

ELA Covid-19 Working Party

Health and Safety: s44 and s100 ERA Claims by employee

Nadia Motraghi, Old Square Chambers 25 March 2020

1. The Coronavirus poses grave risk to public health and has particularly serious consequences for one person's health, including the risk of serious illness and death.
2. While the Coronavirus pandemic continues to spread across the country and while there is neither a vaccine nor antibody test available, employees will be understandably very concerned for their own health and safety, particularly while at work. The workplace provides a source of potential risk because the disease is highly contagious, meaning there is a risk of contracting the virus from colleagues, or others within the workplace.
3. S44 and s100 Employment Rights Act (ERA) provide protection for employees against detriment and dismissal respectively, in cases involving health and safety concerns. I anticipate that an increased number of cases will be presented, especially under s44(1)(d)/ 100(1)(d) on "evasive action" & 44(1)(e)/ 100(1)(e) on "protective action".

Recap on the statutory tests in s44 & 100 ERA

4. To recap, in "evasive action" cases, employees have the right not to be subjected to any detriment/ deliberate failure to act done on the ground that 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 either left / proposed to leave or refused to return to his place of work/ any dangerous part thereof (while the danger persisted).
5. The employee's belief must be both genuine and reasonable. If he cannot reasonably avert the danger, then the employee is entitled to get out of harm's way.
6. In "protective action" cases, employees have the right not to be subjected to any detriment/ deliberate failure to act done on the ground that in "circumstances of danger" which the employee "reasonably believed to be serious and imminent" he took/ proposed to take "appropriate steps to protect himself or other persons from the danger".
7. In protective action cases, the danger may be danger to the employee personally or danger to others, including members of the public: *Masiak v City Restaurants (UK) Ltd* [1999] IRLR 780 and so arguably now also members of the employee's family.

8. In protective action cases, the appropriateness of steps the employee took/ prepared to take are judged “by reference to all the circumstances” (s44(2)/ s100(2) ERA) including, the extent of the employee's knowledge and the facilities and advice available to him at the time.
9. It is a defence where the employer shows that it was/would have been so negligent for the employee to take the steps he took/ proposed to take that a reasonable employer might have treated him as the employer did.
10. S100 provides that where the reason / principal reason for a dismissal is an evasive action case or protected action case described above, that will amount to unfair dismissal.
11. It is also worth recalling that 'danger' is not confined to danger which arises from the circumstances of the workplace itself but also includes from those within it, including the risk of being attacked by a fellow-employee (*Harvest Press Ltd v McCaffrey [1999] IRLR 778*).

Potential claims

12. A number of situations could arise or may have already arisen, which might prompt an employee to raise a grievance or present a claim to the Employment Tribunal (albeit one with no clear date for determination):
 - a. Supermarket checkout operators working close to the public, without the benefit of screens or other protection to ensure a 2m distance, may take the view that they are in serious and imminent danger of contracting the virus particularly if they themselves have health conditions making them more vulnerable to contract the virus.
 - b. Healthcare employees are most likely to be involved in coming into contact with those who have a diagnosis of coronavirus or have severe coronavirus symptoms/ illness. If PPE is not provided, we may expect to see individuals who refuse to come into work or absent themselves from the workplace, or possibly bring in their own PPE substitutes. The adequacy of particular PPE is likely to be an area of dispute, not least in relation to PHE's revised guidance on PPE which has been the subject of controversy as it is no longer consistent with WHO standards.
 - c. Employees who consider that the safeguards for themselves or others (customers/ patients) are inadequate may refuse to care for particular patients/ clients if it poses a risk of cross infection.
 - d. Employees with knowledge that another colleague who is in the workplace (i.e. not working from home) with coronavirus symptoms and/or has not self-isolated for the requisite period, may refuse to work with that particular colleague and/or notify other colleagues and/or absent themselves from the

workplace. This might be of particular concern for employees in restaurants/ takeaways who see a colleague who has not followed hygiene guidance in the preparation of food.

Interim Relief

13. Lastly, it is worth remembering that applications for interim relief can be made in s100 claims. How this will work in practice at present is anyone's guess.