

# Employees' failure to follow COVID-19 guidelines and measures



We are beginning to see a rise in the number of Tribunal claims brought against employers in relation to disciplinaries and dismissals following employees' failures to following COVID-19 measures and guidelines. We highlight below two of the most recent cases which provide a helpful insight on the considerations that Tribunals will take when approaching such matters.

## **Samantha Gould Social Care Wales**

Ms Gould was employed by 1st Grade Care as an Area Planner. On 9 June 2020 Ms Gould had felt unwell was advised to self-isolate, her employer arranged for her to have a COVID-19 test and she was instructed to work from home until she received a negative test result.

Ms Gould stated that she received a telephone call giving the negative result on the morning on 12 June 2020 before going out for the first call. However, Ms Gould's colleagues received their test results via text message. Ms Gould explained that she took care when attending calls, wore PPE and maintained her distance from the service users. However, it later became apparent that Ms Gould had not worn goggles or a visor because they were uncomfortable. The employer believed that, in total, Ms Gould had placed 22 vulnerable people and 6 care staff 'at risk' by attending calls.

Following a disciplinary investigation by 1st Grade Care, Ms Gould was dismissed on 29 June 2020. 1st Grade Care made a referral to Social Care Wales due to the seriousness of the allegations which had led to

Ms Gould's dismissal. In addition, there were also allegations that Ms Gould had also instructed an unauthorised member of staff to care for service users, and she had falsely attempted to claim payment for the work carried out by the unauthorised member of staff.

Ms Gould did not attend the Interim Orders Panel hearing and it proceeded in her absence. It was understood that Ms Gould had obtained alternative employment with Care Cymru and there were concerns in regard to the risk that Ms Gould posed and whether or not she had been honest with her new employer. Social Care Wales emphasised 'the fact that domiciliary care workers work alone in other people's homes and that it is important that they are trustworthy and honest'. On 13 August 2020 Social Care Wales imposed an Interim Suspension Order on her registration as a domiciliary care worker for a period of 18 months. Following the Order, Ms Gould stated that she was not aware of such outcome and had been open with her new employer in respect of the investigation. Upon being informed Care Cymru, the Claimant's new employer, confirmed they had not been informed of the ongoing investigation and terminated Ms Gould's employment.

## Appeal

Ms Gould appealed the decision of Social Care Wales to impose an Interim Suspension Order.

Ms Gould's appeal was dismissed, and the Tribunal held that the interim suspension order should be kept in place for the remainder of the 18-month period due to the seriousness of the allegations and the vulnerability of the service users. The Tribunal stated that Ms Gould was 'working with highly vulnerable people who would have been at significant risk if they had become infected with COVID19'.

The Judge also concluded that Ms Gould understood what self-isolation meant. The evidence concluded that Ms Gould 'knowingly broke the rules which were intended to protect the vulnerable people she was working with'.

It is important to note that this decision was not an Employment Tribunal decision but a decision of the Regulator. It would be interesting to see if an Employment Tribunal would have taken the same approach in these circumstances.

## Kubilius v Kent Foods Limited

In the recent case of Kubilius v Kent Food Limited a dismissal was held reasonable as a result of an employee's failure to wear a face mask.

The Claimant was employed as a delivery driver by Kent Foods Ltd ('Respondent'). The Respondent's employee handbook imposed a number of conditions and expectations surrounding employee conduct. The handbook specifically required courteous treatment of clients and stated that employees should take all reasonable steps to protect their own health and safety and that of others as a result of their actions at work. The Respondent also had a separate driver's handbook which required employees to follow its client's instructions regarding PPE requirements.

As a consequence of the COVID-19 pandemic, one of the Respondent's clients, Tate & Lyle ("Client"), required face masks to be worn at their Thames refinery site.

On 21 May 2020, despite being asked by two of the Client's employees, the Claimant refused to wear a face mask whilst he was in the cab of his vehicle. The Client was worried the Claimant may pass on the virus to others whilst speaking out of the window of his cab. The Claimant maintained his refusal and argued that he was not legally obliged to wear a face mask. The Client reported the incident to the Respondent and banned the Claimant from its site. Following an investigation, the Claimant was invited to a disciplinary hearing to discuss the allegation that, in refusing to comply with the Client's instruction regarding PPE, he had breached the requirements to maintain good relationships with clients and to co-operate to ensure a safe working environment. The Claimant was summarily dismissed.



## Decision

An employment tribunal held that the dismissal had been fair. The Respondent had a genuine belief that the Claimant had been guilty of misconduct having carried out a reasonable investigation and was found to have acted reasonably in treating the alleged misconduct as a sufficient reason for dismissal. It was held by the Tribunal that whilst another employer might have chosen to issue a warning as an alternative option to dismissal, dismissal fell within the band of reasonable responses.

The Tribunal held that the Respondent had been entitled to take account of the importance of maintaining good relationships with its clients, the Claimant's continued insistence that he had done nothing wrong (which caused concern as to his future conduct) and the fact that the Claimant couldn't continue his role because he had been banned from the Client's site when coming to its decision to dismiss.

## Outcome

This case is the first case to be decided in the Employment Tribunal regarding employees wearing facemasks. It is important to remember that each Tribunal case will be decided on its own specific facts. Whilst this is a first instance decision which is not legally binding on other Tribunals, the case provides useful insight as to how the Tribunals are likely to approach such matters in future cases.

It is also a helpful reminder to employers to ensure their handbook and policies are updated regularly and reflect the conduct expected of its employees.

As COVID guidelines begin to change, employers should ensure they are obtaining advice prior to dismissing employees in connection with purported breaches of COVID safety measures. Employers should be reminded about asking employees, as part of the investigation process, if there are any reasonable explanations for their non-compliance, with a view to gaining a full understanding of the issues at hand and so as to minimise the risks of discrimination claims arising.

Employers should be aware of these cases as they provide insight into what approach is being taken at the Tribunal in each case. However, employers should be conscious of the fact that these are first instance decisions and are therefore wholly fact-dependant. Until one of these decisions is heard in the Employment Appeals Tribunal or other higher court and provides guidance on when a breach of an employer's COVID-secure measures will be a fair dismissal, employers should continue to seek advice in individual circumstances.

