



Are employees who live with a shielded person required to return to work?

Personnel Today by *Sophie Vanhegan* - 22 May

As people begin to return to work, official guidance continues to focus on employees who are healthy enough to return to their workplaces, or (at the other end of the scale) employees who are clinically extremely vulnerable and required to continue “shielding”. But what about employees who live with a shielded person? They are likely to be very concerned about the risk they might pose for that shielded person if they were to return to the workplace. Is there a discrimination risk if employers require those employees to return to work regardless?

What is associative discrimination?

Essentially “associative discrimination” is where an employee argues that they were discriminated against, not because of a protected characteristic they have themselves, but because of the protected characteristic of another individual. So in this case, employees would be saying they have been discriminated against because of the disability of their shielded household member.

Are all shielded persons likely to be “disabled”?

Shielded people are those who are “clinically extremely vulnerable”. It is therefore very likely that those shielding are likely to be disabled within the meaning of UK employment law in most cases (ie, that they have a physical or mental impairment which has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities).

Employers should not forget that others may also qualify as disabled for these purposes, such as those who are clinically vulnerable, but not shielding. Additionally, employers should remember that some people who are “clinically extremely vulnerable” were omitted from the list of those recommended to “shield” but the legal risks will still apply to them regardless.

Can an employee claim associative discrimination if they are treated badly by their employer for refusing to attend

work because someone in their household is shielding?

It should be noted that the government's shielding guidance does not require those living with shielded people to also shield, only to follow guidance on social distancing. However, many people will prefer to stay at home and prioritise the health of their loved ones rather than return to work and increase the risks for them.

It is also worth noting that there are various claims (in addition to discrimination) which employees might bring when being instructed to return to work in such circumstances that are outside the scope of this article, such as whistleblowing, and claims for detriment or unfair dismissal in relation to health and safety.

In terms of associative discrimination claims, employers who treat an employee detrimentally (for example, by disciplining them or not paying them) or who dismiss an employee in such circumstances may open themselves up to such claims in the following ways:

1. *Direct discrimination* – this type of claim could arise if an employee is treated less favourably because of their household member's disability. This looks to be a difficult claim to bring in these circumstances, because (i) in most cases it will be that the employee is being disciplined (or treated as on unpaid leave) because they refuse to attend work rather than because they live with a disabled person; and (ii) the employee would need to be treated less favourably than a comparable employee refusing to return to work who is not living with a disabled person.
2. *Harassment* – this type of claim could arise if an employer engages in unwanted conduct related to the shielded household member's disability which creates an intimidating environment for the employee. This could arise from the employer asking the employee to return to work in an intimidating way when they are already aware of the household member's disability. A one-off incident can amount to harassment, so employers should be cautious when communicating with employees about their return to work in such circumstances in order to mitigate the risks.
3. *Victimisation* – this claim could arise if the employee has raised any complaint or grievance regarding treatment of another employee who is shielding, or raised an associative harassment or direct discrimination claim as set out above, and then is subjected to a detriment for raising such a complaint. Even if this is not the real reason for the detrimental treatment, this is another potential discrimination claim an employee might try to bring.

Given the unprecedented times we are in, employment tribunals may well look to interpret the legal framework broadly to give redress to employees making claims in such circumstances.

It is worth noting that the law on associative discrimination does not require employers to make reasonable adjustments for an employee living with someone with a disability or protect them from discrimination arising from disability or (at least currently) associative indirect discrimination.

What can we do to reduce the risks of such claims?

Employers can mitigate these risks by listening to the employee's concerns and seeing if there are any ways these can be addressed, for example, can they do their role from home? Could they be redeployed to a role where homeworking is possible? If not, is there a suitable role at the workplace which can be kept away from others which could be offered temporarily? Could the employee be placed on furlough? At a minimum, employers could consider employees not wishing to yet return to work to take a period of unpaid leave without any disciplinary repercussions.

Overall, the best thing employers can do at the moment is to be understanding. Businesses naturally have to get back to normal at some point and employees generally understand the importance of this. However, these are scary and unprecedented times and employees will likely respond positively and gratefully to supportive employers.

Although disciplining (and eventually dismissing) employees remains an option open to employers, there are inherent risks in doing so, and there are likely to be better solutions which allow the business and the employee to thrive together in the long run.

Read the full article [here](#).