

Covid-19 - how has it impacted the Employment Tribunal?

A look at some of the first Employment Tribunal decisions where Covid-19 has been considered as a factor.

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Following a significant period of 'unprecedented times', we have taken a look at some of the first Employment Tribunal ('ET') decisions where Covid-19 has been considered as a factor. Although it will take some time for all claims pertaining to Covid-19 to filter through the ET, it's interesting to note the approach at first instance.

Health and Safety Dismissals

Ham ('C') v ESL BBSW Limited ('R')

R is a company dealing in cleaning supplies. C had less than a year's service. C was asked to pick up cleaning supplies from a school and deliver them to his manager's house. His manager was self-isolating due to suspected covid-symptoms. C raised concerns about this due to the risk it might pose. He was subsequently dismissed.

The ET's judgment suggests that there was considerable dispute between the evidence of C and that of R, both as to the attitudes of C and his manager during calls, and as to whether C's manager said that she would leave her garage open so that C would not have to have contact. The ET preferred C's evidence.

The ET held that the dismissal was unfair, and that the reason for dismissal was because C had raised health and safety concerns.

Accattatis ('C') v Fortuna Group (London) Limited ('R')

C was employed as a sales and project marketing co-ordinator. R sells and delivers PPE. C had less than 2 years' service. On around 25 March, C asked to work from home. R's position was that homeworking was not possible for C (which the ET accepted) but that employees who wished to isolate or stay at home could do so using holiday or unpaid leave.

C had a period off work isolating, having had Covid symptoms. Following this, he asked to be furloughed. This was refused as his role was still required. R terminated his employment, citing a general failure on the part of C over many months to comply with R's policies and guidelines. C subsequently brought a claim for automatic unfair dismissal, citing that he had been dismissed due to raising health and safety concerns.

R accepted under cross examination that C was dismissed as he was approaching 2 years' service. The ET held that the reason for dismissal was not that C was reluctant to come to work or to use public transport but that he was perceived to be difficult and challenging, and was approaching 2 years' service. His automatic unfair dismissal claim therefore failed.

The ET also commented that C was not only wanting to stay at home (which had been agreed) but that he wanted to be furloughed or to work from home, neither of which were appropriate steps in the circumstances to protect him from danger.

Less Favourable Treatment

Prosser ('C') v Community Gateway Associations Limited ('R')

C was a zero-hours worker. On 13 March 2020, C informed R that she was pregnant. On 17 March 2020, R sent C home because she was considered to be clinically vulnerable. In May, C asked to return to work. Some work was undertaken to facilitate social distancing in the office and a risk assessment undertaken which assessed C safe for some work. However, further work was required to facilitate social distancing which caused a delay until July.

C asserted that she had been subjected to less favourable treatment by being sent home in March. The ET disagreed – it held this treatment was appropriate, based on Government advice at the time. The delay in getting C back to work was also not held to be less favourable treatment – it was a positive step to try to protect C.

Although the above are all first instance decisions and therefore not binding, it is interesting to see the ET's approach to employment decisions impacted by the pandemic. It will definitely be an area to watch in terms of any future appeals or landmark decisions made with Covid-19 as a key factor.

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