SAFETY FIRST? DISMISSAL AND DISCRIMINATION IN THE WAKE OF COVID-19

A Case Note from the 2TG Employment Group

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Introduction

With the gradual easing of lockdown and the re-opening of many places of work, the question of how employers ensure the safety of their employees while endeavouring to keep their businesses afloat will gain even greater prominence. It is highly likely that there will be differences in opinion between employers and employees about how best to strike this balance, which may develop into conflicts where employees are dismissed, resign or otherwise suffer detriment because of their refusal to work in situations where they do not feel safe.

A further, but related, set of issues may arise where an employee is furloughed or transferred away from their usual roles, not because of their actions, but because their disability, race or pregnancy may give them an increased risk of contracting the coronavirus. Although such a decision may be made with the best of intentions, it nevertheless leaves the employer open to allegations of discrimination.

This article will therefore consider the possible impact of the pandemic on employers and employees through the lenses of unfair dismissal and direct discrimination.

Unfair Dismissal

Imagine a scenario where an employer directs their employees to carry out their duties - whether that be caring for patients, driving buses or working on a factory line – in a situation where the employee believes that the infection control measures in place are insufficient to protect the health of themselves, other staff or the wider public. In this context, what are the legal implications if the

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employer dismisses the employee for refusing to come into work, or taking some other step which they believe is necessary to protect themselves? What if the employee is not dismissed, but instead resigns?

Actual Dismissal

Section 100 of the Employment Rights Act 1996 (**"ERA"**) prohibits employers from dismissing employees for taking specified actions relating to health and safety. In the scenario under consideration, ss100(1)(d) and (e) ERA are most pertinent. These provide that an employee will be protected, in that their dismissal will be automatically unfair, where:

(1) The employee was in "*circumstances of danger*";
(2) The employee reasonably believed this danger to be "*serious and imminent*" and
(3) The employer dismissed the employee because they:
    (a) Left or refused to attend their place of work because of the danger (s100(1)(d) ERA); or
    (b) Took "*appropriate steps*" to protect themselves or others from that danger (s100(1)(e) ERA).

Circumstances of Danger

Each of these conditions gives rise to specific considerations in the coronavirus context. In relation to the first condition, an employee will only benefit from the protection of Section 100 ERA where the "*circumstances of danger*" they are reacting to objectively exist. It may be thought that in the context of a pandemic, an employee would be able to establish the presence of an 'objective danger' without significant difficulty. However, a number of factors must be considered before this can be assumed.

First, the type of workplace in which the employee works will be of considerable importance to the assessment of objective risk. For example, while it will be difficult to argue against the proposition that a front-line clinician, care worker or bus driver is required to work in circumstances of 'objective danger', the same may not be true of an employee working in a well-maintained office where social distancing can be ensured.

Second, it may be that, if left uncontrolled, the risk of infection in the workplace would constitute an objective danger and yet safety measures put into place by the employer (such as social distancing, Perspex screens and regular cleaning) are sufficient to remove this risk: *Hamilton v Solomon & Wu Ltd* [2018] 9 WLUK 440. In such circumstances, an employee will not be protected under Section 100 ERA, even if there are further protective steps which could in theory be taken, such as the provision of face masks.

Finally, the assessment of objective danger may be more complex where the employee seeks to argue not that the workplace itself is dangerous, but that travelling to and from work puts them at risk – for example if they would need to use public transport.

In principle, risks attaching to the journey to and from work can constitute 'circumstances of danger' under the ERA: *Edwards & Ors v Secretary of State for Justice* [2014] 7 WLUK 909. However, in that case, the Claimants had refused to travel along a road which had been closed by the police due to heavy snow. Using the road would potentially have been a criminal offence. In contrast, the use of public transport was not directly prohibited even at the height of the lockdown and, while the risk of contracting coronavirus is likely to be increased by using public transport, there are (at least in theory) measures that can be taken by employees themselves to reduce this risk. It is therefore likely that any claim that use of public transport is de facto unsafe will be scrutinised thoroughly by the Tribunal.

Reasonable Belief that Danger is Serious and Imminent

In relation to the second condition for protection under Section 100 ERA, the focus of the tribunal's assessment must be on what the employee reasonably believed about the danger. Crucially, therefore, it will not assist an employer to point to the effective infection control measures that have been put in place to reduce the risk to staff if their employees are not also aware of them: *Edwards & Ors v Secretary of State for Justice*. Communication with employees about how the risk of contracting coronavirus is being managed will be critical in protecting employers from claims.

Given the nature of a pandemic and the disease itself, an employee is currently unlikely to face much difficulty in establishing that they reasonably believed that exposure to coronavirus constitutes a 'serious and imminent' danger. However, this will not always be the case. First, it must be reasonable to believe that the risk of contracting coronavirus is 'imminent' at the point at which the claimant took a protected action. Potential risks – for example from being transferred into a high-risk area - will not be sufficient to establish protection under Section 100 ERA: *ABC News v Gizbert* [2006] 8 WLUK 197.

Second, the statutory protection will cease when the claimant can no longer reasonably believe that the danger is imminent. Therefore, even if an employee's refusal to attend work (for instance) was justified initially, where circumstances change such that there are no longer reasonable grounds to believe in a serious and imminent danger, employees must return to work immediately. This will become increasingly relevant as the country emerges from lockdown restrictions and the prevalence of the coronavirus in the population continues to reduce.

Protected Actions

Finally, in order to establish protection under Section 100 ERA, the claimant must show that they were dismissed as a consequence of their taking a protected step – either leaving/refusing to attend the workplace (s100(1)(d)) or taking an 'appropriate step' to protect themselves or others (s100(1)(e)). In the vast majority of situations, the question of whether an employee refused to attend their workplace will be self-explanatory. However, the situation is rather less clear cut as to what actions may constitute an 'appropriate step' to protect oneself or another.

Pursuant to Section 100(2) ERA, when determining whether steps taken by an employee were appropriate, the tribunal must consider all the circumstances including the knowledge of the employee, any advice that they had been given and the facilities open to them. It will therefore be important to determine what public health advice was current at the time the employee took the allegedly protected step – for example, an employee insisting on wearing a home-made face covering may have a better chance of establishing that this was an 'appropriate step' at the time of writing than they would have had at the start of the outbreak, when the government was advising against the wearing of masks.

Further, by definition a step will not be considered 'appropriate' where it is itself negligent or dangerous: s. 100(3) ERA. Therefore, a construction worker who leaves their site in a dangerous state because a colleague is displaying symptoms of Covid-19, or a bus driver who abandons a bus halfway through a route because it is getting too crowded, will not be protected.

It is important to note that the right of employees to take steps to protect others as well as themselves is not confined to their colleagues but extends to 'appropriate steps' taken to protect members of the public: *Masiak v City Restaurants*

[1998] 6 WLUK 525. In principle, therefore, the ambit of Section 100 ERA is sufficiently wide to encompass steps taken by an employee to protect their family – for example, refusing to work in a public-facing role in case they transmit the virus to a vulnerable relative. In such cases, however, an employee may struggle to establish that the danger they are seeking to avert is imminent – see above.

In conclusion, an employee who is dismissed as a result of refusing to attend work or taking some action which they believe is necessary to protect themselves or others may well have grounds for bringing an unfair dismissal claim under Section 100 ERA. However, such a claimant will have significant hurdles to overcome – not least in establishing that an objective danger remained in spite of any infection control measures put in place by their employer and that it was reasonable to believe that this danger was imminent at the time at which they acted.

Constructive Dismissal

In many cases, the termination of an employee's employment will come about not because they are dismissed by their employer, but because they have felt it necessary to resign in response to what they perceive to be dangerous working conditions. In this situation, the employee may have a claim for constructive unfair dismissal. In order to make out such a claim, the employee must establish that:

(1) The employer breached a fundamental term of the employment contract;
(2) This breach caused the employee's resignation; and
(3) The deemed dismissal (i.e.: the employer's breach) was unfair.

Fundamental Breach

Of all the terms which are routinely implied into employment contracts, the one of most obvious relevance to the present context is the employer's obligation to take reasonable steps to ensure their employees' health and safety at work. The concept of 'reasonableness' here is key – employers are not under an obligation to take every conceivable step which may reduce the risk of infection faced by their employees. Further, even if a particular step is found to be reasonably required to ensure health and safety, an employer will not be liable for failing to implement it where, due to circumstances beyond their control, it is not reasonably practicable to do so.

This may be of particular relevance when it comes to the provision of face coverings by employers. Over the last few months, the media has been flooded with reports of employees being required to carry out their duties despite lacking the PPE which they consider to be necessary to do their jobs safely. In many circumstances – such as those involving front line clinicians and care-workers – it would be difficult, if not impossible, for an employer to argue that the provision of PPE is not reasonably required. In settings without significant contact with the public, however, it may be that an employer can show that the implementation of other protective measures is sufficient to ensure that employees are reasonably safe. In this case, the failure to provide PPE is unlikely to be held to be a breach of the duty to take reasonable care to ensure employees' health and safety.

Even if the provision of face coverings is found to be reasonably necessary, an employer may nevertheless escape liability if it can show that, despite taking all reasonable steps, they could not obtain the necessary stocks. In light of the national (and indeed international) shortages of face masks and other PPE supplies, a Tribunal may be sympathetic to arguments that, despite an employer's best efforts, there was no equipment to be had or that the items that were available were prohibitively expensive. Nevertheless, an employer will need to evidence the steps that they took to attempt to obtain supplies in order to satisfy the Tribunal that they did everything that was

reasonably practicable – this will not be taken on faith.

Causation and Waiver of Breach

As with all claims of unfair constructive dismissal, a claimant must show that their resignation was caused by the employer's fundamental breach of contract. Nevertheless, it is not inevitable that a delay in resigning will be fatal to the employee's claim in all circumstances.

First, if the employee makes clear that they are continuing to work under clear protest – for example they agree to work an extra shift only because otherwise the business would have to close or patients would go without adequate care - and the delay is not too long, then they are unlikely to be taken to have affirmed their contract. This may also be true if the employee delays resigning in order to find alternative employment: *Marriot v Oxford & District Co-Operative Society (No 2)* [1970] 1 QB 186.

Second, if the employer fundamentally breaches the employment contract on a number of occasions, or their actions can be properly characterised as a continuing breach, then an employee will not lose their right to resign in response only because they did not do so at the time of the initial breach: *Reid v Camphill Engravers* [1990] ICR 435. This principle may be of particular relevance where the core of the employee's claim is that the employer persistently failed to put effective infection control measures in place.

Deemed Dismissal Is Unfair

Finally, a claimant must establish that the deemed dismissal (i.e. the reason behind the employer's fundamental breach of contract) was unfair. Unlike cases of actual dismissal, the concept of 'automatic unfairness' under Section 100 ERA is of reasonably limited utility where the alleged dismissal is constructive.

Where an employee resigns due to a perceived lack of infection control in the workplace, the fundamental breach of contract entitling them to treat the employment relationship at an end (i.e. the failure by the employer to take reasonable steps to ensure the safety of employees) occurs before any action on the part of the employee. In other words, the 'dismissal' is not in response to a protected action under Section 100 and cannot therefore be considered to be automatically unfair.

Nevertheless, in the context under discussion, it is likely that an employee would be able to establish actual unfairness with relative ease. Where an employee is relying on the obligation to take reasonable steps to ensure the safety of employees at work, establishing the breach will itself almost always establish the requirement of unfairness as the employer's actions will by definition have been found to be unreasonable. It is difficult to conceive of a situation where the employer's failure to take adequate steps to protect their staff will be considered sufficiently unreasonable to constitute a fundamental breach of the employment contract, and yet not be seen as unfair.

Direct Discrimination

Although perhaps the most obvious focus for discrimination claims in the coronavirus context is disability, such allegations may arise in a far wider set of circumstances. Against the background of media reports highlighting emerging links between suffering severe symptoms of Covid-19 and being of a black or minority ethnic origin, employers may feel compelled to factor in an employee's race when making decisions about their duties. Similarly, in the light of public health guidance that pregnant women should be treated as clinically vulnerable, an employer may be reluctant to allow an expectant mother to work in a high-risk role.

It is therefore easy to imagine a number of scenarios where decisions taken by an employer – often with the best of intentions – could be seen as

discriminatory treatment based on a protected characteristic. In such situations, how does the law on discrimination interact with an employer's responsibility to protect the health and safety of their employees?

Establishing Direct Discrimination

Section 13(1) of the Equality Act 2010 provides that: "*A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others*". Protected characteristics are defined in Section 4 Equality Act 2010 and include disability, race and pregnancy.

In the coronavirus context, less favourable treatment may arise in a number of ways. For example, being placed on furlough – with the resultant 20% pay cut – could easily be argued to constitute less favourable treatment. If, therefore, an employee can show that they were selected for furlough over their white colleagues, they are likely to have a viable claim in direct discrimination.

The issue of less favourable treatment may also be relevant where an employee is transferred away from a public facing role, such as working with patients or customers, to a lower risk 'back room' role. In such a situation, it could be argued that their new duties were less stimulating or rewarding than their previous role and therefore that they had been treated less favourably than their colleagues who were not transferred.

A similar argument may be run even where the employee is transferred to a seemingly better role. It is important to remember that treatment can be considered to be less favourable even where, considered objectively, the employee is better off: *Chief Constable of West Yorkshire Police v Khan* [2001] UKHL 48. The employee's own consideration of what is favourable and unfavourable to them will be of the utmost relevance in determining whether they have been discriminated against.

Can Direct Discrimination Be Justified?

As a general rule, once direct discrimination has been established, the motive behind the employer's conduct (even if it is completely benign) is irrelevant: *James v Eastleigh Borough Council* [1990] 2 AC 751. Therefore, any attempts by an employer to justify their actions by reference to an employee's increased risk of infection are unlikely to be successful.

However, this position is arguably more complicated where an employee is disabled within the meaning of the Equality Act, but also has other health conditions which do not meet the threshold of disability but nevertheless render them clinically vulnerable to coronavirus. In such a scenario, an employer's actions in transferring or furloughing a disabled employee will only be discriminatory if a hypothetical comparator without the employee's disability, but with their other medical conditions, would not have faced the same treatment: *Owen v Amec Foster Wheeler Energy* [2019] EWCA Civ 822.

For example, an employer may be justified in moving an employee with severe lung disease (a disability) away from a public facing role where that employee is also obese and suffers from high blood pressure (conditions which may not constitute disability but are considered to be high risk factors for coronavirus). However, the employer will have to satisfy the Tribunal that they were taking (or would take) a similar approach to other, non-disabled, staff with comparable medical problems. In this situation, as in so many others, an employer would be wise to have a risk assessment in place setting out on what basis these decisions are being made.

Conclusion

As the threat of coronavirus eases and the country slowly returns to a 'new normal', the minds of employers and employees alike will be turning to the effect that the virus has had (and will continue

to have) on the workplace. In light of the significant challenges the pandemic has brought to businesses in all sectors, the legal profession would be wise to be prepared for an increase in employment litigation – the first signs of which are already becoming apparent.

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