Automatic Unfair Dismissal and Covid-19

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In what is understood to be the first consideration by the EAT of a Covid-19 related dismissal, the EAT has confirmed that Mr Rodgers' dismissal after absenting himself from the workplace was not automatically unfair because he neither had a reasonable belief that there were serious and imminent circumstances of danger nor had he taken reasonable steps to avert those dangers.

Background Facts

Mr Rodgers began working at Leeds Laser Cutting as a laser operator on 14 June 2019. At the outbreak of the Covid-19 pandemic in March 2020, a workplace risk assessment was carried out by external professionals which resulted in various recommendations being implemented by the employer, including staggered start/finish and break times, extra social distancing and sanitising surfaces. On 27 March 2020, Mr Rodgers left the workplace and, over that weekend, informed his manager that he would not be returning until the Covid-19 pandemic eased, citing fears of infecting his vulnerable children who had health problems. After a further month with no contact from Mr Rodgers, the employer terminated his employment. With under two years' employment, Mr Rodgers did not have qualifying service to bring an unfair dismissal claim; instead, he presented a claim of automatic unfair dismissal claim under sections 100(d) and 100(e) ERA 1996 which deal with dismissals in health and safety cases in circumstances of serious and imminent danger, for which there is no minimum service criterion. (Essentially Mr Rodgers' claim was he had been dismissed for refusing to return to the workplace due to a serious and imminent danger, namely the Coronavirus). The Employment Tribunal dismissed the claim, finding that the employer had taken reasonable measures to avert the workplace dangers associated with Covid-19 infection at the time, and that Mr Rodgers' evidence was both confusing and contradictory. Mr Rodgers appealed to the EAT.

Key Findings

The EAT dismissed Mr Rodgers' appeal, upholding the original Tribunal decision that his dismissal after failing to return to work for several weeks without authority was not automatically unfair under s.100(1)(d) ERA 1996. The EAT first decided that it did not need to consider whether Mr Rodgers' refusal to return to the workplace separately constituted an "appropriate step" to protect himself or others from danger under s.100(1)(e) ERA 1996 – in its view of the legislative provisions, a case of refusal to return to the workplace falls solely to be considered under s.100(1)(d).

The EAT noted that the Tribunal had accepted that the Covid-19 pandemic created circumstances of some danger, both at large and at work, and in principle could give rise to circumstances of danger that an employee could reasonably believe to be "serious and imminent". However, the EAT identified no error in law in the Tribunal's assessment of the reasonableness of Mr Rodgers' belief as to the serious and imminent nature of that danger. Mr Rodgers did not raise concerns with his employer about any specific workplace related dangers or dangers associated with getting to or accessing the workplace – instead, his concerns were more generally the dangers which Covid-19 at large presented, particularly to his children. The fact that these concerns were genuinely held did not mean that Mr Rodgers necessarily had a genuine belief that there were serious and imminent circumstances of danger, either at work or elsewhere, that prevented him from returning to work. In concluding that he did not, the Tribunal had correctly considered whether Mr Rodgers had acted consistently with his stated position of serious and imminent danger, both in a work context and at large, and whether there were other steps he could have reasonably taken to avert those dangers. The EAT found no fault in this approach or the Tribunal's findings on the facts. The Tribunal had considered the physical size and location of the workplace, employee density within the workplace, working/shift patterns, and what health and safety measures the employer had put in place. Here, the workplace was a large warehouse-type space akin to half a football pitch in which, typically, only five staff would be present at one time, generally physically distanced from each other, where surfaces were regularly sanitised and, shortly after the first national lockdown was announced a risk assessment was conducted and acted upon, including making masks available to staff. Several relevant factors countered Mr Rodgers' contentions that serious and imminent circumstances of danger prevented him from returning to the workplace – notably, he had continued to attend work as normal from the date the national lockdown was announced until completion of his allotted shift on 27 March 2020, had been able to generally maintain social distance at work, had not asked for a mask when available and, subsequent to leaving work, had driven a friend to hospital while he was supposed to be self-isolation and had later worked in a pub during lockdown.

What this Means for Employers

This case does not definitively provide an answer to the question of whether or not the "danger" in a s.100 case has to be solely generated by the workplace. However, it does show that there will be considerable scrutiny of the steps an employer took to mitigate Covid-19 related risks in the workplace, whether the employee's actions were consistent with them

believing they were at serious and imminent risk of danger, as well as whether or not the employee took other reasonable steps to avert any such danger. The Rodgers case demonstrates that, although workplace Covid-19 dismissal cases will inevitably be very fact-specific, it will be evidentially important for employers to show that they conducted robust risk assessments in response to the Covid-19 pandemic, that recommendations were followed, safety measures implemented as well as showing broader compliance with the evolving Government Covid-secure guidance through the pandemic, in order to minimise and mitigate Covid-19 related risks in the workplace. This case took place in the early days of the pandemic and Government guidance has since moved on, including it no longer being a requirement to specifically reference Covid-19 in an employer's risk assessment. Nevertheless, the risk of employees raising a section 100 claim remains, particularly when there are local outbreaks within a team or when new variants arise which might mean some of the steps taken at earlier stages of the pandemic need to be re-implemented. As a result employers need to keep Covid-19 risks and steps to mitigate them in mind and amend any guidance to employees accordingly as we continue to live with Covid-19.

Rodgers v Leeds Laser Cutting Ltd

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