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

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In Rodgers v Leeds Laser Cutting Ltd the EAT upheld an Employment Tribunal’s decision that it was not unfair to dismiss an employee who refused to attend work because he was worried about catching Covid and giving it to his vulnerable children.

What does the law say?

There are special provisions governing dismissals that are classified as “automatically” unfair. Importantly, claimants who have been automatically unfairly dismissed do not need to meet the usual two years’ service requirement to bring an “ordinary” unfair dismissal claim.

Employees 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 began working for Leeds Laser Cutting Ltd (**the Company**) in June 2019. He worked in a large warehouse-type space about the size of half a football pitch in which usually only five people would be working at any one time.

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 staff. 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.

The Employment Tribunal decided that Mr Rodgers had not been automatically unfairly dismissed. It found that Mr Rodgers could not have reasonably believed that there were circumstances of serious and imminent workplace danger at the time that he had refused to attend work. The Tribunal concluded 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 that 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.

- 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.
- Further, his actions (e.g. not wearing a facemask, leaving his home during self-isolation, and working in a pub during lockdown) did not support his argument that there were circumstances of danger which he believed were serious and imminent.

Mt Rodgers appealed to the Employment Appeal Tribunal (**EAT**).

What did the EAT decide?

The EAT agreed with the Employment Tribunal that the dismissal was not automatically unfair.

The EAT accepted that, in principle, an employee could reasonably believe that there were serious and imminent circumstances of danger arising outside the workplace that prevented him from returning to the workplace.

However, on the facts of this case, the Tribunal had found that Mr Rodgers did not reasonably believe that there were circumstances of danger which were serious and imminent, either at work or at large. Even if the Tribunal had been wrong about this, it had been entitled to find that Mr Rodgers could have been expected to take reasonable steps to avoid such danger, such as wearing a mask, observing social distancing, and sanitising his hands.

What does this mean for employers?

As many employers are focusing on reintegrating staff to the workplace, it should be remembered that some workers may still

be feeling anxious about coming back and may have underlying reasons for this, including their own health, or that of those they live with or care for.

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 update risk assessments, implement control measures, and consult with staff about risks in the workplace and return-to-work plans. This should help to reassure anxious staff members that they will be safe at work.

However, where employees are particularly worried about the return to work, other employment rights may come into play. For example, employees who have health conditions that put them at higher risk of severe illness from Covid 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 an associative disability discrimination claim. In BDBF's recent webinar on "Reluctant Returners", we looked at the different reasons why employees may be reluctant to the return to the workplace and how employers should manage this. You can view the webinar and accompanying slide presentation **here**.

Rodgers v Leeds Laser Cutting Ltd

BDBF is a law firm based at Bank in the City of London specialising in employment law. If you would like to discuss your Covid strategy, or any issues relating to the content of this article, please contact Principal Knowledge Lawyer Amanda Steadman (amandasteadman@bdbf.co.uk) or your usual BDBF contact.

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