COVID-19: Refusal to attend workplace and dismissal

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For the first time, the Employment Appeal Tribunal (**EAT**) has considered the fairness of a COVID-19 related dismissal. In the case of *Rodgers v. Leeds Laser Ltd,* it held that it was not automatically unfair to dismiss an employee who refused to attend work over concerns about the risks of COVID-19 to his vulnerable children. While, in principle, COVID-19 could give rise to circumstances where an employee reasonably believes there is serious and imminent danger that affects their ability to go to work, this particular case failed on the facts.

The outcome of the EAT decision will likely provide a degree of relief to employers. However, it does show and underline the importance of employers taking effective steps to comply with the relevant government guidance on workplace safety.

Legal position

Although the majority of protections from unfair dismissal only apply to an employee when they have two years' (or more) service, there are exceptions to this. Certain "day one" protections apply, one such protection being section 100 of the Employment Rights Act 1996 (**ERA**) which generally covers health and safety cases.

In this case, Mr Rodgers sought to rely on sections 100(1)(d) and (e) of the ERA which provide protection from dismissal in circumstances where an employee reasonably believes that there is serious and imminent danger. The protection applies to the following circumstances:

- where an employee exercises their right to leave or not to return to the workplace to protect themselves (section 100(1)(d)); or
- where an employee takes appropriate steps to protect themselves or others (section 100(1)(e)).

Facts

Mr Rodgers worked for Leeds Laser as a laser operator. On 24 March 2020, the day after the announcement of the national lockdown, Leeds Laser sent a communication to its employees explaining that they were putting measures in place to protect them from COVID-19 and asking staff to work as normally as possible.

Mr Rodgers' workplace was a large warehouse-type space about the size of half a football pitch. Usually only five people would be working in it at a time. Leeds Laser arranged for an external professional to conduct a risk assessment and put in place measures to manage the risks to employees, including discussing with them the importance of social distancing and hand-washing. Masks were also made available to staff and the government guidance was reiterated in the workplace.

On 25 March 2020, Mr Rodgers developed a cough and a few days later he started to self-isolate. Shortly afterwards, on 29 March 2020, Mr Rodgers sent a text to his line manager informing him that he could no longer attend work until

the lockdown eased as he had vulnerable children and was worried about infecting them. A month later, Mr Rodgers was dismissed.

Mr Rodgers then brought a claim alleging that his dismissal was automatically unfair because he had exercised his rights under sections 100(1)(d) and (e) of the ERA. He alleged that he had been automatically unfairly dismissed as a result of not returning to work due to his concerns related to the COVID-19 pandemic. As Mr Rodgers did not have two years' service, he was unable to bring an ordinary unfair dismissal claim.

In the first instance, the Employment Tribunal found that Mr Rodgers' dismissal, when he did not return to work because of concerns related to the COVID-19 pandemic, was not automatically unfair. It did not accept that Mr Rodgers held a reasonable belief that there was serious and imminent danger which was preventing him from returning to work and found that his workplace posed no greater risk than there was in the general world.

In reaching its decision, the Tribunal took into account that Mr Rodgers was able to socially distance at work and that he chose not to wear a mask. The Tribunal also noted that Mr Rodgers worked at a pub during the lockdown and that, when he was self-isolating, he had driven someone to the hospital.

Mr Rodgers appealed against the Tribunal's decision.

EAT decision

On appeal, the EAT upheld the decision of the Tribunal. The scope of the appeal was narrowed by agreement, so that the EAT was considering only section 100(1)(d) (exercising a right to leave or not return to the workplace). Both parties agreed that leaving or refusing to return to the workplace (which was the only action Mr Rodgers took) could only fall within section 100(1)(d).

The EAT considered the test for protection under section 100(1)(d) and accepted that, in principle, an employee could reasonably believe that there is a serious and imminent circumstance of danger that exists outside his place of work that could prevent him from returning to it. Such circumstances could fall within the protection of the legislation.

However, this case failed on the facts. The EAT found that the Tribunal had legitimately concluded that Mr Rodgers did not hold a reasonable belief that there were serious and imminent circumstances of danger, either at work or elsewhere, that prevented him from returning to work. A number of factors were significant in reaching this finding, including Mr Rodgers' admissions that (i) he could have socially distanced at work given the size of the workplace and the number of people in it; (ii) measures implemented by Leeds Laser made the workplace as safe as possible (and possibly safer than the general community); (iii) he had driven his friend to hospital when he was supposed to be self-isolating; and (iv) he had worked in a pub during the pandemic.

The EAT also found that, even if Mr Rodgers could have established such a reasonable belief of serious and imminent danger, the Tribunal would still have been entitled to find that he could have reasonably been expected to take steps to avoid the danger such as wearing a mask, sanitizing and washing his hands and socially distancing.

Key takeaways

This decision may give some comfort to employers who have sought to provide a safe workplace to employees during the pandemic, including complying with the relevant government guidance on workplace safety.

While the EAT accepted that, in principle, the pandemic was capable of giving rise to circumstances of danger that an employee could reasonably believe to be serious and imminent, the fact that an employee might have genuine concerns about the pandemic in a general sense does not necessarily mean that they have a genuine belief that there were serious and imminent circumstances of danger.

Claims under section 100(1)(d) relating to the pandemic are likely to be fact-specific. However, this case shows that

the extent to which an employer follows government guidance and the measures it puts in place to reduce the risk of danger in the workplace will be relevant factors in determining whether an employee reasonably believed there was serious and imminent danger preventing them from attending the workplace.

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