CORONAVIRUS AND HEALTH AND SAFETY DISMISSALS:

A GUIDE

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INTRODUCTION

Prior to the coronavirus pandemic, employment disputes in which individuals refused to work because of danger were relatively rarely seen by employment tribunals.

The types of workplace in which dangers were likely to be "*serious and imminent*" would previously (hopefully) have well-established and documented procedures that would minimise the chance of friction between employees and employers. There are few appellate cases considering the relevant provisions of the Employment Rights Act 1996 ("the Act").

The emergence of Covid 19 is likely to change this. For as long as the virus remains prevalent, and no vaccine has been found, each and every workplace is potentially an environment in which there is a serious danger for employees; especially those that are older or vulnerable.

Employers, employees and their advisers will need to form judgements about when and how individuals gain protection under the Employment Rights Act 1996 for taking protected action to protect their own, or others', safety. This guide aims to assist with that.

Outer Temple Chambers

THE 10 KEY POINTS

This guide identifies ten key points that employers, employees and their advisors need to know about health and safety dismissals and detriments in light of Covid 19. They are as follows:

1. It is the employee's belief that matters, not the employer's opinion (p8).

2. Danger is widely interpreted and the actions of other employees count (p10).

3. Potential danger is not "imminent" (p12).

4. Employees can take positive steps to protect others from danger even if it hurts their employer's business (p13).

5. The "danger" doesn't have to be to fellow workers (p15).

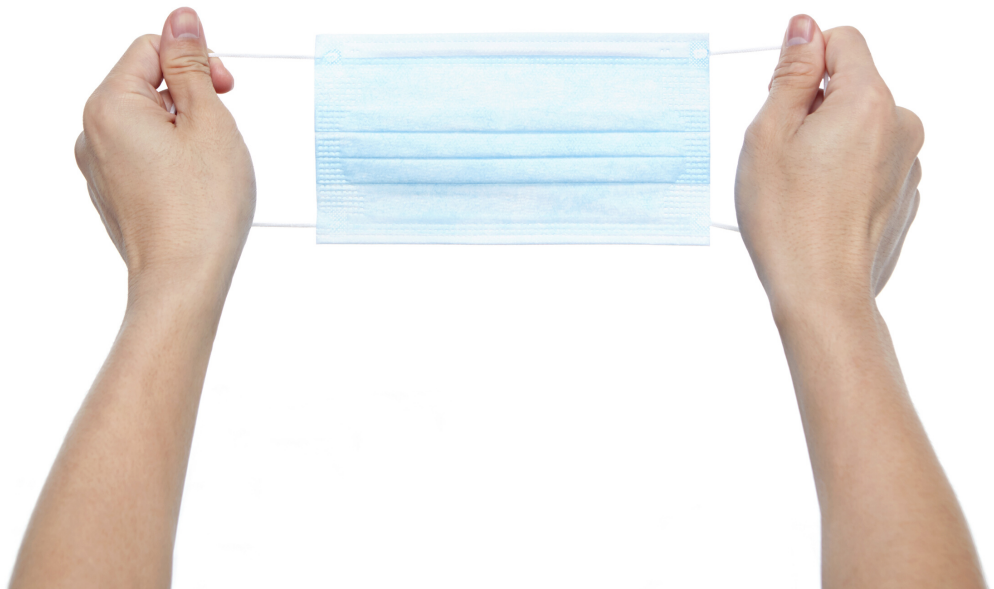
6. Damages under section 44 and 100 are unlimited, subject to no qualifying service requirement and may be extensive (p16).

7. Constructive dismissal claims are likely if employers fail to deal with health and safety issues.

8. The rights are individual and not collective (p21).

9. Workers may be protected as well as employees (p23).

10. Employers must be clear about why they are taking the action they are (p24).



SECTION 44 EMPLOYMENT RIGHTS ACT 1996

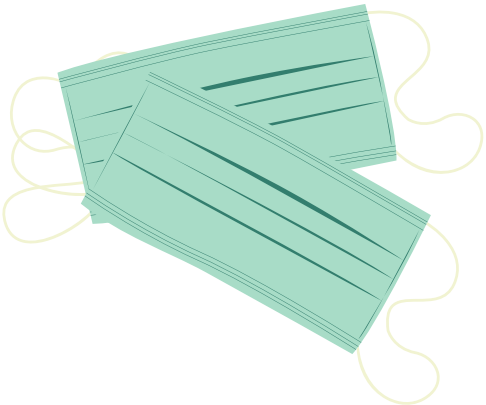
(1)An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that—...

(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.

(3) An employee is not to be regarded as having been subjected to any detriment on the ground specified in subsection (1)(e) if the employer shows that it was (or would have been) so negligent for the employee to take the steps which he took (or proposed to take) that a reasonable employer might have treated him as the employer did.



SECTION 100 EMPLOYMENT RIGHTS ACT 1996

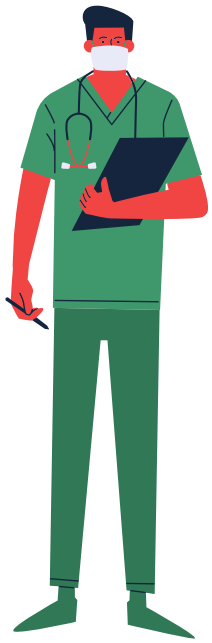
(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that—

(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.

(3) Where the reason (or, if more than one, the principal reason) for the dismissal of an employee is that specified in subsection (1)(e), he shall not be regarded as unfairly dismissed if the employer shows that it was (or would have been) so negligent for the employee to take the steps which he took (or proposed to take) that a reasonable employer might have dismissed him for taking (or proposing to take) them.



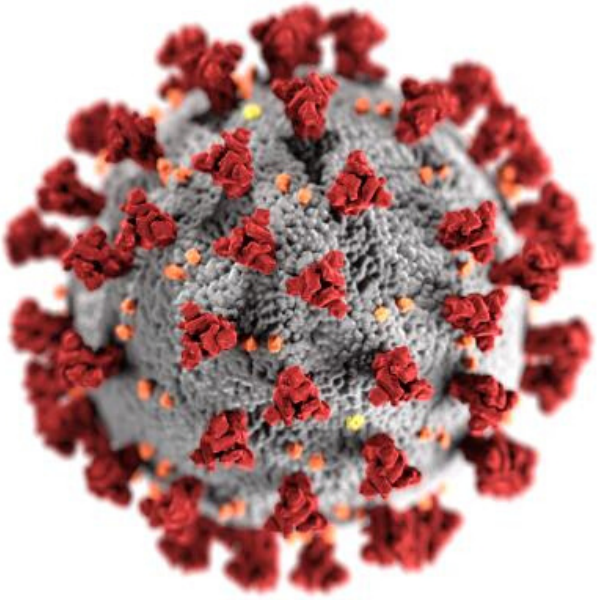
THE STATUTORY PROTECTIONS UNDER THE EMPLOYMENT RIGHTS ACT 1996

Section 44 of the Employment Rights Act 1996 prohibits detriment in circumstances in which individuals have taken specified health and safety related action. Section 100 prohibits dismissals in the same circumstances. Under subsections (1)(d) and (e), where employees reasonably consider that there is “serious and imminent” danger, they may leave the workplace, or take “appropriate steps” to protect themselves or others.

Employees do not have to consult before taking unilateral action and there it is not a defence that what was occurring at the employer’s premises was legal (**Joao v Jurys Hotel Management UK Ltd** UKEAT/0210/11/SM).

The provisions at section 44 and 100 implement the Health and Safety Directive (Council Directive 89/391/EEC). Tribunals and courts are therefore required to adopt a construction of these provisions compatible with the protections provided by the Directive. See **Balfour Kilpatrick Ltd v Mr S Acheson & Others** [2003] IRLR 683 below.

Section 44 and 100 provide protections at (1)(a) to (c) for employees who are designated to look after health and safety functions (IE health and safety officers), members of health and safety committees and people who bring health and safety issues to their employer’s attention. Further, pursuant to Section 43B(1)(d) of the Act, informing an employer that “that the health or safety of any individual has been, is being or is likely to be endangered” is a qualifying disclosure. The rights under those sections are important and may be relevant in coronavirus cases, but are not the subject of this guide.



COVID 19: A SERIOUS AND IMMINENT DANGER

For an employee to take the unilateral action under subparagraphs (d) or (e) of the provisions there must have been *"circumstances of danger which the employee reasonably believed to be* ***serious and imminent****"* (emphasis added).

In that context, it is worth considering the Health Protection (Coronavirus) Regulations 2020, which provide at Regulation 3(1) that:

"These Regulations apply where the Secretary of State declares, by notice published on www.gov.uk, that the incidence or transmission of Coronavirus constitutes a serious and imminent threat to public health, and that the incidence or transmission of Coronavirus is at such a point that the measures outlined in these Regulations may reasonably be considered as an effective means of preventing the further, significant transmission of Coronavirus ("serious and imminent threat declaration").

The Secretary of State made such Serious and Imminent Threat declaration on 10 February 2020, formally declaring that coronavirus posed a serious and imminent threat to public health. The statutory declaration made by the secretary of state is not determinative of the test under the Act for whether the employee believed that danger was serious and imminent. But, as a matter of common sense, it is easy to see how an employee could reasonably believe there was a serious and imminent threat from Covid 19 in many different workplace situations.

The risk of contracting coronavirus is evidently capable of being a "danger". The question for tribunals considering claims under the provisions will often be whether an employee had a reasonable belief that the danger posed by Coronavirus was serious and imminent.

It is unlikely that employers will be able to successfully defend claims on the basis that the risk of coronavirus was not "serious". Covid 19 is a potentially deadly disease. The question of when it will be reasonable for employees to believe that coronavirus poses an "imminent" danger will be the central one for tribunals to wrestle with.

On one view, the risk of coronavirus will always be "imminent" whilst the pandemic persists whenever employees leave their homes. If tribunals take such an expansionist view, sections 44 and 100 will become a real issue for employers as employees will find it easy to assert that they reasonably perceive serious and imminent danger in previously innocuous situations.

1. IT IS THE EMPLOYEE'S BELIEF THAT MATTERS, NOT THE EMPLOYER'S OPINION

Before benefiting from protection under (d) or (e) or the provisions above, employees must show that there were: *“circumstances of danger which the employee reasonably believed to be serious and imminent” .*

It does not matter what the employer thought. What matters is what the employee reasonably believed at the time they acted.

In **Oudahar v Esporta Group Ltd** [2011] ICR 1406, the Claimant was dismissed for failing to comply with his manager’s request to mop an area of the kitchen. The Claimant’s reason for refusing to do so was that it was not safe to do so because there were wires coming out of the wall that had been exposed during maintenance works. In deciding to dismiss, the employer relied on a statement from the Claimant’s manager that the area had been safe to mop.

In upholding the Claimant’s appeal against the original ET’s decision, the Employment Appeal Tribunal (HHJ Richardson) explained at ¶27 that: *“the mere fact that an employer disagreed with an employee as to whether there were (for example) circumstances of danger, or whether the steps were appropriate, is irrelevant. The intention of Parliament was that an employee should be protected from dismissal if he took or proposed to take steps falling within section 100(1)(e)”*

Consider a situation in which pubs have reopened and a barman is dismissed for insisting on wearing a facemask to protect himself from coronavirus whilst serving customers. The questions for the tribunal would be whether at that point and in that pub, there were circumstances of danger which the barman thought were serious and imminent, and whether his steps to protect himself were “appropriate”. Whether his *employer* considered that there was imminent and serious danger is irrelevant.

In **Hamilton v Solomon and Wu Limited (UKEAT/0126/18/RN)**: the claimant was coming to the end of his probation period when he was asked to work in a workshop. He refused on the grounds that "*it was unsafe because of the dust that was in the atmosphere".*

The Tribunal adopted an objective approach, noted the employer's adherence to health and safety regulations, observed that suitable dust masks were issued to staff, and that there was a safe system for dust extraction. Consequently they found that:

"the claimant could not in the circumstances reasonably believe that there was a risk to the health and safety of any employee, including him, arising from the circumstances which actually existed at the respondent's workshop .... In addition, I concluded that there were not ... "circumstances of danger which [the claimant] reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert" in the part of the workshop to which Mr Solomon had required him to go and work. That was because I concluded that it was not reasonable for the claimant to believe that his workplace was not safe because its dust extraction arrangements were to any extent inadequate."

Dismissing the appeal, and considering **Oudahar**, HHJ Stacey considered that there might be three questions for tribunals to ask when considering section 100(1)(d) cases (paragraph 17): first, whether there are, in fact, "circumstances of danger" (an objective question); second whether the claimant reasonably believed the danger was serious and imminent and which he could not be expected to avert; third, what the reason for the claimant's dismissal really was.

Employers that observe health and safety laws and communicate that they are doing so to staff will minimise the chances of staff leaving the workplace and claiming protection from dismissal under Section 100.

The importance of giving employees the relevant information

What employees know about the dangers facing them will be key in any case. In **Edwards and others v Secretary of State for Justice** (EAT 0123/14) eight prison officers refused to go to work at Dartmoor prison because the road they had been asked to travel on had been closed due to heavy snow. The employer offered them a ride in a 4x4. The ET concluded that because some colleagues had made the same journey "without difficulty or danger" they could not have had the relevant belief in danger.

The EAT (HHJ David Richardson) disagreed, noting that whether or not the belief in danger was reasonable ***"depends on what the Claimants were told or knew about the condition, a question on which there is evidence with which the Employment Judge did not deal" (paragraph 37).***

The **Edwards** case demonstrates the importance of employers communicating to employees their own risk assessments. Why has the employer formed the view that it is safe for an employee to attend the workplace or do an element of their job? If an employer fails to properly explain their assessment of the risk, an employee might well be more justified in asserting that it was reasonable for them to perceive that risk as serious and imminent.

2. DANGER IS WIDELY INTERPRETED AND THE ACTIONS OF OTHER EMPLOYEES COUNT

The phrase “circumstances of danger” in the legislation has a wide meaning. It does not need to relate to the workplace itself.

In **Harvest Press Ltd v McCaffrey** [1999] IRLR 778 the Claimant left work after a confrontation with a colleague who he felt physically intimidated by. The Claimant left the workplace in the middle of his shift, telephoned his line manager said that he would only return to work if his safety was assured by the dismissal or removal of the colleague. The Respondent treated him as having resigned and sent him a P45.

The Tribunal allowed the Claimant’s claim under s. 100(1)(d). On appeal, the Respondent’s argued that the danger referred to in the Act should be limited to the general state of the workplace itself as opposed to the risk posed by other employees. The EAT (Morison P) disagreed, and noted at paragraph 15:

“As to the submission that the circumstances of danger referred to in section 100(1)(d) means the circumstances of danger generated by the workplace itself, it seems to us that that is too narrow a view of works which are quite general. It seems to us clear that premises or the place of work may become dangerous as a result of the presence or absence of an employee. For example, premises might become unsafe as a result of the presence of an unskilled and untrained employee working on dangerous processes in the workplace where the danger of a mistake is not just to that employee, but to the colleagues who are working with him. It seems to us that the circumstances of danger contemplated by section 100(1)(d) would be apt to cover such a situation and it seems to us that had a fellow employee walked out because of the presence of an unskilled and untrained operative in those circumstances, he would be entitled to the protection of the legislation”.

Consider a situation in which an employee notices that a colleague has a persistent cough and is feverish/sweating, and consequently leaves the premises and refuses to return until steps are taken to remove the colleague from the workplace until he or she is tested for the coronavirus.

If it is reasonable for the employee to believe that danger of infection was serious and imminent, considering the **McCaffrey** case, it might well be unlawful to subject the employee to detriment or dismiss him or her for leaving the premises and refusing to return while the danger persists.

Note that, pursuant to s.44(1)(d) and s.100(1)(d), there is only protection for an employee who refuses to attend work "*while the danger persisted*". So, when the danger passes, the employee can be expected to return to work.

Once the employee no longer reasonably considers that there is imminent danger, a refusal to return will not attract the protection of subsection (d), see **Balfour Kilpatrick Ltd v Mr S Acheson & Others** [2003] IRLR 683 at paragraph 74.

That means individuals would be well advised to explain clearly in an email or letter why they left their workplace, and/or why they consider that they are in danger if they return to their workplace and why that danger has persisted such that they cannot return.

3. POTENTIAL DANGER IS NOT 'IMMINENT'

There is nothing inherently unlawful in an employer proposing that an employee enters a potentially dangerous situation. Many types of employment require employees to do dangerous things. An employers' duty at common law is to take reasonable steps to ensure the safety of their employees, not protect them agains all possible harm

In **ABC News Intercontinental Inc v Gizbert** (UKEAT/0160/06/DM) the Claimant was a staff reporter for ABC News. After working for the Respondent for many years on a variety of assignments, the Claimant began to decline to go to dangerous warzones because of the risks involved. He refused to go to Afghanistan and Iraq in 2002 and 2003. Consequently, the Claimant's contract with ABC News was not renewed.

It is easy to see that foreign journalists might reasonably consider themselves to be in serious and imminent danger whilst in war zones. The Tribunal in **Gizbert** concluded that the Claimant's refusal to go to the warz ones was the cause of his dismissal. However, the Claimant's claims under s.100(1)(d) and (e) failed because the danger was not "imminent" at the point at which the Claimant had been asked to go to war zones, when he was in London. The EAT (HHJ Peter Clark) upheld that finding, noting at paragraph 32 that:

"the Claimant was under no obligation, contractual or otherwise, to visit war zones. The Respondent operated a voluntary war zones policy. His place of work was London. He chose not to visit war zones. He was thus in no danger, let alone imminent danger, nor could he, in the circumstances, reasonably believe otherwise."

Whilst the result in **Gizbert** is unsurprising, what would have happened if the Claimant had flown to Afghanistan, decided he was in serious and imminent danger and then returned home? When a situation is self evidently dangerous (ie a war zone or a Covid 19 ward), employers may find it hard to contradict an employee's assertion that they perceived that danger to be serious and imminent. The question then becomes whether employee can be expected to "avert" the danger (subsection (d)) or whether the steps he or she took were "appropriate" (subsection (e)).

There are few reported cases about what happens when employees are employed to do a job in which it is inevitable at times that they might find themselves in serious and imminent danger. The legislation has not been tested in times of disaster. Unfortunately, that may not stay true for long.

Applying **Gizbert**, query what would happen if a medical professional refused to be transferred to a team dealing with Covid 19 patients and consequently was made redundant? Would he or she have a claim under Section 100(1)(d) or (e)? It appears the answer is no.

4. EMPLOYEES CAN TAKE POSITIVE STEPS TO PROTECT OTHERS FROM DANGER EVEN IF IT HURTS THEIR EMPLOYER'S BUSINESS

Sections 44(1)(e) and 100(1)(e) go further than allowing employees to refuse to work if they consider that there is serious and imminent danger.

Employees are also protected if they take "appropriate steps" to protect themselves or others from a danger they reasonably consider to be "serious and imminent".

Whether steps are "appropriate" depends on "all the circumstances" including the knowledge of the employee "and the facilities and advice available to him", per sections 44(2) and 100(2).

However, it will not be unfair to dismiss an employee relying on subsection (e) if per subsections 44(3) and 100(3): *"the employer shows that it was (or would have been) so negligent for the employee to take the steps which he took (or proposed to take) that a reasonable employer might have dismissed him for taking (or proposing to take) them".*

In **Dent v Greater Reading Omnibus** (ET Case 2700330/97), the Claimant was a bus driver whose indicators stopped working mid-route. The Claimant's manager told him to continue to drive the bus or be sacked.

The Tribunal found that the Claimant had reasonably believed that driving a bus with no indicators constituted a "serious and imminent" danger. It therefore concluded that:

"the applicant took reasonable steps to protect himself and others from the danger by stopping the bus and refusing to drive it further until the defective indicators had been put right" and found he had been unfairly dismissed.

Consider a situation in which a private driver notices that his passenger is sweating and loudly coughing. He stops the car, refuses to continue the journey, and asks the passenger to get out.

If the driver was dismissed for his actions, or had his pay reduced in response, an employment tribunal would be required to consider whether it was reasonable for the him to believe that a passenger sweating and coughing, considering the circumstances of the pandemic, constituted a "*serious and imminent danger*". It would then have to consider whether stopping the car constituted an "appropriate step" to protect himself (or others) from that danger.

Such a case might be difficult for an employer to defend in circumstances in which the risk of deadly infection was high. Of course, if in asking the passenger to get out the driver had done something obviously negligent or dangerous (perhaps leaving the passenger on the side of a motorway), that would give the employer a defence under subsection (3) of both provisions.

If an employee's action is disproportionate, or dangerous or generally unreasonable, they will not have protection under the statute.

What clearly matters is what the employee knew at the time. The employee's "knowledge" and the "facilities and advice available to him" is made relevant by subsection 100(2) to whether any steps the employee took were appropriate.

Consider an ambulance driver who refuses to transport a coughing and feverish patient to hospital. They might struggle to rely on subsection 100(1)(e) if dismissed because:

a. they would (hopefully!) have the "knowledge", and "facilities" and "advice" about how to transport a potentially infectious patient (per section 100(2)); and

b. refusing to transport a patient might be a step *"so negligent for the employee to take that a "reasonable employer might have dismissed him'"*", per section 100(3).

An employer that has taken careful steps to consider health and safety, provides appropriate "facilities" (ie protective equipment) and advice to its employees will be in a far stronger position when dismissing an employee for taking inappropriate steps in relation to health and safety than one that hasn't.

5. THE "DANGER" DOESN'T HAVE TO BE TO FELLOW WORKERS

Employees are not only protected against dismissal and detriment for taking action to avert serious and imminent danger to themselves and colleagues.

If an employee takes steps “to protect himself [or herself] **or others**” in response to serious and imminent danger, it will be unlawful to dismiss, or subject the employee to a detriment. The category of who may constitute “others” under the Act is open. Members of the public count.

In **Masiak v City Restaurants** [1999] IRLR 780, the Claimant refused to cook chicken that had not properly thawed. The Employment Tribunal decided that because the danger was to other members of the public rather than to fellow employees, the Claimant could not rely on section 100(1)(e). The EAT disagreed. HHJ Peter Clark held that:

“as a matter of pure construction, ... 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. Had that been the intention of Parliament the Act would have referred to “other persons employed” or “other employees” or even “other workers”. In the absence of such limitation we have concluded that the wider construction contended for by Mr Pinder is correct, and we hold that the expression “other persons” contained in section 100 (1)(e) extends to members of the public”

Consider a situation in which a care home worker leaves work because they receive an alert that they have come into close contact with someone who has been diagnosed with Covid 19. Such an employee might well argue that they reasonably considered other service users would be in serious and imminent danger from the risk of infection from the employee themselves, even if they were not showing any symptoms of illness.

Whether or not that view was reasonable, and whether or not refusing to attend work was an “appropriate step” will depend on the advice available to that employee at the time, per section 100(2).

What if an employee’s partner was particularly vulnerable to Coronavirus and “shielding” in accordance with Government advice? Could that employee claim that their partner was an “other” who would be in “serious and imminent” danger if they were not allowed to work from home? Would the prospect of transmission of the virus outside work hours be sufficiently "imminent" under the provisions?

6. THERE IS NO PERIOD OF QUALIFYING SERVICE REQUIRED, COMPENSATION IS UNCAPPED AND MAY INCLUDE INJURY TO FEELINGS

No qualifying period of service and unlimited compensation

Where an employee has been dismissed because of taking protected action under section 100(1) of the Act, there is no period of qualifying service necessary for that employee to bring a claim of unfair dismissal, per section 108(3) of the Act. Further, where an employee has been dismissed because of taking protected action under section 100(1) of the Act any compensatory award is uncapped, per section 124(1A) of the Act.

Employees who have only been working for an employer for a short period of time could make large claims for compensation, especially in circumstances in which unemployment is high and finding alternative employment will not be easy.

Damages for detriments and injury to feelings

If an employee is subjected to a "detriment" because of any act under Section 44(1)(a) to (e), he or she will be able to claim compensation pursuant to section 49 of the Act. That compensation will be calculable on the basis of any loss that the employee has suffered because of the detriment (section 49 (2)(b)).

Consider a situation in which an employee insists on working from home unless he or she is provided with an N95 facemask in circumstances in which she or he reasonably considers that there is a serious and imminent risk from coronavirus at work. The employer refuses (or is unable) to provide the masks and refusing to attend the workplace is found to be am appropriate step pursuant to (1)(e).

If the employee is involuntarily furloughed on 80% of his or her salary on the grounds of him or her taking part in protected conduct under Section 100, the reduction in pay is likely to count as a detriment, entitling the Claimant to compensation.

Injury to feelings awards

In **Virgo Fidelis Senior School v Boyle** [2004] ICR 1210, the EAT decided that the approach to the award of compensation for unlawful detriment under section 49 of the Act should be the same as is applied in cases of unlawful discrimination, (despite the differences in the relevant statutory provisions) and therefore claims for injury to feelings are recoverable.

Consequently (as the law currently stands) employees subjected to detriment on the grounds of taking protected health and safety action will also be entitled to an injury to feelings award.

However, following the Court of Appeal's judgment in **Gomes v Higher Level Care Ltd** [2018] IRLR 440, in which it was held that no injury to feelings claim was possible for detriment under the Working Time Directive, there is a serious doubt as to whether **Virgo Fidelis** is rightly decided and will be followed (see **Timis v Osipov** [2019] I.C.R. 655 at paragraph 27).

7. CONSTRUCTIVE DISMISSAL CLAIMS ON HEALTH AND SAFETY GROUNDS ARE LIKELY

Implied contractual term as to health and safety of employees

Every employment contract contains an implied term that the employee will take reasonable steps to ensure the safety of their employees. If an employer fails to take care of its employees' safety during the pandemic, employees may be able to resign and claim constructive dismissal on the basis of a fundamental breach of that term.

No band of reasonable responses

Whether or not there has been a fundamental breach of contract is an objective question, not one which the tribunal will assess with regards to any band of reasonable responses (see **Bournemouth University Higher Education Corporation v Buckland** [2010] ICR 908 ("**Buckland**")).

Even reasonable behaviour by an employer might be a repudiatory breach of contract. See Sedley LJ at paragraph 28 of Buckland:

"take the simplest and commonest of fundamental breaches on an employer's part, a failure to pay wages. If the failure is due, as it not infrequently is, to a major customer defaulting on payment, not paying the staff's wages is arguably the most, indeed the only, reasonable response to the situation. But to hold that it is not a fundamental breach would drive a coach and four through the law of contract, of which this aspect of employment law is an integral part".

Automatically unfair constructive dismissals

A constructive dismissal can be automatically unfair if the reason for the employer's repudiatory breach is retaliation against the employee for doing a protected act under Section 100(1) of the Act.

So, if an employer:

a. acts in repudiatory breach of the employee's contract (by, say, suspending the employee when there was no contractual power or grounds to do so);

b. the reason for the employer's actions was the employee's decision to leave the workplace when she reasonably considered she was in serious and immediate risk of danger under section 100(1)(d) of the Act;

then if the employee resigns in response, she will likely have been automatically constructively dismissed and will be able to claim unlimited damages without any qualifying period of service required.

In **Skelton v Artel Services Ltd** (ET 3104190/99), the Claimant refused to drive a truck which was missing a mirror. He alleged his manager shouted at him:

""Well, you can go and stand in the f---ing yard all day, as there is no f---ing work for you today""

The Claimant had brought to his employer's attention circumstances relating to health and safety under Section 100(1)(c). It is fair to say that on the tribunal's reading he might also have fairly have been found to have considered that driving the truck down would be circumstances of "serious and imminent" danger which he took appropriate steps to avoid.

When the employer treated him in a way that constituted a repudiatory breach of his contract in response, the Claimant was able to consider himself dismissed. That dismissal was therefore automatically unfair.

A failure to deal with health and safety matters alone (probably) won't lead to an automatically unfair constructive dismissal

For a constructive dismissal to be automatically unfair, the repudiatory act or omission must be caused by the protected conduct of the employee. There are no cases on point in relation to Section 100, but in relation to the whistleblowing provisions at Section 103A, in **Price v Surrey County Council & Ors** (UKEAT/0450/10/SM), the EAT upheld the Tribunal's finding that the employer's false denial that there was evidence to substantiate the Claimant's complaints of bullying had constituted a repudiatory breach of contract. However, because there was no "causal link" between the employer's conduct and the Claimant's protected disclosure, the dismissal was not automatically unfair under Section 103A of the Act. As Carnwath LJ held at paragraph 52, the purpose of the whistleblowing provisions was

"to ensure that employees do not suffer simply because they have had the courage to speak up about problems affecting their workplace. Thus it is the "making" of the protected disclosure which is the focus of attention, and which must be the principal reason for the dismissal, or for the other detrimental action or inaction. In this case, by contrast, Mrs Price's forced resignation came about, not because of the making of her complaint as such, but because of the inadequacy in one important respect of the authorities' response to it".

Applying this to health and safety constructive dismissals: i) a failure to ensure an employee has a safe system of work may well be a repudiatory breach of contract entitling the Claimant to resign and claim unfair dismissal; but ii) if that failure was not motivated by the Claimant's protected conduct under Section 100(1), any such dismissal will probably not be automatically unfair.

Furloughing in response to health and safety complaints

If an employee refuses to attend her workplace because he or she reasonably believes that the danger from Coronavirus is "*serious and imminent*" and in response her employer furloughs her under the Coronavirus Jobs Guarantee Scheme and reduces her pay to 80%, what is the position?

However reasonable an employer's conduct is, if it is in repudiatory breach of contract (and reducing an individual's pay without consent will almost always be a repudiatory breach), and in response to protected conduct under section 100 of the Act, then an employee may well be able to claim that they have been automatically unfairly dismissed.

An employer might be able to defend such a claim by contending that the reason for furloughing the employee was not her protected conduct, but the situation itself in which it was not able to provide a working environment in which the employee felt safe. That is a difficult distinction to draw, but employers, employees and tribunals will need to do so.

If an employer is unable to comply with the health and safety standard required or sought by an employee, such a constructive dismissal could be substantively fair under section 98(4) of the Act (as long as any dismissal is not retaliatory because of protected conduct).

8. THE PROTECTIONS ARE INDIVIDUAL, NOT COLLECTIVE

The rights under section 100 protect individual, not collective action. A tribunal has no jurisdiction to hear ordinary unfair dismissal claims if the claimants at the relevant time were taking part in unofficial industrial action: (section 237 of the TULCRA). This guide doesn't consider the detailed provisions within the Trade Union and Labour Relations Consolidation Act 1992 on when industrial action will be lawful.

In **Balfour Kilpatrick Ltd v Mr S Acheson & Others** [2003] IRLR 683 ("**Balfour**"), the claimants worked on a construction site on marshy ground. There was a particular risk of Weil's disease, a nasty water borne infection carried in rat urine. Warning notices around the site were displayed and the Claimants were provided with PPE. After heavy rainfall there was much standing water on the site. The claimants' PPE was soaking wet and there were worries about slipping hazards and working with electricity. All the claimants left the site in the middle of the working day in response.
The ET found that on the Tuesday on which the workers had walked out, and the following Wednesday, leaving the workplace was protected conduct under section 100(1)(d). However, by Friday the weather had improved and the circumstances of danger no longer existed.

All of the workers at the site were dismissed and were then sent letters reengaging them. On appeal they sought to argue that taking industrial action constituted "reasonable means" of bringing to the employer's attention "circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety", per section 100(1)(c) of the Act.

The EAT (Elias J) rejected that submission, noting at paragraph 59 that:

"the concept of informing the employer cannot extend to taking industrial action to impress upon him the gravity of the issue as perceived by the employees. That is, in truth, part of the process of industrial warfare when the attempted negotiations to resolve the impasse have broken down".

Employees and their advisers must be careful in exercising their rights under Section 100 that they do not stray into taking unlawful industrial action. Each individual seeking to assert that any dismissal or detriment they are subjected to would be unlawful needs to show they fall within the ambit of one of the provisions under section 100.

If walkouts are related to pay discussions and/or are collectively organised such that employees who couldn't reasonably say they need to "avert" danger by leaving the workplace walk out (per section 100(1)(d)), then the action may constitute an unlawful strike and those employees may lose their ordinary unfair dismissal protections.

There is no express prohibition on multiple employees leaving the workplace citing Section 100 at the same time. That is what occurred in **Edwards** and **Balfour**. Unions will play an important role in advising their members about their rights under Section 100 in light of coronavirus. However, the provisions are not a shortcut to industrial action and tribunals will likely carefully scrutinise circumstances in which it appears that a walkout has been collectively organised.

9. IT MAY NOT ONLY BE TRADITIONAL EMPLOYEES THAT ARE PROTECTED

Section 44 expressly only protects “employees”. However, the Health and Safety Directive (Council Directive 89/391/EEC) appears to be wider in scope.

Article 11(4) of the Directive provides 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”.“

“Workers” is defined in at Article 3 of the Directive as "any person employed by an employer, including trainees and apprentices but excluding domestic servants" and "employer" is defined as "any natural or legal person who has an employment relationship with the worker".

Query whether it would be open to an Employment Tribunal to adopt an interpretation of section 44(1) in a way that conforms with the Directive, so a wider class of individuals than those that count as “employees” under the Act are protected.

10. Employers must be clear about why they are taking the action they are

Employers are used to dealing with circumstances in which illness and disease means that employees are unable to continue with their jobs because of the risks to them and the public. If a train driver loses his or her sight, it is unlikely they will be able to remain in employment.

Often these issues are addressed and litigated about in the context of disability discrimination under the Equality Act 2010. People who meet the definition of disability under Section 6 of the 2010 Act may be in danger in the workplace if they undertake activities that would not be dangerous for non-disabled people. Coronavirus means that previously innocuous activities may be dangerous for a whole range of people, irrespective of whether they are disabled (although people with underlying health conditions who may be disabled under the Act will be more at risk).

Where an individual leaves or refuses to attend their normal place of work because of the dangers they perceive which are posed by coronavirus, employers will be left with a difficult decision. The employee will likely argue that their conduct is protected under (d) or (e) of the provisions. However, (evidently) employers cannot run their businesses functionally if each of their employees are unilaterally able to make decisions about whether they attend work, even if it is reasonable to perceive serious and imminent danger from coronavirus.

Take a situation in employee who is particularly at risk from Covid 19 because of their age or health and leaves the workplace. The employee asserts that the danger has "persisted" and insists on working from home in circumstances in which it is not feasible. An employer in this situation might consider they needed to dismiss, but worry that they are at risk of a claim for unfair dismissal under Section 100.

If the employer decides to dismiss, the crucial distinction that they would need to make is that they were doing so *not in response to the employee's protected conduct, but in response to the circumstances in which because of Coronavirus the employee is unwilling or able to safely return to work.*

If a decision is made in haste, ie informing the employee immediately after they leave the workplace that they are fired, then the employee's case that they have been dismissed contrary to Section 100 will be strengthened.

Conversely, if a decision is made carefully, evidenced in writing, explaining that considering the circumstances (including health and safety actions reasonably undertaken by the employer and the employee's health), then a tribunal is more likely to accept that the reason for the dismissal is the circumstances caused by the pandemic, not the protected conduct of the employee itself. That is a narrow, but important distinction.

Conclusion and postscript

It is fair to say that when Parliament enacted sections 44 and 100 of the Employment Rights Act 1996, they probably didn't have a global pandemic in mind.

Each of the provisions is wide in scope and will require employees, employers and ultimately tribunals to make difficult decisions about workplace relations in the time of coronavirus. When is it reasonable to think a danger is "imminent"? What is an appropriate step for an employee to take in circumstances in which we are all (to a lesser or greater extent) in danger from Covid 19? When can employees be reasonably expected to avert the risk from Coronavirus, such that they do not need to leave their place of work?

Ultimately these are factual questions that will be determined by tribunals, but underlying them is a more difficult point of principle. To what extent can employees be expected to bear an increased degree of risk at work because of the pandemic? How far do employers have to go to protect employees from the new danger that we are facing?

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Donations

This document has been made available free of charge, but if you have found it helpful in advising paying clients, I would be delighted if you would donate £25 in lieu of payment to the Free Representation Unit, who will no doubt be assisting many clients with cases involving the questions raised above.

Acknowledgements

Stuart Brittenden of Old Square Chambers' excellent blog on Health and Safety dismissals and industrial action can be found here: https://uklabourlawblog.com/2020/03/27/the-coronavirus-rights-to-leave-the-workplace-and-strikes-by-stuart-brittenden/

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