Legal Information Briefing

The impact of Covid in health and safety cases

The Courts have been dealing with various cases where an employee has relied on health and safety protections from being subjected to a detriment where they reasonably believed there to be dangers which would impact on their health or those of their family. The most important of these was handed down at the end of December 2022 [1]which considered a claim of automatic unfair dismissal in the context of the Covid pandemic.

As a result of his concerns about the health and safety risk to his family, Mr Rodgers left work and failed to return to his duties because of what he considered the danger posed as a result of the pandemic. He did not have two years' continuous service at the point of termination (required in England and Wales) and had not therefore acquired the legal right not to be unfairly dismissed. Mr Rodgers' son had a very serious medical condition known as *sickle cell anaemia*. He claimed that this was an automatic unfair dismissal and that he had been subjected to a detriment by an act, or any deliberate failure to act, by the employer "*in circumstances of danger which the worker reasonably believed to be serious and imminent."*[2]

Mr Rodgers was a laser operator working in the respondent's workplace, which consisted of a large warehouse about the size of half a football pitch with typically five people working on the shop floor at the material time.

Staff were advised that the business would remain open and to work as normally as possible. A staff communication promised that the company was "*putting measures in place to allow us to work as normal."* A risk assessment recommended health and safety measures such a more ventilation, wiping of surfaces, and reminding the staff of the need to socially distance and to wash their hands regularly. Those measures were fully implemented.

[1] Rodgers v. Leeds Laser Cutting Ltd (December 2022, unreported)
[2] Art 68 (1A), Employment Rights (NI)Order 1996.

A colleague who displayed symptoms of Covid-19 was sent home and told to self-isolate. Mr Rodgers had later developed a persistent cough and feared he too might have been exposed to infection and decided to self-isolate. He did not ask for a mask and was not refused one. Before leaving work, he sent an email to his line manager which stated:

"*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 (*sickle cell anaemia*) and would be extremely poorly if he got the virus and also a 7-month-old baby that we don't know if he has any underlying health problems yet."*

The only response to this was from his line manager in text message: "*ok mate, look after yourselves*". Mr Rodgers made no further effort to contact his employer. The Respondent made no effort to contact him to clarify his position or to discuss any alternative options, including furlough or sick pay and appears to have made a conscious decision not to make contact, considering the onus to be on him to make such contact.

He never returned to work and was subsequently dismissed because he had been absent without leave or explanation.

The Court of Appeal dismissed his principal claim that he had been left "*in circumstances of danger which (*he) *reasonably believed to be serious and imminent.*" The presiding Judge, Underhill LJ, said that the key considerations in looking at health and safety related dismissals were:

"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?"

The court rejected a literal reading of the law (requiring an employee to prove dangerous circumstances) with the court saying that there was nothing "that *requires that the danger should be exclusive to the workplace."* It went on to say:

"All that matters is that the employee reasonably believes that there is a serious and imminent danger in the workplace. If that is the case, it is the policy of the statute

that they should be protected from dismissal if they absent themselves in order to avoid that danger. It is immaterial that the same danger may be present outside the workplace – for example, on the bus or in the supermarket."

The Court said that there was nothing in principle that took an outbreak of Covid outside the scope of legal protection. An employee may have a fear of infection, but if the employer can demonstrate that reasonable health and safety measures were in place, a dismissal for leaving and not returning is justifiable.

The tribunal had concluded "*any belief that there were circumstances of serious and imminent danger" was not reasonable* " and that "*it was not hard to socially distance and measures were in place to reduce the risk of Covid-19 transmission*". It cannot have helped this claimant's case that he had driven his friend to hospital (when he was supposed to be self-isolating) and that although he had not left home for nine months he had been working in a pub during the pandemic, where safety measures were apparently in place.

In a case heard this year,[3] Mr Miles was a driving examiner at a vehicle test centre advised his employer that he had stage IV chronic kidney disease. During the pandemic most driving tests ceased and Mr Miles was placed on paid leave. After about three months, the agency announced that driving tests would recommence and those in a clinically vulnerable category were expected to return to work, but those in a clinically extremely vulnerable category were to remain on paid leave.

Mr Miles told his employer that he was worried about catching the virus and that he believed he fell within the clinically vulnerable category. However, his manager confirmed that he was expected to return to work.

Mr Miles resigned and brought proceedings alleging disability discrimination and detriment in the context of health and safety cases. After initiating proceedings, he discovered that his proper diagnosis involved mildly reduced kidney function.

The tribunal dismissed his case on the grounds that he had not held a reasonable belief in a serious and imminent danger to himself. It considered steps that the employer had taken to minimise risks, such as ventilation of vehicles. It considered that Mr Miles' assessment of the risk levels *'lost objectivity'*, as he had formed a fixed view that nothing less than social distancing of two metres would have been safe for him.

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[3] *Miles v Driver and Vehicle Standards Agency* [2023] IRLR 630

His appeal was dismissed by the Employment Appeals Tribunal. It took the view that in determining what was reasonable for Mr Miles to believe, the tribunal did not place an excessive burden on him to investigate matters. Tayler J concluded:

"We do not consider that in determining what was reasonable for the claimant to believe, the employment tribunal placed an excessive burden on him to investigate matters. While the employment tribunal was critical to some extent of the claimant's failure to seek a referral to occupational health and because he became fixated with his view that the only possible approach was to maintain a distance of at least two metres from other people, this was only a part of the multifactual analysis the employment tribunal applied in determining that the claimant did not hold a reasonable belief in a serious and imminent risk to his health and safety."

The Court of Appeal in the Rodgers case had concluded that as these cases are fact sensitive it was "*unsafe to attempt any more general guidance*". Much will depend on the individual circumstances and the degree of precautionary measures an employer has taken, assuming that it was reasonable for the employee to perceive that he could not return to work where he perceived "*serious and imminent danger".*