Reluctant returners: is a worker’s belief that he or she needs to avoid catching COVID-19 protected from discrimination?

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In the case of X v Y, an Employment Tribunal decided that a claimant’s fear of catching COVID-19, and her belief that she needed to protect herself and her partner from catching it, was not a protected belief for the purposes of discrimination legislation.

What happened in this case?

The first national lockdown was lifted in July 2020 and employers were permitted to return workers to the workplace. In this case, the claimant took the decision not to return to the workplace on the grounds of health and safety connected to COVID.

In addition to concerns about health and safety in the workplace, the claimant said she was fearful of contracting the virus herself and passing it on to her vulnerable partner. She explained her position to her employer and said she would not be returning to work. Her employer stopped paying her wages.

The claimant brought various claims in the Employment Tribunal, including that the employer’s actions amounted to discrimination on the grounds of her protected belief, which was described as “a fear of catching COVID and a need to protect herself and others”.

What was decided?

We know that workers are protected from discrimination in employment on the grounds of their religion or their religious

or philosophical belief. However, only philosophical beliefs which meet a certain standard are protected. In order to be covered, a philosophical belief must:

1. be genuinely held;
2. be a belief and not a mere opinion or viewpoint based on the present state of information available;
3. concern a weighty and substantial aspect of human life and behaviour;
4. have a certain level of cogency, seriousness, cohesion and importance; and
5. be worthy of respect in a democratic society and not be incompatible with human dignity or conflict with the fundamental rights of others.

The Employment Tribunal decided that the first, fourth and fifth criteria were met, but the second and third were not.

As to the second criterion, it was decided that the claimant's fear did not amount to a belief. Rather, it was an instinctive reaction to a threat of physical harm and the need to take steps to avoid or reduce that threat. Further, a view that certain actions (e.g. attending a crowded place) would increase the risk of contracting COVID, was an opinion based on the state of information available at the time.

As to the third criterion, the Tribunal said that fears about the harm caused by COVID are weighty and substantial and not minor or trivial. They also concern aspects of human life and behaviour. The fact that such a fear could be descried as time-specific (i.e. for length of the pandemic) would not, in itself, mean this criterion could not be met. However, in the claimant's case, her fear concerned herself and her partner only – there was no wider concern for others.

Accordingly, the claimant's discrimination complaint was not allowed to proceed.

What does this decision mean for employers?

As the working from home guidance is lifted once more, many employers will be looking to bring workers back to the workplace for some, or all, of the time. Some workers may be fearful about the return. This case shows that if negative consequences follow a refusal to return, a worker is unlikely to succeed in a philosophical belief discrimination claim. Even if a claimant could demonstrate concern for a wider group of people (to satisfy the third criterion), it is difficult to see how they would satisfy the "belief not viewpoint or opinion" requirement.

However, employers should remember that employees in this situation may have other valid claims. For example, if employees raise concerns about the safety of the workplace and suffers negative consequences they may be protected against detriment and dismissal (under special rules governing health and safety disclosures and/or whistleblowing laws). In addition, if employees, or someone they live with, are vulnerable to COVID and qualify as disabled, they could argue that a requirement to return to work amounted to indirect disability discrimination.

For these reasons, employers faced with reluctant returners should always engage with employees to understand their concerns and make appropriate adjustments where needed. It would also be sensible to share workplace risk assessments with staff to reassure them of the steps taken at work to protect their wellbeing.

X v Y

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

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