

PALLANT

CHAMBERS

Covid 19 & Health & Safety Dismissals

There have been a number of first instance decisions which have looked at health and safety dismissals relating to Covid 19. The central issue in these claims is a reasonable belief as to the serious & imminent danger. Looking through the lens of repeated lockdowns, vaccination, masks, remote hearings, zoom and working from home, there is a tendency when hearing claims in 2022 to misremember the way things were at the start of the pandemic.

The reason why this is so crucial is because of the wording of S 100(1)(d) ERA which is the section upon which a claimant usually relies (my underlining).

‘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,

(e) in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger.’

A recent Employment Appeal Tribunal decision [Rodgers v Leeds Laser Cutting Ltd \[2022\] EAT 69](#) has shed light on this issue and provided some much needed guidance on the application S 100(d) & (e) to cases arising during the pandemic.

What was it about?

In this case at the beginning of the pandemic on 29th March 2020, the claimant informed his manager that he would be staying away from the office “until the lockdown has eased” because he was worried about the risk that Covid-19 posed to his vulnerable children, who suffered with sickle-cell anaemia. The claimant’s employment ended about a month later (there were issues over who exactly terminated the employment).

What did the Employment Tribunal think?

The claimant brought claims under both S 100(1)(d) & (e) ERA.

The [Employment Tribunal](#) rejected his claim. On the question of his reasonable belief the Tribunal found:

1. The respondent had carried out an external risk assessment.
2. The respondent had followed the Government guidance on social distancing and hand washing.
3. The workplace was spacious with a small number of employees which meant that social distancing was possible.
4. The respondent had masks available on site (NB mask wearing was not advised in March 2020).
5. The claimant had breached self-isolation guidance when he had Covid 19 symptoms.
6. In his communications with his manager he did not mention concerns about dangers in his workplace and importantly could not show there had been any such danger.
7. Whilst he had removed himself from the workplace he had not informed his manager of that fact.
8. The claimant worked in a pub during the lockdown.

What did the Employment Appeal Tribunal think?

The appeal was rejected.

HHJ Taylor noted that whilst the claim had been brought under two separate sub-sections the claim which the claimant was bringing was one which fell within S 100(d). The reasoning on this is important.

There is no overlap between sub-sections (d) & (e). The Judge explained this by referring to the fact that it was clear that the use of 'or' between the two sub-sections must mean that they covered different things. He also pointed out that in (d) there is an additional requirement that the danger could not reasonably be averted. This is not required of a claim under (e). What this means is that where the employee has removed themselves or refused to return then the claim is under (d) and that the added requirement that the danger could not be reasonably averted applies. As the Judge pointed out to hold otherwise would simply lead to claims being made under (e) in such circumstances.

Addressing the (d) claim the Judge observed that it is sometimes helpful to breakdown the relevant statutory provision into its constituent parts but added a warning that if this is done then a Tribunal must ensure that no part of the provision is inadvertently left out (see above how this might arise when looking at a (d) claim alongside an (e) claim).

The Judge broke his analysis down into six parts:

1. In circumstances of danger;
2. the employee believes that the circumstances of danger are serious and imminent;
3. the belief that the circumstances of danger are serious and imminent is reasonable;
4. the employee cannot reasonably have been expected to avert the serious and imminent circumstances of danger;
5. the employee left, proposed to leave (while the danger persisted) or refused to return to his place of work or any dangerous part of his place of work;
6. so doing was the reason, or principal reason, for the dismissal of the employee.

The Judge made it clear that any analysis had to be undertaken as at March 2020 (which is what the Tribunal had done). At that time the following was known about Covid 19:

1. It was a deadly virus which particularly effected older and vulnerable people.
2. It was spread by close contact.

3. Social distancing was advised.
4. Regular handwashing was advised.

Importantly when looking at points 2 & 3 the issue was not whether there was a deadly virus at large in the community but rather whether a deadly virus being at large in the community made the workplace in question one in which a serious and imminent danger existed and it was reasonable to believe this. The findings by the Tribunal as to the claimant's behaviour outside of work, the guidance at the time and the workplace itself made such a belief an unreasonable one.

What can we take away from this?

HHJ Taylor's analysis has provided us with a good start on a list of issues (see earlier blog on [List of Issues](#)) which can be utilised when bringing or defending a S 100(d) ERA claim.

It also confirms that the date when the complaint arises is important. In a recent case where I represented a respondent in the Employment Tribunal we all struggled to remember exactly how things were at various dates during the pandemic. We all forgot as we sat around wearing facemasks that the wearing of facemasks only started at the end of July 2020. The advice in late March 2020 was limited to social distancing/handwashing and working from home did not cover many businesses.

As was found in [Rodgers](#) what was known about the virus in March 2020 had to be taken into consideration when looking at the reasonableness of any belief.

My advice is that if you are involved in this type of claim is to start archiving guidance and advice from 2020 as the Government has a habit of updating the guidance and removing the previous guidance!

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