



## Can dismissal for self-isolating be automatically unfair?

---

**Thomas Wood**

**Barrister**

**St John's Buildings**

Most of us are now up to speed (as far as possible) with the principle, and maybe practice, of furlough, but one thing that has yet to be tested is the ability of unfair dismissal protection to safeguard employees that are unable to attend or carry out work in line with current guidelines. At one point (specifically, 23.03.2020), there was a proposal to introduce provisions creating an automatic unfair dismissal where that dismissal was for 'coronavirus-related' reasons, and where the employer was entitled to reimbursement of statutory sick pay or payment under the coronavirus job retention scheme. That would have been to ensure that businesses being forced to close would also not result in mass job losses when funding to retain those jobs was available as an alternative to dismissal. At the date of writing, that proposal has not progressed, nor is there any other proposal to safeguard employees from any other 'coronavirus-related' dismissal. Whilst ordinary unfair dismissal principles will assist those employees with at least two years' continuous employment, I wanted to consider a couple of options potentially open to employees not qualifying for that protection.

The problem that those employees face is, hopefully (but, in reality, is possibly not) a rare one, and it is that their employers tell them not to return to work after a period of 'self-isolation' i.e. they are dismissed. One can see easily how, under s.98(4) Employment Rights Act 1996, that would be unfair. Where an employee cannot rely on ordinary unfair dismissal protection, a creative employee, given the right circumstances, could seek to establish that their dismissal was automatically unfair, either because the reason was that they made a protected disclosure or that their situation was a health and safety case.

#### *Protected disclosure*

This protection only applies to employees that are dismissed because they made a disclosure of information that they reasonably believed was in the public interest and tended to show that health and safety of any individual is being or is likely to be endangered. Suppose the employee calls his or her employer and explains that they are going to remain at home for seven days because they have developed a fever, a cough, and a sore throat, and as a result, they believe that are infected by coronavirus. Subject to the specifics of the conversation, there is hopefully (I expect there is with this example) sufficient factual content imparted to the employer so that the disclosure is one of information. In the current circumstances, that information is undoubtedly in the public interest, and it tends to show that the health of *any* individual is in danger, since exposure to the employee risks transmission of the virus, but unlike other viruses, the consequences are potentially severe. It will not be difficult for a belief that the statement shows a health and safety risk to be considered reasonable.

The essence of the disclosure is to warn the employer that the employee poses a health and safety risk. Is dismissal automatically unfair in those circumstances, and what if the reason was non-attendance at work rather than the information about infection? Authorities demonstrate that there is a difference between, for example, dismissal because of a disclosure itself and dismissal because of the manner of the disclosure, which an employer might regard as misconduct. An employer will argue that the non-attendance is distinct from the provision of information. However, on the other hand, non-attendance is inextricably linked with the information – the information explains the non-attendance, which is mandatory in view of that same information. There is, at least, a risk to an employer of an unfair dismissal.

### *Health and safety*

If the above falls into difficulty, the suggestion that the employee's is a health and safety case is not impossible. An employee is automatically unfairly dismissed if the reason for dismissal is that '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' (s.100(1)(e) Employment Rights Act 1996). Not attending work in order to prevent the spread of coronavirus would seem to amount to appropriate steps to protect others from danger ('danger' not needing to be life-threatening, only 'liability or exposure to harm or injury; risk, peril'). It would be reasonable to believe that the danger was serious. The real issue would be whether or not a belief that that danger was imminent could be reasonable. If the danger is the mere exposure to the infected employee, it would be imminent on his or her attendance at work. In view of the obvious protective nature and purpose of this part of the legislation and the clear restrictions placed on those people with symptoms of COVID-19, one would imagine that a Tribunal faced with a claim of this kind might give a generous interpretation to 'imminent' in this regard.

s.100(1)(e) Employment Rights Act 1996 requires additional words to be read in so that it complies fully with the European Framework Health and Safety Directive. It should read in full '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 or *to communicate these circumstances by any appropriate means to the employer*'. Even if the telephone conversation in our example does not amount to a protected disclosure, it might well amount to appropriate means of communicating circumstances of danger.

### *Conclusion*

The above are examples of possible arguments that employees otherwise ineligible to pursue claims of unfair dismissal might recruit in these unusual conditions. Employers need to be aware that dismissing a 'short-service' employee during the current pandemic (and because of it) might not be so straightforward after all.

**THOMAS WOOD**

**Barrister St John's Buildings**

**Email – [clerk@stjohnsbldings.co.uk](mailto:clerk@stjohnsbldings.co.uk)**

**Tel – 0161 214 1500**