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## Flexible and Remote Working - More Stick and Less Carrot?

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Most employers are now seeing staff return to the office for at least a portion of the working week. Most have chosen to do so gently and to rely on encouragement, reminders of the importance of in-person collegiality and free lunches for those attending the office. Some employers are now looking for ways to *enforce* – as opposed to encourage – return to those who are failing to show up. When we see employers taking a stricter approach, we also expect to see more and more requests for flexible working – which covers not only hours but also location – including working from home (WFH). A YouGov poll in 2021 found that 81% of respondents expected to work from home at least one day a week post-lockdown and 33% expected to WFH at least three days a week.

At the same time as expecting a wave of remote working requests, *The Daily Telegraph* newspaper grabbed attention last week when it reported that employers across the UK are poised to reduce pay and/or benefits for home workers. Ten percent of employers plan on reducing pay for home workers after failing to encourage people back to work. This is according to a CIPD survey of 1,000 respondents. Four percent have already made the reduction and 13% are on the cusp of doing so.

The legal implications of rejecting flexible working requests and/or reducing pay for those who WFH are complex. We discuss some of the issues below.

### REDUCING PAY AND BENEFITS

It does seem entirely logical that pay is, in part, tied to the employees' expenses – where they live, commuting costs, child-care costs - and the employers' own expenses – high rent properties with utilities. If the employee wants to have the benefit or flexibility of WFH, then the bargain is to strike a different deal.

Salary, like place of work, is contractual: any variation must be done expressly with consent or impliedly through custom and practice. To change any contractual term without consent can amount to a breach of contract and allow the employee to resign and claim constructive



dismissal. Note also that if the employer is found to be in breach of contract, the benefit of any restrictive covenants will be lost which can, depending upon the industry and the individual, be very valuable to an employer.

Many global employers, however, do not take into account cost of living or prevailing tax regimes in local jurisdictions but tie pay almost exclusively to productivity: if that has not reduced as a result of WFH what is the rationale to reduce pay? In analysing employment rights, many claims depend upon the tribunal conducting a balancing exercise - the necessity for the employer to take the action versus the detriment to the employee. If the employer's position is that its costs (usually predominantly premises after staff costs) have not gone down and therefore it needs to reduce its costs, a tribunal will look at what other measures an employer could have taken to save costs which have less of an impact on the employee – for example, downsizing its office space.

There is also an argument that the employee's costs as a result of WFH have not necessarily reduced: employees are now paying for their own heating and lighting to be able to WFH and many have invested in their own equipment. The benefits of annual railcards are lost when only travelling 2 or 3 days a week and so commuting less becomes less efficient and more expensive.

To avoid potential claims we suggest the following:

- A consultation exercise with staff to understand if there are staff who want to work entirely remotely, and if so, why, or if this is more about flexibility. Flexibility is less of a reason to reduce pay and benefits and is also easier to enforce. Staff who want to work entirely remotely may be easier to cut more of a bargain with (as opposed to those wanting a hybrid approach).
- Look at the pool of those staff who want to work remotely: it is mostly women or those with health issues (these are all red flags for discrimination). It could be said that more women with caring responsibilities will choose remote working and therefore any policy to reduce pay could risk being indirectly discriminatory.
- How is your pay structure determined? It is London weighted? Does it take into account cost of living or is it productivity based? If it is the former it may be easier to reduce pay for those who WFH.
- Lastly, and perhaps most importantly, consider the impact on your talent pool. Many employees and candidates see WFH no longer as a perk but as an expectation.

### THE FLEXIBLE WORKING REQUEST REGIME

The current regime for flexible working was introduced pre-pandemic and does not neatly fit with many employers' and employees' experiences of maintaining high productivity levels and efficiency whilst working remotely. It is certainly true that it becomes harder to decline a request for working remotely on those grounds when the lock-down figures for many companies prove the opposite of that.

Employers have legitimate concerns about the effectiveness of remote supervision generally, or there may be aspects of certain roles that do not work as well when team members are working from home. They may also want staff to attend the office in person one or two days a week to allow for employee engagement, effective collaboration, mentoring of younger staff and integration of new team members. These reasons do not neatly fit into the current statutory reasons for refusal which are limited to:

- burden of additional costs;
- inability to reorganise work among existing staff;
- inability to recruit additional staff;
- detrimental impact on quality;



- detrimental impact on performance;
- detrimental effect on ability to meet customer demand;
- insufficient work for the periods the employee proposes to work; and
- a planned structural change to the business.

There is no doubt that working entirely remotely will have a negative impact on the working experience; creativity thrives in person and the experience of many post pandemic is nothing short of joy at seeing colleagues again. The ability to harness that 'meeting in person' needs to be retained and be factored in to the potential reasons to refuse a permanent WFH request. Equally, providing a work environment which is not merely functional and transactional is key. There is limited point forcing people to come back to the office if everyone sits in their own office with interaction restricted to emails.

### HOW MIGHT THE CURRENT 'FLEXIBLE WORKING REQUEST' REGIME CHANGE?

In its 2019 Election Manifesto, the current UK government proposed flexible working would be 'the default': it has now consulted on proposals for reshaping the existing statutory right to request flexible working and recognises that there is no 'one size fits all' solution.

The consultation sets out five proposals for "rebalancing" the current framework, seeking views on:

1. Making the right to request flexible working a day one right (rather than requiring a qualifying period of six months).
2. Whether the eight business reasons employers are allowed to rely on for refusing a flexible working request remain appropriate given the dramatic changes to flexible working arrangements since the right to request framework was first introduced.
3. Requiring the employer to consider alternative flexible working arrangements before refusing an employee's specific request. Currently, an employer only has to say that a request to work flexibly cannot be accommodated and give the relevant business reason(s) as to why not. To encourage compromise, the government is exploring how practical it is to ask employers to set out, when rejecting a request, that alternatives have been considered (for example, making the change temporarily, considering other part-time working patterns or making the changes on some working days only).
4. Whether employees should be allowed to make more than one request per year and whether the current three-month period for responding to a request should be shortened.
5. How to encourage use of requesting temporary arrangements for a defined limited period.

Note, there are no recent reported cases dealing with flexible working requests post-pandemic. Recent cases are still dealing with requests or appeals relating to requests made in 2019.

Note also that, having worked remotely or flexibly for more than two years, we expect to see employees arguing that their contractual 'place of work' clause has been varied through custom and practice. Whilst it would not be fair to count periods of time when employers were prevented from requiring their employees to come to the office, it will be interesting to look back through all communications with employees to see when and under what circumstances (non-mandatory) continuing to work from home became the norm.

### GUIDANCE ON DEALING WITH FLEXIBLE WORKING REQUESTS

- Be careful when relying on detrimental impact on quality or performance – especially where figures or performance reviews show there was no such impact throughout the period of lockdown.



- Identify tasks which are more location–flexible. Tasks that are office dependent might include physical handling of goods and materials, the use of certain equipment and machinery or personal service tasks. Some tasks fall in the middle, requiring a degree of face-to-face contact such as people management, teaching or mentoring, or customer service tasks that require long-term relationships with clients.
- On the hours scale, constraints may come from customer requirements or team resourcing patterns. Hours may be determined by customer needs or time zones or controlled through shift-based patterns.
- Avoid referring to blanket policies to come into the office a certain number of days per week. These can amount to a ‘policy criterion or practice’ which can have a disproportionate impact on employees with disabilities or childcare responsibilities (related to sex).
- Use a trial period – there is currently no statutory obligation to offer a trial period but it is recommended by the ACAS code of practice.
- Be open to exploring alternatives. Offering a middle approach or showing flexibility does not entirely remove the risk of an indirect discrimination claim but shows the employer was keeping an open mind.
- It can often work well to appoint a particular manager (such as HR) to oversee the decision making process and act as a quality control in ensuring that decisions are made fairly and that the basis of rejection of any request is also consistent with previous decisions.

**DISCRIMINATION RISKS**

The remedy for failing to deal with a Flexible Working request properly is relatively nominal unless the employee can establish that they have been discriminated against (for example, on the grounds of a disability or indirect sex discrimination linked to childcare arrangements). In cases of discrimination, the award will be uncapped.

One recent case highlights this risk. In a Tribunal judgment issued in September last year, an employee was awarded a sum close to £185,000 made up of compensation from a successful discrimination claim. The employee had requested a flexible working arrangement that would allow her to finish at 5pm instead of 6pm to collect her daughter from nursery (which closed at 6pm and was an hour’s drive from the office in traffic). The Tribunal found that employee had been indirectly discriminated against on the grounds of sex on the basis that: (a) the practice of requiring all staff to work from 9am-6pm placed women with children at a substantial disadvantage compared to men with children; and (b) in the Tribunal’s opinion, the company had not shown that the rejection of the proposed reduction in the employee’s working hours was proportionate to the needs of the business to maintain successful customer relations.

Remember also that we now have a Tribunal case which found that “long COVID” can amount to a disability. If an employee makes a request on grounds of health such as are capable of amounting to a disability, as well as being required to make any reasonable adjustments, there is now also the risk of a disability discrimination claim.

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