



## Employment Law Brief with Darren Newman January 2022

### Reluctant Returners

Of all the turmoil over the past two years, perhaps the most dramatic lifestyle change for most people is the switch to working from home. For much of that time the switch was essentially required by Government guidance. Employees should work from home, the guidance said, if it was “possible to do so”. And we discovered that for many of us it was possible - even if it was not always ideal. That guidance has now been withdrawn (In England at least) and in its place is the statement “people should now talk to their employers to agree arrangements to return to the office”. But is it a matter for agreement? Does an employee who has worked largely from home since March 2020 now have the right to continue doing so? Or can the employer simply instruct employees to return to their offices?

To answer that question we have to start with the contract. An employee’s written statement of terms and conditions must specify the place of work – essentially defining where the contract is to be performed. Most employees in local government will have a contract which tells them that they work in a specific location, usually with some flexibility to ask them to relocate within the same broad area. The fact that for period of time they have been working at home will not, in my view, alter that basic underlying term. Working from home during the pandemic does not indicate that the parties have agreed to vary the contract, but merely that Government guidance is being followed for the duration of the crisis. When the crisis ends, the position reverts to that set out in the written statement.

It may not be quite that simple. An employee is only obliged to obey reasonable instructions. It may not be reasonable to simply instruct an employee to return to office working on a full-time basis after almost two years of working from home. Employees may have organised their lives around working from home and have made child care and other arrangements that cannot be changed without some notice and period of adjustment.

Subject to a reasonable transition period, however, the contractual position is likely to be that employees can be told that they must now return to the workplace if that is what the employer wants to do. But there are other rights that need to be considered apart from the contract itself.

Some employees may be anxious about returning to an office environment. If that is based on their clinical vulnerability to covid –

or if their anxiety is so severe and long-lasting that it amounts to a disability in its own right - then the employer may be obliged to allow them to continue working from home as a reasonable adjustment. These cases are likely to be rare and do not cover those who are simply reluctant to return or sceptical that there is a need for it.

Employees who want to continue to work at home may make a request to their employer that they be allowed to do so. That could be a request under the right to request flexible working which specifically covers working from home arrangements. The reason for the request is immaterial and the question is simply whether the employer has a valid business reason for any refusal. That sets the bar quite low for an employer who is not prepared to agree to the request – although the refusal must not be based on ‘incorrect facts’. A claim with more legal bite to it would be indirect discrimination. This would be based on the assertion that women are more likely than men to need to work at home and so an insistence on coming into the office puts women at a particular disadvantage. If that assertion was supported by the evidence, then the employer would have to show that its refusal was a ‘proportionate means of achieving a legitimate aim’. This would put the employer’s reasons for not allowing the employee to work at home under much more rigorous scrutiny than in a claim made under the right to request flexible working.

All of this suggests at the very least that an employer should engage with reluctant returners and discuss their concerns. Where these are health related or concern family



arrangements that might have a greater impact on women than men, the employer would be wise to think carefully before proceeding and consider whether some arrangement can be reached that suits both sides.

Apart from those circumstances, however - and allowing for a reasonable period of transition - the employer is entitled to insist that employees return to the office in accordance with their contracts. An employee who refuses to comply with this instruction will be in the difficult position of refusing to obey a reasonable instruction. The fact that they might be able to show that they are just as effective when working at home will not matter. Employees can seek to have their contract changed, but if they fail to do so then they will be obliged to comply with the one they have.

The logic of that position, of course, is that a refusal to return to the office will be treated as a disciplinary matter. Given that it is an ongoing refusal there would seem to be little alternative to the employer either accepting the employee's insistence on working at home or deciding to dismiss. Assuming that a fair disciplinary procedure is followed - and that the consequences of the employees continued refusal are made clear - I would expect a dismissal in such circumstances to be fair.

But that does not mean that employers should now go full speed for a return to the office with the threat of dismissal hanging over any employee who objects. There are wider and more important considerations than what an employer is legally entitled to do. The last two years have seen a transformation in the way we work and many of the changes have been positive. The end of Covid restrictions should give employers an opportunity to think long term about what arrangements work best not only from a managerial point of view, but also in ensuring an engaged and motivated workforce.

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