King & Spalding

# Client Alert

Global Human Capital and Compliance

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# Return to Attender: Getting Back to the Office

## Series 4, 10 in 10: Issue 7

Since companies began their return to the office post-pandemic, there has been an increasing polarization between those which feel the future is to 'work anywhere', versus those which see remote working as a COVID aberration and want to mandate a return to the office. Is the drift to hybrid work inevitable, and how can employers avoid an avalanche of disputes and litigation if shifting back to office-based working?

In the UK, employees have a right to request flexible working, and for this to only be refused where one of eight specific grounds applies. To have this "right to request", employees currently need to have 26 weeks' seniority, however in April this will become a 'Day One' right. Employers handling return to office mandates have often received multiple complaints from objecting employees under their internal grievance procedures, but so far, few cases have been litigated through to a Court decision.

### UK EMPLOYMENT TRIBUNAL DECISION

Employers have been cheered by a UK Employment Tribunal decision upholding an employer's refusal to allow an employee to continue working fully remotely. This was despite the fact she had worked remotely since pre-COVID and was recognised as a good performer[1]. Few cases on flexible working reach the Employment Tribunal, in part given nervousness on both sides about forcing these issues, so the decision offers a rare insight.

Key takeaways from the case:

- The Tribunal recognised that 'good' performance can still be improved. So, the fact an employee had performed well throughout their time working remotely was not a bar on recalling her to the office.

- It also recognised limitations of remote working. This included an employee's ability to observe and respond to 'non-verbal' cues that may arise outside of scheduled events (or over a Teams link). The Tribunal saw limits to the use of remote interfaces, describing it as 'not well suited to the fast interplay of exchanges' in settings such as training events or meetings.
- The Court accepted the employer's approach without 'hard facts' to support its position that in-office working would be more effective, for this role. The Tribunal accepted that an employee already 'successfully' performing the role could still 'be better' even without evidence of a detrimental impact on performance or quality of output.

But this is not a carte blanche for an office recall, for the following reasons:

- The Tribunal was influenced by the fact the employer was asking for the employee to attend the office for 40 percent of her time but would apparently have accepted an even lower percentage. Unusually, the employee was apparently not open to any level of attendance in the office.
- The employee was a senior manager who played a role in managing the department – and in enforcing its return-to-work policy among her team. The Tribunal noted that in-person connections were important 'particularly' given the individual's senior position, so this may not have carried such weight for someone junior.
- This case does not set a precedent, given it is 'first instance'. And it reinforces our expectation that these cases will be decided on their individual facts, making it harder for employers to take clear rules from them, or foresee the outcome of litigation.
- Most importantly, this case was only brought under the UK legal right to request flexible working, which is only to have a request considered and have the decision only rejected on factually correct grounds. The situation is more complex (and the potential liabilities higher) where the employee claims special circumstances which would create a discrimination risk in refusing unequal treatment (childcare, elder care or health considerations among others), or can point to inconsistent treatment with other employees. Where employers have not had clear policies in place since remote working began, employees may also claim an implied contractual right to remote working or that the fact of effective working over that period undermines a justification for refusal.

## KEY PRINCIPLES FOR UK EMPLOYERS

- Give all requests due consideration, and if rejecting, refer to objective business grounds and one of the eight factors in the statutory flexible working legislation.
- Consider compromise especially where discrimination factors are potentially engaged. Changes to the statutory flexible working procedure from April build in an express duty to consider before making a decision.
- Keep a central log of requests and document reasons for refusal.
- Ensure UK flexible working procedures are updated, and staff trained in time for the 6 April 2024 changes. These include a right for employees to make a request from day one of their employment (down from 26 weeks' minimum seniority) and a right to make two requests per year (up from one), and a shorter, two-month deadline for employers to respond (reduced from three months).

There is no doubt this will be the topic of continued litigation whilst employers continue to navigate the uncharted waters of post-pandemic workplace rights and expectations. Employers need to be aware of the legal considerations of asking employees to return to the office, and plan to engage with employees well in advance of any return to office deadline.

## AN INTERNATIONAL COMPARISON

Setting the UK approach in context, in Continental Europe, the Courts are typically quick to imply a contractual right to work remotely, where employees have worked remotely previously. Even where the employer has given instructions throughout to limit remote working, or the arrangement stemmed from COVID, the Courts have upheld employees as having an ongoing right to work remotely. Both communications to employees and the time period over which remote working has been in place need to be carefully tracked.

In APAC, the position is more nuanced. In Australia, as an example, the Fair Work Commission recently upheld the termination of an employee who represented himself to be working in Australia while he was still overseas after a period of approved leave.[2] This was the case even though the employee genuinely believed that he had the 'implicit permission of his employer to work from wherever was convenient to him' and that flexibility had been allowed during COVID. The employer's clear policy requiring specific permission to work from overseas given IT risks was relevant here. However, the Commission reached the opposite decision in another case in the same month – finding that the employee's failure to attend the workplace on a specific 'mandatory in-office attendance day' did not constitute a valid reason for dismissal and that the employer's decision lacked procedural fairness.[3]

## KEY TAKEAWAYS

Across their international locations, employers need to closely monitor individual remote working arrangements, and note where workarounds are agreed on an exceptional on temporary basis. Where general principles on office attendance are put in place on a global or regional basis, local advice is needed on specific processes and actions needed for compliance with specific national rules. And above all, employers need to anticipate and plan to engage with employees well in advance of any return to office deadline.



[1] *Wilson v Financial Conduct Authority* 2302739/2003 ET
[2] *Diandong Ren v The Commonwealth of Australia as represented by the Bureau of Meteorology* [2023] FWC 3157
[3] *Tomaso Edwards Moro v Insider Au Pty Ltd* [2023] FWC 3148