# EMPLOYMENT TRIBUNALS

**Claimant:** Mr Peter McGrath

**Respondent:** Eddie Stobart Limited

**HELD AT:** Liverpool (by CVP) **ON:** 5, 6 & 7 December 2022

**BEFORE:** Employment Judge Shotter

**Members:** Ms A Ayre
Mr S Hussain

**REPRESENTATION:**

**Claimant:** In person
**Respondent:** Ms Price, counsel

# JUDGMENT

The unanimous judgment of the Tribunal is that the claimant was not discriminated against and his claims for disability discrimination brought under section 15, 20-21 and 26 of the Equality Act 2010 are dismissed.

# REASONS

1. This has been a remote hearing by video which has been consented to by the parties. The form of remote hearing was Kinley CVP video fully remote. A face-to-face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The claimant was given as many breaks as he wanted with the Equal Treatment Bench Book in mind, and we adjourned a number of times at the claimant's request who thanked the Tribunal for its patience and assistance during the hearing after oral judgment and reasons had been given.

2. This is a final hearing to decide liability. The Tribunal has before it a bundle consisting of 243 pages in addition to additional documents produced during the hearing, witness statements and an agreed list of issues.

3. The Tribunal heard evidence from the claimant on his own behalf, and on behalf of the respondent Chris Rowlands, UK planning manager, and Simon Morgan, transport manager. Any conflicts in the evidence have been resolved as set out below in the findings of facts.

4. With reference to disability status under section 6 of the Equality Act 2010 ("the EqA") the respondent accepts that the Claimant was disabled as defined in section 6 of the Equality Act 2010 by reason of chronic obstructive pulmonary disease ("COPD") during the relevant period of the events complained about. Knowledge remains in issue.

**Agreed Issues**

5. The issues agreed between the parties are as follows:

(1) Discrimination arising from disability (Equality Act 2010 section 15)

1.1 Did the Respondent treat the Claimant unfavourably by stopping his pay from 2 December 2020?

1.2 Did the Claimant's non-attendance at work from 2 December 2020 arise in consequence of the Claimant's disability?

1.3 Was his pay stopped from 2 December 2020 because of this?

1.4 Was the treatment a proportionate means of achieving a legitimate aim? The Respondent says that its aims were:

(i) to provide a quality of service to customers by sustaining good levels of staff attendance at work; and

(ii) to assist in the safe return of employees to the workplace in compliance with the Government's guidelines on Covid-19 safe workplaces.

1.5 The Tribunal will decide in particular:

1.5.1 Was the treatment an appropriate and reasonably necessary way to achieve those aims?

1.5.2 Could something less discriminatory have been done instead?

1.5.3 How should the needs of the Claimant and the Respondent be balanced?

1.5.4 Did the Respondent know, or could it reasonably have been expected to know, that the Claimant had the disability? From what date?

(2) Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

2.1 Did the Respondent know, or could it reasonably have been expected to know, that the Claimant had the disability? From what date?

2.2 A "PCP" is a provision, criterion or practice. Did the Respondent have the following PCP:

(a) Requiring employees to return [from furlough] without carrying out a risk assessment or having a discussion about safety?

2.3 Did the PCP put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that the Claimant's condition put him at serious health risk and caused him concerns for his own safety.

2.4 Did the Respondent know, or could it reasonably have been expected to know, that the Claimant was likely to be placed at the disadvantage?

2.5 What steps could have been taken to avoid the disadvantage? The Claimant suggests:

(a) To have carried out a risk assessment and had a discussion concerning his health and safety before any return to work.

2.6 Was it reasonable for the Respondent to have to take those steps?

2.7 Did the Respondent fail to take those steps?

(3) Harassment related to disability (Equality Act 2010 section 26)

3.1 Did the Respondent do the following things: Engage in conduct in which the Claimant was pressurised to return to work by threatening him with reduced pay when he considered it was unsafe to return, specifically:

(i) On 16 November 2020 emailing the Claimant and requiring him to return or provide a sick note saying he was unfit to return;

(ii) On 8 December 2020 emailing the Claimant and advising him that his pay had ceased from 2 December;

(iii) Stopping the Claimant's pay from 2 December 2020;

(iv) On 8 December 2020 emailing the Claimant and requiring him to attend for work on 9 December 2020.

(v) Requiring the Claimant to attend work on 9 December without carrying out a risk assessment or having a discussion concerning his health and safety?

(vi) On 30 March 2021 informing the Claimant that the CJRS no longer covered clinically extremely vulnerable people;

(vii) On 1 April 2021 informing the Claimant that as of 1 April 2021 he was needed to return to work and that if he refused to return he would be on unpaid leave and would not be kept on the CJRS;

(viii) On 28 May 2021 informing the Claimant that the Respondent was not looking to utilise the CJRS anymore.

3.2 If so, was that unwanted conduct?

3.3 Did it relate to disability?

3.4 Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

3.5 If not, did it have that effect? The Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

(4) Remedy

4.1 How much should the Claimant be awarded?

**The Proceedings**

6. ACAS early conciliation took place between the 15 February and 26 March 2022 and the claim form lodged with the Tribunal on the 29 March 2022. The claimant brings complaints of disability discrimination following the respondent's treatment of him when he was "protected by the government on a furlough scheme" as a result of his disability. It is not disputed that HGV drivers including the claimant were key workers and the run up the Christmas period was extremely busy for the respondent's business and the need for drivers. It is undisputed the claimant worked alone.

7. The claimant was employed as a HGV driver from 19 November 2015 and provided with terms and conditions of employment on the 13 August 2017 signed by the claimant on the 24 January 2018. The Respondent accepts that the Claimant was disabled as defined in section 6 of the Equality Act 2010 by reason of COPD at the time of the events complained about from 16 November 2020 to 28 May 2021.

8. Prior to the Covid 19 Pandemic the claimant worked as a day driver starting his shift midday when he would take a vehicle that had been driven by another driver previously. The system changed when the respondent introduced measures to protected HGV drivers and other employees during the Coronavirus Pandemic ("Covid Pandemic")..

9. The claimant's complaints rise against a backdrop of the Covid19 Pandemic, furlough and Government Guidelines. In December 2022 when this case was heard it is too easy to forget the impact the Covid Pandemic had on individuals concerned with their own health and that of their loved ones, and business struggling and attempting to survive in unchartered waters. It is entirely credible the claimant was consumed with a fear for his life as a result of his COPD disability that worried him to such an extent he was unable to leave the house whatever steps were taken by the respondent to secure his safety as described by the claimant in oral evidence. The claimant's worries and fears at the time prevented him from working as a HGV driver and there was no other work for him to carry out while he was in his own words "imprisoned" in his home. He was a key worker according to Government Guidance and the respondent. Throughout the relevant period the claimant acknowledged that he was physically well-enough and capable of carrying out his role but was unable to do so because of his all-consuming worries and fears about his health and the possibility of him dying. The claimant's attitude remained constant whatever the Government Guidance and this resulted in problems for him when required to return to the workplace as he did not agree with the Guidance or classification of his disability convinced he should remain at home on furlough receiving 80 percent of wages and was unable to grasp the fact that when Government Guidance changed his position changed requiring him to return to work as a HGV driver.

10. The claimant was on furlough from April 2020 until Government Guidance on shielding changed in November 2020 by which time the respondent was busy gearing up for the Christmas period and required HGV drivers. It is undisputed HGV drivers were not at risk of redundancy by this stage in the chronology and the respondent took the view that HGV drivers no longer qualified for the furlough payments and should return to work unless issued with a formal "shielding letter" advising them to continue shielding. The respondent was mindful of the public purse and complying with Government Guidance in addition to securing its business that had been affected by the Pandemic.

11. The respondent proactively liaised with the Health & Safety Executive ("HSE") about the substantial protective measures put in place including HGV vehicles being provided for sole drivers referred to as "one man one vehicle," cleaning materials to wipe down the vehicles and masks.

12. In an email sent on 23 October 2020 the HSE confirmed it was closing "concerns off on our system and no further action is needed." The Tribunal notes that in the long list of measures set out in the respondent email sent to the HSE on 13 October 2020 there was no reference to the "one man one vehicle" provision confirmed by Mr Morgan and set out in Mr Rowland's witness statement which the claimant did not dispute. On the evidence before

it the Tribunal accepts the respondent had a "one man one vehicle" provision in addition to the cleaning kits provided to individual drivers. All of the safety steps taken would have been shown to and explained to the claimant had he attended a meeting with the respondent, which he refused to do as the claimant had no intention of ever leaving the house when he was at risk.

13. On the 5 November 2020 the claimant emailed the respondent attaching a letter from the Secretary of State confirming he was "clinically extremely vulnerable and at highest risk of becoming unwell if you catch COVID-19." The claimant was advised from 5 November to 2 December to stay at home shielding until the 2 December 2022. The claimant alleges he was sent an email on the 16 November 2020 requiring him to return or provide a sick note saying he was unfit to return. The Tribunal found there was no such email in existence and the claimant conceded this in evidence. However, Chris Rowlands confirmed in evidence that on 16 November 2020 the claimant was notified he would be removed from furlough and should submit a sick note from his GP and the Tribunal accepted the claimant's evidence that he understood that he was required to return to work or submit a sick note from 16 November 2020 or he would be deemed absent without leave.

14. The respondent had decided not to claim for employees who were shielding and whose position was not at risk of redundancy, such as HGV drivers including the claimant. Furloughed staff were returning to work. The respondent understood that the Coronavirus Job Retention Scheme (furlough) was only available to employees whose jobs were at risk, and the HGV's drivers were key workers whose jobs were not at risk and their presence in the business was necessary. The respondent took the decision following Government Guidance bringing the furlough of HGV drivers to an end. The Tribunal is aware that furlough was primarily a scheme introduced to protected jobs that were at risk when employees could no longer work due to lockdown to avoid potential redundancy and provide assistance to businesses by paying eighty percent of the salary.

15. The contemporaneous internal documents that follow reveal that the claimant was not required to return to work, but submit a sick note in order to be paid statutory sick pay ("SSP") whilst off work as opposed to 80 percent of salary. It is undisputed that when the claimant, who was unhappy with the prospect of returning to work, challenged the decision the respondent agreed that he remained on furlough until the 2 December 2020.

16. On the 17 November 2020 the claimant emailed the respondent asking why he had been taken off furlough and put on SSP when he was clinically vulnerable and had been on the scheme since it was put in place in March referring to the letter from the Secretary of State confirming he was clinically vulnerable and unable to work from home.

17. The respondent emailed the claimant on 17 November 2020 explaining the Government Guidelines regarding shielding had changed on 1 November 2020 "if you cannot attend work for this reason you may be eligible for statutory sick pay (SSP), Employment Support Allowance (ESA) or Universal

Credit…The furlough scheme as explained by Claire is a Job Retention payment made by the Government to assist companies who would otherwise need to make employees redundant due to the Covid implications. As the business is no longer in a position to need to consider redundancies at this time this payment is not applicable therefore your continued absence due to shielding will be in line with the Guidelines above on SSP."

18. The claimant was informed in an email sent on 18 November 2020 "continued absences will be reviewed again in line with Government Guidelines and the possibility of continuation of furlough."

19. The Government updated its guidance again in late November 2020 and the claimant confirmed on the 4 December 2020 he had not been issued with a Covid19 letter sent to clinically vulnerable people and that he was not feeling well. At the liability hearing the claimant stated he was well enough to work. However, in his email of 4 December 2020 the claimant informed the respondent "I am unwell and having some difficulties."

20. The claimant was informed via email sent on the 7 December 2020 by the respondent that the Government has set new guidelines starting 2 December 2020…that new letters will be issued to anyone who needs to continue to shield beyond this date, see the wording below taken directly from the Government website: This guidance is for clinical extremely vulnerable people…The government is sending COVID-19 letters to extremely vulnerable people. This letter is to let you know about the new guidance that will be in place for clinically extremely vulnerable people from 2 December…" The respondent concluded in the email "As you have not received a further letter for December the NHS do not consider you to be clinically extremely vulnerable people and therefore you can return to work as per the guidelines below…**I can assure you all safety measures have been put in place to ensure the safest environment within the workplace and this includes the provision of masks and sanitisers, screens in driver receptions, social distancing in all work areas, wearing of masks in all communal areas. Safety audits have carried out on all sites and reports of all measures taken have been reported to the HSE who are content with the action taken by the company**. As a result of this further guidance it is expected you will return to work with immediate effect and any absence from 2 December 2020 will be unauthorised. If your absence is to continue this will need to be covered by a fit note or updated medical advice from the NHS" (my emphasis).

21. There followed an exchange of emails between the respondent and claimant concerning the claimant's belief that he was clinically extremely vulnerable despite not having been issued with a formal shielding letter, should not be required to return to work but stay at home and be paid 80 percent of his wages and not SSP. The respondent's position set out in the emails was that Government Guidance no longer advised the claimant to stay away from work and due to the measures put in place under the HSE guidance and the fact the claimant worked alone as a HGV driver it was expected that he would return to work.

22. The claimant on the 8 December 2020 was asked to contact his manager for a meeting to discuss what a return to work would look like, the safety measures that were in place and individual requirements. The object of the meeting was to put the claimant's fears to rest. However the claimant's fears were so great that he could not and would not even leave the house in case he was exposed to Covid, let alone travel to the respondent's premises for a meeting in order that he could be physically shown the protective measures put in place and discuss his requirements. As indicated above, there was nothing the respondent could have done to get the claimant back in to work due to his concerns over catching Covid as soon as he moved away from the house.

23. In a letter dated 8 December 2020 to the claimant his manager Gary Stephens made it clear that he was a furlough worker from 6 April 2020 to 2 December 2020, when furlough ended, he was no longer required to shield and "we've made changes across all our sites to make you feel safe. **As part of our return-to-work plans, we want to make surer that you're comfortable with all the measures we have in place, but more importantly that you are happy to work in the new surroundings**" [my emphasis]. A leaflet explaining all the measures was enclosed and the claimant was informed of the Covid-19 champion put in place by the respondent who supported "all the measures and monitored their adherence." Whatever steps the respondent took to ensure the claimant's personal health and safety would not have resulted in his return to work as he was too frightened to leave the house and did not agree with Government Guidance or the stance taken by the respondent based on the fact he was no longer required to shield. In the claimant's view shielding at home was paramount and he was never going to return to work in this period. From that point onwards there was no flexibility to the claimant's attitude towards a return to work because he was convinced that returning to work would endanger his life and he was entitled to remain at home under the furlough scheme and receive eighty percent of his wages rather than be signed off with a doctor's certificate in receipt of a much lower SSP payment. The claimant's view was that he was fit for work but should not be asked to work and yet be paid eighty percent wages at the same time.

24. In attempt to persuade the respondent that he should remain on furlough the claimant sent in a letter dated 27 November 2020 from the Department of Health and Social Care which confirmed "unlike the Guidance that has been in place since the 5 November we are no longer advising you to stay away from work…" The claimant refused to accept the advice he received was that he should return to work, and interpreted the letter to mean that he was no longer clinical extremely vulnerable when the claimant believed he was vulnerable with a serious condition. The respondent relying on the 27 November letter confirmed furlough had ended on the 2 December 2020. The claimant was upset because of his reduced income coming up to Christmas.

25. It appears from document held back by the claimant during the final hearing for the first time (and allowed into the evidence taking into account the fact the

claimant was a litigant in person and the balance of prejudice between the parties which favoured the claimant) that he was inadvertently sent part of a draft letter from the respondent inviting him to a meeting on 21 December concerning the claimant refusing to attend a welfare meeting "so we can show the Risk Assessment and the measures we have taken…**We fully appreciate and understand you haven't seen all of these measures we've introduced. ..The health and wellbeing of our colleagues is of paramount importance and remains the number one priority and as such we have taken all the necessary steps and measures in line with the government advice as a minimum**" (my emphasis).

26. The claimant did not return to work, and nor did he provide a sick note. As a consequence, the absence was unauthorised and the claimant knew this but took the view that he should be furloughed and remain so until March 2021. It was irrelevant to the claimant whether there was a risk assessment or not and he was not interested in meeting with the respondent to discuss his return from furlough, the risk assessment or having a discussion about his safety.

27. The claimant asserts that on 8 December 2020 the respondent emailed advising him that his pay had ceased from 2 December 2020. There was no such email in the bundle or the additional documents produced by the claimant during the hearing, however, it is clear to the Tribunal that the effect of the emails sent to the claimant, for example, on the 7 December 2020 at 10.17 can be interpreted to mean that unless the claimant returned to work with immediate effect he was required to provide a fit note, and only if a fit note was provided SSP would be paid otherwise he would be on unauthorised unpaid leave.

28. Attempts were made by Gary Stephens to persuade the claimant to contact him on the 8 and 9 December 2020 which the claimant ignored. The claimant maintained he did not receive any missed calls and had he the call would have been returned. The Tribunal concluded on the balance of probabilities that given the claimant was due to return to work and had not, his absence was unauthorised and his manager would make contact about this. It preferred the evidence of Gary Stephens to that of the claimant on this point, concluding the claimant ignored Gary Stephens in the knowledge that on no account would he be returning to work whatever was said or if his pay was stopped.

29. The claimant's pay stopped from 2 December 2020 because he had not turned off to work, supplied a fit note or logged his absence on the respondent's absence management portal. The claimant's absence was deemed unauthorised and the claimant was fully aware that as a result of his actions he would not be paid.

30. In a letter dated 10 December 2020 the claimant was invited to attend a telephone welfare meeting on the 14 December 2020 to discuss a number of matters including reasonable adjustments and health and the safety measures put in place. The claimant failed to attend and requested a risk assessment. Gary Stephone's responded in an email of the 15 December

"there are risk assessments in place which we will go through as part of your return to work so you will have a full understanding of them…the newly appointed COVID champion for the site who I will ask to be fully involved in your return and answer any questions or concerns you may have. I am conscious that it has been 2 weeks now from when we were expecting you back in work and as such you remain on unauthorised absence so it's important we have the welfare meeting as soon as possible to avoid further action being taken."

31. The welfare meeting took place on the 21 December 2020 with the claimant, Gary Stephen's and an employee from the human resources department ("HR") in attendance. Contemporaneous notes were taken. It was clear from the notes of the meeting the claimant was upset because he believed the respondent no longer considered him clinically extremely vulnerable, a belief he continued to hold despite Gary Stephens explaining it was not the respondent's view but Government Guidance and the NHS letter. The claimant did not accept the respondent could not reinstate the furlough scheme for him and he did not believe he could be safe leaving the house or at work whatever protection the respondent put in place.

32. The claimant alleges he was required to attend work on 9 December without carrying out a risk assessment or having a discussion concerning his health and safely and was clear from the evidence this was not the case and so the Tribunal found. The claimant chose not to have a meeting to explore his personal health and safety requirements at work because he did not want to leave the house and the Tribunal concluded there was nothing the respondent could have done to ensure the claimant returned to work as the claimant was adamant he should not leave the house and should be paid eighty percent of salary to remain at home.

33. The claimant produced a letter from his doctor dated 14 December 2020 stating the claimant "can only return to work when the environment is covid safe and if it isn't safe to do so as he shares wagons and is likely to be at risk when he meets people in his job. He is symptomatic and under review at surgery so I feel he should remain furloughed until the government have reviewed the situation in January 2021." The Tribunal find it surprising that a medical professional as opposed to the respondent running its business and attempting to following complex Government Guidance concluded the claimant should remained furloughed rather than providing a sick note given the claimant "remains symptomatic." As far as the respondent and the HSE were concerned the environment was believed to be "covid safe" and the GP letter made no reference to claimant's total inability to leave the house whether the wagon he drove and working environment was "covid safe" or not.

34. The claimant was not happy, and as a result it is undisputed he was paid eighty percent of salary as a "good will gesture" by the respondent The claimant continued to be paid eighty percent of salary during the period covered by this claim. There was no evidence that the payment following the welfare meeting was made on the basis that the respondent had "got it

wrong" as submitted by the claimant at this liability hearing. In oral submissions the claimant stated the respondent in trying to pay him SSP was "their way of getting me out" and in his written statement it was a way to get him back into work. There is no evidence the respondent was seeking to dismiss, quite the reverse, there were strenuous attempts to get the claimant back to work after a meeting had taken place to explore health and safety measures including the claimant's outstanding concerns, for example, if the "one cab one driver" policy would be sufficient to meet the claimant's fears.

35. The Tribunal found on the balance of probabilities that there was no satisfactory evidence the respondent required the claimant to attend work on 9 December or any other date without carrying out a risk assessment or having a discussion concerning his health and safety as submitted by the claimant. It preferred the evidence given on behalf of the respondent on this point supported by the undisputed contemporaneous documentation. The Tribunal was satisfied that the claimant would have been aware from the communications he received the respondent was eager to have a discussion with him about his health and safety risk assessment and show him the measures that had been put in place to ease his concerns.

36. The claimant raised a grievance on 4 January 2021 principally based on the fact that his furlough payment had ceased. He stated that because of this he was being forced and harassed to return to work. He believed that as he belonged to a clinically vulnerable category he should remain on furlough.

37. The claimant was invited to a formal grievance hearing via TEAMS in a letter dated 8 January 2021. This was scheduled to take place on 14 January 2021 chaired by Chris Rowlands, the UK planning manager. The meeting took place and the claimant chose not to be accompanied. The claimant was given the opportunity to state his case regarding his concerns about furlough and work not being a safe place.

38. On the 19 January 2021 a letter was sent to the claimant informing him his grievance had not been upheld. Chris Rowlands dealt with all the grievance points raised by the claimant and assured him they had properly applied the Government Guidelines and that there was no evidence whatsoever of the respondent forcing or harassing the claimant to come back to work. On the evidence before the Tribunal recorded in the factual matrix above Chris Rowlands was entitled to reach this conclusion. Chris Rowlands correctly took the view that the claimant and Gary Stephens had not spoken over the telephone as the claimant did not answer calls, and all the communication was via email. He found that the claimant's reference to telephone calls from Gary Stephens attempting to force him back into work did not take place. The Tribunal agreed with Chris Rowlands having heard from the claimant who was vague as to whether any telephone calls had taken place as alleged. It also transpired that it was the claimant's practice to record meetings and conversations on his telephone for future reference, including recording a visit with occupational health. The claimant has not produced any transcript as to when he recorded discussions and did not know where the recordings were

other than the part transcript before the Tribunal which did not assist the claimant in his claim.

39. It is notable that the claimant was recording secretly and did not inform the respondent of this until a case management dealing with his second claim when he stated recordings were held by him. The claimant had not disclosed this fact in relation to the first claim which is the only claim before the Tribunal, and there was no reference to the recordings by the claimant in the case management discussion held to discuss the first claim. The claimant's attitude to covert recordings and his disclosure of them raised a question mark over his credibility.

40. The claimant appealed the grievance outcome on the 22 January 2021 and in a further email dated 25 January 2021 set out six grounds of appeal that was more about the process than the decision, for example, he had not signed the notes. Importantly the grounds of appeal did not raise issues raised before concerning furlough and SSP payments.

41. The appeal hearing took place on 2 February 2021 before the business development manager, and on 8 February the claimant received an outcome letter upholding the rejection of his grievance.

42. The claimant did not return to work and nor did he provide a sick note in order to qualify for SSP. He had exhausted the grievance process.

43. On the 23 February 2021 the respondent wrote to the claimant to invite him to a further welfare meeting (via TEAMS) with Gary Stephens on the 26 February 2021 to discuss his health and wellbeing, the time scales involved in a possible return to work, reasonable adjustments and agree actions for the next stage. The meeting took place, the notes of which were sent to the claimant on the same day. It is significant the claimant asked to remain on furlough until the summer, which reinforced the fact the claimant had no intention of ever returning to work in the foreseeable future and some ten months after he was fist asked to return or provide a sick note.

44. On the 26 February 2021 the claimant provided a photo shot of the latest NHS government letter where the guidance had changed and he was advised to shield until the 31 March 2021. The respondent wrote to the claimant to confirm the furlough scheme would be extended until 31 March 2021.

45. On the 18 March 2021 the claimant was sent a letter from the Secretary of State informing him he was no longer advised to shield from 1 April 2021 as the guidance for the clinically extremely vulnerable had changed and he was to attend his workplace. The respondent who wrote to the claimant on the 25 March reiterating the advice and arranging a welfare meeting on the 30 March 2021. In the same communication the claimant was told he was no longer eligible for SSP or ESA on the basis of being advised to shield. The claimant was told the COVID19 measures put in place would be discussed at the welfare meeting.

30 March 2021 Welfare Meeting

46. Simon Morgan conducted the welfare meeting, notes were taken and the claimant made it clear that he did not want to go inside the respondent's building, wear a mask or share his truck. This was discussed with resolutions suggested including a risk assessment when the claimant attended work. It is clear the claimant took the view his safety could not be guaranteed, and as before he was not prepared to even consider exploring a risk assessment that could be suitable for him because there was none as he would not leave the house. The claimant did not have a shielding letter and yet he took the view that he could remain at home, could not enter into the respondent's premises and should be paid eighty percent of his wages.

47. The claimant produced part of a selective transcript of a recording taken covertly at the welfare meeting during this liability hearing referred to above. Originally he was unable to put a date to the recording. It was clear from the document produced that the claimant had also inserted his own comments and it was not a true transcript. The claimant relied on the transcript as evidence that Simon Morgan had misinformed him when he stated the furlough scheme was no longer available. There also exist notes taken by the respondent of the welfare meeting with Simon Morgan sent to the claimant who did not amend the record. The Tribunal has taken time to compared the transcript of the meeting notes with the part transcript provided by the claimant, it concluded the claimant was not misinformed as alleged. It was made clear to the claimant the respondent had taken the decision to require employees to return to work and not use the Furlough Scheme, the claimant did not have a shielding letter and was required to return as he was unable to work from home. The transcript does not undermine the respondent's witnesses' credibility; however it does raise a question mark over the claimant who was prepared to go into meetings and covertly record the discussion in the knowledge that he was going to use the information at a later date, including in this litigation when the part transcript to which the claimant had added comments was disclosed during the final hearing.

48. The Tribunal concluded that there were no steps the respondent could have taken to get the claimant back into work, whether it was a meeting exploring the risk assessments already in place or an individual risk assessment for the claimant who was adamant that he should remain on the furlough scheme with no other options despite the fact his partner at the time went out in public to work in a factory. The claimant indicated that he would not even go out of the house for his Covid inoculation because he was so frightened of catching the virus at the doctors surgery and it follows that there was never any prospect of the claimant leaving the house to work whatever the Government Guidance, risk assessments and HSE approved measures taken to protect the respondent's employees including HGV drivers.

49. The claimant's intransigent belief that he was clinically vulnerable and therefore entitled to remain on furlough was evident in the correspondence that followed the welfare meeting. On the 15 February he entered ACAS early conciliation and on the 29 March 2021 issued proceedings for disability

discrimination. Having agreed to come into the respondent's premises and discuss safety measures the claimant changed his mind convinced he should remain on furlough. In an email sent on the 31 March 2021 the respondent expressed its surprise at the claimant's change of mind to meet Simon Morgan and the Covid champion "to see what changes we've made as part of your return-to-work plan, we want to make sure you're conformable with all the measures we have in place, but more importantly that you're happy to work in the new surroundings." The Tribunal found that this email reflected the respondent's attitude throughout the process and it was at pains to inform the claimant of the health and safety steps taken, for example, in an email sent on the 30 March 2021 that listed the measures.

50. On the 1 April 2021 Simon Morgan emailed the claimant "…you have failed to turn up today as agreed from our previous welfare meeting that you would come in and have a look at the measures…put in place. The Government have confirmed to you in writing you are no longer required to shield on the 1 April 2021 therefore as per our conversation you are to return to work effectively from this date. I need to inform you…as of the 1 April 2021 you should have return to work as you are not willing to return to work and your furlough has come to an end, you will now be on unpaid leave from the 1 April 2021."

51. The claimant raised a second grievance on the 5 April alleging he had been "bullied and harassed in an attempt to force me back to work". The issue for the claimant was his income "being stopped to force my return to work" and he alleged he had been provided with "false information" by HR. In response Simon Morgan in an email sent on the 6 April 2021 referred to the claimant's failure to meet and "complete any relevant risk assessments with yourself and our Covid champion." Simon Morgan noted that the government clearly stated the claimant was no longer required to shield, the workplace was Covid secure and he would be on unpaid leave if he did not return to work unless a sick note was provided from his doctor. If no medical evidence was provided by 9 April 2020 the claimant would remain on unpaid leave and a further meeting would be arranged. The respondent could not have made the position clearer to the claimant who was intent on getting his way even to the extent of making covert recordings. It is uncontroversial the claimant was paid 80 percent of his pay and remained at home refusing to return to work and this was further extended to the effect that the claimant was in receipt of full furlough pay throughout the period in question, even if some payments were backdated.

52. The claimant emailed Simon Morgan on the 5 April requesting a risk assessment for clinically extremely vulnerable employees pointing out that he never required a doctor's note whilst on the job retention scheme.

53. A welfare meeting took place on the 28 May 2021. HR stated, "unfortunately I can't control what the business decides, if they tell us the furlough scheme is no longer on the table I have to report this back to your line manager…it's been announced that we will not utilise the Scheme after May however in your circumstances its slightly different we agree to keep you on furlough until 20

June 2021" and a phased return was an option. The claimant was referred to occupational health. After the meeting the claimant raised a complaint about HR for telling him his payment would end on 20 June 2021.

54. Finally, had the claimant been in any doubt that the respondent was taking the heath and safety of its employees seriously during the pandemic these should have been put to rest not only by his managers and their attempt to get him back into work with assurances but also a leaflet shared with employees titled "Keeping In Touch." The leaflet referenced an Employee Assistance Programme with stress and emotional counselling available to those who were worried about coronavirus, government guidelines and the "5-kay steps to safer working together" including setting out a number of rules and displaying posters in the workplace.

**Law**

Disability discrimination arising from disability

55. Section 15(1) of the EqA provides-

(1) A person (A) discriminates against a disabled person (B) if –

(a) A treats B less favourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

56. The Equality and Human Rights Commission Code of Practice provides that when considering discrimination arising from disability there is no need to compare a disabled person's treatment with that of another person. It is only necessary to demonstrate that the unfavourable treatment is because of something arising in consequence of the disability.

57. In order for the claimant to succeed in his claims under s.15, the following must be made out: there must be unfavourable treatment:

(1) there must be something that arises in consequence of claimant's disability;

(2) the unfavourable treatment must be because of (i.e. caused by) the something that arises in consequence of the disability;

(3) the alleged discriminator cannot show that the unfavourable treatment is a proportionate means of achieving a legitimate aim.

58. Unfavourable treatment is not the same as detriment. The test is whether a reasonable worker would consider that the treatment is unfavourable. Useful guidance on the proper approach to a claim under s.15 was provided by Mrs

Justice Simler in the well-known case of Pnaiser v NHS England and anor [2016] IRLR, EAT:

1.1 "A tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.

1.2 The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a s.15 case. The "something" that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

1.3 The Tribunal examined closely the conscious and unconscious thought process of the respondent's witnesses who gave evidence before it, concluding the explanations they gave were untainted by disability discrimination.

1.4 Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see *Nagarajan v London Regional Transport* [1999] IRLR 572. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises…"

1.5 The Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability'. That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of s.15 of the Act (described comprehensively by Elisabeth Laing J in *Hall),* the statutory purpose which appears from the wording of s.15, namely, to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

1.6 This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

59. Whether or not treatment is "unfavourable" is largely question of fact but this does not depend just on the disabled person's view that he should have been treated better - Williams v Trustees of Swansea University Pension and Assurance Scheme [2018] UKSC 65.

60. In Sheikholeslami v University of Edinburgh [2018] IRLR 1090 the EAT held that the approach to this issue requires :An investigation of two distinct causative issues: (i) did A treat B unfavourably because of an (identified) something? and (ii) did that something arise in consequence of B's disability? The first issue involves an examination of the putative discriminator's state of mind to determine what consciously or unconsciously was the reason for any unfavourable treatment found. If the "something" was a more than trivial part of the reason for unfavourable treatment, then stage (i) is satisfied. The second issue is a question of objective fact for an employment tribunal to decide in light of the evidence.

61. The actual disability does not need to be the cause of the unfavourable treatment under s.15 but it needs to be "a significant influence" or "an effective cause of the unfavourable treatment" - Hall v Chief Constable of West Yorkshire Police [2015] IRLR 893, EAT.

62. It is not enough that but for their disability an employee would not have been in a position where they were treated unfavourably. The unfavourable treatment must be because of the something which arises out of the disability - Robinson v Department of Work and Pensions [2020] EWCA Civ. 859.

Objective Justification

63. With regard to the objective justification test, when assessing proportionality, the Tribunal must reach its own judgment, that must in turn be based on a fair and detailed analysis of the working practices and business considerations involved, having particular regard to the business needs of the employer: Hensman v Ministry of Defence UKEAT/0067/14/DM.

64. When carrying out the balancing exercise and considering proportionality the question is whether the conduct can be shown to be an appropriate and reasonably necessary means of achieving the legitimate aim, and it will be relevant for the ET to consider whether or not any lesser measure might have served that aim - Birtenshaw v Oldfield [2019] IRLR 946 EAT. The ET should give a substantial degree of respect to the judgment of the employer as to what is reasonably necessary to achieve the legitimate aim.

Disability discrimination – failure to make reasonable adjustments

65. The duty to make reasonable adjustments is set out in S 20 of the Equality Act 2010 ("EqA"). Section 20(3) sets out the first requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage. Section 21(1) provides that a failure to comply with the first, second or third requirement is a failure to comply with the duty to make reasonable adjustments. Schedule 8 of the EqA 2010 applies where there is a duty to make reasonable adjustments in the context of 'work' and the Statutory Code of Practice on Employment is to be read alongside the EqA.

66. The EHRC's Employment Code states that the term PCP 'should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions. A PCP may also include decisions to do something in the future — such as a policy or criterion that has not yet been applied — as well as a "one-off" or discretionary decision.' The protective nature of the legislation meant that when identifying the PCP, a Tribunal should adopt a liberal rather than an overly technical or narrow in order to identify what it is about the employer's operation that causes disadvantage to the disabled employee.

67. In the well-known case Secretary of State for Work and Pensions (Job Centre Plus) v Higgins [2013] UKEAT/0579/12 the EAT held at paragraphs 29 and 31 of the HHJ David Richardson's judgment that the Tribunal should identify (1) the employer's PCP at issue, (2) the identity of the persons who are not disabled in comparison with whom comparison is made, (3) the nature and extent of the substantial disadvantage suffered by the employee, and (4) identify the step or steps which it is reasonable for the employer to have to take and assess the extent to what extent the adjustment would be effective to avoid the disadvantage.

The PCP

68. The purpose of the comparison exercise is to test whether the PCP has the effect of producing the relevant disadvantage as between those who are and those who are not disabled, and whether what causes the disadvantage is the PCP – Sheikholeslami cited above. Whether there is a substantial disadvantage as a result of the application of a PCP in a particular case is a question of fact assessed on an objective basis and measured by comparison with what the position would be if the disabled person in question did not have a disability.

69. A substantial disadvantage is one which is more than minor or trivial – s.212(1) EqA 2010. The ET must be satisfied that the PCP has placed the disabled person not simply at some disadvantage viewed generally, but at a disadvantage which is substantial - Royal Bank of Scotland v Ashton [2011] ICR 632.

Reasonableness of adjustments

70. The statutory duty is for the respondent to take such steps as are reasonable, in all the circumstances of the case, for it to have to take in order to avoid the disadvantage. The test of "reasonableness" imports an objective standard - Smith v Churchills Stairlifts plc [2005] EWCA 1220. It is important to identify precisely the step which could remove the substantial disadvantage complained of - General Dynamics Information Technology Ltd v Carranza [2015] IRLR 43.

Harassment

71. The EHRC Employment Code provides that unwanted conduct can be subtle, and include 'a wide range of behaviour, including spoken or written words or facial expressions.'

72. Section 26 EqA covers three forms of prohibited behaviour. In the claimant's case the Tribunal is concerned with conduct that violates a person's dignity or creates an intimidating, hostile, degrading, humiliating or offensive environment — S.26(1) It states that a person (A) harasses another (B) if: A engages in unwanted conduct related to a relevant protected characteristic — S.26(1)(a), and 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 — S.26(1)(b).

73. The word 'unwanted' is essentially the same as 'unwelcome' or 'uninvited' confirmed by the EHRC Employment Code at para 7.8. Unwanted conduct means conduct that is unwanted by the employee assessed subjectively.

74. S.26(4) states that, in determining whether conduct has the proscribed effect, a tribunal must take into account the perception of the claimant, the other circumstances of the case and whether it is reasonable for the conduct to have that effect. There can be cases where the claimant when alleging the acts violated his or her dignity, is oversensitive and it does not necessarily follow that an act of harassment had objectively taken place despite a subjective view that it had.

75. In order to decide whether any conduct has either of the proscribed effects under s.26 (1)(b) EA 2010, the Tribunal must consider both (by reason of s. 4(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of s.4(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). All the other circumstances must also be taken into account (s.4(b)) - Pemberton v Inwood [2018] EWCA Civ 564.

Related to a protected characteristic

76. This is a very broad test, but some guidance about how the ET should approach the issue was provided in UNITE the Union v Nailard [2018] EWCA

Civ. 1203. The ET should make findings as to the mental processes of the alleged harassers.

77. Whilst the view of a claimant might be that the conduct related to the protected characteristic is relevant, it is not determinative - Tees Esk and Wear Valleys NHS Foundation Trust v Aslam [2020] IRLR 495 EAT. The ET has to apply an objective test in determining whether the conduct was related to the protected characteristic in issue. The intention of the actors concerned might form part of the relevant circumstances, but it is not the only factor.

Burden of proof

78. Section 136 of the EqA provides: (1) this section applies to any proceedings relating to the contravention of this Act. (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provisions concerned, the court must hold that the contravention occurred. (3) Subsection (2) does not apply if A shows that A did not contravene the provisions. (4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule."

79. In determining whether the respondent discriminated the guidelines set out in Barton v Investec Henderson Crossthwaite Securities Limited [2003] IRLR 332 and Igen Limited and others v Wong [2005] IRLR 258 apply, as affirmed in Ayodele v CityLink Ltd [2018] ICR 748. The claimant must satisfy the Tribunal that there are primary facts from which inferences of unlawful discrimination can arise and that the Tribunal must find unlawful discrimination unless the employer can prove that it did not commit the act of discrimination. The burden of proof involves the two-stage process identified in Igen. With reference to the respondent's explanation, the Tribunal must disregard any exculpatory explanation by the respondent and can take into account evidence of an unsatisfactory explanation by the respondent, to support the claimant's case. Once the claimant has proved primary facts from which inferences of unlawful discrimination can be drawn the burden shifts to the respondent to provide an explanation untainted by sex [or in the present case disability], failing which the claim succeeds.

**Conclusion – applying the law to the facts**

Burden of Proof

80. The claimant has not proved, on the balance of probabilities, facts from which the Tribunal could decide, in the absence of any other explanation, that the respondent subjected him to the discrimination alleged. If the Tribunal is wrong in its application of the burden of proof, and the burden shifted to the respondent to prove on the balance of probabilities that the claimant's disability was no part of the reason: Igen cited above, it would have gone on to find the explanation given on behalf of the respondent was untainted by disability discrimination. With reference to allegations 2.1(c) the respondent satisfied the Tribunal it had met the burden of proving managing absence was

an appropriate and reasonably necessary means of achieving a legitimate aim that was objectively justifiable.

The Agreed Issues

81. Turning to the agreed issues and applying the law to the facts, the Tribunal reached the following conclusions.

Discrimination arising from disability (Equality Act 2010 section 15)

82. With reference to issue 1.1, namely, did the respondent treat the claimant unfavourably by stopping his pay from 2 December 2020, the Tribunal found stopping pay invariably amounts to unfavourable treatment, however in the claimant's case it was not. He was aware if his absence remained unauthorised pay would be stopped if he refused to attend work when he was not prepared to leave the house for any reason. It is notable that whilst the claimant's pay was stopped it was then backdated to the eighty percent rate despite the claimant being on unauthorised leave and the respondent's decision was favourable to the claimant given the fact that he was not contractually entitled to any pay other than statutory sick pay had a medical certificate been provided had the claimant been too unwell to work, which he was not.

83. With reference to the second issue 1.1(a) namely, did the Claimant's non-attendance at work from 2 December 2020 arise in consequence of the Claimant's disability, the Tribunal found it was not. The Tribunal preferred Ms Price's submission to the claimant's argument that his absence was not related to the COPD, he was in fact well enough to work but chose not to, preferring to stay at home on eighty percent of pay. The claimant was anxious about going out of the house and his risk of catching coronavirus. The claimant accepted he was fit to return to work, his argument was that given his disability he should have been shielding at home throughout and receive eighty percent of his salary despite Government advice to the contrary and the fact that he did not have a formal shielding letter. The claimant's pay was stopped because he refused to attend work, was on unauthorised leave, had not provided a sick note in the alternative and did not arise in consequence to the claimant's disability taking into account the guidance set out in Pnaiser above.

84. The claimant has failed to shift the burden of proof and the section 15 claim is not well-founded and is dismissed.

85. In the alternative the Tribunal made the following findings in relation to issue 2.1(c) concluding stopping the claimant's pay from 2 December 2020 was a proportionate means of achieving a legitimate aim. The respondent aims were legitimate; provide a quality of service to customers by sustaining good levels of staff attendance at work. The Tribunal accepted the undisputed evidence that the respondent was busy and needed all of the HGV drivers working in the period before Christmas 2020.

86. Ms Price submitted the respondent assisted employees returning to work and followed the Government Guidelines, which the Tribunal accepted as recorded above in its findings of facts. The Tribunal found the respondent went to great effort and expense to assist in the safe return of employees to the workplace in compliance with the Government's Guidelines on Covid-19 safe workplaces, and explained the steps it had taken on numerous occasions with the offer initially accepted by the claimant that he should come into the workplace and have a meeting with the Covid champion and discuss his own requirements. The respondent had carried out safety audits reporting to the health and safety executive creating a safe Covid working environment with HSE approval. The claimant was unable to point to any health and safety requirements that he needed in order to attend work and take part in the initial health and safety meeting with his manger and Covid champion. The reason for this was that the claimant never intended to leave home whatever steps were taken by the respondent to secure his health and safety.

87. Ms Price reminded the Tribunal that a balance must be struck between the claimant's need to stay at home in receipt of eighty percent of pay and the respondent's need to have him back at work having spent considerable time and effort ensuring the workplace was Covid safe and the claimant happy in it. The claimant was given time to stay at home, and as his complaint unfolded over time, despite the clear business needs the respondent agreed to the claimant receiving eighty percent of his pay against a backdrop of him not being entitled to it according to Government Guidelines and the respondent's decision to bring employees back into the workplace with the result that they could not be described as being at risk of redundancy. The claimant was not forced back into work, and it was always open to the respondent to have taken formal action against the claimant for his point-blank refusal to attend any meetings in person or return to work resulting in unauthorised absences. The Tribunal agreed with Ms Price it was proportional for the respondent to comply with Government Guidance as and when it was issued, including the changes made which the Tribunal understands resulted in the situation becoming confusing and complex for all involved, including the claimant. The guidelines were fluid, and when tiers were added it became even more complicated. The Tribunal's findings is also relevant to the harassment claim.

88. With reference to issue 2.2 the Tribunal concluded the treatment was an appropriate and reasonably necessary way to achieve the legitimate aims referred to above. Bearing in mind the leeway given to the claimant, not least the back payment of his salary as a gesture, his treatment could not have been less discriminatory taking into account balancing the needs of the claimant and the respondent.

<u>Reasonable Adjustments (Equality Act 2010 sections 20 & 21)</u>

89. With reference to issue 3.1, the respondent knew the claimant had the disability of COPD from at least March 2020 prior to when the alleged acts of disability discrimination took place.

90. With reference to issue 3.2 the PCP relied upon by the claimant, namely, requiring employees to return from furlough without carrying out a risk assessment in compliance with HSE stipulations or having a discussion about safety did not exist. It is clear from the factual matrix and contemporaneous correspondence that the respondent complied with HSE stipulations and attempted on numerous occasions to discuss health and safety measures with the claimant and carry out a risk assessment with him personally before he was to start sole working as a HGV driver.

91. There was no such PCP and the claimant has failed to discharge the burden of proof. In the alternative, had such a PCP existed the claimant was not put at a substantial disadvantage compared to someone without the Claimant's disability, in that the Claimant's condition put him at serious health risk and caused him concerns for his own safety. The Tribunal relies upon all of the steps taken by the respondent who satisfied the HSE that it was a Covid secure workplace and the invite to the claimant to have meeting with his manager and Covid champion to discuss the measure in place and his individual needs.

92. With reference to issue 3.5(a) the Claimant suggests to have carried out a risk assessment and had a discussion concerning his health and safety before any return to work was a reasonable adjustment. Had the Tribunal found the PCP put the claimant at a substantial disadvantage (which for the reasons set out above it did not) it would have gone on to find there were no reasonable steps effective in keeping the claimant in his employment as a HGV driver because the claimant would never have gone out to work during the Covid Pandemic whatever risk assessment had been put in place and procedures securing the claimant's attendance. In short, the Tribunal concluded there was no real prospect of the claimant returning to work whatever course of action was taken by the respondent evidenced by the factual matrix in this case. It is clear that the respondent had carried out risk assessments and attempted to discuss this with the claimant, and whatever steps the respondent took the claimant was never going to return to work because he believed he was entitled to stay at home and receive a furlough payment.

<u>Harassment related to disability (Equality Act 2010 section 26)</u>

93. With reference to issue 4.1(a)(i), namely did the respondent engage in conduct in which the claimant was pressurised to return to work by threatening him with reduced pay when he considered it was unsafe to return specifically the Tribunal found that it did not. Whilst there is no 16 November 2020 email to the Claimant there was contemporaneous evidence that the claimant was informed that he was either to return to work or provide a sick note otherwise he would be regarded as being on unauthorised leave. In short, the claimant ignored the reasonable managerial instruction to return to work and attend a meeting aimed at discussing the health and safety measures put in place and the claimant's requirements or provide a sick note saying he was unfit to return. In oral evidence the claimant accepted he was not required to return to work and there was no such email. The claimant chose not to return to work, chose not to attend a meeting to discuss the

protection of his health and safety and instead consistently argued the point despite medical advice and Government Guidance to the contrary that he should not be asked to return but allowed to stay at home on furlough for months on end. The Tribunal concluded on the balance of probabilities that the claimant has not discharged the burden of proof and the claim fails.

94. With reference to issue 4.1(a)(ii), namely on 8 December 2020 emailing the Claimant and advising him that his pay had ceased from 2 December 2020; the Tribunal found that the 8 December email did not reference the claimant's pay would cease as alleged. In direct contrast to the claimant's reliance of the 8 December 2020 email as an act of harassment it was in fact aimed at persuading the claimant to get back to work using terminology such as "we've made changes across all our sites to make you feel safe " and "we want to make surer that you're comfortable with all the measures we have in place, but more importantly that you are happy to work in the new surroundings." The fact the claimant did not want to leave the house but preferred to stay at home on eighty percent of his pay does not, objectively assessed, mean that the respondent's attempts to persuade were acts of harassment as defined by Section 26 EqA despite the claimant's clear indication to the respondent that he did not want to return.

95. With reference to issue 4.1(a)(iii), namely, stopping the claimant's pay from 2 December 2020; the Tribunal found clear evidence that pay was stopped (and subsequently repaid at the respondent's discretion) because a fit note had not been submitted and the absence was rightly considered to be unauthorised leave. The claimant had been invited to submit a fit note but had not availed himself of the option. The decision to stop pay was not related to the claimant's disability but to his refusal to submit a sick note after the claimant had been forewarned and remain absent on unauthorised leave.

96. With reference to issue 4.1(a)(iv), namely, on 8 December 2020 emailing the claimant and requiring him to attend for work on 9 December 2020, requiring an employee who was on the face of it fit to return to work in the circumstances set out within the factual matrix including the involvement of the HSE in health and safety measures and attempts to meet up with the claimant and show him all the measures that had been put in place does not amount to unwanted conduct. The claimant's expectation date to return was the 8 December and there was an alternative option set out, which was to log his absence on the absence management portal which the claimant also failed to do in tandem with his failure to submit a medical certificate relating to his absence in accordance with the respondent's managing absence Policy dated 19 October 2010. It is notable that at no stage was the claimant taken through the various stages of the Policy which set out 5 stages the last being dismissal despite this option being made available to the respondent, who took the decision to pay the claimant his backpay and furlough pay during the period relevant to this litigation. Talking to the claimant about his return to work, health and safety requirements, adjustments and unauthorised absences does not in this case amount to unwanted conduct and taking the full picture into account the Tribunal found the respondent's conduct did not meet the proscribed effect set out under section 26.

97. With reference to issue 4.1(a)(v), namely, requiring the claimant to attend work on 9 December without carrying out a risk assessment or having a discussion concerning his health and safety, the Tribunal found there was no such requirement for the reasons set out in the findings of facts including the discussions that took place in welfare meetings.

98. With reference to issue 4.1(a)(vi), namely, on 30 March 2021 informing the claimant that the CJRS no longer covered clinically extremely vulnerable people; the Tribunal found decision by the respondent to comply with Government Guidance and the medical evidence before it that the claimant was not clinically extremely vulnerable was not related to the claimant's disability, it was business decision that reflected the respondent's understanding of a complex and changing situation which it was doing its best to manage against a backdrop of business survival and the UK as a whole taking steps to "get back to normal." It was reasonable for the respondent to act as it did given the circumstances and it was not reasonable for the claimant, objectively assessed, to perceive that the respondent's conduct could be regarded as having the effect set out in Section 26.

99. With reference to issue 4.1(a)(vii), namely, on 1 April 2021 informing the Claimant that as of 1 April 2021 he was needed to return to work and that if he refused to return he would be on unpaid leave and would not be kept on the CJRS; the Tribunal repeats its observations above concluding that the respondent's conduct does not have the proscribed effect set out in section 26.

100. With reference to issue 4.1(a)(viii), namely, on 28 May 2021 informing the Claimant that the Respondent was not looking to utilise the CJRS anymore, the Tribunal repeats its observations above concluding that the respondent's conduct does not have the proscribed effect set out in section 26.

101. With reference to the remaining issues 4.2 to 4.5 in short, the Tribunal found it found as far as the claimant was concerned the conduct was unwanted conduct because he believed he should remain on furlough with wages and not return to work. It did not relate to his disability, and the respondent's actions reflected its attempt to follow Government Guidance and keep the claimant informed as to what was happening in good faith. The claimant perceived the conduct had the purpose of violating his dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him because he did not want to hear about a return to work against a backdrop of all the steps taken to secure the health and safety of employees during the Covid Pandemic, and any action by the respondent amounted to harassment when the objective was his return to work or in the alternative sick note with the prospect of SSP being paid instead of furlough pay assessed at eighty percent. Objectively assessed, even taking into account the claimant's skewed perception reached against Government Guidance and medical advice taking into account all the circumstances of this case, it is not reasonable for the conduct to have the proscribed affect set out in section 26. Had the claimant stepped back and taken note of the Government Guidance,

the GP report and the shielding letters coupled with the repeated explanations given to him by managers who invited him to a number of meetings, he would have realised that harassment was not taking place. It suited the claimant to allege acts of harassment because he knew there was no chance of him returning to work and the discrimination and harassment complaints were leverage to ensure that the respondent paid him eighty percent of his wages throughout the period whilst he remained at home despite Government Guidance to the contrary, which they did. In short, the purpose and effect of the claimant's actions was to get the claimant back into work taking into account the explanations given by witnesses and contemporaneous documents and did not have the effect or purpose of violating his dignity or of creating an adverse environment for him at work.

102. In conclusion, the unanimous judgment of the Tribunal is that the claimant was not discriminated against and his claims for disability discrimination brought under section 15, 20-21 and 26 of the Equality Act 2010 are dismissed.

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26.1.23 Employment Judge Shotter

REASONS SENT TO THE PARTIES ON

3 February 2023

FOR THE SECRETARY OF THE TRIBUNALS