

Wednesday 16 November 2022

Where does the balance lie between employees reluctant to return to the office and employer needs/wishes, and when does an SOSR dismissal become a realistic option?

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We do what's right

Overview

- While a novelty at first, flexible working became a necessity over the Covid-19 Pandemic;
- Accelerated changes in attitude towards home and flexible working
- Shown WFH can be done!
- **But** return to “normality” – not a permanent or long-term option

Potentially Fair Reasons for Dismissal – Quick Recap

Section 98 Employment Rights Act 1996

- (a) Capability or qualifications of employee for performing kind of work employed to do;
- (b) relates to conduct of employee;
- (c) redundancy
- (d) contravention of a duty or restriction imposed by an enactment

OR

→ Section 98(1)(b) if doesn't fall within the above:

“some other **SUBSTANTIAL** reason of a kind such as to **JUSTIFY** the dismissal of any employee **HOLDING THE POSITION** the employee held.”

Contractual Obligations – ‘Place of Work’ - Section 1 Statement

- Place of work must be specified in section 1 statement
- Typically be the employer’s premises, but may also allow for flexibility to work elsewhere
- Employers may have relied on this flexibility during the Pandemic
- Where the contract was silent on flexibility, this could have been implied (*Millbrook Furnishing Industries Ltd v McIntosh and ors*)

Response to Office Working Requests

- Final guidance on working from home was lifted entirely on 19 January 2022
- Default position now - place of work reverts to what was stated in the contract (whether express or implied).
- Issues arising:
 - Those who have a preference for working from home;
 - Those who wish to work from home as it makes another part of their life easier;
 - Those who are fearful about catching Covid.

Employees who prefer to work from home

Analyse current position:

- Has there been an express agreement to vary the place of work?
- Does conduct of the parties imply an agreement to vary the place of work?
- Statutory flexible working request
- What happens if they still refuse to return?
 - Dismissal by way of conduct or capability
 - Dismissal – SOSR
 - A 'catch all'
 - Must show acted reasonably in treating that reason as sufficient to dismiss
 - Follow proper procedure

Employees who say WFH facilitates another difficult part of their life

- Depends on what other aspect of life is!!!
- Caution, particularly if a protected characteristic could be engaged (discrimination claim)
- Indirect discrimination claims:
 - Childcare responsibilities
 - Disabled employees, or those with caring responsibilities for a disabled person
- Usual downfall: Is dismissal a proportionate step?
- Striking a balance between employer's legitimate aims and employee's needs

Employees who are fearful about catching Covid

- S. 100 (c), (d) and (e) and s.103 Employment Rights Act 1996
- Risk of automatic unfair dismissal
- A legal right to stay away from the workplace where there is a reasonable belief that it would put them at risk of serious and imminent danger which they could not be reasonably expected to avert
- Mixed responses at Tribunal:
 - *Preen v Coolink Ltd and Anor*
 - *Quelch v Courtiers Support Services Ltd*
 - *Rodgers v Leeds*
 - *Moore v Ecoscape*

What can we learn from this?

- Fear of Covid generally is not enough – there must be a belief that there is a danger arising in the workplace
- Employers who have taken sufficient H&S measures, complied with guidance and engaged with employees will be best placed when faced with unfair dismissal claims
- Times have changed, particularly since the vaccine roll-out
- Employers must be able to demonstrate that any dismissal is for the refusal to return itself, and not the raising of concerns alone.

Complicating Factors

- Those with a higher risk of serious illness as a result of Covid
- Those who have severe anxiety about returning to the office
- Pregnant employees
- Employees with a philosophical belief

Back to SOSR!!!

Potentially Fair Reason

Capability = Possible but unlikely:

- assessed by reference to skill, aptitude, **health or any other physical or mental quality**

Conduct = possible **but** consider “can’t” vs “won’t”

SOSR:

- Is refusal to return/office requirement **substantial?**
- How significant is working in the office to the **position they hold?**
- Does refusal **justify dismissal?**
- **Process adopted**

Balancing Act

Reluctant Employees:

- Analyse/understand reasons
- Consider:
 - Contractual variation already happened
 - Protected characteristics
 - Flexible working
 - Is it can't rather than won't???

Requirement for Office Working

- Analyse/understand reasons
- Consider:
 - Essential vs Desirable
 - Evidence to support need
 - Can there be some accommodation?
 - Exhausted all other options/processes

Conclusion – dealing with 'reluctant returners'

- Ensure H&S and risk assessments are updated prior to any return to office
 - Special considerations given to disabled, at-risk or pregnant employees
- Handle flexible working requests carefully and be aware of the risks
- Seek medical advice where required and consider any reasonable adjustments
- Engage with employees about their return
- Provide a reasonable period of notice
- Ensure a fair process is followed prior to dismissal.



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