

In what is believed to be the first Appellate consideration of a Coronavirus related dismissal the EAT (HHJ Tayler) upheld the judgment of the Leeds Employment Tribunal (EJ Anderson) that the Claimant's Coronavirus related absence dismissal was not automatically unfair for a health and safety reason pursuant to s100(d)-(e) of the Employment Rights Act 1996.

Jonathan Gidney of St Philips Chambers, Birmingham represented the Respondent on the instruction of **Karin Henson of Aeris Employment Law**, in the case of Rodgers v Leeds Laser Cutting Ltd (EA-2021-000437-VP).

Background

The Claimant Darren Rodgers worked for Leeds Laser Cutting as a laser operator. He had been working for the business for less than two years. Employees with less than two years' service generally cannot bring a claim for unfair dismissal unless they can argue their dismissal was for a reason where two years' service is not required. The most common examples are whistleblowing and health and safety dismissals.

At the start of the pandemic in March 2020, the employer (via an external professional) carried out a Coronavirus risk assessment to identify areas of risk and put in place measures to protect its staff who worked in a large ventilated factory space (about five employees in a space the size of half a football pitch). Despite this, on 27 March Mr Rodgers left the premises and made it clear he would not be coming back. A month later, having had no contact from Mr Rodgers, his employer terminated his employment.

Mr Rodgers presented a claim for automatic unfair dismissal, asserting he had been dismissed for refusing to return to the workplace due to a serious and imminent danger, namely the Coronavirus, as he had a family member with sickle cell anaemia, who was required to shield. It was however confirmed during the tribunal hearing that he had chosen to take a friend to hospital, even though he was required to self isolate and also was happy to work in a pub.

The Tribunal dismissed the Claimant's claim, finding that he did not believe there to be a serious and imminent danger in the workplace, but rather in the world at large and that his employer had taken reasonable measures to reduce the risk of infection in the workplace. The tribunal found his evidence to be 'confusing and contradictory', finding that he would have been able to socially distance at work, that on a balance of probabilities he had not asked for a mask and did not make any complaints.

The tribunal also found inconsistencies in Mr Rodgers pleaded case and said that this questioned the reliability of his evidence.

Appeal

Mr Rodgers appealed, asserting that the existence of the danger in the world at large shouldn't act as a bar to any claimants in respect of the existence of the danger in the workplace. The wording of s100 Employment Rights Act ("ERA") contains no such restriction

The Law and the appeal arguments

The Claimant's claim was based on section 100(d)-(e) of the **ERA** deals with dismissals in health and safety cases. The relevant provisions for this case state:

100 Health and safety cases

- (1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that*
 - (d) in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left ...*
 - (e) in circumstances of danger which the employee reasonably believed to be serious and imminent, he took appropriate steps to protect himself or other persons from the danger.*
- (2) For the purposes of subsection (1)(e) whether steps which an 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.*
- (3) Where the reason (or, if more than one, the principal reason) for the dismissal of an employee is that specified in subsection (1)(e), he shall not be regarded as unfairly dismissed if the employer shows that it was (or would have been) so negligent for the employee to take the steps which he took (or proposed to take) that a reasonable employer might have dismissed him for taking (or proposing to take) them.*

At first instance the case was argued using both limbs of s100 i.e both s100d (employee leaving to avert risk) and s100e (employee taking steps to protect from danger, by leaving). It was agreed during the appeal hearing that as the only action Mr Rodgers took was to leave, s100e (taking steps) could not apply. Leaving the workplace couldn't be a step envisaged by s100e, otherwise s100d would be rendered ineffective. This was an important point as the key requirement to 'take reasonable steps to avert' a danger only appears in s100d.

Chronologically, it probably makes better sense for s100e to come first (ie ask for safety measures) and if refused, then an employee could leave. The EAT's Judgment contains a useful analysis of the relationship between s100d & s100e, averting dangers inside and outside the workplace and when each section should be used. The escape of green gas is used by the EAT to illustrate how the two sections would work.

Another interesting point that arises in the decision is an analysis of the expression 'in circumstances of danger which the employee reasonably believed'. The EAT had to consider whether these two components should be considered separately or together i.e must circumstances of danger exist as a first stage requirement (regardless of the employee's belief) as HHJ Stacy held in Hamilton v Solomon and Wu Ltd or is it sufficient for an employee to reasonably believe they did, even if, as a matter of fact, no such danger existed? Again we come back to the escape of gas which looked dangerous but was in fact inert. HHJ Tayler preferred the second approach which may create scope for disagreement between different divisions of the EAT. We will have to see how that develops.

On the facts the Employment Judge found that the employer had taken considerable steps to avert the danger of Coronavirus infection in its workplace. The EAT held that had Mr Rodgers followed those steps the danger would have been averted. As a result the key requirement in s100d (referred to in the judgement as a 'gateway requirement') that there must be a danger that can't reasonably be averted was not engaged. As mentioned above, the evidence was that Mr Rodgers in reality had little regard to the danger outside the workplace (by breaking his own NHS mandated isolation instruction and by working in a pub). The EAT upheld that analysis as correct.

Summary

Whilst Claimant representatives might have wished for a more deserving test case, the decision represents useful reassurance for employers who did take steps to reduce the risk of infection in the workplace that they will be well placed to defend claims presented under s100d or s100e ERA based on an employee's belief that the Coronavirus presented a serious and imminent danger in the workplace.

However of note is that the EAT did not rule out that there for a claim to be brought under s100 any danger had to be generated by the workplace only – there could still be some interesting challenges ahead on this point.