Automatic Unfair Dismissal Under S.100 ERA 1996 In the Context of Fears Around Covid 19

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Rodgers v Leeds Laser Cutting Limited, EAT, EA-2021-000437-VP

Introduction

1. HHJ James Tayler determined this appeal. The Judgment was handed down on May 6th 2022. On the facts of this case, the employment tribunal did not err in law in concluding that the claimant's dismissal when he did not return to work because of concerns related to the Coronavirus pandemic was not automatically unfair pursuant to section 100(1)(d) ERA.

Background

2. The Claimant asserted that he had left and/or had not returned to his place of work because he reasonably believed there were circumstances of danger that were serious and imminent arising out of the Coronavirus pandemic, which, in the terms of section 100(1)(d) ERA, he could not reasonably have been expected to avert.

3. Mr Rodgers worked in a large warehouse-type space about the size of half a football pitch in which usually only 5 people would be working. On 16th March 2020, a colleague of the claimant displayed symptoms of Covid-19 and the colleague was sent home and told to self-isolate. The colleague remained off work until after the claimant's employment ended.

4. The employer received recommendations to reduce risk, including social distancing, hand washing and wiping down surfaces, as well as staggering start/finish/lunch/break times. Staff were also told not to congregate at lunch and break times, but this advice had to be

reiterated, as it would be ignored. The Tribunal found that there was partial adherence to the recommendations.

5. Masks were available for employees. The employment tribunal held that the claimant, whose evidence the employment tribunal found vague on this point, had not asked for one.

6. There came a point when Mr Rodgers self-isolated. During his period of self-isolation, Mr Rodgers sent a text to his employer stating,

> *"unfortunately I have no alternative but to stay off work until the lockdown has eased. I have a child of high risk as he has siclecell (sic) & would be extremely poorly if he got the virus & also a 7 month old baby that we don't know if he has any underlying health problems yet"*

7. While still self-isolating, Mr Rodgers drove a friend to hospital, to have a broken leg treated.

8. The Claimant did not return to work. Towards the end of April 2020, he sent a text to the Respondent stating,

> *"just been told iv been sacked for self isolating, could you please send it to me in writing or by email…with an explanation of why my employment ended with the date it ended. i also need my p45 sending out as soon as possible".*

9. On the same day, the Respondent sent the Claimant a P45. The employment tribunal did not make a finding of fact about the reason why the respondent sent the P45 to the claimant, and so there was no specific finding of fact about the respondent's reason for dismissing the claimant.

10. The Claimant gave evidence that he had not left home for 9 months. He told the Tribunal he had spent a period of time working in a pub during the pandemic, where safety measures were in place.

The Law

11. Section 100 of the Employment Rights Act 1996 states,

> *"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 (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work …"

The Decision of the Employment Tribunal

12. The Employment Tribunal accepted that the claimant had significant concerns about the Covid-19 pandemic to the extent that he did not leave the house in 9 months because he felt that nowhere was safer than his home. However, the Judge found it difficult to reconcile that view with the fact that the Claimant chose to transport his friend to hospital despite being advised to self-isolate. The Judge also accepted that the Claimant had concerns for his family and it noted that he had a young baby and a child with sickle-cell anaemia living with him in March 2020, when there was huge uncertainty about how different, younger groups in society might be affected by the virus.

13. Having considered all the circumstances including the claimant's knowledge and the facilities and advice available to him at work at the time, and also having considered the Claimant's decision to drive his friend to hospital in the circumstances described, The Judge did not find that the claimant believed there were circumstances of serious and imminent danger within the workplace, but that the Claimant considered there were circumstances of serious and imminent danger all around saying,

"In my judgment, whilst conditions pertaining to Covid-19 could potentially amount to circumstances of serious and imminent danger in principle, I do not consider that they did so in this case. I do not consider that the claimant reasonably believed that the circumstances were of serious and imminent danger, for the reasons set out above. … [T]he claimant's decision to stay off work was not directly linked to his working conditions I find that this is not a case where the claimant refused to return to his place of work, or any dangerous part of his place of work due to the conditions in that environment; he refused to return to his place of work until the national lockdown was over. I cannot conclude that the decision to absent himself, regardless of what the situation might be at the workplace, until a national change was made, can lie at the door of the respondent."

The EAT

14. HHJ Tayler rehearsed the key factual parts of the Tribunal's judgment before stating, at paragraph 44,

> *" … the 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."*

15. HHJ Tayler then set out 9 findings that the Employment Tribunal had made that were contrary to the Claimant's contention that he believed that there were serious and imminent circumstances of danger both at work and in other places outside his home, that prevented him returning to work:

> *1. The workplace was large and few people worked in it*
>
> *2. The claimant had remained at work from the date of the announcement of the lockdown on 24 March 2020 until he left at his normal time on 27 March 2020*
>
> *3. The claimant could generally maintain social distance at work*
>
> *4. The employment tribunal rejected the claimant's contention that he was forced to go out on deliveries*
>
> *5. The claimant had not asked for a mask*
>
> *6. Masks were available*
>
> *7. The claimant did not say that he would not be returning when he left [work]*
>
> *8. The claimant drove [his friend] to hospital while he was meant to be self isolating*
>
> *9. The claimant worked in a pub during the lockdown*

16. The judgment of the EAT was that the ET had legitimately concluded that the claimant did not hold a reasonable belief that there were serious and imminent circumstances of danger that prevented him from returning to work. The Tribunal had concluded that the claimant considered that his workplace constituted no greater a risk than there was at large.

17. No error of law was established. The employment judge accepted that the Coronavirus pandemic could, in principle, give rise to circumstances of danger that an employee could reasonably believe to be serious and imminent, but this case failed on the facts.

Comment

18. This case is a decision on its particular facts. Mr Rodgers had not acted in a way that was consistent with holding a reasonable belief that there were serious and imminent circumstances of danger both at work and in other places outside his home, that prevented him returning to work. This is the reason that his claim failed. However, both the ET and the EAT acknowledged that the C-19 pandemic could give rise to circumstances of danger that an employee could reasonably believe to be serious and imminent. Watch this space for the appropriate case!

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