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Returning from lockdown

Dealing with employee complaints: whistleblowing and the Equality Act

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The country is going to start to try and emerge from the lockdown, which was imposed to try and slow the spread of coronavirus. Guidance provided on 10.05.2020 was that some employees, who cannot work from home, should go to work. Coronavirus is still with us, so the Government has produced guidance on how employers can implement social distancing measures so as to make the workplace safe for its workers. For instance, employers are told that they might consider staggering start times; providing handwashing facilities or hand sanitiser at entrances; reducing congestion by opening multiple entrances, having one-way flow, discouraging non-essential trips; or rearranging workstations. The list goes on, but there are perhaps infinite ways in which employees can be protected in any particular workplace.

Given the notoriety of coronavirus, and the concern it has rightly created, it is not unlikely that employers are going to be faced with workers raising issues about the safeguarding measures in place. It might be tempting for employers to disregard those concerns, or easy to do so under the banner of 'well that's all we can do', but the following provides some issues that arise from the simple act of making a complaint, and reasons employers should not ignore them.

Whistleblowing

I covered the topic of the potential relevance of the whistleblowing during the current pandemic in '[Can dismissal for self-isolating be automatically unfair](#)' in which both whistleblowing and health and safety dismissals were raised as possible claims to watch out for in future. There is perhaps an increased risk of mishandling protected disclosure on the return to work.

Where a worker raises an issue about the (in)adequacy of the employer's measures, assuming it is explained by fact rather than by vague allegation (for why, see another of my previous articles '[Whistleblowing: how easy is it to make a protected disclosure](#)'), it is likely to amount to a whistleblowing disclosure. It will probably be reasonable for the worker to believe that raising the issue of less than satisfactory social distancing to be in the public interest, and to believe that the information tends to show either a legal obligation has been breached, or health and safety is being endangered.

The problem for employers is that, whilst they might not specifically retaliate by way of a deliberate act or even dismissal, failure to investigate the disclosure could, of itself, amount to the subjecting of the worker to a detriment (not least the continued exposure to the inadequate safety measures), making them liable for compensation. Employers need to be aware that this could be the case, and may wish to implement a whistleblowing policy to follow in these instances.

Equality Act

Any worker raising a complaint about poor social distancing measures could be indirectly stating that they require reasonable adjustments for a disability. It may be that, because of an underlying health condition, coronavirus poses a higher risk to them than it would someone else i.e. they are at a comparative disadvantage. If so, the employer comes under a duty to take steps to avoid that disadvantage, by, for example, revising the social distancing measure complained about. Whilst it is a defence for the employer to say that it could not reasonably have known about the disadvantage, in circumstances in which it knows about the disability (assuming it does from the employee's personnel records), it would not be unreasonable in light of current well-known effects of coronavirus to enquire further. In other words, the employer is unlikely to be able to plead ignorance.

There is also the possibility of the disregarding of a complaint of this nature amounting to victimisation. Depending on the content of the complaint, it may amount to an allegation of infringement of the Act, or if not, 'any other thing for the purposes of, or in connection with' the Act. Failure to act on it could then amount to victimisation.

Having a good equality and diversity policy, and following it, will assist matters here. Dealing with any complaints as grievances would also be sensible.

The above are merely two simple examples of complaints-handling that might be relevant in the 'new normal'. The possibilities, though, are endless. The complaints may extend to other workers' conduct (in flouting the social distancing measures in place), which may require disciplinary action as well as treating the matter under the whistleblowing policy. Failure to deal with any complaint, if it does not meet the test to amount to a protected disclosure, could constitute a constructive dismissal (breach of the implied term to provide a safe workplace). One thing we do know, and the point of the simple demonstration above, is that employers are going to have to be mindful of the implications carried by what may seem a simple grumble.

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