COVID-19

HEALTH & SAFETY AT WORK

A Guidance Note from the 2TG Employment Team **Spring 2020**

On the 23 March 2020, the Prime Minister announced the British public are to stay at home save for very limited reasons. One of those reasons is where an employee needs to go to work, "but only where this is absolutely necessary, and cannot be done from home."

Employees across the country are already working from home, or in the process of being 'furloughed' under the Coronavirus Job Retention Scheme ("CJRS"). However, there are still many employees who are physically attending work. This is perhaps because they are designated key workers, or because they work for employers who consider that such travel is absolutely necessary, and the employee's work cannot be done from home.

Those employees will undoubtably be concerned for their own health and safety. As a result, some may refuse to attend work.

Employees and employers should be mindful of the Health and Safety provisions in the Employment Rights Act 1996 ("ERA 1996") and how they might apply in light of Covid-19.

Section 100(1)(d) of the ERA 1996 provides that an employee will be regarded as unfairly dismissed if the reason or principal reason for the dismissal is that the employee left work, proposed to leave work or refused to return to work, 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. Section 44(1)(d) ERA 1996 provides that an employee has a right not be subjected to a detriment in those same circumstances.

Section 105(3) of the ERA 1996, means that where an employee is selected for redundancy on the ground that in the circumstances covered by section 101(d) ERA 1996 they have left work, proposed to leave work or refused to return to work, that dismissal will be unfair where it is shown that the

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circumstances constituting the redundancy applied equally to one or more other employees in the same undertaking, in similar positions who have not been dismissed.

It is not hard to see how these provisions might become front and centre. Consider an employee who works in food production, processing, distribution or sale who refuses to attend work owing to health and safety concerns around Covid-19, who is dismissed in favour of an individual who will attend work. Would that dismissal be automatically unfair? Or consider an employer who, on considering the scope of the CJRS and the £2,500 monthly cap, finds that redundancies are still necessary and elects to make redundant those employees who refuse to attend work owing to health and safety concerns. Would that selection for redundancy also be unfair?

The trigger for protection is that there are circumstances of danger which the employee reasonably believed to be serious and imminent and which the employee could not reasonably be expected to avert. Whether that trigger is engaged by Covid-19 will dramatically impact the rights of employees still expected to physically attend work.

Covid-19 – are the Health and Safety provisions engaged?

Whether there are circumstances of danger which the employee reasonably believed to be serious and imminent will be a question of fact in each case (*Oudahar v Esporta Group Ltd* UKEAT/0566/10/DA). The Tribunal will be required to scrutinise the employee's state of mind at the time of their decision to leave work or refusal to return, and make findings as to what each employee actually believed as to the seriousness and imminence of the danger, and whether their belief was reasonable (*Edwards and others v Secretary of State for Justice* UKEAT/0123/14/DM). It is not directly relevant that the employer disagrees with the employee's assessment of the circumstances, and the seriousness and imminence of the danger: so long as the employee has a reasonable belief in the same, and could not reasonably be expected to avert the danger, they will be entitled to protection (*Oudahar v Esporta Group Ltd)*.

The circumstances of danger relied upon are not confined to dangers generated by the workplace itself (*Harvest Press Ltd v McCaffrey* EAT/488/99, where the danger created by a fellow employee was said to suffice). Rather, the word danger was used without limitation and intended to cover any danger however originating ([17] of *Harvest Press*).

There are few cases on the scope of circumstances of danger, and reasonable belief in seriousness and imminence. Those cases that do exist, whilst helpful in extracting general principles, have facts a long way from the outbreak of Covid-19. For instance, *Edwards* concerned the danger posed by a road closed by snowfall that the employee was expected to drive along, and *Oudahar* concerned the danger posed by mopping an area of floor with exposed wires on it.

It may well be contended that in light of Covid-19 every workplace across the country can now be said to be circumstances of danger. A Tribunal might consider however that there is more nuance to such an assessment. Given the current government guidance appears to be that employees can still attend work where absolutely necessary and where that work cannot be done

from home, it might be said that a workplace constituting a circumstance of danger is not automatic. An employee who usually works in isolation (e.g. a delivery driver in the food sector) and is fully compliant with social distancing might not be said to working in circumstances of danger.

Further nuance might arise following the contention in *Harvest Press* that 'danger' is without limitation in definition. It is certainly the case that the danger can arise from another employee rather merely the state of the premises, so a fellow employee who has Covid-19 would seemingly fall within the definition. What of an individual who is not concerned with the risk posed by their fellow employees or workplace, but with their commute which forces them to take public transport?

The Tribunal will carefully scrutinise the reasonable belief of an employee in the seriousness and imminence of the danger. If a workplace provides the recommended PPE, enforces social distancing and has no signs of infection in its workforce, a Tribunal might consider that an employee did not have a reasonable belief in imminence. An example likely to be seen by employers throughout the outbreak is of an employee who notes a cough in a fellow employee and refuses to attend work until the coughing employee self-isolates. A Tribunal will need to consider whether merely noting a cough gives rise to a reasonable belief of infection from Covid-19 or whether that employee also needs to have noted the persistence of that cough in order to gain protection.

The factors relevant to the reasonableness of an employee's belief will evolve over time. As testing becomes publicly available a Tribunal may well consider it relevant that an employer has informed its workforce that it has tested a certain proportion of its workforce and found no cases.

Further, a Tribunal may well focus on the sources of information that gave rise to an employee's belief. Say, an employee sees on Social Media a suggestion of a positive Covid-19 test in the community, which is quickly disavowed, but the employee nonetheless stays away from work. A Tribunal might consider that a belief is not reasonable where it is based on questionable sources.

Conclusions

There are a number of unanswered questions in considering the application of the ERA 1996 Health and Safety provisions to Covid-19. The answers will have dramatic implications on the rights of employees still required to physically attend work.

Not only is the case law concerned with dramatically different facts to Covid-19, but the Tribunal would ultimately be carrying out a highly fact sensitive exercise in considering the circumstances of the workplace and the reasonableness of the belief of the employee. Employers should be extremely cautious when faced with an employee who refuses to attend work and should make use of the CJRS where at all possible.

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Ben represents employees and employers across a range of employment litigation including unfair dismissal, discrimination and whistleblowing claims. He is currently instructed by an employee in a claim for unfair dismissal against a backdrop of a highly peripatetic working life and instructed by the MOD in a long running sexual harassment and discrimination claim.

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