Handling Health and Safety Based Refusals to Work

Guidance for schools

ellis whittam

Please note this guidance is subject to change and is up to date as of 3 February 2021.

Introduction

On 1 January 2021, the Department of Education (DfE) published guidance about the requirements around schools being open.

This includes the following statement:

"*In any area where restrictions have been implemented, employers should consider advice from the relevant Director of Public Health and their local authority in relation to staff attending workplaces when updating their risk assessment. This includes initial teacher training (ITT) trainees. Employers should continue to explain to staff the measures they are putting in place to reduce risks, including how these protective measures have been reviewed as part of an updated workplace risk assessment.*

Schools and FE providers should also consider if the coronavirus (COVID-19) education contingency framework offers more opportunities for staff to work at home, given reduced numbers of students on-site and the use of remote education for students scheduled to be at home. Employers should have regard to staff work-life balance and wellbeing. This includes considering how best to balance the demands of on-site teaching and support for remote education, which should be done within the terms and conditions of teachers' and staff employment."

On 2 February 2021, the government updated its guidance on Actions for schools during the coronavirus outbreak.

Unions' stance

We are aware that some staff are sending in so-called s.44 letters, whereby the employee raises issues around their concerns about attending work based on their belief that it is a serious risk to their health and safety. We understand that the NEU had a template letter that members could utilise for these purposes. Their advice to members who have concerns about health and safety is to use their escalation guidance to raise concerns.

Interestingly, we understand that the NASUWT advised their members that "where a union authorises or endorses or encourages its members not to attend or return to work in reliance on section 44 Employment Rights Act 1996 (ERA) (without a ballot mandate), [this] would amount to the members being induced to breach their employment contract by the union." The NASUWT is advising staff that they should attend work and that a direction to employees to attend work will be a reasonable management instruction and failure to comply will be a breach of contract by the employees involved with potential for the employer to take disciplinary action, implement a deduction in pay, or a refuse to pay them.

Employers' options

What are the employer's options if an employee refuses to attend work? Are they entitled to be paid? Could you discipline them? The answer to this depends on a number of factors, not least the additional protection that may be afforded to employees who raise such concerns.

Sections 44 and 100 of the Employment Rights Act 1996

The protection that is likely to be most relevant here is contained in the Employment Rights Act 1996. Section 44 states:

*(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*

A detriment will include a decision to not pay an employee if they don't come into work. Note that this protection now also applies to workers as well as employees.

Section 100(1)(d) makes a dismissal automatically unfair if the reason or principal reason for the dismissal is the scenario mentioned above – this effectively means that if the above is satisfied, you cannot defend the claim by arguing that it was nevertheless 'fair'. This also covers situations where the employee resigns and claims constructive dismissal relying on s.100. In addition, there is no requirement to have at least two years' service as is necessary for normal unfair dismissal.

There is also additional protection for appointed Health and Safety Representatives which this note does not cover – seek separate advice if you are dealing with such an individual.

What does this mean in the context of COVID-19?

It is likely that some employees may be quite frightened about coming back to work. They may be fearful that it is not safe for them, particularly if they have an underlying chronic medical condition such as asthma or diabetes, if they are pregnant, or if they live someone who is vulnerable.

If an employee raises concerns about the workplace on those grounds and refuses to come into work or has left work, would they fall under the situation mentioned in (d) above? It depends on what exactly the issue is and what the employer has done.

The protection is quite specific in that:

- The employee needs to believe that they are in serious and imminent danger.
- It is the employee's belief that matters – the question is whether the belief is "reasonable", i.e. it doesn't have to be true. It doesn't matter that the employer may not agree with them.
- If the employee holds that **reasonable belief**, then the situation must be one that they could not reasonably avert other than to leave or not attend the premises.

If all these elements are met, then taking any action against the employee, whether that be not paying them or dismissing them, could fall foul of the protection. If an employee was successful in bringing such a claim, damages can be awarded for loss of earnings and injury to feelings.

What can employers do?

As mentioned above, the key point will be whether the employee holds a "reasonable belief". The government guidance is that employees should work from home where possible, but also that schools should remain open for key workers' children and children who are vulnerable. We understand that there are far more children attending school than was the case than during the last closure for schools.

We believe that the risk for staff who are attending schools where there are very small numbers of pupils attending will be lower than those where most pupils are attending.

Here are some steps that may help:

1. Ensure that you have in place an up-to-date risk assessment. It is likely that you have already consulted with staff and recognised unions regarding COVID-secure measures last year. We are not aware that there is any increased risk to staff in light of the new strain, other than it spreads more easily than before. However, it is worth revisiting your risk assessments in light of this new strain. Take specialist advice on this, and if you are an Ellis Whittam Health & Safety client, discuss with your Health & Safety Consultant. If you do not have a risk assessment in place, this will make it very hard to defend a claim.
2. Once you have your new risk assessment, put in place any new recommendations and ensure previous ones are still being adhered to where applicable.
3. Particular attention should be paid to those employees who have underlying medical conditions and you should arrange for updated individual risk assessments for vulnerable staff who have raised concerns.
4. Share with all employees the details of the updated generic risk assessment and what steps you have taken. If steps are to be taken at a later date, explain when this will happen and why there is a delay.
5. Provide some kind of support for employees' mental health in general.
6. If an employee raises a concern, then find out what that is, getting as much information as possible. Approach this sensitively, bearing in mind the uncertainty of the whole situation. Do not reprimand the employee for coming forward with the concerns. Ensure a detailed note of the discussion is taken.
7. If they have sent you a generic s.44 letter which doesn't contain specific details as to why they think they are more at risk in their workplace this term than before, then ask them to specify why they believe this to be the case. Again, ensure a detailed note of the discussion is taken, particularly if the employee is unable to provide anything more than is contained in their letter.
8. If you can, answer the concerns with objective evidence to support your assertion that the workplace is safe for the employee. Set out what steps have been taken. If there are any further measures that can be taken to ensure safety, discuss those with the employee and implement them. Consider whether the employee can work from home. If you are satisfied that there are no further steps to be taken, you can write to the employee using our **H&S Disclosure Letter** (available to clients via MyEW) asking them to return.
9. If the employee is still asserting that the workplace is not safe for them, establish why, despite sharing information with them, they still hold that view. If necessary, and if you haven't done so already, seek their consent to a medical report from their GP or refer to Occupational Health.
10. Try to reassure them that the dangers they have highlighted are not actually present or that they are being adequately controlled.

11. If the employee is still certain that they cannot continue to work, it will be at this point that you consider your options and risks to the school from a regulatory, operational and legal perspective.
12. We recommend ongoing dialogue with the staff and unions around their concerns.
13. Seek advice from the local Public Health department for your area.
14. Consider whether allowing some staff to work from home (where there is no sound medical reason for them to do so) could mean that the 'flood gates open' and more staff demand the same, meaning operational difficulties for the school and potentially contravening the legal obligation to remain open as directed by the DfE.
15. Consider whether there is a viable threat of industrial action but bear in mind that this takes time to organise and ultimately means staff are not paid.

Whistleblowing protection

There is also a possibility that someone raising health and safety concerns could have raised a protected disclosure, AKA blown the whistle. If the information disclosed meets the requirements in the legislation, then they will be entitled not to suffer any detriment or be dismissed for having raised that issue.

You will therefore need to be careful with refusing to pay or disciplining someone if the reason for doing so is because they have made the disclosure. It may be possible to argue that the reason why you are taking the action you are is because they are not coming into work rather than the disclosure itself. In order to be able to rely on this approach, the steps mentioned above should be followed.

Breach of contract and 'ordinary' unfair dismissal

Finally, you should be mindful of what the Contract of Employment actually says in order to ensure that any steps you decide to take do not breach those.

In addition, if you are going down the disciplinary route, even if you can show that the belief held by the employee was not reasonable and/or there was no serious and imminent danger, ordinary unfair dismissal rules will apply to those with two or more years' service. You would therefore need to ensure that a reasonable investigation was undertaken, and a fair process was followed.

Disability discrimination

Remember that disabled employees have additional protection and those who are advised on medical grounds to shield, or who provide medical evidence that they are not able to attend work, should work from home where possible. If they cannot work from home – for example, if they are a TA – then they should still be paid.