Thomas More Chambers

Health and Safety Claims Under The Employment Rights Act 1996

Introduction

1. At the present time, the issue of health and safety at work has never been more important. Employees on the frontline are, in many cases, being cajoled, threatened and bullied to attend work in circumstances where they have very legitimate concerns about the potential of being infected by Covid-19. Further, employees are often being forced to work in circumstances where their employers have failed to implement adequate health and safety measures. The continuing failure by the Government to provide adequate PPE to healthcare professionals is the most prominent example of such failures.

2. This Article is one of several by the Thomas More Chambers Employment Law Team that will address the rights of employees and workers in the context of Health and Safety law. Future Articles will discuss issues such as potential criminal and civil liability under the Health and Safety at Work Act 1974; PPE legal requirements; health and safety whistleblowing; and potential employer liability for the impact of the current work situation on employee's and worker's mental health.

3. This Article considers the remedies available to employees under the Employment Rights Act 1996 ("the ERA") when they suffer detriment (under section 44) and/or dismissal (under section 100) because they raised Covid-19 health and safety issues at work, refused to attend work or took other appropriate steps because of that health and safety risk.

Sections 44 and 100 ERA 1996

4. Section 44 provides that employees have the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer on the grounds that he is exercising certain health and safety rights set out in subsection (1). Safety officers and safety representatives are protected from dismissal for carrying out their functions. The material provisions that are relevant to the current circumstances are as follows:

> *"(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 —*
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> *...*
>
> *(c) being an employee at a place where —*
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> *(i) there was no such representative or safety committee, or*
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> *(ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means, he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health and safety,*
>
> *(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*
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> *(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."*

5. Identical provisions are set out in section 100 in relation to employees who are dismissed if the reason, or the principal reason (if there is more than one) for the dismissal is that the employee took one of the steps set out in section 100(1)(c), (d) and (e). Such dismissals are automatically unfair.

6. Under section 105(3) ERA 1996, a dismissal is also unfair if there is a redundancy and the reason why the employee was selected for dismissal was one of those set out section 100(1).

7. The genesis of sections 44 and 100 ERA 1996 are to be found in the European Directive 89/391/EEC on the introduction of measures to encourage improvements in the safety and health of workers at work. Article 1(2) provides that the Directive:

> *"contains general principles concerning the prevention of occupational risks, protection of safety and health, the elimination of risk and accident factors, the informing, consultation, balanced participation in accordance with national laws and/or practices and training of workers and their representatives ..."*

Section 44(1)(c)/100(1)(c) – Bringing Health and Safety Circumstances to the Employer's Attention

8. An employee can only rely upon the protection in subsection(1)(c) in circumstances where there was either no health and safety representative or safety committee through which health and safety concerns could be raised; or such a representative or safety committee was in place but it was not reasonably practicable for the employee to raise the health and safety matter through the representative or safety committee.

9. This requirement was considered by Elias J in *Balfour Kilpatrick Ltd v Acheson and others* [2003] IRLR 283, EAT (*'Balfour Kilpatrick'*). The EAT was highly critical of the argument that a failure to raise imminent health and safety risks through appointed health and safety representatives removed the protection afforded by the legislation. At paragraph 54, Elias J stated (emphasis added):

> *"There is something highly artificial about a contention that when drawing matters of serious and imminent concern to the employer, the employees must concern themselves with the appropriate route whereby that information is conveyed. In the practical world, we cannot believe that any employer would criticise an employee for informing him of imminent health and safety risks, whether directly or through any other means of communication. The important thing is that the message is communicated quickly and succinctly. Moreover, in*

Article 13(2)(d) of the Directive, which we have reproduced above (para 24), it is provided in terms that workers must "immediately inform the employer" of serious and immediate dangers to health and safety. If and in so far as there is a conflict between the Directive and section 100(1)(c) then we must so far as we can construe the section compatibly with the Directive. We consider that there is no difficulty in doing that: in our view it would be possible to insert at the end of paragraph (e) the words ***"or to communicate these circumstances by any appropriate means to the employer****". That would in turn restrict, in our view, the scope of 100(1)(c). It may be there are better ways of achieving the same result. What we are clear about, however, is that an employee exercising his obligations under Article 13 of the Directive— and we emphasise that they are obligations— cannot conceivably be lawfully dismissed under English Law on that account".*

10. The health and safety matter or matters at issue must be brought to the employer's attention by reasonable means. In *Balfour Kilpatrick*, the employers appealed against the tribunal's finding that there had been an automatic unfair dismissal under section 100(1)(c). This appeal succeeded on the grounds that industrial action was not a reasonable means of bringing health and safety concerns to the employer's attention. The EAT accepted that there may be circumstances where communication by action rather than words may be a reasonable means of bringing the issue to the employer's attention, but reasoned that the circumstances '*must be exceptional' (at paragraph 59)* – such as an employee pointing out a hazard to his employer who is some distance away from him.

Sections 44(d)(e) and Sections 100(d)(e) – Detriment or Dismissal for Staying Away from Dangerous Workplace or Taking Action to Prevent Danger

11. When determining whether the steps the employee took or proposed to take under sections 44(e)/100(e) were reasonable, the court must consider all the circumstances including the employees' knowledge and the facilities and advice available to them (sections 44(2)/100(2)).

12. An employee is not to be regarded as subjected to a detriment if the employer can show the steps the employee took or proposed to take were so negligent that any

reasonable employer would have treated them in the same manner (sections 44(3)/100(2)).

13. Both subsections (d) and (e) require reasonable belief on the part of the employee that there were serious and imminent circumstances of danger. Case law demonstrates that the courts tend to interpret these provisions widely and in favour of the claimant employee. For example, in *Kerr v Nathan's Wastesavers Ltd* 1995 EAT IDS Brief 548 the EAT held that employment tribunals should not place too onerous a duty on the employee to make enquiries to determine if their belief is reasonable. Similarly, in *Harvest Press Ltd v McCaffrey* [1999] IRLR 778, the EAT confirmed that the scope of section 100(1)(d) was intended to be wide and that the word 'danger' should be used without limitation (*at paragraph 17)*. *Joao v Jurys Hotel Management UK Ltd* UKEAT0210/1 also established that an employee is protected if they genuinely and reasonably believed that a workplace practice created a health and safety risk, even if that belief was mistaken.

14. Further, in *Masiak v City Restaurants (UK) Ltd* [1999] IRLR 780, the court held that danger under subsection (e) can include danger to others as well as to the employee directly and that an employment tribunal must hear evidence before determining that there is no serious or imminent danger.

15. As set out above, in *Balfour Kilpatrick Ltd v Acheson* [2003] IRLR 283 the EAT held that in order to make section 100(1)(e) compatible with the Framework Health and Safety Directive (*89/391/EC),* the words "*or to communicate these circumstances by any appropriate means to the employer*" should be read into section 100(1)(e). Therefore, employees will be protected under s100(1)(e) if they communicate or take steps to communicate the relevant circumstances to their employer by appropriate means.

16. In *Oudahar v Esporta Group Ltd* [2001] UKEAT/0566/10 (a case which considered the provisions of section 100(1)(e)) the EAT set out a two-tiered test that employment tribunals should adopt when determining whether a dismissal was automatically unfair for a health and safety reason. The approach should be:

i. Did the employee reasonably believe that there was a serious and imminent danger and did the employee take or propose to take appropriate steps to protect himself or other persons from the danger or to communicate these circumstances to their employer by appropriate means?

ii. If the answer to (a) is yes, was the sole or principal reason for the dismissal the fact that the employee took or proposed to take the steps in question?

Procedure and Remedy

17. If an employee suffers detriment for the reasons set out in section 44 or has been dismissed for the reasons set out in section 100, he or she may bring an employment tribunal claim. Claimants must first comply with the ACAS Early Conciliation process and also abide by strict time limits. Claims must be brought within three months of the act complained of (plus the extra time for early conciliation). If the complaint relates to a series of acts, the claim should be brought within three months of the date of the last act.

18. If the tribunal finds that a section 44 claim is established, it must make a declaration to that effect and may make an award of compensation to the employee. The tribunal will award a level of compensation that is just and equitable in all the circumstances (section 49(2)).

19. An employee who succeeds on a section 100 claim will be found to be automatically unfairly dismissed on health and safety grounds. The compensatory limits that apply to 'normal' unfair dismissal claims do not apply to automatic unfair dismissals such as dismissals on health and safety grounds.

20. Further, the two-year employment qualifying period that applies to 'normal' unfair dismissal claims does not apply to automatic unfair dismissal claims. Therefore, an employee who is dismissed on the relevant health and safety grounds shortly after his or her employment began can bring a section 100 claim.

21. It should also be noted that health and safety claims related to raising or communicating health and safety concerns may overlap with other potential claims such as asserting a statutory right (under section 104) and/or making a public interest disclosure (whistleblowing) (under Part IVA ERA 1996).[1]

Covid-19 and Health and Safety Claims under the Employment Rights Act 1996

22. The Covid-19 pandemic and the need, notwithstanding the lockdown, for many employers to have their employees working in factories, supermarkets, public transport, care homes and hospitals is likely to lead to a surge in claims under sections 44 and 100 ERA 1996. Until such cases are heard, conclusions as to how the tribunals and appeal courts deal with them is, by necessity, speculative. The following points, however, can be made:

    i. The authorities pre Covid-19 have applied a wide interpretation to the concept of 'danger' in sections 44 and 100.
    ii. The simple fact is that danger (in the form of risk of infection), over the last few weeks and at the present time, is both serious and imminent.
    iii. Any requirement for an employee to work away from home at this time increases the risk of infection (just by virtue of using crowded public transport), even where the employer has taken health and safety measures to reduce the risk of infection.
    iv. Many health and safety measures taken by employers were and, in some cases, remain inadequate. This is particularly the cases in relation to PPE.[2]

23. Given the above considerations, it is likely that any employee who raises health and safety concerns, in an appropriate manner, with his employer about the dangers of infection from Covid-19 in the workplace and is treated detrimentally as a result (for example, with the threat of disciplinary action or selection for redundancy) will have a good detriment claim under section 44 .[3] Any employee dismissed for raising such

[1] Health and Safety and Whistleblowing will be the subject of a separate article by the TMC Employment Law Team.

[2] PPE requirements will be the subject of a separate article by the TMC Employment Law Team.

[3] As well as, potentially, a whistleblowing claim and/or an assertion of statutory right claim.

health and safety concerns with his employer is also likely to have a good automatic unfair dismissal claim under section 100.

24. Similarly, employees who take action by refusing to work in their normal workplace because of their concerns of the increased risk of contracting Covid-19 and are consequently subjected to detrimental treatment (by for example the threat of/actual disciplinary action) or dismissed as a result are also likely to have good claims under section 44 or section 100.

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