42 BEDFORD ROW
BARRISTERS

LIVING WITH COVID:
How will ending mandatory restrictions impact the workplace?

GILLIAN CREW AND JAMIE FIREMAN

42 BEDFORD ROW BARRISTERS

ENDING COVID RESTRICTIONS

- 21.2.2022 PM ANNOUNCED END OF RESTRICTIONS AS OF 24.2.2022 NOTWITHSTANDING HIGH LEVELS OF COVID IN THE COMMUNITY
- END OF MANDATORY SELF ISOLATION
- END OF REQUIREMENT TO WEAR FACE COVERINGS
- DUTY OF EMPLOYER TO PROVIDE A SAFE PLACE OF WORK AND SAFE SYSTEMS OF WORK REMAINS

STATUTORY SICK PAY (SSP) – ENDING OF THE NEW SSP PROVISIONS

- Regulation 2(1)(c) was added to the Statutory Sick Pay (General) Regulations 1982 (SI 1982/894) (SSP Regulations)
- Made clear clear that anyone isolating as a result of COVID-19 and who was, by reason of that, unable to work work would meet the “deemed incapacity” provisions

STATUTORY SICK PAY (SSP) – ENDING OF THE NEW SSP PROVISIONS

- Regulation 2 of the Statutory Sick Pay (Coronavirus) (Suspension of Waiting Days and General Amendment) Regulations 2020/374 meant that s.155 of the Social Security Contributions and Benefits Act 1992 did not apply where:
- (a) that employee's period of incapacity for work is related to coronavirus; and
- (b) the first day of incapacity for work in that period arose on or after 13th March 2020

STATUTORY SICK PAY (SSP) – ENDING OF THE NEW SSP PROVISIONS

- The Statutory Sick Pay (Coronavirus) (Funding of Employers' Liabilities) Regulations 2022 (SI 2022/5)
- This meant that companies with fewer than 250 employees have been able to reclaim SSP paid in respect of the first 14 days of COVID-19 related absence
- Scheme in place from March 2020 to 30 September 2021 and again from 21 December 2021 until 17 March 2022

STATUTORY SICK PAY (SSP) – ENDING OF THE NEW SSP PROVISIONS

Moving forward:

- The SSP COVID-related deemed incapacity provisions will end
- Employees are no longer able to claim SSP from the first day of COVID-related sickness
- SMEs with fewer than 250 employees no longer able to claim back COVID-related SSP from the government

42 BEDFORD ROW BARRISTERS

RETURNING TO WORK

RISK ASSESSMENTS AND EMPLOYER'S DUTIES

- Employers continue to have the common law duty of care to provide a safe place of work and safe systems of work
- Duty under the *Health & Safety at Work Act 1974* to take all reasonably practicable steps to assess and protect against risks to the health and safety of staff and visitors

42 BEDFORD ROW BARRISTERS

RISK ASSESSMENTS AND EMPLOYER'S DUTIES

- Employers still need to carry out risk assessments to consider the dangers posed by Covid-19 to the workforce
- Consider how best to identify the risk of transmission
- Consider how to address the identified risk
- Share the outcome of the risk assessment with the workforce

42 BEDFORD ROW BARRISTERS

WHAT NOW?

- Likely to be reasonable for employers to require employees to attend the office for work subject to safeguards in place
- Employees may feel they have less motivation and/or less of a justification in refusing to attend office
- Employers may need to factor into their risk assessments the greater possibility of employees attending work with Covid-19

42 BEDFORD ROW BARRISTERS

ENDING MANDATORY VACCINATION

- 11.11.2021 Health and Social Act 2008 (Regulated activities)(Amendment)(Coronavirus)Regulations 2021 required staff employed in registered care homes to be fully vaccinated unless they are exempt
- Was to apply to front line NHS staff from 1 April 2022
- Ended as of 15 March 2022

THE CONS OF MANDATORY VACCINATION

- Staffing shortage? End of October 2021, 1 in 10 care home staff had not received 2 doses of the vaccine
- Discriminatory? Reduced uptake in BAME staff
- R (on the application of Peters and others) v (1) The Secretary of State for Health and Social Care and (2) the Joint Vaccination Committee for Vaccination and Immunisation [2021] EWHC 3182 (Admin)

WHAT NOW FOR STAFF DISMISSED?

- Does the change in the law mean that the dismissal is unfair?
- Allette v Scarsdale Grange Nursing Home Limited : balance of Art 8 rights - interference was necessary given the state of the Covid 19 pandemic in January 2021 and the pressing need to protect its residents
- The Judge found that the dismissal = proportionate and justified: allowing an unvaccinated person to continue to work with the residents would be a greater interference to the residents' Article 8 rights

WHAT NOW?

- Reasonable management instruction
- Potentially fair if take into account factors such as working with vulnerable people in care homes or frontline NHS roles –
- Less persuasive for offices where less vulnerable.
- Reasonable employer: discuss reasons, seek to persuade, opportunity to change mind
- But what if new variants and rising cases? Stronger arguments for compulsory vaccination policies

42 BEDFORD ROW BARRISTERS

FIRST INSTANCE CASES:

- Mr D Rodgers v Leeds Laser Cutting Ltd: 1803829/2020
- Moore v Ecoscape UK Limited: 2417563/2020
- Ms C Rendina v Royston Veterinary Centre Ltd: 3307459/2020
- Mr C Preen v Coolink Ltd and Mr R Mullins: 1403451/2020
- Mr N Quelch v Courtiers Support Services Ltd: 3313138/2020
- X v Y: 2413947/2020

42 BEDFORD ROW BARRISTERS

Mr D Rodgers v Leeds Laser Cutting Ltd: 1803829/2020

- Claimant employed by Respondent as laser operator
- Worked in workspace with large dimensions
- Respondent kept business open and asked staff to work as “normally as possible”
- On 29 March 2020 Claimant said he would stay away from workplace ”until lockdown had eased”
- Claimant dismissed a month later, having not returned to the workplace

Mr D Rodgers v Leeds Laser Cutting Ltd: 1803829/2020

Findings:

- Claimant fairly dismissed
- Claims under section 100(d) and (e) ERA 1996 not well founded
- Claimant was inconsistent and contradictory in his evidence and had given a friend a lift on 30 March 2020 (which was after he had left the office for the last time)
- EJ found that the Claimant did not believe *"there were circumstances of serious and imminent danger, within the workplace, but that he considered there were circumstances of serious and imminent danger all around"*

42 BEDFORD ROW BARRISTERS

Ms M Moore v Ecoscape UK Limited: 2417563/2020

- Respondent's work involved providing environmentally-friendly building materials
- Claimant's place of work was open-plan office
- Respondent closed office and furloughed employees in March 2020 but re-opened for work in April 2020
- Claimant did not wish to return + offered unpaid leave which she accepted
- Claimant asked to return to work in May 2020 but refused
- Claimant resigned in August 2020 after grievance not upheld

Ms M Moore v Ecoscape UK Limited: 2417563/2020

Findings:

- Claimant fairly dismissed
- Claims under section 100(d) and (e) ERA 1996 not well founded
- Belief that there were circumstances of serious and imminent danger was not objectively reasonable given:
  - Respondent had assessed risks and addressed need for increased levels of hygiene and distancing
  - Offered staggered shifts
  - Offered the Claimant her own office
- The Claimant's complaints *"were a general fear about being required to leave home and her perception that danger was everywhere"*

Ms C Rendina v Royston Veterinary Centre Ltd: 3307459/2020

- Claimant (of joint Italian and British nationality) employed as assistant veterinary surgeon
- Raised H & S concerns with Practice Manager and Practice Director in March 2020
- Practice Director said on 16 March 2020 that Covid-19 was like *"the cold and flu"*
- On 23 March 2020 Claimant e-mailed raising concerns and the BVA's recommendations
- The practice was said to be open *"as normal"* following lockdown announcement and on 24 March 2020 Practice Director said the *"worry"* about Covid-19 was *"hyped up"*
- On 30 March 2020 Claimant was dismissed because there was said to be a "*level of discord"* between the Practice Director and Claimant

Ms C Rendina v Royston Veterinary Centre Ltd: 3307459/2020

Findings:

- Claimant was unfairly dismissed contrary to section 100(1)(c) ERA 1996
- Claimant had conveyed her H & S concerns about Respondent's inadequate arrangements to address COVID-19 reasonably
- The step she took of avoiding certain procedures was not to protect herself or others from danger but to establish from her regulatory body what her position was in respect of emergency procedures
- Only her claim under section 100(1)(c) of ERA 1996 was thus made out
- Real reason for dismissal was Claimant raising issues of concern that she reasonably believed were harmful or potentially harmful to health and safety (in this case, the spread of COVID-19)

Mr C Preen v Coolink Ltd and Mr R Mullins: 1403451/2020

- Claimant employed as air conditioning and refrigeration engineer for Respondent, a company run by Mr Richard Mullins
- Work involved a mix of routine servicing and maintenance, and emergency response
- In March 2020 masks, hand sanitiser and gloves made available to Claimant in his van
- On 24 March 2020 Claimant was booked to carry out a service and maintenance booking, which was neither essential nor emergency work. Claimant messaged Mr Mullins and stated *"…I am going to stay at home and would urge you to do the same. I understand that if any call out is urgent and/or essential I will come in to help out…"*
- Claimant dismissed with from 31 March 2020, purportedly on grounds of redundancy

Mr C Preen v Coolink Ltd and Mr R Mullins: 1403451/2020

Findings:

- Claimant automatically unfairly dismissed under section 100(1)(c) ERA 1996
- Message on 23 March 2020 did bring circumstances connected with work to employer's attention which Claimant believed were potentially harmful to health and safety
- Claimant did reasonably believe those circumstances to be either harmful or potentially harmful to his health and safety
- Reasonable for Claimant to form impression that staying home was the right course of action, and that only urgent or essential work should be done
- Objection to doing routine work was the principal reason for dismissal
- Other claims rejected. With respect to section 100(1)(d), there were not circumstances of danger which Claimant reasonably believed to be serious and imminent. This had a higher threshold than section 100(1)(c) and was not made out. Undeniable that Covid-19 is dangerous to many people, but here it was not the case that Claimant reasonably believed that he or others were in serious and imminent danger if he went to work

42 BEDFORD ROW
BARRISTERS

Mr N Quelch v Courtiers Support Services Ltd: 3313138/2020

- Claimant was a compliance analyst at the Respondent - a financial services firm
- Lived in one-bedroom flat with girlfriend X who was clinically vulnerable due to asthma and heart condition
- On 18 March 2020 it was agreed Claimant could work from home
- Following lockdown, Respondent viewed its employees as "*critical workers*"
- Claimant required to return to workplace on 6 July 2020
- Claimant repeatedly raised H & S concerns about X's health, his anxiety about returning, and the Respondent not complying with Covid-secure guidelines
- Requests to continue working from home refused. Claimant maintained his position and was disciplined and summarily dismissed

Mr N Quelch v Courtiers Support Services Ltd: 3313138/2020

Findings:

- Claimant was automatically unfairly dismissed under section 100(1)(d) and (e) of ERA 1996 for refusing to return to the office
- Dismissal would have been unfair under ordinary unfair dismissal test as no potentially fair reason for dismissal had been shown and the sanction and the procedures followed outside range of reasonable responses
- Claimant genuinely and reasonably believed that there were circumstances of serious and imminent danger were he to return to the office. His concerns were reasonable given Respondent's failure to comply with government guidelines

X v Y: 2413947/2020

- PH to consider whether belief in fear of catching Covid-19 and need to protect oneself constituted philosophical belief worthy of protection under EqA 2010
- Held not to be a belief but a reaction to a threat of physical harm and a need to take some action to reduce that
- It was also a belief specific to the Claimant herself and her own steps to protect others (principally her partner) rather than a belief in wider terms than that was perhaps applicable to other elements of life