

ET finds that a dismissal on the grounds that a care worker refused to be vaccinated against Covid-19 was fair

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Allette v Scarsdale Grange Nursing Home Ltd 1803699/2021

Background facts

1. The Claimant worked as a care assistant in a nursing home ('the Home') providing residential care for dementia sufferers from December 2007. In December 2020 the government announced the roll-out of the COVID-19 vaccine to nursing home staff and residents and arrangements were made for staff in the Home to have their first vaccination, starting on 22 December 2020. However, the Home was hit with an outbreak in which numerous staff and residents were infected and there were a number of deaths. Thus, vaccinations were rescheduled for January 2021.
2. At this point, there was no statutory obligation on care home workers to be vaccinated. However, the Home decided to make it a condition of continued employment.
3. The Claimant became aware of this requirement on 12 January 2021, the day before her vaccination was due to be administered. She did not want to have the vaccine and explained her reasons in a telephone call on 12 January with one of the directors, Mr McDonagh. She stated that she did not trust the vaccine's safety; that it had been rushed through without proper testing; that she had read stories on the internet about a Government conspiracy; and that no one could guarantee that it was safe. It was found that the Claimant did not make any reference during this phone call to her religious beliefs [as a Rastafarian, she said she did not believe in taking any non-natural medication] and that she did not refer to any medical authority for her belief that it was unsafe. The Claimant was advised that if she did not get the vaccine, she would be suspended and face disciplinary action.

4. The Claimant did refuse the vaccine and was invited to a disciplinary hearing, the allegation being that she had failed to follow a reasonable management instruction and that her reasons for refusing the vaccine were not reasonable. During the disciplinary hearing, the Claimant referred to her religious beliefs and Rastafarianism. When challenged as to why she had not raised this during the call on 12 January, she initially said that she had raised it, but eventually accepted that she had not. The dismissing officer, Mr McDonagh, formed the view that the Claimant was not being truthful when she alleged that her religious views had anything to do with her not wishing to have the vaccine and that she was cynically accusing the Home of discrimination when she knew that she had not been discriminated against.
5. During the disciplinary meeting Mr McDonagh explained to the Claimant that the Home's insurers had advised that they would not provide cover for Covid-19 risks after March 2021 and thus if unvaccinated staff were found to have passed on the disease, they faced risk of liability. It was not disputed that Mr McDonagh also explained there were similar issues around employer's liability insurance and that, as she was the only staff member refusing the vaccine, it would be easier to trace transmission to her and make legal action more likely. Mr McDonagh also explained that the insurers had made it clear to him that they were expecting the respondent to insist that all staff were vaccinated, unless they could reasonably justify refusal.
6. The Claimant was dismissed by letter dated 1 February 2021. She appealed this decision, and an appeal hearing took place on 24 February. During the hearing the Claimant accepted that having the vaccine would reduce the risk of Covid-19 to people's lives and Health in the Home. The Claimant stated that she was scared of the vaccine and referred to the fact that one of her grandchildren had developed autism following vaccination.

ET judgment

7. The tribunal found that in all the circumstances, in particular the state of the Covid-19 pandemic nationally at that time, the dreadful consequences of the recent outbreak at the Home, and the advice from Public Health England with regard to the virus and vaccination, the decision to make vaccination mandatory for staff who were providing close personal care to vulnerable residents was a reasonable management instruction.
8. The judge concluded that the Claimant's primary reason for refusing the vaccine was that she did not believe it to be safe and was sceptical about it. As the vaccination programme was being rolled out nationwide at that stage, the Claimant was clearly not accepting the word of authorities that the vaccine was safe. She had not presented any medical authority

or clinical basis for her belief that the vaccine was not safe, and the tribunal was not persuaded that her actions, in relying on unidentified Internet sources and believing that there was a conspiracy about vaccination, constituted a reasonable refusal of the management instruction to have the vaccine. The judge did not consider that her religious beliefs played any part in her decision. As such, it was found that her refusal constituted gross insubordination, which was an example of gross misconduct in the Home's Disciplinary Policy. It was found therefore that in the specific circumstances of this case, that the Claimant's actions amounted to gross misconduct. However, the tribunal went on to say that this does not mean that a refusal to be vaccinated would amount to gross misconduct, or even misconduct at all, in another case on different facts.

Article 8 rights

9. The Claimant argued that her Article 8 Convention rights (right to respect for private and family life) were engaged. As the Home was not a public authority, they could not be in direct breach of Article 8. However, the tribunal accepted that they were obliged [in accordance with sections 2 and 3 of the Human Rights Act 1998] to take into account any relevant decisions of the ECHR and to read primary legislation in a way which was compatible with the Convention rights. The tribunal relied on the case of X v Y [2004] IRLR 625 in which the Court of Appeal analysed the relevance of article 8 in respect of unfair dismissal claims. It was held that if a dismissal fell within article 8 and was an interference with the right to respect for private life, it might be necessary for the tribunal to consider whether there was a justification. On questions of justification the tribunal should bear in mind the complexity of employment relationships. In addition to the right of the employee under Article 8 and Article 14 (that all rights and freedoms must be applied without discrimination), the employer, fellow employees and members of the public also have rights and freedoms under the Convention which could be relevant.

10. If the interference is found not to be justified, it was held in X v Y that the next step was to consider if there was:

... a permissible reason for the dismissal under the ERA, which does not involve unjustified interference with a Convention right? If there was not, the dismissal will be unfair for the absence of a permissible reason to justify it.... If there was, is the dismissal fair, tested by the provisions of s.98 of the ERA, reading and giving effect to them under s.3 of the HRA so as to be compatible with the Convention right?

11. The tribunal considered that an employer's instruction that an employee must be vaccinated, unless they have a reasonable excuse, interferes with the employee's physical integrity in a manner capable of engaging the rights under Article 8(1) of the Convention. Although no one was forcing her to have the vaccine because she had the option to remain unvaccinated, doing so would mean losing her job. Thus, the issue to be determined was whether the dismissal was justified. This involved considering whether the interference was necessary in a democratic society, the legitimate aim of the interference, and the proportionality of the interference to the legitimate aim being pursued. 8. The tribunal considered that the Home had a legitimate aim for both the management instruction requiring employees to be vaccinated against Covid-19 and the dismissal of the claimant for unreasonably refusing to comply with that instruction. It was not disputed that the key legitimate aim was to protect the health and safety of residents, staff, and visitors to the Home during the Covid-19 pandemic. It was also found that there was a second legitimate aim, namely the concern about the withdrawal of insurance cover and that the claimant's status as the only unvaccinated staff member (and therefore the most likely vector for infection) might increase the likelihood or success of claims against the respondent.
12. As regards whether the conduct was a reasonable and proportionate way of achieving the legitimate aim, it was found that:

the requirement for the staff of the Home to be vaccinated against Covid-19 corresponded to a pressing social need, which was to reduce the risk to the residents, who were among those most vulnerable to severe illness and death through catching Covid-19. The state of the Covid-19 pandemic in early 2021, the history of outbreaks in nursing homes during 2020 and the recent outbreak at the Home itself were evidence of the pressing social necessity of reducing the risk to residents. In my judgment, the interference with the claimant's private life in requiring her to have the vaccine was therefore necessary in the circumstances of this case.

13. The tribunal went on to find that the consequences of any increased risk of Covid-19 was potentially so serious, the dismissal was proportionate. It was also important to bear in mind the Article 8 rights of the residents, the other staff and visitors to the Home. The residents were vulnerable people, some of whom had no capacity to exercise choice over whether they came into contact with unvaccinated people. To allow an unvaccinated person to work in the Home would pose a significant and unjustified interference with the Article 8 rights of others they would come into contact with.

Reasonableness

14. The judge found that Mr McDonagh genuinely believed that the Claimant was guilty of gross misconduct and that her refusal to have the vaccine was due to her scepticism about it. He went on to find that it was not outside the range of reasonable responses for an employer to conclude that an employee who was merely sceptical of the advice and did not trust the vaccine did not have a reasonable excuse for refusing to follow the management instruction to have the vaccine. The Claimant argued that the respondent acted outside the range of reasonable responses because Mr McDonagh failed to refer her to independent scientific sources of information and failed to properly address her scepticism. It was found that Mr McDonagh did seek to address her scepticism during the telephone conversation on 12 January 2021 and again in the disciplinary hearing. He relayed to her the information he had gleaned from various sources and addressed her concerns about the speed with which the vaccines had been produced. He did not provide her with any specific documentary evidence or refer her to specific scientific sources but referred to the advice from PHE and the government, which was widely available on the Internet.

Commentary

15. No doubt employers who have made it a requirement of continued employment for staff to have the vaccine will be bolstered by this judgment. However, it should be remembered that this is only a first instance decision and thus not binding, albeit it will no doubt be persuasive. This is not a straightforward topic and employers should ensure that before disciplining any employee for refusing to get vaccinated that they have carried out a full investigation as to the reason why they consider that the vaccination is necessary within their particular workplace and the reasons why an employee has refused the vaccine. It is possible that disciplinary action in these circumstances could give rise to a discrimination claim, most notably religious or disability discrimination.

16. It is also important to bear in mind that the tribunal were careful to make it clear that they were not setting a precedent that dismissal for a refusal to have the vaccine would always be fair. One of the factors relied upon by the Respondent was the fact that at the time when the dismissal took place, the picture nationally was bleak, with 100,000 recorded cases per day and 1,500 deaths per day, with a large percentage of those occurring in nursing homes. The judge pointed out that they had to look at the facts available as at the time the decision was made, and here, there was much more limited knowledge around the vaccines and how the pandemic would progress. The situation was fast-moving, and

the Home had to make difficult decisions in a short period of time. The same result may not be achieved if a dismissal took place today, at a time when the deaths have reduced greatly, and the Omicron strain appears to be somewhat milder.

17. There were also potential ramifications in respect of public and employer's liability insurance, given that the Respondent was operating a care home. Given these particular circumstances, it is clear that this case should not be seen as setting any form of precedent that dismissal based on a refusal to have the vaccine is fair- clearly it will depend on all the circumstances of the case, including the prevailing state of affairs in relation to Covid-19.

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