

Coronavirus – A Case Study on Staff Member Refusing to Attend Work

Introduction

The coronavirus is giving rise to a variety of challenging individual employee relations issues. Whilst each case will need to be dealt with on its own merits, there are some common approaches that employers may wish to adopt as a framework to help make decisions when issues of a similar nature arise. In this note we focus on the case of the staff member who is not sick, not at high risk and where you can be satisfied that any risk can be effectively managed, but notwithstanding that the staff member insists that it is not safe to attend work.

The scenario

Within the last 2/3 years the staff member [Bill] was diagnosed with cancer; he had a significant period of time away from work; the company supported Bill by maintaining company sick pay throughout, making Occupational Health advice and facilities available and keeping in regular contact; with treatment Bill was given the all clear about a year ago; Bill returned to work and the company accommodated him on a phased return; for the last year Bill has remained in work, albeit that his manager has continued to accommodate him by providing him with the lightest role available in the work area.

In the wake of the coronavirus outbreak the company referred Bill to Occupational Health to assess whether the extent to which Bill was at risk would enable him to remain in work. Occupational Health advised that so long as the company followed Government guidance on social distancing then Bill was not at increased risk and did not fall into the class of people that the Government had designated as being at high risk. The manager responded to Occupational Health by giving a detailed explanation of what measures had been put in place for Bill since the outbreak of the virus. Occupational Health confirmed that the measures were reasonable to manage the risk.

This week Bill left work early, despite knowing that he had a one to one meeting scheduled with his manager. When the manager sent a message to Bill to ask why he did not attend the one to one, Bill messaged back and said “I have to leave work early because I need to reduce the risk to my health because of the virus. You don’t understand how worrying things are for me. I think it best that I stay at home until all of this is over, so I won’t be coming back for now”.

What are the issues arising from Bill’s email?

The coronavirus has clearly played a part in this scenario and the manager will need to consider the significance of that as a factor when dealing with the case. However, notwithstanding the extraordinary times that we are working in, we have to consider the principal employee relations issues that arise given Bill’s refusal to attend work.

The factors that are relevant to this case are that the company is entitled to bear in mind that Bill is employed under a contract to attend work and carry out the duties assigned to him under that contract; the company has a duty to take reasonable steps to protect Bill’s health and safety at work; consideration will have to be given as to whether reasonable steps have been taken to protect Bill’s health and safety (i.e. has the company done what it reasonably can to be satisfied that it is safe for Bill to attend work); consideration will have to be given as to Bill’s

explanation and reasoning for not attending work; consideration should be given as to whether any further steps can reasonably be taken to address Bill's concerns and to satisfy him that reasonable steps have been and will continue to be taken to manage the risks.

What should the manager do now given Bill's refusal to return to work?

The manager should invite Bill to meet with him. The purpose of the meeting is to discuss and seek an understanding of Bill's reasons for refusing to attend work; to explore whether Bill has any additional evidence that is relevant to his refusal; for the manager to explain the reasons why the company believes that it is safe for Bill to attend work (i.e. to review the Occupational Health reports and any other evidence relating to the risks in this case); to openly and constructively explore whether any further steps can reasonably be taken to secure Bill's agreement to return to work; to make Bill aware of the consequences that are open to the company when staff members refuse to attend work in circumstances where the company does not believe there is justification for that refusal.

Even though there is no right for Bill to be accompanied, the manager may wish to give Bill the right to be accompanied at this meeting, given the potential implications going forward. The question may arise as to what policy the meeting is taking place under. Firstly, we should always remember that an employer is entitled to ask staff members to attend meetings to discuss relevant issues, whether or not it relates to a specific policy. Secondly, in relation to the facts of the case, it is apparent that the manager wants to understand the nature of the issue (i.e. whether Bill relies on medical grounds, health and safety grounds, both, and any other grounds). It is only then that the manager will be able to determine what route to take under relevant company policy. Therefore, the answer to the question is simply to explain what the purpose of the meeting is and what items are on the agenda.

What are the manager's options?

The manager will have to carefully consider Bill's explanation for not attending work and review that in the light of the evidence which the company has in relation to the risk and in the light of the steps that have been taken so far and any additional steps that can reasonably be put in place.

The manager should explain to Bill that a decision will have to be made about what to do next and which route will be followed. That should include the manager explaining to Bill that no decision will be made that does not have his health and safety in mind; that the assessment as to the health and safety risk will have to take account of the Government guidance available on managing coronavirus and the specific medical advice that the company has received in his case; that the usual process applied in cases where a staff member refuses to attend work when the company is satisfied that there is no valid reason for not doing so would be to commence disciplinary proceedings for failure to comply with a reasonable management request.

In these special extraordinary circumstances, mindful of the obvious fears that staff members may have, the manager may wish to introduce an option that may not

usually be put forward in such cases, namely, time off without pay, subject to review of how long the current crisis may continue.

The manager may then give Bill (and his representative) time to reflect on the situation, after which Bill should be invited back to the meeting to state his position at that stage. The manager can then decide what route to take in the circumstances. For instance, if Bill returns to say that he knows that he may be overly fearful and he just needs time to come to terms with what is going on, then that may lead to a different route than if Bill returns to say that there is no way he is coming back until the last trace of coronavirus has gone from the world.

What is the risk if the manager goes down a disciplinary route and takes disciplinary action?

To some extent this is the “elephant in the room” in this case. The disciplinary option is a factor and the manager should make Bill aware of that.

The disciplinary route is not the preferred option. Working collaboratively to understand and address Bill’s concerns is the best outcome. However, once the manager is satisfied that he has done what he reasonably can to satisfy himself of the risks and that appropriate measures have been taken; and once all that reasonably can be done has been done to try to address Bill’s concerns, then should Bill simply insist that he will not attend work and reject the suggestion of time off without pay, then the disciplinary route would be a reasonable option.

The level of disciplinary action would depend on how Bill responds to the charge. For example, if he simply dismisses the medical evidence without any explanation then he may receive a more serious sanction than if he acknowledges that the medical evidence may be right but that he nonetheless does not want to return at the moment.

Some employers may usually treat failure to comply with a reasonable management request as gross misconduct, whereas others may use progressive warnings and reissuing of the instruction in an attempt to encourage the employee back to work. Each employer would have to make a decision based on the facts and ensuring that it approaches the sanction consistently with previous cases. Remember also that an employer would need to have made it clear in the invitation letter to the disciplinary hearing that a sanction of summary dismissal was a potential outcome. Notwithstanding the prevailing fears about coronavirus and what impact that has on peoples’ minds, employers have to bear in mind that they have a business to run and that the efforts to keep things going could be severely undermined if individual staff members are left to decide their personal view as to whether they should be attending work. There has to be some evidential basis, based on the best guidance and evidence available.

The law does provide that a staff member who refuses to attend work if he/she believed he/she is in serious and imminent danger, and which he/she could not reasonably have been expected to avert, is protected from dismissal or detriment. The assessment of whether that protection applies in each case therefore goes to the very issues that we recommend are the subject of the discussion that should take place with the staff member.

Every case will be different and careful consideration will need to be given as to the company's assessment and attitude to risk. We are available to help if you have a case where such issues have arisen.

Vista Employer Services

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