

Covid-19:

Can employees withdraw from the workplace?

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Employees returning to work from the Covid-19 lockdown will need to show reasonable justification if they halt work on the basis that they are exposed to the virus.

Legal provisions allowing employees to withdraw from a hazardous working situation could, in the context of Covid-19, be open to abuse by unprincipled employees or trade unions.

This is because employers will be obliged to continue remunerating employees who have withdrawn their labour on the basis of their belief that they may contract Covid-19, unless it can be proven that employees acted in bad faith (which may be difficult or even impossible to do). Only if bad faith can be proven would there be a justification to withhold remuneration (on the basis of no work no pay).

The Mine Health and Safety Act (MHSA) and the Occupational Health and Safety Act (OHSA) grant employees the right to withdraw from a dangerous working place. Disaster Management Act (DMA) Regulations or related directives could also confer this right, when drafted.

Under the MHSA, employees may withdraw from the workplace if there is "reasonable justification" to believe that there is a serious danger to their



health and safety or if a health and safety representative directs them to withdraw. We believe this section contemplates what may be called 'a clear and present danger'.

The act also requires employees to hold dialogue with their employers on these issues to mitigate the danger so work can be conducted safely.

The OHSA does not grant employees an express

right to withdraw from a dangerous working place, but requires them to report the situation to their employers or health and safety representatives.

The first difficulty with managing the workplace hazard of Covid-19 virus is that it is invisible, because it is a microscopic virus, and even its host may be unaware and be asymptomatic. The second difficulty is that, even though we still know relatively little about the virus, what we do know is that it is highly contagious.

Where employers have provided all relevant instruction, health and safety protocols and personal protective equipment (PPE) to safeguard employees, is it reasonable and rational for

employees to exercise the right to withdraw from the workplace because they are (subjectively)

apprehensive of contracting Covid-19 there?

Practically speaking, there can certainly be no issue with granting employees the right to withdraw from a workplace due to Covid-19, where they have reasonable

justification. However, in our view, in the absence of some objective criteria, it will be impossible for employees to show reasonable justification. Only if employees present symptoms of the virus to their co-workers or test positive for Covid-19 (and that

information becomes known to their co-workers), can other employees be said to have reasonable justification to withdraw from the workplace.

Even then, this may not constitute reasonable justification when the employer has taken appropriate steps, such as disinfecting the workplace and screening (on an ongoing basis) all employees who came into contact with the infected employees.

In our view, employers should at least:

- constructively engage with Government to set clear parameters on what will be acceptable measures to establish and maintain a safe workplace
- ensure that an adequate risk assessment is conducted prior to the commencement of work, specifically dealing with any potentially unsafe areas or conditions, and ensure that adequate control measures, including the availability and suitability of PPE, are implemented
- comply with physical distancing requirements in accordance with the risk assessment, sanitising, screening, isolation and all other requirements set out in the DMA Regulations, where applicable
- comply with all requirements of employers prescribed in the Department of Labour's Occupational Health and Safety Directive, where applicable
- regularly and frequently convene health and safety committee meetings to proactively monitor the workplace and address any concerns raised by employees about Covid-19 transmission risk.



If, despite all these measures, employees withdraw from the workplace, employers should first consider whether, under the circumstances, employees have a reasonable justification for doing so. If they believe it is reasonable, employers must remedy the allegedly unsafe working conditions.

If employers do not agree that a reasonable justification exists, they may consider the following legal recourse:

- notify employees that their withdrawal from the workplace is unjustified and accordingly unlawful and call upon employees to return to work. If they do not return, it may be regarded as either unauthorised absence or unprotected industrial action. In those circumstances, the employer could, in our view, advise that it will apply the principle of no work, no pay

- initiate legal action seeking to inter alia interdict employees' withdrawal from the workplace and/or refusal to tender their services or mandate the employees to tender their services. **SR**

“ Employers should engage practically and constructively with employees and trade unions to attempt to resolve concerns when they arise. ”



Kenneth Coster specialises in employment law, with a particular focus in Occupational Health and Safety (OHS) law. He has acted for a broad range of employers in employment tribunals and courts. He has also advised and acted for a variety of leading mining, construction and engineering corporations in investigations and inquiries pertaining to OHS.