COVID-19 dismissals: *Rodgers v Leeds Laser Cutting* [2022] EWCA Civ 1659

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Rodgers v Leeds Laser Cutting Ltd [2022] EWCA Civ 1659

Introduction

1. This is the first claim to reach the Court of Appeal on the application of s100(1) Employment Rights Act 1996 (**'ERA'**) (health and safety dismissals) to dismissals related to the Covid-19 pandemic. While the decision itself is fact specific, the judgment provides some useful guidance on the interpretation of s100(1)(d) ERA.

2. The Claimant worked as a laser cutter for the Respondent and started his role on 14 June 2019. This was not work that could be done from home. As we all remember, on 23 March 2020, the Government announced the first national lockdown, making clear that everyone should stay at home, but could travel for the purposes of work. On 29 March 2020, the Claimant texted his manager to say that he would be staying away from work because he was concerned about the risk of infection. On 26 April 2020 he was dismissed. As the Claimant lacked sufficient service to bring a claim for ordinary unfair dismissal (s98 ERA) so instead brought a claim under s100 ERA.

Law (and guidance from the Court of Appeal on s100(1)(d))

3. S100 ERA governs health and safety dismissals. In this case, the relevant sections were s100(1)(d) and (e) ERA 1996. In summary, these are met if an employee is dismissed and the reason or principal reason for that dismissal is that:

   (a) The employee left, proposed to leave or refused to return to work when there were *"circumstances of danger which he reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert* "(s100(1)(d) ERA).

   (b) The employee took or proposed to take steps to protect himself or others, in "*circumstances of danger which he reasonably believed to be serious and imminent"* (s100(1)(e)).

4. Underhill LJ made the following important points on the interpretation of these sections:

   (a) In terms of the phrase "*circumstances of danger which he reasonably believed to be serious and imminent"*, this is not a two-part test. Underhill LJ stated: *"the subsection should indeed be construed purposively rather than literally"* and that *"it is sufficient that the employee has a (reasonable) belief in the existence of the danger as well as in its seriousness and imminence"* **[17]**.

   (b) It is implied in the wording that it only applies where the employee has left the workplace (or proposes to do so, or has not returned) **because of** the perceived danger rather than for some other reason **[18]**.

   (c) S100(1)(d) does **not** apply to perceived or actual dangers which arise on an employee's journey to work. The perceived danger must arise in the workplace **[19]**.

5. The test under s100(1)(d) was summarised **[21]**:

   1. **Did the employee believe that there were circumstances of serious and imminent danger at the workplace? If so:**
   2. **Was that belief reasonable? If so:**
   3. **Could they reasonably have averted that danger? If not:**
   4. **Did they leave, or propose to leave or refuse to return to, the workplace, or the relevant part, because of the (perceived) serious and imminent danger? If so:**
   5. **Was that the reason (or principal reason) for the dismissal?**

6. Finally, it was noted that there was no reason this could not apply to a virus or other disease, as much as dangers arising from the workplace itself **[22]**.

Decisions below

7. The ET dismissed the Claimant's claim. In summary, the judge found the Claimant's evidence to be confused and often contradictory **[28]**. Overall, it appeared that the reasons for not attending work were concerns about the virus generally, and that he did not believe that there was such a danger specific to the workplace. In particular, he had never made a complaint to the Respondent about his working conditions and the judge found that *"It was not hard to socially distance and measures were in place to reduce the risk of Covid-19 transmission"* **[28-29, 32-36]**. Crucially for the appeal, it was found that this distinction (about what the Claimant thought was the risk of infection at the workplace, as opposed

to what it might be elsewhere in the community) was a factual one, instead of a distinction based on a proposition of law **[47]**.

8. The EAT upheld the ET's decision, considering that the ET legitimately concluded on the facts that *"the Claimant considered that his workplace constituted no greater a risk than there was at large"* and *"The claimant did not reasonably believe that there were circumstances of danger that were serious and imminent, at work or at large, that prevented him returning to his place of work"* **[50]**.

Court of Appeal decision

9. The grounds of appeal focused on the issue of whether the Claimant's belief in danger at large generally meant he did not have a reasonable belief that the danger at work was serious and imminent.

10. As explained at paragraph 7 above, the Court of Appeal concluded that the ET had reached its conclusion on a factual basis (that in fact the Claimant did not consider his workplace to be a particular threat), rather than the legal question of whether, in principle, a danger at large can also amount to a danger in the workplace. As such, the appeal was bound to fail **[58]**.

11. Nevertheless, Underhill LJ went on to make clear that there was nothing in the language of s100(1)(d) ERA that requires the danger to be exclusive to the workplace. All that matters is that the employee reasonably believes that there is a serious and imminent danger **in** the workplace. It is immaterial that the same danger may be present outside the workplace – for example, on the bus or in the supermarket **[59]**.

Conclusion

12. The outcome of this appeal was very specific to the facts of the case. However, the Court of Appeal has provided useful guidance on s100(1)(d) ERA cases generally and those in the Covid-19 context. Most significantly the Court of Appeal has made clear that simply because there was a threat of Covid generally in the community, this does not preclude it also being a danger in the workplace. Whether employers put in place sufficient measures to mitigate that danger (so that it could not reasonably be considered 'serious and imminent') will depend on the facts of each case.

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