Neutral Citation Number: [2022] EWCA Civ 1659

Case No: CA-2022-001244

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL
HIS HONOUR JUDGE JAMES TAYLER
[2022] EAT 69

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/12/2022

Before :

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))
LADY JUSTICE NICOLA DAVIES
and
LORD JUSTICE STUART-SMITH

- -

Between :

DARREN RODGERS	**Claimant/ Appellant**
- and -	
LEEDS LASER CUTTING LIMITED	**Respondent**

- -
- -

Rad Kohanzad and **Anna Dannreuther** (instructed by **Atkinson Rose LLP**) for the **Claimant**
Jonathan Gidney (instructed by **Aeris Employment Law**) for the **Respondent**

Hearing dates: 3 November 2022

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Approved Judgment

This judgment was handed down remotely at 10.30am on 20 December 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Lord Justice Underhill:

INTRODUCTION

1. The Respondent operates a business in Leeds which uses laser equipment to cut metals and other materials. The Claimant in these proceedings, who is the Appellant before us, started employment with it as a laser cutter on 14 June 2019. On 29 March 2020, shortly after the start of the first Covid lockdown, he texted his manager to say that he would be staying away from work because he was concerned about the risk of infection. On 26 April he was dismissed.

2. On 14 July 2020 the Claimant commenced proceedings in the Employment Tribunal ("the ET") claiming that he had been unfairly dismissed. He was unable to claim for "ordinary" unfair dismissal under section 98 of the Employment Rights Act 1996 because he did not have sufficient qualifying service. Rather, his claim was for "automatic" unfair dismissal under section 100 ("Health and safety cases"), and specifically subsection (1) (d) and (e). The relevant part of the section reads:

> "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 —
>
> (a)–(c) …
>
> (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."

3. The claim was heard by Employment Judge Anderson on 29 January 2021. By a judgment and reasons sent to the parties on 2 March she dismissed the claim.

4. The Claimant's appeal to the Employment Appeal Tribunal ("the EAT") was heard by HH Judge Tayler on 12 April 2022. In the course of the hearing he abandoned his case under section 100 (1) (e), so as to rely only on subsection (1) (d). By a judgment handed down on 6 May his appeal was dismissed.

5. This is an appeal from the decision of the EAT, with permission granted by Bean LJ. The Claimant has been represented by Mr Rad Kohanzad and Ms Anna Dannreuther and the Respondent by Mr Jonathan Gidney. The same counsel appeared in both tribunals below, save that in the ET Ms Dannreuther appeared on her own.

THE BACKGROUND FACTS

6. At this stage I will only set out the essential background and the primary facts which give rise to the claim. Most of the facts in question derive from unchallenged findings by the ET, but at one or two points I supplement them from the contemporary documents. I will return later to the Judge's findings on various matters of evaluation.

7. On 14 February 2020 the Secretary of State for Health and Social Care made a declaration, in accordance with regulation 3 of the Health Protection (Coronavirus) Regulations 2020, that "the incidence or transmission of novel Coronavirus constitutes a serious and imminent threat to public health". The first national lockdown was announced on Monday, 23 March. Although this placed severe restrictions on the reasons for which people could leave their homes, one of the permitted reasons was to go to work if the work was of a kind that could not be done from home. Section 4 of the Guidance began:

> "As set out in the section on staying at home, you can travel for work purposes, but only where you cannot work from home.
>
> With the exception of the organisations covered above in the section on closing certain businesses and venues, the government has not required any other businesses to close – indeed, it is important for business to carry on.
>
> …
>
> Certain jobs require people to travel to, from and for their work – for instance if they operate machinery, work in construction or manufacturing, or are delivering front line services."

The Claimant's job was plainly of a kind which could not be done from home.

8. On 24 March 2020 the Respondent put out an employee communication saying that the business was in a position to fabricate materials for the NHS and would remain open. It asked employees to work as normally as possible. The previous day it had had a Covid risk assessment of its premises carried out by an external professional. It said that "your health is our priority" and it was "putting measures in place to allow us to work as normal". The measures which it put in place, following the recommendations in the risk assessment, included advising employees about social distancing and hand-washing and making masks available.

9. The Claimant came in to work for the remainder of that week. The size of the premises and the nature of his normal work made it easy to observe social distancing: I give more details below. He said in his evidence that he was nevertheless on occasion asked to do tasks where social distancing was not possible. The Judge found that he did not make any objection at the time. She rejected his evidence that masks were not available. When he left on the Friday evening he said nothing to indicate that he was intending not to return to work the following week, and the Judge found that he had not in fact formed any such intention.

10. On Saturday, 28 March 2020 the Claimant phoned NHS 111 and was given an "Isolation Note" for the period to 3 April 2020. The note records that this was because he had reported "symptoms of coronavirus". It may be that this is a reference to a cough which the Claimant said that he had developed the previous week, but the ET found his evidence about this unsatisfactory.

11. On Sunday 29 March the Claimant texted his manager, Mr Thackery, as follows:

> "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 [i.e. sickle cell anaemia] & 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."

The son who the Claimant said suffered from sicklecell anaemia was aged five at the time. Sickle cell anaemia is a condition identified in the contemporary guidance as giving rise to a high degree of vulnerability from Covid-19. The Claimant did not mention the isolation note from NHS 111 or send the Respondent a copy. Mr Thackery responded "ok mate, look after yourselves".

12. The Claimant did not come in to work on 30 March 2020 or thereafter. He did not contact the Respondent after 3 April, when the period covered by the isolation note came to an end. Nor did the Respondent seek to get in touch with him.

13. On 24 April 2020 the Claimant texted Mr Thackery as follows:

> "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."

The Respondent sent a P45 on 26 April.

14. Although the Claimant's witness statement gives an account of what prompted him to send his text and the Respondent's witnesses seek to explain why he was dismissed – in short, because he had been absent without leave or explanation – the Employment Judge makes no findings about those matters. Judge Tayler in the EAT observed that it would have been better if she had done so, and I agree. But, as he also pointed out, such a finding was not in fact necessary to the basis on which she decided the case.

THE APPLICABLE LAW

15. I have already set out the terms of section 100 (1) (d). It is convenient to make some general points about it at this stage. For brevity I will sometimes refer simply to "danger" rather than "circumstances of danger" and will treat the employee "leaving" the workplace as covering also the alternatives of proposing to leave or refusing to return: I will also sometimes refer to "perceived danger" as a shorthand for a serious and imminent danger which the employee believes to exist.

16. First, I should record that section 100 was introduced in order to give effect to EEC Council Directive 89/391 "on the introduction of measures to encourage improvements in the safety and health of workers at work". Article 8.4 of the Directive reads:

> "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."

However, neither party suggested that the terms of the Directive added anything to what could be understood from the statute itself, and we were not referred to any case-law of the European Court of Justice.

17. Second, on a literal reading the opening words – "in circumstances of danger which the employee reasonably believed to be serious and imminent" – can be read as requiring a tribunal to decide, first, whether (objectively) there was a danger and then, separately, whether the employee reasonably believed that danger to be serious and imminent (which involves both subjective and objective elements). At paras. 30-32 of his judgment in the EAT Judge Tayler questioned whether that two-stage approach was correct. In para. 30 he said:

> "… [A]ssume 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."

I agree that it would be surprising if employees were not protected in the circumstances posited. Since on the ET's reasoning in this case the point did not in fact have to be decided Judge Tayler expressed no concluded view. However, I think I should say that in my view the subsection should indeed be construed purposively rather than literally and that it is sufficient that the employee has a (reasonable) belief in the existence of the danger as well as in its seriousness and imminence.

18. Third, although the subsection does not say so in terms, it is necessarily implicit that it only applies where the employee has left the workplace (or proposes to do so, or has not returned) because of the perceived danger rather than for some other reason.

19. Fourth, in the course of his oral submissions Mr Kohanzad argued that section 100 (1) (d) could apply not only where an employee reasonably believed that they were in serious and imminent danger at the workplace but also where the perceived danger arose on their journey to work. The submission was not in fact necessary to his case, but I think I should make it clear that I do not accept it. In my view it is quite clear that

the perceived danger must arise at the workplace – or, to put the same thing rather more fully, the employee must believe that they are subject to the danger as a result of being at the workplace: if that were not the case, the question of them leaving the workplace would not arise. (It does not follow that the danger need be present *only* at the workplace: I return to that question below.)

20. In connection with the last point we were referred by Mr Kohanzad to two decisions of the EAT, *Harvest Press Ltd v McCaffrey* [1999] IRLR 778 and *Von Goetz v St George's Healthcare NHS Trust* EAT/1395/97, both of which were also cited by the EAT in the present case. *Harvest Press* involved a claim under section 100 (1) (d) in which the danger relied on was from the abusive behaviour of a fellow-employee. Morison P rejected a submission from the employers that the word "danger" was limited to "dangers generated by the workplace itself" (i.e., apparently, the physical state of the premises or plant) and held that it could cover dangers caused by the presence (or indeed absence) of fellow-employees: see paras. 15-16 of his judgment. That has nothing to do with Mr Kohanzad's proposition. In *Von Goetz* it is difficult to identify precisely what the issue was, but Mr Kohanzad referred us to an observation by Lindsay J, at para. 28 of his judgment, that:

> "We see no reason … 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 …."

But that has no application to section 100 (1) (d). I see nothing in either of these cases that supports a submission that it applies to dangers elsewhere than at the workplace.

21. On that basis the questions which the ET has to decide in a case under section 100 (1) (d) can be analysed as follows:

(1) 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?

Questions (1) and (2) could in theory be broken down into two questions, addressing separately whether there was a reasonable belief in the existence of the danger and in its seriousness and imminence; but in most cases that is likely to be an unnecessary refinement.

22. The paradigm case covered by section 100 (1) (d) is evidently where a serious and imminent danger arises at the workplace by reason of some problem with the premises or the equipment or the system of working, whether in the form of an accident or the manifestation of a more chronic problem; and its language is rather less apt to a case where the danger relied on is the risk of employees infecting each other with a disease. In the ET Mr Gidney submitted that for that reason it did not in fact apply in the present

case at all. The Judge rejected that submission, and it was not pursued in the EAT or before us. I agree that there is nothing in principle about such a risk which takes it outside the scope of section 100 (1) (d): the tribunal will have to decide whether on the particular facts of each case it amounts to a serious and imminent danger.

THE REASONING OF THE EMPLOYMENT TRIBUNAL

23. The Employment Judge's reasoning is carefully structured and reasoned. Mr Kohanzad took us through it in some detail, and in view of the nature of the issues I need to do the same exercise. I will use the headings from the Reasons themselves.

"THE FACTS"

24. After dealing with various preliminary matters, the Employment Judge made her findings of fact at paras. 12-39 of the Reasons. I have already set out the essential background facts. The following further findings are potentially relevant.

25. At paras. 18-22 the Judge considered various specific disputes about the precautions taken by the Respondent and the Claimant's attitude to them. In summary:

    (1) At paras. 18-19 she found that the Respondent implemented the measures recommended by the risk assessment, although many were in fact already in place. As already noted, those measures included reminding the staff of the need to socially distance and to wash their hands regularly; the Claimant confirmed in his evidence that he was aware of these. However, she found that, contrary to the recommendations, staff tended to ignore the recommendations not to congregate in their breaks and to stagger clocking-out times, to the "frustration" of management. For that reason she referred to there being "partial adherence" to the recommendations.

    (2) At para. 20 she found that "it was possible for the Claimant to socially distance at work, certainly for the majority of his role". That is unsurprising since, as she found at paras. 13-14, the workspace was "a large warehouse-type space" (described in the evidence as half the size of a football pitch and well ventilated), and typically there were no more than five employees working there. The phrase "certainly for the majority of his role" appears to be an acknowledgment of his evidence that there were some occasions where he had had to work more closely with other staff; but the Judge found that there was no evidence that he had raised any problem about that with the Respondent.

    (3) At paras. 21-22 she considered and rejected the Claimant's evidence that masks were not supplied and that he had been "forced" to take a van out on deliveries. She appears to have accepted that he had been asked to do some deliveries but that it had been no more than a request, since it was not strictly part of his job, and that he had not objected.

26. At paras. 23-28 the Judge considered the circumstances in which the Claimant left work. I have largely covered these above, but it is material to note that she found that he said nothing when he left work on the Friday to suggest that he was not coming back on the Monday. It is clear from the context that she regarded this as relevant to the question whether he had concerns about his safety at work.

27. Para. 29 of the Reasons reads:

> "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."

Mr Knapton was a friend and fellow-employee, who had broken his leg the previous day. It is clear from the context that this episode is regarded as potentially relevant to the degree of the Claimant's concern about Covid infection.

28. At paras. 33-36 the Judge considered what views the Claimant had had and expressed at the time about the safety of the workplace. Para. 33 reads:

> "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."

Paras. 34-36 consider whether the Claimant raised with his managers any concerns about the safety of the premises. The Judge is critical of his evidence, which she describes as confusing. Her finding, at para. 36, is:

> "… 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."

29. At paras. 37-38 the Judge gives her conclusions about why the Claimant had not returned to work on 30 March. She says:

> "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."

30. Para. 39 addresses a particular factual inconsistency in the Claimant's pleadings and evidence about what caused him to decide to self-isolate. I need not set out the details, but she concludes that "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"

31. At paras. 40-44 the Judge sets out the applicable provisions and refers to an authority which was relevant to the claim under section 100 (1) (e). No issue arises as to this section of the Reasons.

"APPLICATION OF THE LAW TO THE FACTS"

32. In this section the Judge addresses what she treats as the dispositive issues under a series of headings, which (as regards section 100 (1) (d)) substantially correspond to questions (1)-(3) at para. 21 above, ending with the heading "Conclusions". I take them in turn (marking them (1)-(3) for ease of reference).

(1) "Did the Claimant believe there were circumstances of serious and imminent danger?"

33. The Judge addresses this question at paras. 46-49, as follows:

> "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."

34. The essential finding in that passage is at the end of para. 48. The Judge finds that although the Claimant believed that there were circumstances of serious and imminent danger "all around" (see paras. 46-47) he did not consider that there were such circumstances "within the workplace" (see the earlier parts of para. 48, reinforced by para. 49). I will consider the precise nature of that distinction later.

(2) "Was that belief objectively reasonable?"

35. This question only arises if the Judge was wrong to find that the Claimant did not believe that there was a serious and imminent danger at the workplace. Nevertheless, she addresses it in the alternative at paras. 50-53 of the Reasons, as follows:

> "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."

36. The "reasons set out above" referred to in para. 50 are evidently those which she goes on to summarise in paras. 52-53, of which more detail had been given in the "Facts" section (and recapitulated in para. 48).

(3) "Could the Claimant reasonably have been expected to avert the dangers?"

37. This question arises in the further alternative. The Judge deals with it as follows:

> "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."

"Conclusions"

38. Strictly speaking, the Judge's dispositive conclusions are to be found in her answers to the three questions set out above. What appears under this heading is her consideration of some particular arguments advanced by counsel (paras. 61-63), followed by a summary recapitulation of the conclusions already reached (paras. 64-65).

39. At para. 61 the Judge rejects Mr Gidney's submission that section 100 (1) (d) and (e) could not apply to the present case because they were not designed for a danger of the kind posed by the Covid-19 pandemic and says that "every case will need to be considered on its facts and merits". As I have said, that conclusion is not now challenged, and I agree with it.

40. At para. 62 she rejects a submission on the part of Ms Dannreuther that the Secretary of State's declaration of 14 February 2020 that "the incidence or transmission of [Covid-19] constitutes a serious and imminent threat to public health" was conclusive of "this part of the statutory test" – which I take to be a reference to what I have analysed at para. 21 above as questions (1) and (2). Mr Kohanzad did not pursue that submission, and I agree that the Judge was right to reject it.

41. Para. 63 reads as follows:

> "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."

42. The Judge's recapitulation of her reasoning as regards section 100 (1) (d) reads as follows:

> "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."

43. She concludes, at para. 67, with the observation that:

> "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."

The implication is that the Claimant might well have had a good claim for "ordinary" unfair dismissal if the tribunal had had jurisdiction to entertain it. Without a fuller account of exactly how the dismissal came about we are not in a position to reach our own view about that: I will content myself by saying that the Judge's observation does not surprise me.

ANALYSIS OF THE JUDGE'S REASONING

44. The outcome of this appeal depends primarily on establishing the true basis of the Judge's reasoning, particularly on question (1). My analysis is as follows.

45. It is clear that at the centre of the Judge's reasoning is a distinction which she makes at several points in the Reasons, albeit using slightly different language, between

    (a) the Claimant believing that the danger of infection with Covid-19 was "all around" (see para. 48) or "in the community at large" (para. 33), described in para. 37 as a "general" concern – I will refer to this as the danger being "at large"; and

    (b) his believing that there was such a danger "specifically within the workplace" (see para. 49), or "directly attributable to the workplace" (para. 37), as a result of the "working conditions" there (paras. 37-38 and 65) – I will refer to this as the danger being "specific to the workplace".

    Her finding that the Claimant did not believe that there was a serious and imminent danger at the workplace is based on her finding that, although he did believe that there was a serious and imminent danger at large, he did not believe that there was such a danger specific to the workplace.

46. It is necessary to establish what the Judge intended by that distinction. Mr Kohanzad submitted that on a fair reading of her Reasons the Judge believed that as a matter of law section 100 (1) (d) was only concerned with dangers that were specific to the workplace in the sense that they only arose there. He submitted that that was the clear sense of her references to dangers "directly attributable to the workplace" and to "working conditions".

47. I do not accept that submission. Reading the Reasons as a whole, it seems to me adequately clear that the distinction intended by the Judge depended not on a proposition of law but on a factual finding about what the Claimant thought was the risk of infection at the workplace, as opposed to what it might be elsewhere in the community. That is the clear focus of her detailed findings at paras. 18-39, as summarised above, and in particular of her consideration of the Claimant's evidence about "his level of concern over Covid-19" (see para. 39), about which she was sceptical for the reasons that she gives, including the absence of any contemporary complaint. Those findings suggest a factual finding that, in short, the Claimant did not feel seriously at risk in the workplace, and that that is all that is meant by her references to a danger "directly attributable to the workplace" or to "working conditions". It is fair to say that that begs the question why he decided on 28 March to self-isolate, especially as the Judge acknowledges the genuineness of his concern about the risk of infection, in particular to his children: there may be answers to that question, but the Judge does not give them. However, that point does not go to the nature of the exercise that she was carrying out. At most it might be said to be a factor to which she did not give sufficient weight in making her finding of fact about what the Claimant thought – though in fact, as we shall see, there is no challenge on that basis.

48. My conclusion about the nature of the distinction relied on by the Judge is reinforced by her statement at para. 64 that her decision was specific to the facts of this particular case. If she had decided it on the basis of the proposition of law which Mr Kohanzad attributes to her the outcome would be the same in any case where an employee was dismissed for leaving the workplace because they believed that the risk of infection with Covid-19 was a serious and imminent danger; that is an outcome which she disapproves at para. 63. I also believe that if the Judge was relying on such a proposition of law she would have explained explicitly what it was and on what she based it.

49. I need not say anything at this stage about the Judge's alternative reasoning based on the reasonableness of the Claimant's belief in any perceived danger and on the possibility of averting it. I return to them later.

THE DECISION OF THE EAT

50. Since the ultimate question for us is whether the ET, and not the EAT, erred in law it is unnecessary to summarise the reasoning of the EAT in any detail, and without intending any disrespect to Judge Tayler I will not do so. The essence of his reasoning is to be found at para. 46 of his judgment, where he deals together with questions (1) and (2). He says:

> "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."

THE GROUNDS OF APPEAL

51. The pleaded grounds of appeal are rather discursive and contain material that belongs in the skeleton argument rather than the grounds. I set out only the parts that identify the errors of law alleged. Two numbered grounds are pleaded, together with what appears to be intended as a third ground headed "Averting the danger".

52. Ground 1 is pleaded at paras. 10-15. The point itself is pleaded at paras. 10 and 11, which read:

> "10. The ET erred 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.
>
> 11. The claimant avers that there is no requirement in section 100 for the danger to be confined to the workplace. As such, the Claimant's belief in serious and imminent danger from the virus, which, at that time, was 'all around' did not preclude it from being a reasonable belief."

That challenge clearly proceeds on the basis that the distinction identified at para. 45 above involved a proposition of law to the effect that a perceived danger must be "specific to the workplace". Para. 12 advances a supporting argument and paras. 13-14 challenge the reasoning of the EAT. Para. 15 reads:

> "The ET simply did not address the question of whether the claimant's belief in danger at large was reasonable because it rejected his complaint on the grounds that his concerns were not specific to his workplace."

53. As worded, paras. 10 and 11 of ground 1 are directed to question (2) – that is, to whether the Claimant's belief that there was a serious and imminent danger at the workplace was reasonable. In fact, as we have seen, the Judge relied on the "not specific to his workplace" point in connection not with question (2) but with question (1) – that is, whether the Claimant believed that there was such a danger. Sensibly, in his and Ms Dannreuther's skeleton argument (to some extent) and (more clearly) in his oral submissions Mr Kohanzad re-focused his challenge on to question (1). Para. 15 of ground 1, however, is truly directed to question (2).

54. Ground 2 is pleaded at paras. 16-17 and is that the ET in para. 63 of the Reasons impermissibly gave weight to "floodgates" considerations. Mr Kohanzad told us that he was not pursuing that as a separate ground.

55. The third ground contends that the ET's decision on question (3) is

> "… intrinsically linked to the ET's finding as to the reasonableness of the Claimant's belief. If he reasonably believed that being in society at large presented circumstances of serious and imminent danger, then he could not be expected to avert the danger other than by isolating himself from society."

That ground is accordingly parasitic on the first.

56. It should be noted that the challenge in paras. 10 and 11 of ground 1 is addressed squarely and only to the proposition of law which they attribute to the Judge. If her reasoning did not in fact rely on that proposition but was based purely on a finding of fact about what the Claimant believed, there is no challenge to that finding based on perversity or inadequate reasoning – or, which might be an important point in some cases, on how the phrase "serious and imminent" applies in the context of the risk of infection with Covid-19.

57. That being so, although in the introductory part of his oral submissions Mr Kohanzad made some points about the factual background – emphasising, for example, the depth of public concern in the early stages of the pandemic, and the particular vulnerability of a child suffering from sickle-cell anaemia – those were immaterial to the grounds on which he relied. We are concerned on this appeal with the particular issue said to be raised by the Judge's reasoning.

DISCUSSION AND CONCLUSION

58. My conclusion on the outcome of the appeal is largely dictated by the conclusion which I have already expressed about the Judge's reasoning. For the reasons given I do not believe that she proceeded on the basis of the proposition of law attributed to her by Mr Kohanzad and which he seeks to challenge. It follows that the appeal must fail.

59. It may, however, be useful if I say that if, contrary to my view, the Judge had proceeded on the basis alleged by Mr Kohanzad, I agree with him that she would have erred in law. I can see nothing in the language of section 100 (1) (d) that requires that the danger should be exclusive to the workplace. 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.

60. Since the Claimant has failed to impugn the Judge's finding that he did not believe that there was a serious and imminent danger in the workplace the question of whether any such belief would have been reasonable – question (2) – does not arise. However, even if I were wrong in my conclusion about the Judge's reasoning on question (1), I believe that her answer to question (2) was unimpeachable and that the appeal accordingly would fail in any event. I should briefly explain why.

61. The Judge began her consideration of question (2) at para. 50 of the Reasons by saying that "any belief that there were circumstances of serious and imminent danger" was not reasonable "largely for the reasons set out above". Mr Kohanzad submitted that the latter phrase showed that her conclusion was necessarily infected by the same error as her conclusion on question (1). I do not accept that submission (which I take to be same point as is pleaded at para. 15 under ground 1). The Judge was, necessarily, proceeding for the purpose of question (2) on the basis that, contrary to her conclusion on question (1), the Claimant did believe that there was a serious and imminent danger at the workplace. For that purpose her (*ex hypothesi*) flawed legal distinction between a danger at large and a danger specific to the workplace was irrelevant. She was simply looking at the Claimant's belief and considering whether it was reasonable. The "reasons set out above" are, as I have already said, those given in the "Facts" section and briefly recapitulated in paras. 52-53 – that is, in essence, that "it was not hard to socially distance and measures were in place to reduce the risk of Covid-19 transmission". As we have seen, there is no challenge to that conclusion in its own terms.

62. As for the Claimant's challenge to the Judge's conclusion on question (3) – averting the danger – I have already noted that that appears to be parasitic on his ground 1. In any event, the challenge goes nowhere if he has failed on his other grounds.

63. For those reasons I would dismiss this appeal.

64. We were conscious that this is the first appeal to reach this Court on the application of section 100 (1) of the 1996 Act to dismissals related to the Covid-19 pandemic. We asked to be referred to any ET decisions of which the parties were aware involving such a claim so that we could be aware of the general litigation background, and Ms Dannreuther helpfully supplied us with copies of several judgments. A brief perusal of these showed that the circumstances in which claims under section 100 have arisen – as much under subsection (1) (e) as under subsection (1) (d) – are very various. I have dealt at paras. 17-22 above with a few particular issues of wider application which were raised by the submissions in the present case, but it would be unsafe to attempt any more general guidance.

Lady Justice Nicola Davies:

65. I agree.

Lord Justice Stuart-Smith:

66. I also agree.