Automatically unfair Covid dismissals

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As expected, there has been an increase in employees seeking to bring claims of automatic unfair dismissal where they have been dismissed for:

(i) telling their employers about harmful circumstances to health and safety;

(ii) leaving work or refusing to go to work where the employee believed there was serious and imminent danger; and

(iii) taking appropriate steps to protect themselves or others from serious and imminent danger.

The attraction of these claims is that employees can bring such claims even where they don't have two years' service, and automatic unfair dismissal in these cases is uncapped in compensation.

Recently, the employment tribunal has handed down another judgment in relation to an employee who has brought a combination of

these claims, and we have taken a look at what the cases to date can tell us about the tribunal's approach to these issues generally.

Preen v Coolink and Mullins

In this most recent case, the employee raised safety concerns with his manager about going to work during the first national lockdown. His role could not be done from home, but he wanted to follow the government's guidance to stay home, save for that he would help out if work was urgent or essential. A couple of days later he was dismissed for 'redundancy' for refusing to come to work.

The tribunal held that the employee had clearly communicated his concerns about continuing to work during the lockdown, that he reasonably believed that continuing to do non-essential work would put himself and others at risk during the first lockdown and that raising this to his boss was the reason he was dismissed. Therefore, his dismissal was automatically unfair. However, the employee had not "blown the whistle" in this scenario as the concerns he raised about working during the national lockdown did not disclose information.

In respect of other parts of the health and safety provisions which the employee sought to rely on, the tribunal made clear that that Covid-19 doesn't automatically create circumstances of serious and imminent danger and 'something more' is required such as unsafe working practices or medical vulnerability for arguments (neither of which applied here).

This case demonstrates that it is much easier for employees to rely on the health and safety protections regarding informing employers about harmful circumstances to health and safety, than to prove that their workplace posed a 'serious and imminent danger' allowing them to refuse to go to work or take other measures to protect themselves or others from danger.

Other cases

However, in Gibson v Lothian Leisure, a "danger which the employee reasonably believed to be serious and imminent" was found by the tribunal. The employee was found to have been automatically unfairly dismissed for raising concerns about lack of PPE or other workplace measures, out of concern for his clinically vulnerable father. The employee was told to 'shut up and get on with it' and then summarily dismissed by text message.

In Rodgers v Leeds Laser Cutting, a tribunal found that the dismissal of an employee who said he would not return to work until after lockdown, because he feared he would infect his children with Covid was *not* automatically unfair. Mr Rodgers was found not to have a reasonable belief in serious and imminent workplace danger. The tribunal was influenced by his actions, including breaching self-isolation guidance the day after leaving work, and the employer's implementation of government guidance (hand-washing and social-distancing).

In *Accattatis v Fortuna Group (London)*, the tribunal again found that the dismissal of an employee for refusing to work during lockdown was *not* automatically unfair. The employee had expressed concerns about commuting and working in the office during lockdown and had repeatedly asked to be furloughed. The tribunal found that he reasonably believed there were circumstances of serious and imminent danger; however, his response was not only that he wanted to stay at home (which was agreed, either on unpaid leave or annual leave), but also that he be allowed to work from home on full pay or be furloughed on 80 per cent pay. These were not considered by the tribunal to be appropriate steps to protect himself from danger.

Relevant factors

All of these judgments are tribunal decisions and so not binding on other tribunals. They also arise out of the beginning of the pandemic and so future cases will likely need to grapple with the different factual circumstances about what we knew about the virus and the guidance in place at the relevant times.

Each case will heavily turn on its facts but it's clear from these judgments that the following are highly relevant factors:

- the conduct of the employee: whether their concerns were valid, properly communicated to their employer, whether the steps they took in response were reasonable and whether the employee had a history of being "challenging".
- the conduct of the employer: whether safety measures had been taken, whether those were communicated to the employee, whether the employer considered the employee's concerns and the manner of the dismissal.
- whether the employees' concerns arose from the workplace itself or the broader environment.
- whether the employee's concerns are linked to a higher chance of vulnerability to Covid-19.