Neutral Citation Number: [2022] EAT 69

Case No: EA-2021-000437-VP

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 6 May 2022

Before :

HIS HONOUR JUDGE JAMES TAYLER

- -

Between :

MR D RODGERS	**Appellant**
- and -	
LEEDS LASER CUTTING LTD	**Respondent**

- -

RAD KOHANZAD and ANNA DANNREUTHER
(instructed by Atkinson Rose LLP) for the **Appellant**
JONATHAN GIDNEY
(instructed by Aeris Employment Law) for the **Respondent**

Hearing date: 12 April 2022

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JUDGMENT

SUMMARY

HEALTH & SAFETY

On the facts of this case, the employment tribunal did not err in law in concluding that the claimant's dismissal when he did not return to work because of concerns related to the Coronavirus pandemic was not automatically unfair pursuant to section 100(1)(d) ERA. Sub-sections 100(1)(d) and (e) ERA considered.

HIS HONOUR JUDGE JAMES TAYLER

Introduction

1. This is an appeal against the judgment of Employment Judge Anderson dismissing a claim of automatic unfair dismissal brought pursuant to section 100(1)(d) or (e) Employment Rights Act 1996 ("ERA"). The claimant asserted that he had left and/or had not returned to his place of work because he reasonably believed there were circumstances of danger that were serious and imminent arising out of the Coronavirus pandemic, which, in the terms of section 100(1)(d) ERA, he could not reasonably have been expected to avert . The claim was heard on 29 January 2021. The judgment was sent to the parties on 1 March 2021.

The facts

2. I take the facts from the judgment of the employment tribunal. The employment tribunal heard evidence from the claimant and from a colleague of his, Mr Knapton. The respondent called Mr Rice, a Director, and Mr Thackery, the Production Manager and claimant's line manager.

3. The claimant commenced work for the respondent as a laser operator on 14 June 2019.

4. The employment tribunal described the respondent's workplace:

> 13. The workspace at the respondent's business is large. Various dimensions were offered by the witnesses, including 12000-14000 square feet, the size of half a football pitch and 'not a small building; like a big big garage'. The Tribunal heard that it sometimes has a skip or forklift on the 'shop floor'. I am satisfied that this was a large warehouse-type space.
>
> 14. There were typically five people working on the shop floor at the material time. This was the consistent evidence of the witnesses.

5. The employment tribunal accepted that the workplace was a large warehouse-type space about the size of half a football pitch in which usually only five people would be working.

6. On 16 March 2020, a colleague of the claimant, whom the employment tribunal described as TA, displayed symptoms of Covid-19. TA was sent home and told to self-isolate. TA remained off work until after the claimant's employment ended.

7. In a number of respects the employment tribunal found that the claimant's evidence lacked clarity and had changed over time. The employment tribunal noted:

> 16. In the claimant's original claim, he said that he had been working with TA on the day TA was sent home (which he had pleaded as being 27 March 2020), that he (the claimant) had later developed a persistent cough and feared he might have been exposed to infection and decided to self-isolate. In the amended claim, the claimant states that he had worked with TA on 16 March 2020 and that his (the claimant's) cough had developed on 27 March 2020.

8. The first national 'lockdown' because of the Coronavirus pandemic was announced on 23 March 2020. The employment tribunal described the actions taken by the respondent immediately following the national lockdown:

> 17. Following the announcement of the first national 'lockdown' on 23 March 2020, the respondent published, on 24 March 2020, an 'employee communication'. This document confirmed that the business would remain open, asked staff to work as normally as possible and states "we are putting measures in place to allow us to work as normal." I accepted the clear and consistent evidence of the respondent's witnesses that there were already some measures in place to protect against Covid-19 and that the need to socially distance was by that time common knowledge.

9. A risk assessment was undertaken in mid March by an external professional. Most of the recommendations were already in place before it was undertaken:

> 18. A risk assessment was carried out by an external professional in mid-March 2020. That assessment identified the level of risk of various scenarios, with recommendations to reduce risk. Many of these recommendations refer to social distancing and wiping down surfaces, as well as staggering start/finish/lunch/break times. Mr Rice and Mr Thackery were clear that most of these recommendations were already in operation prior to the risk assessment being carried out. Mr Thackery told the Tribunal there was no real need to stagger start times, as individuals already arrived at staggered times. I accepted this evidence, having considered the clocking in sheet and hearing the evidence. Mr Rice said that staff had been told not to congregate at lunch and break times, but this advice had to be reiterated, as it would be ignored. I accepted this evidence and noted Mr Rice's exasperation at this fact. However, I noted that the evidence about 27 March 2020 was consistent that all the staff on shift were clocking out at the same time. I therefore find that there was partial adherence to these specific recommendations.

10. The employment tribunal found that measures to protect against Covid-19 had been discussed with staff:

> 19. I find there were conversations with staff at the respondent's premises in relation to safety measures to protect against Covid-19. These included conversations about social distancing and the need for handwashing. Mr Thackery was clear in his

> evidence that he reiterated the advice from the government about these measures. The claimant accepted that there were some conversations and that he was told about handwashing. The claimant also spoke about social distancing, indicating he was aware of this.

11. The claimant was generally able to maintain "social distance" at work:

> 20. I find that it was possible for the claimant to socially distance at work, certainly for the majority of his role. I had asked the claimant why it was hard to socially distance in the workplace and he told me it was "*not hard, you could do it*", but that there were times when staff had to work together. This included to carry things, or on one occasion when they stood around a skip cleaning some steel. There was no evidence that these specific occasions had been raised with the respondent.

12. The employment tribunal rejected the claimant's evidence that he was forced to go on deliveries:

> 22. In respect of the allegation that the claimant was forced to go on deliveries, Mr Thackery said that he did not recall any concerns being raised about this. Mr Thackery also said that going out in the van was not a direct requirement of the claimant's job. Mr Thackery said that it was a help for company, the claimant was not forced and that he asked the claimant if he was alright doing that task. I note that the claimant was employed as a laser cutter and I accept the evidence that it was not a direct part of his role. I further accept that he was not forced or required to undertake such tasks; this was not asserted by the claimant, who said that he was 'asked'. I do not find that concerns around this issue were raised directly with Mr Thackery. I considered Mr Thackery's slight surprise around this issue to be genuine.

13. Masks were available for employees. The employment tribunal held that the claimant, whose evidence the employment tribunal found vague on this point, had not asked for one:

> 21. I find, on the balance of probabilities, that the claimant did not ask for a mask, and was not refused one. The claimant said in evidence that there was a mask dispenser at the door of the premises, but that it was empty. He said he was sent out on deliveries without a mask. Mr Thackery said he has no recollection of being spoken to about a lack of masks. Mr Thackery said he had no recollection of the dispenser being empty or anyone telling him that it was empty. He said he still has boxes of masks in his desk. Mr Rice also made reference to Mr Thackery always having masks. When I asked the claimant if he had asked specifically for a mask, he said he had made the respondent aware, but could not remember what response he had received. I preferred the clear and consistent evidence of the respondent over the vague evidence of the claimant in this regard.

14. The claimant developed a cough on 25 March 2020 that he attributed to dust at work. The employment tribunal, having weighed up the competing evidence, rejected the claimant's contention that he said he would not be coming back when he left work at his normal time on Friday 27 March

2020:

> 23. The claimant displayed a slight cough from 25 March 2020, but attributed this to the temperature and dust within the workplace and was not concerned it was a symptom of Covid-19.
>
> 24. The claimant left work at normal time on Friday 27 March 2020.
>
> 25. I find the claimant did not say, on 27 March 2020 when he left work for the day, that he was not coming back.

15. On 29 March 2020 the claimant sent an email to Mr Thackery [26]:

> *"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 siclecell (sic) & would be extremely poorly if he got the virus & also a 7 month old baby that we don't know if he has any underlying health problems yet"*

16. Mr Thackery replied [27]:

> *"ok mate, look after yourselves"*

17. The claimant was self isolating from 28 March to 3 April 2020, but drove Mr Knapton, who had broken his leg, to hospital:

> 28. The claimant obtained a self-isolation note from NHS 111 for the period 28 March 2020 to 3 April 2020.
>
> 29. The claimant transported Mr Knapton to hospital, by car, on 30 March 2020. This was during the period that the claimant had been told by the NHS to self-isolate. The claimant told the Tribunal both he and Mr Knapton wore masks, that Mr Knapton sat in the back of the car and that he did not accompany Mr Knapton into the hospital itself. I accept that account.

18. There was no further contact between the claimant and the respondent until the claimant sent a text on 24 April 2020:

> 30. The claimant made no further effort to contact the respondent after 29 March 2020, whether to raise the issue of furlough or sick pay, or for any other reason.
>
> 31. The respondent made no effort to contact the claimant to clarify his position or to discuss any alternative options, including furlough or sick pay. The respondent made a conscious decision not to make contact with the claimant, considering the onus to be on him to make such contact.
>
> 32. The next contact between the parties, after 29 March 2020, was on 24 April 2020 when the claimant sent Mr Thackery a text saying:

> *"just been told iv been sacked for self isolating, could you please send it to me in writing or by email…with an explanation of why my employment ended with the date it ended. i also need my p45 sending out as soon as possible".*

19. The employment tribunal was not convinced by the claimant's evidence about why he decided not to come into work:

> 33. I found the claimant's case confusing and his views apparently contradictory at times. He gave evidence that if all the measures described by the respondent were in place, that would make the business as safe as possible from infection. He gave evidence that this would possibly make the workplace safer than the community at large, but not safer than his own home. He gave evidence that he was not sure that any measures would have made him feel safe enough to work at the respondent's business. He gave evidence that he drove his friend to hospital (during his period of self-isolation). He gave evidence that he had not left home for nine months. He told the Tribunal he had spent a period of time working in a pub during the pandemic, where safety measures were in place.
>
> 34. The claimant's evidence about any concerns he had and how these were raised was also confusing. He said that he didn't make any complaints. He said that he raised issues but was told *'there's the door'*. He said he and colleagues talked about their concerns. He said he did mention this to Mr Thackery, but could not give any firm examples. When asked if he had complained to Mr Thackery that the risk assessment measures, wiping down etc was not happening, he said *"probably not in them words"*. He was then asked if he made that complaint and he said *"not that I can remember."* When asked whether he told managers, or just discussed with colleagues, he said that he had chats with colleagues, but Mr Thackery *'knew about it'*. When asked if he said to Mr Thackery measures are not in place and so the workspace isn't safe, the claimant replied "*I can't say that I remember saying that. I'd be lying*."
>
> 35. Mr Thackery said that there were some general conversations about Covid-19 in general society only and he had no recollection of ever threatening the claimant with his job as alleged.
>
> 36. I find that the claimant did not raise concerns with the respondent that could reasonably be described as meaningful concerns or complaints, which would inform the respondent that the claimant thought there were circumstances of imminent danger within the workplace.
>
> 37. I conclude that the claimant's decision to stay off work entirely was not directly linked to his working conditions; rather, his concerns about the virus were general ones, which were not directly attributable to the workplace. In his oral evidence, it was clear he was concerned as to the virus in general, he referred to his own home as being the safest place and he told the Tribunal that he chose to self-isolate 'until the virus calms down'.
> 38. I find that, when communicating to his employer his intention to stay away from work, the claimant made no reference to the working conditions as playing any part in his decision. The text on 29 March 2020 said he was going to stay off work until the lockdown eased; nothing to do with the conditions of employment.

> 39. The claimant amended his claim on two separate occasions. In his oral evidence, his account was still different. His amended claim stated that "*on 27 March 2020, he developed a persistent cough and fearing he might have been exposed to infection and following Government guidance*", he decided to self-isolate. This would mean the claimant feared having been exposed to TA some 11 days earlier. In his oral evidence, the claimant said that he was not worried about having Covid-19 due to his cough, and put it down to the temperature and dust within the workspace. I consider the inconsistencies more than a simple mistake over dates, given the detail provided about their significance and I consider it further calls into question the claimant's reliability in his version of events, his level of concern over Covid-19 and his concerns specifically in relation to the safety or otherwise of the workplace.

20. The respondent sent a P45 on 24 April 2020 that was received by the claimant on 26 April 2020. The respondent accepted that the claimant's receipt of the P45 constituted a dismissal. The employment tribunal did not make a finding of fact about the reason why the respondent sent the P45 to the claimant, and so there was no specific finding of fact about the respondent's reason for dismissing the claimant.

The legal claim

21. The claimant asserted that his dismissal was automatically unfair being contrary to section 100(1)(d) or (e) ERA:

> 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, **or**
> >
> > (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.
>
> (2) For the purposes of subsection (1)(e) whether steps which an employee took (or proposed to take) were appropriate is to be judged by reference to all the circumstances including, in particular, his knowledge and the facilities and advice available to him at the time.

> (3) Where the reason (or, if more than one, the principal reason) for the dismissal of an employee is that specified in subsection (1)(e), he shall not be regarded as unfairly dismissed if the employer shows that it was (or would have been) so negligent for the employee to take the steps which he took (or proposed to take) that a reasonable employer might have dismissed him for taking (or proposing to take) them. [***emphasis added***]

Can leaving, or refusing to return to, a place of work within section 100(1)(d) ERA also constitute an appropriate step for the purposes of section 100(1)(e) ERA

22. On a fair reading of the employment tribunal judgment it seems clear that the employment tribunal concluded that this case concerned the claimant leaving; or, more likely, refusing to return to his place of work. It was common ground between the parties before the employment tribunal that leaving, or refusing to return to, a place of work could fall both within section 100(1)(d) ERA and constitute an appropriate step within section 100(1)(e) ERA. The employment tribunal analysed the claim on that basis. Shortly prior to the hearing, I asked the parties to consider the question of whether leaving, or refusing to return to, a place of work could only fall within section 100(1)(d) ERA and could not constitute taking an appropriate step within section 100(1)(e) ERA. I raised this point for two reasons. Firstly, the subsections of section 100 are linked by the word "or" which suggest that they are alternatives. Secondly, leaving, or refusing to return to, a place of work is only protected if the employee could not "reasonably have been expected to avert" the circumstances of danger. This limitation does not apply to section 100(1)(e) ERA. It would make little sense if an employee who had left, or refused to return to, his place of work was excluded from the protection of section 100(1)(d) ERA because he could reasonably have been expected to avert the circumstances of danger, but nonetheless he was protected by section 100(1)(e) ERA because leaving, or refusing to return to, a place of work constituted taking an "appropriate step". Alternatively, if leaving, or refusing to return to, a place of work is an appropriate step there is no purpose to section 100(1)(d) ERA. Mr Kohanzad said that he accepted that leaving, or refusing to return to, a place of work could not fall within section 100(1)(e) ERA and only advanced the appeal by challenging the reasoning of the employment tribunal under section 100(1)(d) ERA. He did not take any point on the fact that this was

not how the respondent had advanced the case below. Mr Gidney stated that he also accepted that the case could only fall within section 100(1)(d) ERA. Accordingly, I will limit my consideration to that provision.

The components of section 100(1)(d) ERA

23. Lawyers tend to break down statutory provisions into their component parts, sometimes seemingly thinking that the more a provision can be broken down the better. Such analysis is often useful, but care should be taken not to lose the meaning of the provision as a whole. The purpose of a provision is more likely to be ascertained by considering the whole rather than by only considering its dismembered parts. There may be a number of logical ways of breaking down a provision. Depending on the facts of the case, there may be no error in considering some of the components together; and it could be a better way of applying a provision to the facts of the particular case. The key requirement is that in applying the provision no relevant component is overlooked.

24. With that caveat in mind, there was broad agreement between the parties as to the components of section 100(1)(d) ERA. In neutral terms, the potential components are:

1) circumstances of danger (subject to the question, discussed below, of whether there is an objective requirement that there were "circumstances of danger" or whether it is sufficient that the employee reasonably believed that there were circumstances of danger)
2) the employee believed that the circumstances of danger were:
    a. serious, and
    b. imminent
3) the employee's belief that the circumstances of danger were serious and imminent was reasonable
4) the employee could not 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

1) Circumstances of danger

25. On a natural reading of section 100(1)(d) ERA it appears that there is a gateway requirement that, on an objective assessment of fact, there were circumstances of danger. Considering the provision at a preliminary hearing in the EAT in **Hamilton v Solomon and Wu Limited** UKEAT/0126/18/RN HHJ Stacey stated:

> In an appropriate case, there is an argument to be made that there are three, not two, stages in considering a claim under section100(1)(d) and that **Oudahar** identifies the second and third. On a plain reading of the statute the first question appears to be whether there are, in fact, "circumstances of danger" which is an objective test. The second question then considers the claimant's reasonable belief in whether those dangerous circumstances are serious and imminent and which he could not reasonably be expected to avert, and the third, the reason for dismissal. [Emphasis added]

26. That analysis would be compatible with paragraph 4 of Article 8 of Directive 89/391 EEC ("the Framework Directive")

> 4. Workers who, in the event of serious, imminent and unavoidable danger, leave their workstation and/or a dangerous area may not be placed at any disadvantage because of their action and must be protected against any harmful and unjustified consequences in accordance with national laws and/or practices.

27. Paragraph 4 of Article 8 of the Framework Directive refers to serious, imminent and unavoidable danger, without including circumstances in which an employee holds a reasonable belief that such circumstances exist.

28. In **Von Goetz v St George's Healthcare NHS Trust** EAT/1395/97 Lindsay J (President) noted that ERA could grant greater protection than the Framework Directive:

> 30 It is, of course, a formidable argument, when it is encountered, that a domestic provision does not go as far as the Directive requires it to have been done, but there is, in our view, no force whatsoever in an argument, where the language of the domestic provision is clear and unambiguous, that the domestic provision goes further in terms of protection than the Directive requires.

29. The issue is potentially relevant because the employment tribunal determined the case on the basis that it had to assess whether the claimant had a reasonable belief that there were serious and imminent circumstances of danger. That analysis involves an acceptance that all that is required in respect of the "circumstances of danger" component is that the claimant reasonably believed such circumstances existed. That would be contrary to the approach of HHJ Stacey in **Hamilton**.

30. I can see some force in the argument that the provision should apply if the employee reasonably believes that there are circumstances of danger. I appreciate that care must be taken in considering hypothetical situations because they may be unrealistic. But, for the sake of argument, assume that a green gas starts escaping at a place of work. Unbeknown to the employees the gas is inert and entirely harmless. The employees leave, reasonably believing that there are circumstances of danger that are serious and imminent. They are dismissed for so doing, even though it is accepted that they acted reasonably by leaving the premises because at the time it seemed likely that the gas was dangerous, and the risk of injury appeared to be serious and imminent. In such circumstances should the employees fall outside of the protection of section 100(1)(d) ERA because, objectively speaking, although not appreciated by the employees at the time they left the workplace, there was no circumstance of danger because the gas was harmless. That would be surprising. It would be surprising if employees are protected for reasonably but erroneously believing in the seriousness and imminence of a threat to their health and safety, but not for a reasonable but erroneous belief in the underlying circumstances of danger. It is arguable that despite the order of the words in section 100(1)(d) ERA it is designed to protect a reasonable belief in imminent and serious circumstances of danger, so that the reasonable belief protection applies not only to seriousness and imminence, but also to the underlying circumstances of danger. That could be a purposive construction of the provision. While in **Von Goetz** Lindsay J considered it is legitimate to construe a phrase in a provision that is "clear and unambiguous" as going beyond the underlying protection offered by a Directive, it is not necessarily limited to such circumstances, and might arguably be achieved by a purposive

construction. In reality, there are unlikely to be many, if any, real-life situations in which an employee would reasonably believe that there are serious and imminent circumstances of danger when, in fact, there are no circumstances of danger at all. Even in the green gas example the panic that could be caused by the gas, even though unbeknown to the employees it is harmless, would be likely to create some circumstance of danger. In this case, although the employment tribunal approached the matter by asking a question that suggested that a reasonable belief that there were circumstances of danger was sufficient to engage section 100(1)(d) ERA, there can be no doubt that the employment tribunal accepted that the Coronavirus pandemic created at least some circumstances of danger at work and elsewhere, so it is not necessary for me to reach a final conclusion on this point.

31. For section 100(1)(d) ERA to apply it is not necessary that the circumstances of danger be generated by the workplace itself: **Harvest Press Ltd v Mr T J McCaffrey** [1999] IRLR 778 [15-16]:

> 15. As to the submission that the circumstances of danger referred to in section 100(1)(d) means the circumstances of danger generated by the workplace itself, it seems to us that that is too narrow a view of words which are quite general. It seems to us clear that premises or the place of work may become dangerous as a result of the presence or absence of an employee. For example, premises might become unsafe as a result of the presence of an unskilled and untrained employee working on dangerous processes in the workplace where the danger of a mistake is not just to that employee, but to the colleagues who are working with him. It seems to us that the circumstances of danger contemplated by section 100(1)(d) would be apt to cover such a situation and it seems to us that had a fellow employee walked out because of the presence of an unskilled and untrained operative in those circumstances, he would be entitled to the protection of the legislation.
>
> 16. Another example might be the absence of an inspector or foreman who had specific safety responsibilities and who was required to be there as a result of the dangerous processes which were being carried on. Again, we can contemplate circumstances in which a fellow employee would be entitled to say that his workplace was dangerous as a result of the absence of the specific person in charge of the safety responsibilities at that place of work. Another example might be where there was a foolhardy employee who, not through lack of training, but through determination to indulge in horseplay, persisted in adopting dangerous practices in the place of work so as to render the place at work dangerous. It seems to us that that might again be a situation in which fellow employees would be entitled to say to their employer; "so long as this person is at the workplace, my workplace is dangerous and I will not be willing to stay there during this time". Again, it seems to us that that falls within the words "in the circumstances of danger" and there is nothing in the statute to indicate that these examples would be outwith the

protection granted by section 100.

32. There is no requirement that any harm that might be caused by the circumstances of danger will occur at the claimant's place of work, or to the employee or fellow employees. In **Von Goetz** Lindsay J stated:

> 28 We see no reason, simply in point of construction of a domestic provision, to limit the ambit of, for example, 1(c) and 1(e), so that they should be concerned only with harm or possibilities of harm at the dismissed employee's place of work or to his fellow employees, or to any employees.

2) the employee believes that the circumstances of danger are serious and imminent

33. The parties agree that it is necessary that the employee did, as a matter of fact, believe that the circumstances of danger were serious and imminent.

3) the belief that the circumstances of danger are serious and imminent is reasonable

34. The parties agreed that the belief must be reasonable

4) the employee can not reasonably have been expected to avert the serious and imminent circumstances of danger

35. The parties accept that this was a necessary component of the analysis in this case because the claimant's situation could only properly be analysed under section 100(1)(d) ERA.

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

36. Although the judgment could have been a little clearer on this issue, I consider that on a fair reading of the judgment of the employment tribunal accepted that the claimant left or, more likely, refused to return to his place of work.

6) so doing was the reason, or principal reason, for the dismissal of the employee

37. The employment tribunal did not make an express finding about the reason for the claimant's dismissal. That may be because the employment tribunal accepted that he did not come within the potential protection of section 100(d) or (e) ERA, so considered it was not necessary to do so. There is much to be said for determining the factual reason, or principal reason, for dismissal and then deciding whether that reason was protected by the provision. If there was some reason for dismissal

did not fall within section 100(d) ERA it is generally helpful to have a factual finding of what that reason was.

The components of section 100(1)(d) ERA relevant to this appeal

38. From the above analysis it is apparent that the components of section 100(1)(d) ERA that are relevant to this appeal are: 2) whether the claimant believed that the circumstances of danger were serious and imminent; 3) whether any such belief was reasonable; and, 4) whether the claimant could reasonably have been expected to avert the serious and imminent circumstances of danger.

The appeal

39. In his skeleton Mr Kohanzad put his ground of appeal as follows:

> Did the ET err in concluding that, because the claimant's belief was one of a serious and imminent danger *at large*, his belief that his workplace presented a serious and imminent danger was not objectively reasonable?

The reasoning of the employment tribunal

Components 2) and 3)

40. The reasoning of the employment tribunal did not break down the components of section 100(1)(d) ERA exactly as I have, and dealt with the components of sub-sections 100(1)(d) and (e) ERA together in a manner that is not always very easy to follow. In the section "Application of the Law to the Facts" the employment tribunal first dealt with what I have described as components 2) and 3):

> Did the claimant reasonably believe there were circumstances of serious and imminent danger?
>
> 45. I have to consider this both objectively and subjectively, i.e. did the claimant believe the circumstances were of serious and imminent danger and was that belief objectively reasonable?
>
> Did the claimant believe there were circumstances of serious and imminent danger?
>
> 46. I accept that the claimant has, and continues to have, significant concerns about the Covid-19 pandemic. This is entirely understandable. His comments that he has not left the house in nine months and that nowhere is safer than his home demonstrate the level of his concern. It is difficult however, to reconcile those

apparently genuine beliefs, with his actions on 30 March 2020 when he chose to transport his friend to the hospital, despite being advised to self-isolate.

47. I accept also, his concerns for his family and note that he had a young baby and a child with sickle-cell anaemia living with him in March 2020, when there was huge uncertainty about how different, younger groups in society might be affected by the virus.

48. The government guidance at the time centred around social distancing and handwashing. The workplace is large, with a handful of people working within it at the time. On the claimant's own evidence, it was generally 'not hard' to socially distance. In addition, he accepted there had been reminders around handwashing and he gave some specific examples of this. Having considered all the circumstances including, the claimant's knowledge and the facilities and advice available to him at the time, and bearing in mind his decision to drive his friend to the hospital in the circumstances described, I do not find that the claimant believed there were circumstances of serious and imminent danger, within the workplace, but that he considered there were circumstances of serious and imminent danger all around.

49. I remind myself that the claimant's text to Mr Thackery on 20 March 2020 made reference to staying off work until the lockdown eased; there was no reference to any issue specifically within the workplace. The claimant did not indicate that he would return if improvements were made. He intended, seemingly regardless, to remain absent until the national lockdown was over.

Was that belief objectively reasonable?

50. For the avoidance of doubt, I do not consider that any belief that there were circumstances of serious and imminent danger were objectively reasonable, largely for the reasons set out above.

51. I have to consider the circumstances as they were at the time of these events and in light of what was known to the parties and particularly the claimant at the time. We have learnt much more about the virus since March 2020, but my focus is on that point in time.

52. It was clear, even in late March 2020, that Covid-19 was a real risk to everyone, that it was a deadly virus and that it was affecting the older and vulnerable more. The guidance at that time was that Covid-19 was spread by close contact and the advice was to maintain two metres distance from others and to wash hands regularly.

53. I consider the large size of the workspace and the small number of employees to be a relevant factor. It was not hard to socially distance and measures were in place to reduce the risk of Covid-19 transmission.

41. The employment tribunal returned to these issues in the section headed "Conclusions". The employment tribunal rejected the suggestion that section 100 ERA is inapt to deal with circumstances

arising because of the Coronavirus pandemic or that the Secretary of State's declaration of a serious and imminent threat to public health was decisive of the issue:

> 61. Mr Gidney submitted that the provisions within s100(1)(d) and (e) were not designed for the Covid pandemic and the claim was an attempt by the claimant to 'shoehorn' his situation into these provisions, to suit him, in the context of the pandemic. I accept that when drafted, the Act was not specifically designed for the Covid pandemic – how could it have been? However, I reject the suggestion that s100(1)(d) and (e) cannot apply to situations arising from the pandemic, as a matter of principle. It seems to me that every case will need to be considered on its facts and merits.
>
> 62. The claimant refers to the Secretary of State's declaration of 10 February 2020 under regulation 3(1) of the Health Protection (Coronavirus) Regulations 2020 that Covid-19 poses a serious and imminent threat to public health (emphasis added). However, I consider that the fact that the virus has been described in those terms does not, of itself, satisfy this part of the statutory test. If it did, it seems to me any employee or worker could simply 'down tools' on the basis that the virus is circulating in society.

42. The employment judge considered the submission that the claimant had a reasonable belief in a serous and imminent circumstance of danger:

> 63. In her closing submissions, Miss Dannreuther submitted that even if there had there been measures in place at the time, there was still a reasonable belief held by the claimant of a serious and imminent danger, which he could not avert. I am not persuaded that this is a correct interpretation of the provisions. To accept this submission would essentially be to accept that even with safety precautions in place, the very existence of the virus creates circumstances of serious and imminent danger, which cannot be averted. This could lead to any employee relying on s100(d) or (e) to refuse to work in any circumstances simply by virtue of the pandemic.
>
> 64. In my judgment, whilst conditions pertaining to Covid-19 could potentially amount to circumstances of serious and imminent danger in principle, I do not consider that they did so in this case. I do not consider that the claimant reasonably believed that the circumstances were of serious and imminent danger, for the reasons set out above.
>
> 65. When considering s100(1)(d), I conclude the claimant's decision to stay off work was not directly linked to his working conditions I find that this is not a case where the claimant refused to return to his place of work, or any dangerous part of his place of work due to the conditions in that environment; he refused to return to his place of work until the national lockdown was over. I cannot conclude that the decision to absent himself, regardless of what the situation might be at the workplace, until a national change was made, can lie at the door of the respondent. For that reason, and for those set out above, in my judgment, the criteria in this paragraph are not made out.

Analysis

43. The claimant contends that the employment tribunal erred in law by concluding that "because the claimant's belief was one of a serious and imminent danger at large, his belief that his workplace presented a serious and imminent danger was not objectively reasonable". The employment tribunal clearly did consider that the claimant's general concern about the risk of being anywhere other than at home was relevant to the issue of whether he had a reasonable belief that there were serious and imminent circumstances of danger that resulted in him leaving, or refusing to return to, his place of work. The employment tribunal stated that: [33] "He gave evidence that if all the measures described by the respondent were in place, that would make the business as safe as possible from infection. He gave evidence that this would possibly make the workplace safer than the community at large, but not safer than his own home"; [37] "I conclude that the claimant's decision to stay off work entirely was not directly linked to his working conditions; rather, his concerns about the virus were general ones, which were not directly attributable to the workplace"; [48] "I do not find that the claimant believed there were circumstances of serious and imminent danger, within the workplace, but that he considered there were circumstances of serious and imminent danger all around"; and "In my judgment, whilst conditions pertaining to Covid-19 could potentially amount to circumstances of serious and imminent danger in principle, I do not consider that they did so in this case."

44. I accept that an employee could reasonably believe that there is a serious and imminent circumstance of danger that exists outside his place of work that could prevent him from returning to it, and that such circumstances could potentially fall within section 100(1)(d) ERA. However, the fact that the claimant had genuine concerns about the Coronavirus pandemic, and particularly about the safety of his children, did not mean that he necessarily had a genuine belief that there were serious and imminent circumstances of danger, either at work or elsewhere, that prevented him from returning to work.

45. The employment tribunal made a number of significant findings of fact that were contrary to

the claimant's contention that he believed that there was serious and imminent circumstances of danger both at work and in other places outside his home, that prevented him returning to work:

45.1. The workplace was large and few people worked in it

45.2. The claimant had remained at work from the date of the announcement of the lockdown on 24 March 2020 until he left at his normal time on 27 March 2020

45.3. The claimant could generally maintain social distance at work

45.4. The employment tribunal rejected the claimant's contention that he was forced to go out on deliveries

45.5. The claimant had not asked for a mask

45.6. Masks were available

45.7. The claimant did not say that he would not be returning when he left on 27 March 2020

45.8. The claimant drove Mr Knapton to hospital while he was meant to be self isolating

45.9. The claimant worked in a pub during the lockdown

46. The reasoning of the employment tribunal overlapped to an extent when dealing with the questions of whether the claimant believed there were serious and imminent circumstances of danger that prevented him returning to work and whether any such belief was reasonable. I do not consider it is an error of law not to hermetically seal these two components provided the overall assessment is compatible with the wording of the provision. On an overview, I consider that the employment tribunal did legitimately conclude that the claimant did not hold a reasonable belief that there were serious and imminent circumstances of danger that prevented him from returning to work. I do not consider that was because, as is asserted by the ground of appeal, the employment tribunal concluded that because the claimant held a belief in a serious and imminent danger at large he could not reasonably believe, on an objective basis, that the workplace presented a serious and imminent circumstance of danger. On a fair reading of the judgment the employment tribunal concluded that the claimant considered that his workplace constituted no greater a risk than there was at large. 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.

Component 4

47. The employment tribunal also held that:

> Could the claimant reasonably have been expected to avert the dangers?
>
> 54. Having regard to all the circumstances, as the claimant knew them, in my judgment, the claimant could reasonably have been expected to avert any dangers, by abiding by the guidance at that time, namely by socially distancing within the large, open workspace, by using additional personal protective equipment if he wished to do so, and by regularly washing/sanitising his hands.
>
> 55. If there were specific tasks which he felt removed his ability to socially distance, it seems to me these were tasks he could reasonably have refused to carry out, or raised specifically with his employer. There was no evidence he did so.

Analysis

48. Mr Kohanzad contended that as the employment tribunal had erroneously concluded that because the claimant's belief was one of a serious and imminent danger at large, his belief that his workplace presented a serious and imminent danger was not objectively reasonable, that error undermined any conclusion that there were steps that the claimant could reasonably have been expected to take to avert the dangers. I do not accept that is the case. Even if the employment tribunal had erred and should have concluded that components 2) and 3) were established, the employment tribunal was entitled to find as a fact in respect of component 4) that the claimant could reasonably have taken steps to avoid the dangers, even having regard to his concerns about the health of his children. He could have taken similar steps both at large and at work, wearing a mask, socially distancing, sanitising and washing his hands. The claimant did not assert any particular difficulty about his journey from home to work that would require him to take additional steps to those available at work.

Overall conclusion

49. Despite the topicality and the potential importance of employment issues arising from the

Coronavirus pandemic, the sympathy that one necessarily has for the concerns that the claimant had about the safety of his children, and the careful and well presented arguments advanced on behalf of the claimant, I conclude that no error of law has been established. The employment judge accepted that the Coronavirus pandemic could, in principle, give rise to circumstances of danger that an employee could reasonably believe to be serious and imminent, but this case failed on the facts.