Refusals to work

Refusals to Return to Work Guide

Guidance on handling health and safety issues raised by employees

Introduction

Since 23 March 2020, there has been a restriction on which businesses can open during the COVID-19 pandemic, with the government message being to work from home wherever possible.

Since then, the guidance has changed on numerous occasions, depending on how prevalent the virus was and is.

Since then, England has removed the “work from home” mandate, whereas other parts of the UK have kept that message in place where possible. It’s therefore important to check the government’s website where you are for the most up-to-date position. Sector-specific guidance has been issued to assist employers in making their workplaces safe.

With restrictions continuing to relax, it’s likely that employers will want more employees to come back to work if they haven’t done so already and it is not possible for them to work from home. One issue that is likely to come up is employees raising concerns that they do not want to come into work because they do not think it is safe to do so, particularly in light of new variants such as Omicron.

So, what are the employer’s options if this happens? Can you dock their pay? 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:

(1A) A worker 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:

(a) 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. There are similar provisions under S.44(1A)(b), which covers situations where the worker takes appropriate steps to protect himself or others.

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?

As mentioned in the introduction, it's 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 one that means they are classed as clinically extremely vulnerable (CEV).

If an employee or worker 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 S.44(1A)(a) and/or (b) above? It depends on what exactly the issue is and what the employer has done.

The protection is quite specific in that:

- The worker needs to believe that they are in serious and imminent danger.
- It's the worker'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 worker 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, or under S.44(1A)(b) have taken appropriate steps to avoid the danger.

If all these elements are met, then taking any action against the employee or worker, 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". Whether that belief is reasonably held will depend on:

- What steps the employer has taken to ensure the health and safety of their employees, particularly those in vulnerable groups;
- What information has been provided to the employee; and
- What steps have been taken to reassure the employee that they are not in fact in serious or imminent danger.

Here are some steps that may help:

1. Ensure that you have in place an up-to-date risk assessment. It is likely that any changes to the workplace that affect the health and safety of workers would have to be consulted upon with a recognised trade union, employee health and safety representatives, or employees individually. Take specialist advice on this. 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 risk assessment, put in place all recommendations. Particular attention should be paid to those employees who have underlying medical conditions.
3. Share with all employees the details of the risk assessment and what steps you have taken – this may be as part of the consultation process referred to above. If steps are to be taken at a later date, explain when this will happen and why there is a delay.
4. 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.
5. 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' asking them to return.
6. 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. Try to reassure them that the dangers they have highlighted are not actually present.
7. If the employee is still certain that they cannot continue to work, it will be at this point that you consider your options – you could say that any period will be unpaid, or that they may be disciplined for unauthorised absence.

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 or 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 followed.