Employee stranded overseas at the start of the COVID-19 pandemic was unfairly dismissed

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In the recent case of Montanaro v Lansafe Limited, an Employment Tribunal held that an employer unfairly dismissed an employee who was on annual leave in Italy when the first lockdown was announced and was unable to return to the UK.

What does the law say?

It is automatically unfair for an employer to dismiss an employee if the reason or principal reason for the dismissal is that:

- in circumstances of danger;
- which the employee reasonably believed to be serious and imminent;
- the employee took (or proposed to take) appropriate steps either to protect himself and/or others from the danger or communicate these circumstances by any appropriate means to the employer.

Employees do not need any qualifying service to bring this claim unlike the two years required for standard unfair dismissal claims. Compensatory awards for automatic unfair dismissal award are also uncapped, whereas they are capped in ordinary unfair dismissal claims (at the lower of a year’s pay or £89,493).

What happened in this case?

In March 2020, M travelled to Italy to attend his sister’s wedding. By the time he was due to fly back to the UK, Italy had declared a national lockdown. On 10 March 2020, M went to the airport, however, he did not take his flight because he had concerns about health and safety as a result of Government announcements in both Italy and the UK. Furthermore, he believed he needed documentation from his employer to show that his journey qualified as essential business travel.

Whilst at the airport, M updated his employer about what had happened and asked for their advice. His employer told him that he should keep his laptop and mobile online and await further instructions. During the weeks that followed, M asked his employer whether they required him to return to the UK and, if so, to provide the documentation he believed he needed to travel. However, M's communications with the company's Managing Director, Mr Roby, were ignored.

Given the lack of direction from his employer, and the gravity of the health crisis in Italy and the UK, M remained at home in Italy. He communicated directly with a client, Boohoo, for whom he had provided services for many months. Boohoo agreed that M could work for them remotely from Italy.

On 11 March 2020, M's employer sent a letter to his UK address purporting to dismiss him with effect from 6 March 2020. As M was in Italy, he did not receive the dismissal notice. The company claimed that M had travelled to Italy in breach of their annual leave booking procedure and that his absence amounted to gross misconduct. M first became aware of the termination on 1 April 2020 when he received an email attaching his P45 and final payslip.

M brought a claim in the Employment Tribunal for automatic unfair dismissal on health and safety grounds.

What was decided?

The Employment Tribunal upheld the claim finding that:

- there were circumstances of danger given the declaration of a pandemic and the risk of catching a contagious virus about which little was known;
- M reasonably believed the danger was serious and imminent; and
- M had taken appropriate steps to protect himself and others by returning to his home in Italy and asking his employer for instructions and assistance with

documentation. M had also forwarded appropriate information to his employer about the situation in Italy.

The Tribunal held that the real reason for the dismissal was because M had communicated the difficulties and dangers posed by the pandemic in Italy and the UK, and because he had proposed to work remotely from Italy until those circumstances changed. Accordingly, the dismissal was automatically unfair.

What does this mean for employers?

It should be remembered that COVID-19 dismissals are fact and context specific. Here, the fact that M's claim related to the very early stages of the pandemic when little was known about COVID-19, and the death rate was rising exponentially, no doubt influenced the Employment Tribunal's assessment of the claim. The situation now is rather different given the higher level of knowledge about COVID-19 and the presence of effective vaccines.

However, there are several scenarios where an employee who takes an overseas holiday may not be able to return to work as planned, and this raises the question of how employers should treat such absences. For example, if employees contract COVID-19 while overseas they will usually not be allowed to travel back to England (as a negative COVID-19 test is a **requirement of entry**). Alternatively, employees might test positive for COVID-19 on their return, meaning they will have to self-isolate. In either situation, the employer should treat the employee as on sick leave in the usual way, unless it is possible for the employee to work remotely.

Alternatively, new travel restrictions might be imposed while employees are overseas, meaning they cannot return to work. For example, if a green or amber list country is unexpectedly moved to the red list, this will usually mean that employees have to quarantine in a managed quarantine hotel for 10 days

on their return. Assuming they cannot work remotely, the position on pay entitlements is unclear. On the one hand, the employee is unable to work and so the implied right to be paid would not apply, meaning it could be treated as a period of unpaid leave. However, the Courts have previously held (in the context of a suspension from work) that where employees are ready and willing to work, and an inability to work is a result of an external constraint, they may still be entitled to be paid. Either way, dismissing an employee in this position is likely to be automatically unfair.

The best course of action is to seek legal advice before taking any action against an employee who is unable to return to work after an overseas holiday

Montanaro v Lansafe Limited

If you would like to discuss any issues arising out of this decision please contact James Hockley (jameshockley@bdbf.co.uk), Amanda Steadman (amandasteadman@bdbf.co.uk) or your usual BDBF contact.

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