

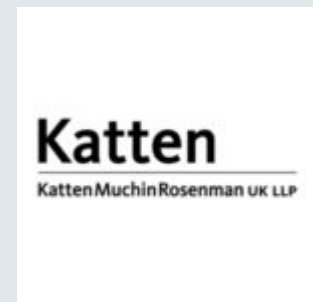
■ COVID-19

## Covid-19: How to manage anxious returners following recent EAT ruling

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If there is a single lesson that we have learned from the past couple of years, it is that people have had very different experiences of the pandemic. Everyone had different pressure points, losses and even silver linings. The same is true of businesses: some workplaces had to remain open while office-based businesses could move to homeworking. Some businesses suddenly had to work out how to manage a scared and sometimes vulnerable workforce while others had to scramble to distribute technology and work out how to use Zoom.

When managing a return to the office, businesses that moved to remote working can look to those that did not for guidance. In this article, I explore a recent Employment Appeal Tribunal (EAT) decision and emerging themes that might help businesses manage those who are anxious about returning to the workplace.

## Covid now unlikely to present serious and imminent danger to employees

In the recent case of *Rodgers v Leeds Laser Cutting Ltd* [2022], the EAT held that a parent with a vulnerable child at home, who argued that he was in serious and imminent danger in his workplace due to Covid-19, was lawfully dismissed when he refused to attend work.

On the face of it, this decision is good news for employers but the facts of this case are very specific. The crux of the ruling was that the employee's decision to stay away from the workplace entirely was not directly linked to the safety of his working conditions; rather, his concerns about Covid-19 were general ones, which were not directly attributable to the workplace.

## Facts

Mr Rodgers was a relatively new employee of Leeds Laser Cutting (LLC). He worked in a large warehouse. On 25 March 2020, shortly after the first lockdown was announced, Mr Rodgers suffered from a slight cough. He attributed this to the temperature and dust within the workplace and did not think it was a symptom of Covid-19. He left work the next day (a Friday) as normal and then, on the Sunday, messaged his manager to say:

*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.*

His manager responded: 'ok mate, look after yourselves' and they had no further communication. Neither party raised the proposed length of absence, the need for a sick note or self-isolation evidence or the option of furlough.

Mr Rodgers did not attend work for about a month and was subsequently dismissed. He brought a claim for automatic unfair dismissal under s100 of the Employment Rights Act 1996 (the ERA). He asserted that he had left and 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 he could not reasonably have been expected to avert. He said that due to his children's vulnerable status, he had to self-isolate.

## Tribunal decision

After hearing the evidence, the original employment tribunal held that Mr Rodgers' actions undermined his assertion that he was concerned about the risk of Covid-19 to his children. He admitted that he drove a friend to hospital the day after he informed his employer that he would not be returning to work. He also gave evidence that he had not left home for nine months, yet he admitted that he spent some time working in a pub during the pandemic.

It was relevant to his claim under s100 of the ERA that Mr Rodgers did not raise any concerns with his manager before he excused himself from the workplace. His message to his manager did not raise any concerns relating to workplace danger and he could not demonstrate there had been any such danger.

In fact, an external professional had carried out a risk assessment of LLC's workplace in mid-March 2020. That assessment identified the level of risk of various scenarios, with recommendations to reduce risk. These recommendations referred to social distancing, wiping down surfaces and staggering start, finish, lunch and break times. These measures were already in place before the lockdown was announced. LLC also communicated its safety measures to protect against Covid-19, such as handwashing and social distancing, to staff and reiterated the government's advice about these measures. The tribunal accepted that Mr Rodgers was generally able to maintain social distancing at work for the majority of his role and masks were available.

## **EAT decision**

The EAT upheld the employment tribunal's decision that Mr Rodgers' dismissal was not automatically unfair. A reasonable belief in serious and imminent danger under s100 of the ERA has to be judged on when the relevant acts took place, and what was known and when. Mr Rodgers had not established the required belief that he was in serious and imminent danger in the workplace. He could have averted the danger of Covid infection by socially distancing, washing his hands and wearing a mask.

As the employment tribunal had observed, Covid-19 cannot be treated as automatically creating circumstances of serious and imminent danger. Otherwise, an employee could rely on s100 to stay away from the workplace as a result of concerns about the pandemic in general. This would give rise to a disproportionate number of claims.

## **Comment**

Now that all government-issued guidance has been lifted and life is, for the moment at least, returning to normal, staff are unlikely to be able to use the threat of serious and imminent danger in the workplace due to Covid-19 as a reason to refuse to attend work against their employer's reasonable request.

It is clear from this case that it is not enough that an employee has genuine concerns about the pandemic and the risks to their family's health in general. The employee must hold a reasonable belief in serious and imminent danger that affects their ability to go to work. The extent of the employee's appetite for risk outside work may be relevant to establishing whether they hold a reasonable belief that coming to work presents a serious and imminent danger.

Clearly, no employer wants to be defending a claim that their workplace poses a serious and imminent danger to employees. This is a reminder that businesses must follow government public health guidance and comply with their duty to assess and control health and safety risks in relation to Covid-19 and, more recently, monkeypox.

## **Reducing workplace anxiety**

If employees are anxious about returning to work due to their own health, having vulnerable dependants or other reasons, there are various practical steps which employers can take. This is an extremely sensitive issue and unless employers are sympathetic, they are likely to see increased long-term sickness absence and reduced morale, performance and productivity. Ultimately, employees will leave if they don't feel supported.

The box below highlights three actions employers can take to support nervous returners.

## **Key actions to support anxious employees**

### **Keep lines of communication open**

Communication with anxious employees will be crucial if employers want to encourage them to attend the workplace more regularly. That might mean ensuring that they understand the health and safety measures that have been taken to protect employees in the workplace.

Having one-on-one conversations with concerned employees will help employers to understand what the root causes of their issues are. It could be a medical vulnerability, the need to care for a dependant, the cost of the commute as energy prices rise, crowded public transport or concerns about work-life balance. Or it could just be force of habit that is keeping them away from the office. Whatever the issues, open communication can help employers address those concerns and put a plan in place to support the employees.

### **Remind employees of the benefits**

Reminding employees of the benefits of being with their colleagues in the office can help to improve attendance. While a single sandwich lunch is unlikely to get everyone rushing back to their desks, a regular programme of opportunities to get together may result in a shift in thinking and a more sustained return. It has been an isolating couple of years for some and the energy that comes from getting together in a group cannot be replicated on Zoom.

### **Mental health support**

Anxious returners might be more inclined to seek support from a trusted colleague rather than from human resources or a supervisor. Some offices are training employees as mental health first aiders, while some are empowering employees to support each other through buddying or mentoring schemes. If someone is having a difficult time, their colleague might be more likely to spot that and can direct them to resources that can offer them meaningful support.

## **The future**

Although the past couple of years have been challenging for businesses and their employees, many are now finding their feet again as the world returns to some semblance of normality. Some companies are ultimately looking for employees to be back in the office full time, while others are retaining some flexibility. For those moving towards a return to the workplace, managing anxious returners now should pay dividends in the long term.

## Cases Referenced

- *Rodgers v Leeds Laser Cutting Ltd* [2022] EAT 69

### **Citation reference:**

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