Was it unfair to dismiss an employee who refused to attend the workplace over concerns about the risk of COVID-19 to his vulnerable children?

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Was it unfair to dismiss an employee who refused to attend the workplace over concerns about the risk of COVID-19 to his vulnerable children?

In Rodgers v Leeds Laser Cutting Ltd an Employment Tribunal decided that it was not automatically unfair to dismiss an employee who refused to attend work because he was worried about catching COVID-19 and giving it to his children.

What does the law say?

In the Employment Rights Act 1996 there are special provisions governing dismissals that are classified as "automatically" unfair. Importantly, claimants asserting that they have been automatically unfairly dismissed do not need the two years' service required to bring an "ordinary" unfair dismissal claim.

Individuals can claim automatic unfair dismissal on a number of grounds, including for health and safety-related reasons. This includes protection from dismissal for exercising the right to refuse to attend the workplace and/or to take steps to protect themselves where they reasonably believe there is serious and imminent danger in the workplace.

What happened in this case?

Mr Rodgers worked for Leeds Laser Cutting Ltd. He worked in a large warehouse where, typically, there would be about five people working at any one time, each with staggered start times.

Following the announcement of the first lockdown on 23 March 2020, the Company told employees that the business would remain open but that it was putting in place measures to ensure the safety of individuals. A risk assessment had been carried out by an external professional, which made various recommendations relating to social distancing, wiping down surfaces and staggering start/finish/break times. In fact,

the Company already had many of these measures in place prior to the risk assessment.

On 29 March 2020, Mr Rodgers sent a text message to his line manager that said he would not return to work until the lockdown had eased because he had a young child with sickle cell anaemia who could become very ill if he caught the virus. In addition, he also had a seven-month-old baby who might have had the same health problems (this was not known at the time).

A month later Mr Rodgers was dismissed by the Company. He brought a claim for automatic unfair dismissal, arguing that he had been dismissed because he had exercised his right to leave the workplace to protect himself from serious and imminent danger.

What was decided?

The Employment Tribunal decided that Mr Rodgers had not been automatically unfairly dismissed.

The Tribunal asked itself whether Mr Rodgers reasonably believed there to be serious and imminent workplace dangers at the time that he had refused to come to work. It found that Mr Rodgers could not have reasonably believed that there were circumstances of serious and imminent danger. The Tribunal noted that:

- There was no evidence that Mr Rodgers had ever raised any health and safety concerns with the Company. His place of work was large, with only a few people working at any one time, meaning it was not difficult to socially distance.A risk assessment had been carried out and there were reminders about handwashing regularly. Mr Rodgers acknowledged this information had been communicated to him.
- In Mr Rodgers' text message to his line manager he did not identify any specific risks within the workplace.

> Nor did he make any indication that he would return if improvements were made to the workplace. The message suggested that he would stay off work until the national lockdown was over.

Mr Rodgers argued that the pandemic itself created a serious and imminent workplace danger, regardless of the Company's safety precautions. Importantly, the Tribunal rejected this, noting that if this were to be the case then any employee could simply down tools on the basis that the virus was circulating in wider society.

What does this mean for employers?

As many employers turn their minds to requiring staff to return to the workplace, they should be conscious that some may be feeling anxious about coming back. This case demonstrates that by taking steps to ensure that the workplace is safe, employers can minimise the risk of successful automatic unfair dismissal claims on health and safety grounds.

Employers should consider the Government's COVID-19 secure guidelines for their particular industry, conduct a risk assessment and implement measures to control the risk of COVID-19 at work. Importantly, employers should consult with staff about risks in the workplace and their return to work plans and share the outcome of the risk assessment with them. This should help to reassure anxious staff members that they will be safe at work.

However, it's worth remembering that where employees are particularly worried about the return to work, other employment rights may come into play. For example, employees suffering from severe anxiety may be disabled, requiring reasonable adjustments to be made (which could include allowing homeworking). If employees are concerned about returning to the workplace because they live with a vulnerable

person, then this could give rise to some form of associative discrimination claim. The best course of action is to keep the lines of communication open with such employees and seek legal advice where a mutually acceptable resolution cannot be found.

Rodgers v Leeds Laser Cutting Ltd

If you would like to discuss any issues arising out of this decision please contact Hannah Lynn (hannahlynn@bdbf.co.uk), Amanda Steadman (amandasteadman@bdbf.co.uk) or your usual BDBF contact.

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