EMPLOYMENT

COVID-19: Back to Reality – Return to Work Risks

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For six months, the Irish government have advised people to continue to work from home where possible.

This cautious approach remains at the centre of the Government's Resilience and Recovery Plan for Living with COVID-19, which envisages working from home to a greater or lesser extent at each level of the framework. This strikes a marked difference to the approach of the UK Government, who have urged a return to the workplace to "get back to normal". A lively debate ensued about the extent to which employers can require their staff to return to the workplace having regard to the potential risk of contracting COVID-19, and how the law might protect those employees who refuse to return to the workplace.

While this is a hot topic in the UK, this has not yet become a live issue in Ireland, despite the fact that the Safety, Health and Welfare at Work Act 2005 provides for very similar protections under Irish law to those provided to UK employees under the Employment Rights Act 1996.

Protection from penalisation in circumstances of danger

Section 27(3)(f) of the 2005 Act provides that in circumstances of danger which an employee reasonably believes to be serious and imminent and which they could not reasonably have been expected to avert, an employee may not be penalised (or subjected to the threat of a penalisation) for leaving, proposing to leave or (while the danger persists) refusing to return to work or taking (or proposing to take) appropriate steps to protect themselves or others from danger.

Penalisation under the 2005 Act is widely construed, and can include dismissal/suspension (or threats of same), change of location of place of work, change in working hours, imposing penalties (including financial penalties) and coercion/intimidation.

How will this operate in practice?

The following questions are likely to arise if the matter is brought before the WRC or Labour Court:

- *What does "serious and imminent danger" mean?* This will be considered on its facts. A serious and imminent danger may be found to exist if an employer is not complying with their duties under the Return to Work Safely Protocol, any sector specific guidance and the most up to date Government public health advice.
- *When will an employee "reasonably believe" the danger to be serious and imminent?* The Labour Court has considered this question from the perspective of the employee, having regard to the circumstances at issue (see further joined cases *Aranbel Construction v Braney & Lacey (HSD086/087); Stobart (Ireland) Driver Services Ltd v Kennedy, Hazel & Doolin (HSD171/172/173)*). This implements a subjective element to this test - the fact that one employee returns to work doesn't automatically mean another is unreasonable in not returning to work. Much is likely to depend on personal circumstances applicable to the employee and the workplace.
- *Causation:* In some cases, the reason for the alleged penalisation may not be due to the employee's refusal to return to work – rather, it may be due to other factors such as a downturn in business or a need for an organisation to restructure. Employers should be slow to rely on a lack of causation unless they have very strong evidence that they have taken all necessary and reasonable precautions.
- *What are the consequences of breach?* The WRC/Labour Court may require employers to take a specified course of action (including reinstatement/re-engagement) or require the employer to pay to the employee compensation of such amount (if any) as considered just and equitable having regard to all the circumstances. The Labour Court has previously indicated it will have regard to the fact that only a minimal loss of earnings has been incurred by an employee.

A potential impasse?

The difficulty with Section 27(3)(f) claims is that both parties could be acting entirely reasonably: assuming that the employer

fully complies with their duties under the Return to Work Safely Protocol, and up to date public health measures, one can easily envisage how some employees may also reasonably believe their return to work will create a serious and imminent danger to themselves and others. This begs the question – if everyone is being reasonable, how can stalemate be avoided and relationships maintained?

A starting point for an employer is Section 27(6) of the 2005 Act, which provides that in determining whether the steps which an employee took (or proposed to take) were appropriate, account shall be taken of all the circumstances and the means and advice available to them at the relevant time. The obligation of employees to act reasonably to avert danger also indicates that where employers present reasonable solutions, these should be engaged with. This means that employers can be proactive to protect themselves from claims under Section 27(3)(f).

Are there other risks for employers?

Claims under Section 27(3)(f) are not the only remedy to which employees may have recourse if they refuse to return to the workplace:

- *Section 27(3)(c) Safety, Health and Welfare at Work Act 2005:* The penalisation protections also apply to employees who demonstrate that they have made a complaint within the meaning of Section 13 of the 2005 Act. This approach may be applicable to a wider range of scenarios than Section 27(3)(f).
- *Protected Disclosures Act 2014:* As well as significant compensation remedies, an employee who claims to have been dismissed wholly or mainly for having made a protected disclosure may apply to the Circuit Court for interim relief – a more immediate remedy than compensation.
- *Payment of Wages Act 1991:* If an employer withdraws pay due to the employee not working, this may in certain circumstances amount to an unlawful deduction.
- *Employment Equality Acts 1998 – 2015:* If an employee has an illness (or is associated with someone who has an illness) and is not provided with reasonable accommodation, they may be able to bring a disability discrimination claim under the Employment Equality Acts 1998 – 2015.
- *Negligence/Breach of Duty:* Employees may allege that they have suffered psychiatric injury arising from an employer's insistence on their return to the workplace.

Assessment

As is the case with many employment issues, positive engagement with employees is key. Employers who implement and monitor the Return to Work Safely Protocol and any sector specific guidelines, and take steps to engage proactively with employees are likely to be in a stronger position to defend themselves against claims or avoid such claims in the first place.

Some practical steps that employers can consider include the following:

- *Comply with the Return to Work Safely Protocol and other Government advice:* conduct risk assessments, provide training to employees and monitor the implementation of the measures taken. Ensure that special accommodation is provided to vulnerable employees in accordance with the Protocol. Monitor developments in Government public health advice and act using up to date information.
- *Communicate with employees regularly:* Ensure that people have confidence that you are implementing and enforcing the Return to Work Safely Protocol, and that you are taking account of latest government public health advice.
- *Create clear reporting channels:* Acting quickly to address legitimate safety concerns allows an employer to address specific issues and reassure employees that their concerns will be dealt with without them having to leave work.
- *Be flexible:* Where employees can do some work from home, encourage this – it will help avoid/reduce risk without them having to stop working. It may be necessary to allow employees to leave the workplace where they raise concerns, and even to maintain pay until the issues have been addressed. Where employees present with specific concerns, these should be dealt with on a case by case basis.
- *Do not compel people to return:* Where work can be done from home, many employers are either implementing a default work from home environment or allowing people to return on a voluntary basis only, and only where safeguards are built in to limit voluntary returns. Where possible, ensure key decision-making activities are not confined to office based individuals to avoid creating "soft" incentives to return to the office.
- *Consider public transport:* Public transport routes may create a particular risk. Consider creative solutions, such as alternative methods of transport and adjusting hours as necessary to avoid peak times.
- *Sick pay:* While not an option for all employers, providing sick pay to employees who are asked to self-isolate will provide an additional level of comfort to their colleagues.

Conclusion

Employers who take steps to engage proactively with employees and demonstrate the extent of the measures that they are taking to protect employees are likely to be better able to defend themselves against claims.

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