Employment

Returning to work - a right to refuse?

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Whilst some people have remained at work during the period of full “lockdown”, at the time of writing we have now reached the point where the Government is actively encouraging those who "cannot work from home” to return to work. On 11 May 2020, the Government published guidance for employers to help them “get their businesses back up and running and workplaces operating safely”.

In this article we examine part of the current legal framework that provides protection for employees in relation to health and safety at work, and how this might be applied in the coming weeks and months as more individuals are asked to return to work in conditions of potential risk. We have largely focused on section 44(1)(d) and (e) and their unfair dismissal counterparts at section 100(1)(d) and (e), as these have been the subject of particular debate and discussion over recent days within the press and across social media.

At a time when travel outside the home could expose an employee (or their family) to an increased risk of infection, does existing employment law assist employees who wish to remain at home? At the time of writing we are already seeing the potential for conflict between employers, Trade Unions and their members. For example, the RMT has said that based on health and safety concerns relating to overcrowding on buses and trains, strike action may be deemed necessary, and that their members should refuse to work if they do not feel safe.

How does the law protect employees?

The most relevant provisions are contained within the Employment Rights Act 1996 (“ERA 1996”) - section 44 (concerning the right not to be subjected to detriment due to health and safety issues) and section 100 (concerning dismissal on the grounds of health and safety).

Whilst this article concentrates on subsections (d) and (e) which, as set out below, deal with an employee facing circumstances of serious and imminent danger, the earlier provisions of sections 44 and 100 which relate to health and safety representation within the workplace are also very likely to be relevant at this time. For example:

- in circumstances where the Government has advised businesses to carry out risk assessments in relation to employees returning to work, those businesses which do have health and safety representatives or have designated individuals to carry out activities in that regard will want to work with them to ensure that the risk assessments are fit for purpose, and that appropriate protective measures are implemented. Such individuals are protected from dismissal or detriment (sections 44(a) and (b) and 100(a) and (b)) arising as a result of their carrying out those activities.

- many small businesses may not have a safety representative, and employees may therefore decide themselves to raise circumstances connected with their work which they believe are harmful or potentially harmful to health or

safety. Sections 44(c) and 100(c) operate to render unlawful any detriment or dismissal suffered as a result.

- appropriate consultation with employees and their representatives, where applicable, will be fundamental to preventing occasions where employees may refuse to attend the workplace fearing a serious and imminent threat to their health.

Turning then to the provisions relating to circumstances of danger, so far as is relevant, the sections read as follows:

"SECTION 44

(1) An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that...

(d) in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work, or

(e) in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger.

(2) For the purposes of subsection (1)(e) whether steps which an employee took (or proposed to take) were appropriate is to be judged by reference to all the circumstances including, in particular, his knowledge and the facilities and advice available to him at the time..."

"SECTION 100

(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that...

(d) in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work, or

(e) in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger.

(2) For the purposes of subsection (1)(e) whether steps which an employee took (or proposed to take) were appropriate is to be judged by reference to all the circumstances including, in particular, his knowledge and the facilities and advice available to him at the time."

The provisions are complementary, with section 44 providing protection from detriments up to dismissal, and section 100 concerning dismissal. Importantly, through operation of section 108(3), there is no qualifying period for an unfair dismissal claim relating to section 100. Unlike 'ordinary' unfair dismissal, the protection exists from day one of employment. Compensation for such a dismissal is also uncapped (unlike 'ordinary' unfair dismissal), due to the operation of section 124(1A). Claims for detriment also have the advantage of allowing a claimant to recover compensation for any injury to feelings suffered.

Currently, in order to benefit from either section, the claimant must be an 'employee'. These are not provisions which can, on the face of it, be relied upon by 'workers' or the self-employed – although there is an argument, as yet untested, that the wording of the Directive from which these rights are derived (Council Directive 89/391/EEC) does provide

protection for all those 'working' for an employer. Article 8(4) of the Directive simply states that “workers who, in the event of serious, imminent and unavoidable danger, leave their workstation and/or a dangerous area may not be placed at any disadvantage because of their action and must be protected against any harmful and unjustified consequences, in accordance with national laws and/or practices”.

We understand that at least one union (the IWGB) is preparing to launch a judicial review against the Government in relation to its alleged faulty transposition of the Directive into domestic law with respect to sections 44 and 100. Such an action, if successful, could conceivably open the way for so-called ‘Francovich’ claims against the government itself for any harm (such as an inability to claim compensation) resulting from failure properly to implement the Directive – although claimants would have to act quickly to avoid their cause of action being extinguished by Brexit and the end of the ‘grace period’ for such Francovich claims.

Application to the COVID-19 pandemic

Before being able to benefit from the protection of these sections, employees must show that there were 'circumstances of danger' which the employee 'reasonably believed to be serious and imminent'.

It does not matter whether such a belief was true, but rather whether it was reasonable at the time. In *Oudahar v Esporta Group Ltd* [2011] ICR 1406, the Claimant was dismissed for refusing to mop an area which featured obviously protruding wires. As it transpired, the employer did not agree that the wires were in any way unsafe, but the Employment Appeal Tribunal held that this was not relevant. As HHJ Richardson put it: *“If an employee was liable to dismissal merely because an employer disagreed with his account of the facts or his opinion as to the action required, the statutory provisions would give the employee little protection”.*

Nor does the danger need to relate to the workplace itself. In *Harvest Press Ltd v McCaffrey* [1999] IRLR 778, the Employment Appeal Tribunal held that *“the word danger is used without limitation in section 100(1)(d) and Parliament was likely to have intended those words to cover any danger however originating”.*

The EAT has also found that employees are protected for taking action to avert danger against anyone, not just themselves or fellow colleagues. In *Masiak v City Restaurants* [1999] IRLR 780, HHJ Peter Clark clarified that *“neither the Directive nor section 100(1)(e) of the Act seeks to limit the class of persons at risk of danger to those employed by the employer...we hold that the expression “other persons” contained in section 100 (1)(e) extends to members of the public”.*

The contemporary question is, of course, can COVID-19 amount to a “danger” under these provisions? This is currently untested before the courts, but we suggest the following may be relevant considerations:

- There is no absolute barrier to such a finding. As set out above, the danger in question does not need to relate to the physical state of work premises themselves having been interpreted widely by the EAT in the past;

- However, the danger must be “serious”. Whilst no one doubts the seriousness of the illness that can develop in some people, the question is whether the danger posed to an employee in connection with his work can reasonably be believed to be serious. A Claimant is more likely to reach that threshold where a risk assessment and protective measures in line with the Government’s guidance have not been put in place by an employer. Similarly, where an individual is vulnerable and/or where the employee comes into sustained contact with others as a necessary part of his employment, the threshold is more likely to be reached;

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The danger must be “imminent”. Again, the circumstances of the employee’s working environment are likely to be explored. However, it is perhaps noteworthy that the Health Protection (Coronavirus Restrictions) (England) Regulations 2020 – the “lockdown” regulations – explicitly state that they were made “in response to the serious and imminent threat to public health” posed by coronavirus; and

- The danger can, when considering subsections 1(e) of the relevant sections, relate to danger posed to 'other persons'. At least in theory, this permits an argument that an employee may refuse to attend work for fear of returning home and infecting vulnerable members of their family.

However, whilst the courts have previously held the ambit of the relevant sections to be wide, it should be noted that, were an employee to leave or refuse to return to work, the circumstances must be such that he *“could not reasonably have been expected to avert”* the danger concerned.

Similarly, in respect of subsections 1(e), the steps taken to avert the danger must be “appropriate” by reference to all the circumstances. Tribunals have not generally looked kindly upon claimants who have left or refused to attend work when the means for ameliorating the “circumstances of danger” are within their own power.

In the context of the COVID-19 pandemic, does an employee have the means to avert danger themselves?

Again, the answer is likely to be heavily fact sensitive. It seems unlikely that an employee who cannot work from home and whose employer is following the government’s guidance would be justified in refusing to return to work without having explored with their employer ways they could be made to feel and be safe carrying out their role This only emphasises the importance of early and prior consultation with employees and their representatives, and the protection afforded to those individuals as highlighted above.

Whilst the implementation of the measures may not be in the employee’s gift, compliance with them may be. Therefore where, for example, a risk assessment has been carried out and the workplace redesigned to maintain 2m social distancing, an employee may not be able reasonably to refuse to work.

Finally, the steps taken must be appropriate in all the circumstances. Factors to be considered include the employee’s knowledge, and the facilities and advice available to him at the time but these are not exhaustive. The Government is encouraging employers (and mandating for employers with over 50 staff) the publication of a risk assessment which should be available to employees. This should help inform any actions they subsequently take. Employers should be carrying out these risk assessments in consultation with workers and Trade Unions to prevent disputes arising and a situation where an employee feels they have to take action to remove themselves from harm.

Conclusion

Much remains uncertain about how businesses will start to reopen and get their workforce back to work whilst complying with health and safety obligations. However, it is clear that employers will need to ensure that they are doing everything they can to implement risk assessments, maintain proper social distancing and provide PPE where necessary. Failure to do so could lead to employees testing the boundaries of sections 44 and 100, and a multitude of new cases for the Employment Appeal Tribunal to consider.

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