

12

King's Bench Walk

Employers, Workplaces and Covid 19

Steven Snowden QC, Joel Kendall and Laura Robinson

www.12kbw.co.uk

 @12KBW

The scope of the discussion

- General introduction to legal duties owed by employers to their employees during the Covid-19 pandemic, breach of which may give rise to claims for personal injury
- In addition an overview of the rights of employees and workers not to be subjected to detriment or dismissal for health and safety reasons, and the scope of disability discrimination claims in relation to the pandemic

Types of PI claim

- From employees who contract Covid-19
- Secondary exposure
- Employees who suffer psychiatric injury
- Physical injury claims associated with remote working

Component elements of a PI claim

- Factual matrix
- Breach of duty
- Causation
 - Cluster-type claims

PI claims – the duties

- No new legal duties
 - Most important – the duty to risk assess under the Management of Health and Safety at Work Regulations 1999
- The various pieces of guidance effectively determinative

Government - “5 steps to working safely”: <https://www.gov.uk/guidance/working-safely-during-coronavirus-covid-19/5-steps-to-working-safely>

HSE - “Working safely during the coronavirus outbreak”:
<https://www.hse.gov.uk/news/assets/docs/working-safely-guide.pdf>

Government – “Working safely during COVID-19 in offices and contact centres”:
<https://assets.publishing.service.gov.uk/media/5eb97e7686650c278d4496ea/working-safely-during-covid-19-offices-contact-centres-240520.pdf> (one of 14 such guides covering different types of workplace)

The importance of consultation – HSE – “Talking with your workers about preventing coronavirus”:
https://www.hse.gov.uk/news/assets/docs/talking-with-your-workers.pdf?utm_source=govdelivery&utm_medium=email&utm_campaign=coronavirus&utm_term=working-safely-4&utm_content=construction-14-may-20

The guidance – the core principles

- Changes as of 1 August: encouraging a return to the workplace – “ensuring workplaces are safe whilst also enabling working from home”
- The Covid-19 specific risk assessment
- Protecting people who are at higher risk
- Ventilation
- Social distancing
- Handwashing/cleaning/hygiene
- PPE and face coverings
- Passing on information and guidance
- Don't forget remote working

Health and Safety Cases

- ▶ Section 44 Employment Rights Act 1996
 - ▶ Section 100 Employment Rights Act 1996
 - ▶ Right not to be subjected to any detriment 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 left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work”
- An employee shall be regarded as unfairly dismissed if the reason or principal reason for dismissal was as defined above.

Health and Safety Cases

- ▶ Covid- 19 secure workplaces – separate risk assessments for different categories of risk i.e. those who are over 70, pregnant, have an underlying health condition.
- ▶ Likelihood that some employees will have a greater level of risk, might need different precautions and/or might have a stronger argument that they are in serious and imminent danger.

Disability Discrimination

- ▶ New categories defined by the government: clinically extremely vulnerable and clinically vulnerable.
- ▶ Consideration of how those categories might affect any finding in relation to disability under the Equality Act 2010.
- ▶ Discrimination arising from disability – unfavourable treatment because of something arising in consequence of disability i.e. requirement to shield and/or take extra precautions relating to Covid-19 .
- ▶ Reasonable adjustments – consideration of how these might change post- Covid.
- ▶ Associative discrimination – those who live with clinically extremely vulnerable and clinically vulnerable people.