumstances of danger at the Respondent's depot and whilst the Claimant was on delivery or collection;
 - 21.2 that the Claimant reasonably believed those circumstances of danger to be serious and imminent and which he could not reasonably be expected to avert;
 - 21.3 that he left and refused to return to his place of work or any dangerous part of his work while the danger persisted;
 - 21.4 that the Claimant suffered detrimental treatment; and
 - 21.5 that the sole or principal reason for the detrimental treatment was that the Claimant had taken such steps.
22. It is of paramount importance to the Claimant's claim that his belief in the serious and imminent danger was reasonably held. In this regard, we consider the discussion in ***Oudahar v Esporta Group Ltd*** which, although a Section 100 ERA case, posed the question as to whether the employee in that case reasonably believed there to be a serious and imminent danger and whether he took appropriate steps to protect himself or other persons from that danger. To add appropriate context to this discussion, we bear in mind the measures taken by the Respondent to reduce the spread of the corona virus at its depots and specifically in relation to the Claimant. He was given a late start each morning to avoid the rush of drivers attending and leaving the depot; he was given PPE; a delivery van and parking space was provided for the Claimant's exclusive use; an independent company monitored social distancing at all of the Respondent's depots by CCTV and warning and information signs were put up throughout the Respondent's depot. We also

note that after the Claimant's complaint to the Health and Safety Executive, their inspection concluded that the measures taken by the Respondent were compliant with measures necessary to avoid or reduce the transmission of the virus.

23. We have also considered the Claimant's evidence as to his own practices in relation to attempting to avoid the virus. He did not self-isolate. His partner's son, who lives with them, left the home on a daily basis. Further, whilst the Claimant complains that there were some instances of social distancing not being followed by the Respondent's employees, he himself could have ensured that he remained 2 metres apart from his colleagues within the depot. Mr Gidney submits that whilst the virus posed a risk to society as a whole, it cannot fairly be said that the workplace posed a serious and imminent danger to the Claimant and he could not reasonably have held that belief to the extent that he removed himself from the workplace, given that he was not self-isolating, as the risk of the virus being transmitted was just as viable in the community at large.
24. Of course, the covid-19 virus presented exceptional and unusual circumstances requiring strict measures which had never before been anticipated. Mr Gidney cites the Employment Tribunal decision in **Rodgers v Leeds Laser Cutting Ltd** and rightly points out that it is not binding on this Tribunal. However, since the conclusion of this case, that decision has been upheld in the EAT. That decision is binding on this Tribunal and confirms that, although "circumstances of danger" should be given a wide meaning, it cannot be construed as widely as the Claimant insists because this might result in an employee refusing to work in any circumstances simply because of the existence of the virus and consequential pandemic.
25. Considering all of the circumstances in this case, including the Respondent's preventative measures and the Claimant's own conduct, we conclude that, viewed objectively, it was not reasonable for the Claimant to consider there were circumstances of serious and imminent danger by virtue of his attendance at the workplace.
26. If we are wrong in this analysis, we must consider whether the Claimant did indeed suffer detriments at the hands of the Respondent. Those detriments are that he was threatened with disciplinary action by letters dated 21 and 23 April 2020 and was not paid when he was absent from work between 20 April and 30 June 2020. In support of these claims, the Claimant alleges that he should have been furloughed or been given special paid leave because of his partner's extreme clinical vulnerability due to her asthma.
27. In the weeks of his absence, the Claimant received letters referred to above regarding his absence from work. We note that the Claimant was asked whether he wished to take holiday leave or unpaid leave during that absence. For some considerable time, he refused to engage with the Respondent by telling them how his absence should be categorised. The Respondent's absence policy (at page 178) provides:

"It is the employee's responsibility to make contact with their line

manager to notify them of the reason for their absence. If the employee fails to make contact, the absence will be determined as Absence Without Leave (AWOL) and in these cases, the manager must follow the AWOL procedure, which may result in the suspension of pay and disciplinary action in cases of repeat of persistent AWOL.

This could not be any more clear. Under the terms of the policy which, remarkably, the Claimant admitted to not having read, he was rightly categorised as AWOL and an indication that disciplinary action might follow was entirely appropriate under the terms of the absence policy. He did eventually indicate he would take unpaid leave and the threat of disciplinary action fell away.

28. Thus, the Claimant was not paid was because he took unpaid leave. This was entirely in accordance with the Respondent's absence policy and cannot, in our view, amount to a detriment. Further, the Claimant's view that he should have been furloughed or given special leave is misconceived. Under the terms of the furlough scheme, the Claimant was clearly a key worker since he was involved in the logistics industry. His argument that he was not a key worker because he did not deliver exclusively medical equipment or treatment is clearly wrong. In addition, the Claimant could not work from home and would not otherwise have been considered for redundancy in the light of an increase of almost one-third in the volume of work undertaken by the Respondent. Again, in line with government guidance, the Claimant was not shielding. In relation to special leave, he was not entitled to take leave on full pay because his partner was extremely clinically vulnerable. In any event, he did not provide evidence of this until towards the end of June 2020. In fact, we note that the Respondent did place its employees who were extremely clinically vulnerable on special leave, but that provision only applied to employees and not their family members.
29. Accordingly, even if the Claimant could satisfy the requirements of Section 44 ERA, which we find he cannot, he suffered no detriments.
30. The Claimant also brings a claim for direct discrimination by association by virtue of his partner's severe asthma, which the Respondent concedes is a disability. He therefore claims direct discrimination by association and seems to rely on a hypothetical comparator.
31. The law in relation to direct discrimination is settled. It falls to the Tribunal to determine the reason why the Claimant was treated as he was and it is for the Claimant to prove the facts from which the Tribunal "*could*" conclude he has suffered discrimination, in this case, by treating him less favourably because of his partner's disability (***Igen Ltd and others v Wong***). If the Claimant proves facts from which the Tribunal could conclude there has been discrimination, the burden of proof shifts to the Respondent to prove there was no such act of discrimination. We must consider all of the circumstances before considering the burden of proof. In ***Madarassy v Nomura International plc*** whether the Tribunal could conclude the Respondent has committed an unlawful act of discrimination means that the

evidence of both parties must be considered before we can properly conclude that the Respondent has unlawfully discriminated against the Claimant. We also bear in mind that the circumstances of the hypothetical comparator must not be materially different to those of the Claimant.

32. The Claimant relies on the following alleged acts of less favourable treatment:
- 32.1 the Respondent's refusal to accept that the Claimant's partner had been instructed to shield by the NHS from 24 March 2020;
 - 32.2 not furloughing the Claimant or giving him a safe and non-frontline role from 20 April 2020;
 - 32.3 not affording the Claimant's special leave and, therefore, full pay during his absence from work; and
 - 32.4 being threatened with disciplinary action on 21 and 23 April 2020.
33. We have already considered the Respondent's absence policy. The Respondent was entitled to enquire as to the reason for the Claimant's absence and for him to give relevant evidence. In relation to his partner's disability, he seems to have deliberately avoided engaging with the Respondent on this point until around 22 June 2020 when his partner received a letter confirming she should shield. We find it impossible to accept the Claimant's argument that the refusal to accept his partner was required to shield amounted to less favourable treatment when he simply did not provide any evidence that this was the case.
34. We have also already commented on the Claimant's request to be furloughed. As our findings of fact make clear, he was a key worker who could not work from home and was not at risk of redundancy. Accordingly, he was not required to self-isolate and there was no reason for his absence from work. There was no evidence before us that the Claimant ever asked for an alternative role.
35. We have also considered above the Claimant's suggestion that he should have been given special leave. He was not extremely clinically vulnerable. Those of the Respondent's employees who were did have the advantage of special leave, but their circumstances were not materially the same as those of the Claimant.
36. As for being threatened with disciplinary action amounting to unfavourable treatment, we cannot accept the Claimant's argument. The Respondent's absence policy is clear in relation to an employee's obligations when they are absent from work. The Claimant had refused to engage with the Respondent when asked whether he wished to take his absence as paid holiday or unpaid leave and he ignored this issue for much of the time he was absent. Thus, the absence policy was applied to the Claimant in exactly the same way it would have been applied to any other employee.

37. In relation to direct discrimination by association, we therefore conclude that the Claimant’s treatment was no less favourable than it would have been for any other employee. His arguments rest on his own misconceived interpretation of government guidance. His argument that such guidance is only guidance and did not have to be followed by him or the Respondent is unsustainable.

38. The claim of harassment is ill-founded. In **Land Registry v Grant**, the Court of Appeal considered the wording of Section 27 EqA in relation to “intimidating, hostile, degrading, humiliating or offensive”. The court said:

“Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being cause by the concept of harassment.”

As we understand it, the Claimant alleges that he was threatened with disciplinary action and was refused furlough and special leave because of his partner’s disability. As our findings of fact make clear, his absence from work by reason of his partner’s disability was contrary to government guidance and the Respondent’s absence policy. By comparison, the Respondent’s actions were entirely in accordance with government guidance and their absence policy. The Claimant cannot sustain an argument that the Respondent’s actions were intimidating, hostile, degrading, humiliating or offensive. The Respondent acted reasonably and appropriately and the Claimant’s argument that he perceived the Respondent’s actions to satisfy the definition of harassment has no factual or legal basis.

39. For the above reasons, the claims are dismissed.

Employment Judge M Butler

Date: 17 June 2022

JUDGMENT SENT TO THE PARTIES ON

.....

.....
FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.