



Employment Law Brief

with

Darren Newman

Has this pandemic seen the end of the traditional office job? Among the many changes to our way of life that we have seen over the past six months has been a huge rise in the number of people working from home. For many of us, virtual meetings have become the norm to the point where the idea of a group of people gathering together in a single room just to talk to each other seems downright strange.

The question is whether this change is a temporary one or something more long-lasting. Will more employees want to work from home on a permanent basis? Will employers want to encourage employees back to the office and back to a normal working pattern, or will the need to ensure a COVID-secure workplace mean that they will rely on extensive homeworking for the foreseeable future? The extent to which employees have a say in their place of work could be a key employment law issue in the coming year.

For employees who want to work from home the key employment right is the right to request flexible working, enjoyed by employees with six months' continuous service. The right was originally introduced to help those with caring responsibilities balance those with the demands of work but in 2014, all reference to the reason for the request was removed. Employees are now free to make a flexible working request for any reason they choose.

It is also important to remember that while we talk about a right to request 'flexible working' what the Act actually provides is a right of an employee to request a change in their terms and conditions of employment provided that change relates either to working time (including a change to the length of the working week, or the employee's specific hours of work) or to the place of work. IN other words, an employee with at least 26 weeks' service has the right to request that they be allowed to work from home for all or part of the working week. When the request is made the employer must handle that request in a reasonable way. There is no formal procedure that needs to be followed, but a Tribunal would expect to see a genuine discussion between the employer and the employee focussed on whether the arrangement can be made to work. A blanket policy to refuse requests will certainly not do.

Any refusal of a right to request flexible working must be based on one of the business reasons set out in the Act.

There is no need to list them all because basically they cover every conceivable business reason you could think of from the burden of additional costs, through the impact the request would have on performance or the quality of the work that could be done and the difficulties that the change would present in reorganising work among existing staff. The facts on which the employer bases any refusal must be correct, but the Tribunal is not entitled to weigh the employer's reason for refusing against the employee's reason for making the request. While the process must be handled in a reasonable way and the reason for the refusal must be genuine – the employer's decision does not need to be a reasonable one.

Of course, there are wider issues. Hitherto most requests for a flexible working arrangement have been prompted by the employee's caring commitments and a large majority of such requests have been made by women. That raises the possibility of a right to request claim being backed up by allegations of indirect sex discrimination if the employer's refusal to accept a more flexible arrangement can be shown to put women at a particular disadvantage. To defeat such a claim the employer would have to show that it's decision amounted to a 'proportionate means of achieving a legitimate aim' and in that case the Tribunal would absolutely be concerned with the reasonableness of the employer's refusal.

Not everyone requesting homeworking will be able to back that up with a discrimination claim – but there will be some. An employee with an underlying health condition that makes them more vulnerable to coronavirus may feel less able to travel into work on public transport – even if the workplace itself is COVID-secure. The same may be true of an employee in a vulnerable age groups and even – though more research is clearly needed on this issue – a member of ethnic group that may be particularly susceptible to the virus.



While a claim in any of these areas would be breaking new legal ground, it is clear that a sensible employer should approach all requests for homeworking in the same spirit of open mindedness and with a commitment to making the change work if possible. There is no room for prejudice against the whole concept of working from home or refusals based simply on a line manager's gut instinct or personal preference. Indeed, it is important that the approach to homeworking is consistent across the whole organisation. That does not mean that all employees are equally likely to have a request accepted – there are some jobs that simply cannot be done from home – but the same constructive approach centred on trying to make it work should certainly be followed in every case.

What we may also see is a reverse situation in which it is the employer who wants the employee to work from home and the employee who wants to come into the office. Here the issue will be the contract of employment. The place of work is something that must be set out in the employee's written statement of terms and conditions. Usually that is drafted with some flexibility on the employer's part so that the employee's location can be changed if necessary. Often that is based on a reasonable daily travelling distance – and so asking the employee to work from home might well be within the scope of the contract. But often in local government the place of work is confined to the local borough or county. It is not entirely clear that an employee in that case could be instructed to work from home if he or she happened to live over the council boundary.

There is another complication. Wherever the employee can be asked to work, it is clear that there is an implied term in the contract that the employer will provide the employee with the facilities necessary to do the job. Not everyone has a domestic arrangement conducive to working from home. It is not just a question of equipment such as an appropriate chair, desk, and laptop – or even the question of broadband – all of these can be arranged. But not every employee will have the physical space to work effectively. They may not have a quiet room away from other people where they can work uninterrupted.

During lockdown there was a general sense that we were all working in a less than ideal environment and appropriate allowances were made on both sides. But in the long term a more sustainable approach will need to be taken. If an employer is asking more employees to work from home, then that needs to be accompanied by the appropriate package of support needed to make it work. If the employee does not have a suitable home environment, then it is up to the employer to find

somewhere – perhaps a local co-working space – where the work can be done.

Finally, employers will have to grapple with the question of choosing who gets to work from home and who has to come into the office. This is an unenviable task that will require meeting the needs of employees in vulnerable groups without creating resentment among the rest of the workforce. Employers will need to retain some flexibility so that they can make changes to arrangements as the situation develops. Any change to an employee's contract should therefore include a review clause allowing the employer (after giving suitable notice) to revert to the original arrangement should the needs of the organisation require it. Getting the mix of home and office work right is going to be a key challenge in the months - and even years - to come.

[Don't forget to check more about Darren Newman on his blog at A Range of Reasonable Responses or on twitter at @DazNewman](#)