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UK-COVID-19: BACK TO THE OFFICE AND EMPLOYEES WITH HEALTH AND SAFETY CONCERNS – CAN AN EMPLOYER DISMISS AN EMPLOYEE WHO REFUSES TO RETURN?

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After 18 months of almost entirely remote working, we have seen much of the City now implementing 'Back to the Office' policies and on Monday 6 September central London saw its busiest day on public transport since the pandemic began.

Employers' 'Back to the Office' policies vary. Many of these arrangements are now mandatory and staff are required to return to the office either on a full-time or part-time ("hybrid") basis.

However, employers may find themselves in a situation where one or more employees refuse to come back to the office on a full or part-time basis on the grounds of health and safety concerns. In this article, we consider the legal merits of such a situation, as well as examining recent case law.

CAN AN EMPLOYER DISMISS AN EMPLOYEE WHO REFUSES TO COME BACK TO THE OFFICE BASED ON HEALTH AND SAFETY CONCERNS?

Section 100(1)(e) Employment Rights Act 1996 ("ERA") provides that an employee can be automatically unfairly dismissed if that employee takes "appropriate steps" to protect himself/herself in circumstances of danger which he/she reasonably believes to be "serious and imminent" and is dismissed as a result.

Pre-pandemic, claims under s100(1)(e) ERA were relatively rare but we anticipate an increase in s100 claims because of mandatory return to the office policies and employees who refuse to return to the office because of health and safety concerns related to Covid-19. In this context, employees may not just be concerned about their own welfare but they may live with individuals who are clinically vulnerable.

In the recent case of *Rodgers v Leeds Laser Cutting Limited*, the claimant refused to return to the workplace after another colleague began to show symptoms of Covid-19. The claimant sent a text message to his manager explaining that he had no alternative but to remain off work until lockdown had eased because he was worried about infecting his vulnerable children. After a month

of refusing to attend the workplace, the claimant was dismissed. The employment tribunal found that the dismissal was not automatically unfair and the claim failed.

Notably, the tribunal rejected the claimant's argument that Covid-19 created circumstances of serious and imminent workplace danger regardless of the extent of the employer's safety precautions. It found that, if this submission were accepted, it *"could lead any employee relying on s100(1)(d) or (e) to refuse to work in any circumstances simply by virtue of the pandemic."* It was also noteworthy that the claimant himself had breached self-isolation guidance during the period of his refusal to work, which somewhat weakened his assertion of serious and imminent danger caused by the virus.

The tribunal also found that a reasonable belief in serious and imminent workplace danger had to be judged on the circumstances as they were at the time of the events and on what was known to the parties given that knowledge about the virus was always developing. The tribunal ultimately held that the working conditions and Covid-19 secure measures implemented by the employer were reasonable and did not warrant a claim that the workplace was dangerous. The claim failed.

In another recent case, *Accattatis v Fortuna Group (London) Ltd*, the claimant's claim of automatic unfair dismissal also failed. The claimant, a 'key worker', requested to work from home or to be placed on furlough as he was uncomfortable using public transport or working in the office. His requests were denied by his employer but he was told that he could take holiday or unpaid leave instead. The claimant was subsequently dismissed following repeated requests to be furloughed.

Although the tribunal was prepared to accept that, subjectively, the claimant reasonably believed the danger to be serious or imminent, the tribunal considered whether he had taken "appropriate steps" to protect himself as is required under s100(1)(e). The tribunal held that the claimant's demands for furlough or working from home did not qualify as him taking "appropriate steps" on the basis that his job could not be performed from home, he was not eligible to be furloughed and his employer had suggested he take holiday or unpaid leave. The claimant did not try to take holiday or unpaid leave. As such, and in all the circumstances, the claim failed.

WHAT DOES THIS MEAN FOR EMPLOYERS?

Whilst these decisions might be welcomed by employers, both are first instance tribunal decisions and are not binding on other tribunals. Also, the Employment Judge in *Rodgers* specifically held that *"every case will need to be considered on its facts and merits."* As such, a case by case approach will need to be taken and it will be important to consider both the employer's reasons for requesting its employees to attend the workplace as well as the employee's reasons for refusal.

It is important that Covid-19 secure measures are implemented in the workplace for employers to reduce the risk of a successful claim under s100(1)(d) and (e) by making it harder for employees to establish that the workplace is dangerous. Employers should also ensure that the measures are properly communicated to all employees.

Legal advice should also be sought at an early stage if an employee raises health and safety concerns regarding a return to the workplace as this may be a precursor to a claim under s100. This is particularly the case as s100 claims are “special category” dismissals - employees do not need two years’ service to bring a claim, the dismissal is automatically unfair, and, unlike “ordinary” unfair dismissal claims, compensation awards are uncapped.

This article was co-written with Trainee Solicitor Jemma Green.

BCLP has assembled a COVID-19 Employment & Labor taskforce to assist clients with employment law issues across various jurisdictions. You can contact the taskforce at: COVID-19HRLabour&EmploymentIssues@bclplaw.com

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