EMPLOYMENT TRIBUNALS

Claimant: Mr D Rodgers

Respondent: Leeds Laser Cutting Limited

Heard at: By CVP
On: 29 January 2021

Before: Employment Judge Anderson

Representation
Claimant: Miss Dannreuther (counsel)
Respondent: Mr Gidney (counsel)

RESERVED JUDGMENT

1. The complaint of automatically unfair dismissal is not well-founded and is dismissed.

REASONS

Technology

2. This hearing was conducted by CVP (V - video). The parties did not object. A face to face hearing was not held because it was not practicable and all the issues could be dealt with by CVP.

Introduction

3. This was a claim of automatically unfair dismissal brought by the Claimant, Mr Rodgers, against his former employer, Leeds Laser Cutting Limited. The Claimant was represented by Miss Dannreuther, counsel. The Respondent was represented by Mr Gidney, counsel.

Preliminary Matters

4. At the beginning of the hearing, Miss Dannreuther made an application to amend the claim. She sought permission to amend the date the Claimant received his P45 from the Respondent, from 6 April 2020, to 26 April 2020. Miss Dannreuther submitted that the amendment went to a factual point and there was no real prejudice to the Respondent by the amendment. She said it would assist the Claimant with the proper presentation of his case. The Respondent objected to the amendment. Mr Gidney reminded the Tribunal that the claim had already been amended once, after an application by the Claimant dated 13 October 2020, which had followed disclosure. Mr Gidney submitted that this was the second time the Claimant had tried to change his case to match the facts. Mr Gidney submitted that this amendment should have been made when the other amendments were made. Mr Gidney noted this application was made without notice. Mr Gidney accepted the point made by the Claimant that there was no prejudice by the amendment.

5. I considered the application and decided to allow the amendment. I considered it a factual point which could be dealt with by the witnesses as necessary and I accepted there was no prejudice to the Respondent in allowing the amendment. I made it clear that I would hear submissions on the timing of this amendment, which I would take into account.

Evidence

6. There was an agreed bundle of documents running to 53 pages and a witness statement bundle. I also considered a submissions pack from the Respondent and written submissions from the Claimant.

7. I heard evidence from the Claimant and from Mr Knapton on his behalf. For the Respondent, the Tribunal heard from Mr Rice (Director) and Mr Thackery (Production Manager and Claimant's Line Manager).

The Claims and Issues

8. The Claimant brings a complaint of automatically unfair dismissal. The Claimant did not have two years' continuous service at the point of termination and so had not acquired the statutory right not to be unfairly dismissed pursuant to s98(4) of the Employment Rights Act 1996 (ERA).

9. The Claimant relies on s100(1)(d) and (e) ERA.

10. I agreed the issues that the Tribunal needed to decide with both counsel before hearing the evidence. They were agreed as follows:
    i. Was the Claimant dismissed? It was accepted by the Respondent that he was.
    ii. What was the reason, or principal reason for the dismissal?
        a. Was it, as the claimant maintains, because in circumstances of danger which he reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he (while the danger persisted) refused to return to his place of work, or in circumstances of danger which he reasonably believed to be serious and imminent, he took appropriate steps to protect himself or other persons from the danger?
        b. In assessing this, are the criteria in s100(1)(d) or (e) made out?

i. Did the Claimant believe there were circumstances of serious and imminent danger?
ii. Was that belief reasonable?

iii. If the claimant was automatically unfairly dismissed, is there a chance he would have been fairly dismissed for a fair reason, or if a fair procedure had been followed?

iv. Did the claimant contribute to his dismissal by his own conduct, or blameworthy conduct? The Respondent says that the claimant did not do enough to return to work and/or notify the Respondent.

The Facts

11. The Tribunal made the following findings of fact:

12. The Claimant started working for the Respondent on 14 June 2019 as a laser operator. He did not have a written contract of employment. References were made to an employee handbook, which is available online. The Tribunal heard that in order to access this handbook, an employee has to be 'added'. It appeared the Claimant had never heard of this. The Respondent was unable to say if the Claimant had been 'added'. I find it more likely than not that the Claimant did not have access to this handbook and that he had no written statement of particulars.

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.

15. On 16 March 2020, a colleague of the Claimant (TA) displayed symptoms of Covid-19. He was sent home and told to self-isolate. TA remained off work until after the Claimant's employment ended. TA initially received statutory sick pay during his absence and was later furloughed.

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.

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.

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.

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.

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.

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.

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.

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. Mr Thackery, by his own evidence, was possibly on the phone during part of this conversation and he was not quite clear of it. Mr Thackery told the Tribunal that two other employees reported the Claimant and Mr Knapton as saying they were not coming back. There was no witness statement or direct evidence from either of these reporting individuals. I further note that in oral evidence, Mr Thackery confirmed that the words said by the Claimant were "*see you later mate.*" I do not accept that this is indicative of an intention not to return to the workplace. I also consider the text exchange between the Claimant and Mr Thackery on 29 March 2020, which reinforced my view. I accept the Claimant's evidence that if he had said on 27 March 2020 that he was not coming back, or if he had no intention of returning, he would not have notified Mr Thackery on 29 March 2020 that he was going to stay off work "*until the lockdown has eased*".

26. I have seen a screen shot of the text exchange between the Claimant and Mr Thackery on 29 March 2020. The material part states:

    "*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*"

27. Mr Thackery's response to that text message was "*ok mate, look after yourselves*".

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.

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*".

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 that 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.

Legal Principles

40. As set out above, the Claimant is not entitled to bring a claim for 'ordinary' unfair dismissal under s 98 ERA, as he does not have two years' continuous service.

41. The claimant is claiming automatically unfair dismissal under s100(1) ERA. This has no minimum qualifying period of service. Specifically, the Claimant relies on the following subsections:

> (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.

42. Each of these paragraphs constitutes an independent ground of an automatically unfair dismissal

43. S100 also provides:

> (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.

44. Mr Gidney relied upon the case of Oudahar v Esporta Group Ltd [2011] IRLR 739 EAT. In that case the EAT held that s100(1)(e) should be applied in two stages:

Firstly, the Tribunal should consider whether the criteria set out in that provision have been met, as a matter of fact. Were there circumstances of danger which the employee reasonably believed to be serious and imminent? Did he take or propose to take appropriate steps to protect himself or other persons from the danger? Or did he take appropriate steps to communicate these circumstances to his employer by appropriate means? If these criteria are not satisfied, section 100(1)(e) is not engaged.

Secondly, if the criteria are made out, the Tribunal should then ask whether the employer's sole or principal reason for dismissal was that the employee took or proposed to take such steps. If it was, then the dismissal must be regarded as unfair.

Application of the Law to the Facts

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.

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.

Did he take appropriate steps to protect himself or other persons from the danger.

56. The Claimant's main concern was in respect of his vulnerable family members. I accept that as a matter of principle, the Claimant could have taken steps which were intended to protect such individuals from a serious and imminent danger, rather than himself.

57. On his own evidence, the Claimant did not raise any formal complaints about the measures and I considered his evidence somewhat vague around the context in which any conversations took place. I am not satisfied that it was appropriate to absent himself from work entirely when, on his own evidence, it was not hard to socially distance at the workplace, save for specific tasks. I further do not consider it was an appropriate step to absent himself from work entirely, in order to avert any specific dangers where he could not socially distance, particularly when he had not raised any specific complaint in this regard.

Did he take appropriate steps to communicate these circumstances to his employer by appropriate means?

58. As set out above, the Claimant's evidence on what was said, to whom and when about any concerns, was vague at best. I do not consider he took appropriate steps to communicate concerns of serious and imminent danger in the workplace and I consider this is because his concerns and fears were in respect of the virus in general.

59. Crucially, in the text exchange on 29 March 2020, the Claimant makes no reference to the measures or lack of measures implemented by the Respondent as playing a part in his decision to absent himself from work.

60. The Respondent could not have known that the Claimant was absenting himself from work due to any concern of serious and imminent danger within the workplace, or any concerns about the safety measures in place, based upon that text exchange.

Conclusions

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.

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.

66. When considering the test within s100(1)(e) and applying the approach in *Oudahar*, I conclude that the Claimant did not reasonably believed that the circumstances were of serious and imminent danger. Furthermore, I consider the steps he took in absenting himself entirely were not appropriate and that he did not take appropriate steps to communicate any belief that there were circumstances of serious and imminent danger to his employer. Therefore, s100(1)(e) is not engaged.

67. Whilst there are many comments the Tribunal could make about what then followed, the way in which the Respondent conducted itself and the manner of the dismissal, they are not relevant in this case, due to the Claimant not having sufficient qualifying service to bring a claim of 'ordinary' unfair dismissal.

68. The claim is dismissed.

Employment Judge Anderson

Date 1 March 2021