Rodgers v Leeds Laser Cutting Ltd

In Rodgers v Leeds Laser Cutting Ltd, the Employment Appeal Tribunal ('EAT') upheld a decision that dismissal of an employee who refused to work due to Covid-19 safety concerns was not unfair.

National lockdown was announced on 23 March 2020. At that time, Mr Rodgers (the Claimant) worked on the shop floor of a laser cutting factory with around five other employees. The company announced that it intended to put measures in place (such as mask availability, social distancing and staggered start and finish time) to allow them to carry on as normal.

Mr Rodgers had two young children, one of which had sickle-cell anaemia, and did not return to work after he had completed his shift on 27 March 2020, informing the company that he would not be returning until the end of the lockdown, referencing his kids. There was no further contact between Mr Rodgers and the company until Mr Rodgers was dismissed. Mr Rodgers brought a claim for automatic unfair dismissal under s100(1)(d) and (e) Employment Rights Act ('ERA').

Section 100(1) makes a dismissal automatically unfair when:

- in circumstances of danger which the employee reasonably believed to be serious and imminent and which they could not reasonably be expected to avert, they left or proposed to leave or refused to return to their workplace (s100(1)(d)); or
- in circumstances of danger which the employee reasonably believed to be serious and imminent, they took (or proposed to take) appropriate steps to protect themselves or others from the danger (s100(1)(e)).

It is worth noting that Mr Rodgers did not have the required period of service to bring a claim for unfair dismissal – s100(1) claims are available irrespective of the period of service of the employee.

Employment Tribunal decision

Although the ET accepted that Mr Rodgers had concerns about the Covid-19 pandemic, he did not reasonably believe there were circumstances of serious imminent danger, and so the claim was dismissed. The ET held that, although the Covid-19 pandemic was referred to as a 'serious and imminent threat to public health' by the Secretary of State, this did not, of itself, satisfy the requirements of the statutory test, and if it was held to do so, it would enable any employee to refuse to work based on existence of the virus.

Mr Rodgers appealed.

Employment Appeals Tribunal

On appeal, the EAT determined that s100(1)(e) was not relevant to this claim (the reasoning being that a claim cannot be covered by both s100(1)(d) and (e)), but considered the following questions when looking at the requirements of s100(1)(d):

1. Were there circumstances of danger?
2. Did the employee believe that the circumstances of danger were:
    a. serious, and
    b. imminent?
3. Was the employee's belief that the circumstances of danger were serious and imminent reasonable?
4. Could the employee not be reasonably expected to avert the serious and imminent circumstances of danger?
5. Did the employee leave, propose to leave (while the danger persisted) or refused to return to his place of work, or any dangerous part of his place of work?
6. Was this the reason, or principal reason, for the dismissal of the employee?

The EAT accepted that there was some danger caused by the Covid-19 pandemic and that Mr Rodgers was concerned about the Covid-19 pandemic at large, but that he was not specifically concerned with the dangers in the workplace. In reaching this decision, the EAT considered the following factors (amongst others):

- There were safety measures in place in the factory (including mask provision and social distancing);
- Mr Rodgers had not raised his concerns with the company;
- Due to the size of the factory and small numbers of employees, it was possible to socially distance;
- Mr Rodgers had worked in a pub during lockdown; and
- Mr Rodgers had taken someone to hospital when he was self-isolating.

Honour Judge James Tayler stated that “[t]he fact that the claimant had genuine concerns about the Coronavirus pandemic, and particularly about the safety of his children, did not mean that he 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”.

Furthermore, the EAT upheld that Mr Rodgers could have been expected to avert the risk by taking steps such as mask wearing, hand sanitising and socially distancing.

This decision is encouraging for employers that took reasonable steps to mitigate against the risk of Covid-19 as this will clearly to strengthen any defence against claims under s100(1)(d) or (e).

However, both the ET and EAT accepted that the Covid-19 pandemic could, in principle, give rise to circumstances of danger that an employee could reasonably believe to be serious and imminent. Therefore, it is possible that we may yet see successful claims in this sphere on different facts.

