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Employment Tribunal Rulings On Return To Work Refusals – What Can We Learn?

As the "return to the office" push gathers steam, case law relating to the COVID-19 pandemic is now filtering through the UK's Employment Tribunal system. The decisions made by employers in respect of staff who refused to return to the office following lockdowns have come under scrutiny in some recently issued Tribunal judgments.

Whilst the landscape of the pandemic has significantly changed since the first lockdown in March 2020 (which provides the backdrop to the below cases), for employers implementing "back to the office" policies this month, some points are worth bearing in mind.

HEALTH AND SAFETY DISMISSALS

By way of context to these cases, the Employment Rights Act 1996 (**ERA**) protects employees from being subjected to a detriment or dismissal by their employer on the ground that:

- they reasonably brought to their employer's attention, circumstances connected with their work, which they reasonably believed were harmful or potentially harmful to health and safety; or
- in circumstances of danger which the employee reasonably believed to be serious and imminent, and which the employee could not reasonably be expected to avert, they either:

a. left or refused to return to their workplace or any dangerous part of their workplace; or

b. took appropriate steps to protect themselves or other persons.

Dismissal in these circumstances is automatically unfair, meaning that there is no need for the employee to establish that the employer acted unreasonably or failed to follow a fair procedure. Unlike 'ordinary' unfair dismissal claims, compensation is uncapped and employees do not need any period of qualifying service to bring such claims.

DELIVERY NOT INCLUDED: EMPLOYEE UNFAIRLY DISMISSED FOR REFUSING TO DELIVER EQUIPMENT TO SELF-ISOLATING MANAGER'S HOME

An employee dismissed during his probationary period was awarded a year's pay after the Tribunal concluded that he was automatically unfairly dismissed on health and safety grounds. Mr Ham was dismissed one week into the first national lockdown for refusing to deliver equipment to his manager's home, where she and her daughter were self-isolating with suspected COVID symptoms.

In declining the request, Mr Ham had queried whether it was safe for him to bring the equipment to the house in view of her self-isolation. Mr Ham was dismissed by email later that day for refusing to obey a 'reasonable' management instruction. The Tribunal concluded that Mr Ham's health and safety concerns were legitimate and that he had been dismissed for raising concerns and taking appropriate steps to protect himself.

The manager may have mistakenly believed that she was on safe grounds from any unfair dismissal claim given Mr Ham was still in his probationary period. However, the case is a timely reminder that these protections are day one rights. Before dismissing any employee, it is important to consider the facts and determine if any underlying health and safety concerns are at play.

FURLOUGH AND BEHOLD: EMPLOYEE REFUSING TO RETURN FROM FURLOUGH UNFAIRLY DISMISSED

In *Gibson v Lothian Leisure*, the Tribunal considered whether the fear of the pandemic amounted to a belief of "serious and imminent danger" within protection of the ERA. Mr Gibson, a chef, was furloughed during the first lockdown and asked to return to work when restrictions started easing. Mr Gibson raised concerns about coming into work because of a lack of COVID-secure measures or PPE, and because he lived with his father, who was categorised as "clinically extremely vulnerable". Mr Gibson was then summarily dismissed by a text message, purportedly on the grounds of redundancy.

It was held that the circumstances of the pandemic and the potential significant harm that could be done to Mr Gibson's father should he contract the virus did meet the test of 'serious and imminent danger'. Further, these beliefs were reasonable and the raising of concerns and refusal to attend work was an appropriate step to protect his father from that danger. This rendered the dismissal automatically unfair.

This case confirms that the right to protect 'other people' from danger under the ERA can extend to family members at home. The Tribunal also left open that it was 'arguable' that the health and safety concerns Mr Gibson had raised could potentially amount to a protected disclosure. However, he did not meet the public interest requirement in these circumstances as the concerns only related to his father.

LOCKED DOWN AND OUT: EMPLOYEE HAD NO RIGHT TO ABSENT HIMSELF FROM WORK WHERE NO HEALTH AND SAFETY CONCERNS HAD BEEN RAISED

In *Rodgers v Leeds Laser Cutting Ltd*, the Tribunal ruled that an employee who had a "clinically extremely vulnerable" daughter at home had not been automatically unfairly dismissed in similar (ish) circumstances where he refused to return to work. The company's warehouse was allowed to remain open during the lockdown as it was not on the government list of workplaces that needed to close. The company put measures in place to protect against COVID-19 following a risk assessment carried out by a professional third party. These included social distancing, regular cleaning, and staggering start and finish times. The workplace was a large warehouse which only had five employees in it at a time, making social distancing possible.

After one colleague caught COVID, Mr Rodgers texted his boss to say he would be off work until the lockdown had eased due to having a high-risk child who had sickle cell anemia. The manager had replied "*okay mate, look after*

yourself" and there was no further communication between them. Mr Rodgers' absence was treated as unpaid leave. Mr Rodgers was dismissed one month later for unclear reasons and did not have sufficient service to bring a claim for ordinary unfair dismissal. The Tribunal held that Mr Rodgers had no right to absent himself from work in these circumstances:

- Whilst he had significant concerns about the pandemic, the circumstances of "serious and imminent danger" were all around him, rather than specifically within or attributed to the workplace.
- He had failed to state why he felt the workplace was unsafe and did not indicate that he would return if improvements were made.
- Any belief that there were circumstances of serious and imminent danger in the workplace was not reasonable. Given the size of the workspace and small number of employees, it was not hard to abide by government advice at that time.
- Further, Mr Rodgers could reasonably avert any dangers by abiding by government guidance at that time. If there were specific tasks which he felt removed his ability to socially distance, he could reasonably have refused to carry these out or raised these with his employer. It was not an appropriate step to absent himself from work entirely, particularly where he had not raised any specific complaints.

The Tribunal rejected the argument that the very existence of the virus created a serious and imminent danger as otherwise it would create a situation where any employee could refuse to work in any circumstances by virtue of the pandemic. While employers can breathe a sigh of relief at this outcome, it could have gone very differently had Mr Rodgers been able to perform his job from home, as indicated by the next case.

LANDMARC RULING: ASTHMA BASIS OF CONSTRUCTIVE DISMISSAL CASE

In *Bryan v Landmarc Support Services Ltd*, an asthmatic employee (categorised as vulnerable, but not extremely vulnerable) was held to be constructively dismissed after her employer disciplined her for refusing to attend the workplace once every seven weeks on a rota.

Landmarc provided project management services to the Ministry of Defence and was classified as an essential service, with all employees deemed as key workers. Within the first week of the national lockdown in March 2020, staff were allowed to work from home whilst Landmarc put COVID-measures in place. Staff were then asked to return to work, save for extremely clinical vulnerable staff who were shielding. These measures were not communicated to staff at the time to help them feel safe, which the Tribunal noted and was critical of the lack of communication.

Ms Bryan was reluctant to return to the workplace as she had asthma. This was accepted as being well-controlled but she had previously been hospitalised on occasions due to asthma attacks. The Tribunal accepted there was evidence that Ms Bryan genuinely was "terrified" of catching COVID. Although her son could have remained in school due to her key worker status, Ms Bryan had opted to homeschool him to minimise the risk of COVID.

Ms Bryan arranged for other staff to cover her week on the rota and was given a first written warning for doing so, although staff had been happy to cover because she was vulnerable. Ms Bryan raised a grievance about being asked to attend the workplace when government advice was that vulnerable people could attend work where working from home was not possible.

The Tribunal undertook a forensic analysis of the exact duties which required Ms Bryan to be in the office and concluded these made up only a small part of her role. Further, no thought had been given to training a junior employee to scan things to her at home or pick up some of these tasks such as escorting contractors on site. The

Tribunal found that it was less of a case of her being actually "needed" as opposed to it being more efficient and easier for others if she was there.

The Tribunal held that the warning and improvement notice around her absence amounted to "badgering a vulnerable and stressed person into attending the office" in order to enforce a blanket policy. By "unnecessarily ordering" her to attend the office before it had conducted an individual risk assessment of the risk to her specifically, Landmarc had breached the implied term to take reasonable steps to protect her safety and "had put its needs above hers". The constructive dismissal was automatically unfair on the grounds of health and safety. The Tribunal noted Ms Bryan could have also brought a discrimination claim around lack of reasonable adjustments.

HOME ALONE: EMPLOYEE UNABLE TO WORK FROM HOME UNSUCCESSFULLY CLAIMS CONSTRUCTIVE DISMISSAL

In ***Moore v Ecoscape UK Ltd***, an asthmatic employee's claim for constructive dismissal failed. Ecoscape was permitted to remain open as a construction business. It reopened after a short closure once it had been made COVID-secure. Safety measures included face masks, anti-bacterial gel, a prohibition on customers entering the premises and social distancing.

Ms Moore asked to continue working from home as she could not see how the workplace could be made "completely risk free". This was declined on the basis that measures had been put in place and there could not be one rule for her and another for everyone else who had now returned. It was stated that, if Ms Moore had an underlying health issue, the company would address this differently. Ms Moore was offered holiday and unpaid leave.

When case numbers were reported to be falling in mid-May, the company followed up with Ms Moore. Her manager provided some additional assurances about a new workstation which had been put in place, distanced from her colleagues and gave her own stationery. Ms Moore refused, citing government guidance that businesses should "*make every reasonable effort to enable working from home as a first option*." Ms Moore was told that she was now on unauthorised absence and that she must return to work to avoid disciplinary proceedings.

Ms Moore raised a grievance alleging that the company had breached its health and safety obligations and that her request to work from home had been refused contrary to government guidelines. During the grievance hearing, Ms Moore mentioned that she had asthma for the first time, but did not obtain a doctor's note or state it was serious. Ms Moore offered to take on other tasks which might be capable of being carried out at home. There was a lengthy discussion around the feasibility of her working from home, with problematic tasks identified. These mostly related to efficiencies, including a paper heavy workload and the need to adapt a number of processes for her with additional costs. The Tribunal described these reasons as "unenlightened" but noted there was a relatively small back office and that home working was more difficult to accommodate than would be the case with a larger more office-based employer.

After her grievance was not upheld, Ms Moore was signed off work with stress-related problems. Due to her unpaid absence she did not qualify for statutory sick pay. Ms Moore resigned claiming constructive dismissal, citing non-payment of wages and the rejection of her grievance as a breach of trust and confidence.

The Tribunal dismissed her claim. It was observed this was not an employee who had been told to shield by the NHS or who had raised specific health concerns. Ms Moore's fears were not with the workplace in any specific way, but a general fear about leaving the home. These beliefs were not reasonable and the danger could have been averted by following the guidance and particular measures provided by her employer. Her "homeworking or nothing" approach was deemed unreasonable and simply removing herself was not an appropriate step to take.

This approach is significantly different to the Landmarc case, despite both employees having asthma and shows how specific each case is on its facts.

TAKEAWAYS

The government no longer encourages people to work from home in England and recommended a "gradual return" to the workplace from 19 July 2021. Although social distancing requirements no longer apply, employers still have a legal duty to manage and mitigate risks to staff and customers. Employers should ensure that they have an up-to-date health and safety risk assessment and comply with the government's working safely guidance as they introduce staff back to the office. The government has said they may consider asking people to work from home again as part of "Plan B" in controlling the virus this Winter.

These first-instance Tribunal decisions are not binding on future Tribunals. However, they show the different approaches taken by different Tribunal judges and how each case strongly depends on its own specific facts. Any refusal to return to work should be considered on a case by case basis. It will be important for any employer to show that they have fully considered the circumstances of the individual's case and any health and safety concerns.

Employers will now face different issues in their return to work policies. The above assessments of whether there were circumstances of "serious and imminent danger" preceded the vaccination roll-out. Employers and Tribunals will have to deal with complicated questions around whether the employee could have reasonably averted any danger by being vaccinated.

As indicated by the above cases, it is important to understand the reason why the employee is asking to continue to work from home. If an employee's concerns about a return to work do not relate to health and safety, but a request to change their location either permanently or party to their home, direct them to the flexible working policy. Employees have the right to submit one flexible working request a year, which must be considered in line with a statutory process.
