



# **White Paper Conference**

**Gareth Brahams, Managing Partner**

**Brahams Dutt Badrick French LLP**

**B|D|B|F**

**Where does the balance lie between employees who are reluctant to return to the office and employer needs / wishes? When does dismissal become a realistic option?**

Date	Homeworking or office working?
23 March 2020	<ul style="list-style-type: none"> <li>• First national lockdown, meaning almost all office workers had to work from home</li> </ul>
1 June 2020	<ul style="list-style-type: none"> <li>• Stay at home order lifted. Guidance said office workers who could work from home should continue to do so (the guidance was relaxed in August but tightened up again in October)</li> </ul>
3 November 2020	<ul style="list-style-type: none"> <li>• Second national lockdown, meaning almost all office workers had to work from home</li> </ul>
2 December 2020	<ul style="list-style-type: none"> <li>• Stay at home order lifted. Guidance said office workers who could work from home should continue to do so</li> </ul>
6 January 2021	<ul style="list-style-type: none"> <li>• Third national lockdown, meaning almost all office workers had to work from home</li> </ul>
29 March 2021	<ul style="list-style-type: none"> <li>• Stay at home order lifted. Guidance said office workers who could work from home should continue to do so</li> </ul>
19 July 2021	<ul style="list-style-type: none"> <li>• Guidance said that workers could be returned to the office on a gradual basis</li> </ul>
13 December 2021	<ul style="list-style-type: none"> <li>• Guidance said that workers who could work from home should do so</li> </ul>
19 January 2022	<ul style="list-style-type: none"> <li>• Guidance said that workers could be returned to the office, with special consideration given to certain groups</li> </ul>

## Three types of “reluctant returners”

- 1. Scenario 1:** Those who simply have a preference for working from home (or another location) full-time
- 2. Scenario 2:** Those who wish to work from home full-time because it facilitates the management of another demanding aspect of their lives
- 3. Scenario 3:** Those who are fearful about catching Covid

# The starting point: where is the place of work?

- Place of work must be specified in the statement of employment of particulars (usually the employment contract)
- Typically:
  - the employer's premises; **and**
  - flexibility to move the employee to work elsewhere (this may be implied in exceptional circumstances)

# What was the place of work during the pandemic?

## During lockdowns and when WFH guidance in place

- Employers invoked the express or implied flexibility term to direct the employee to work from home **temporarily** (also a reasonable management instruction)

## After WFH guidance lifted (i.e. 19 January 2022)

- No need to rely on flexibility term
- Default position is that place of work will revert to that stated in the contract

## Scenario 1

**Employees who simply prefer to work  
from home (or another location)**

# Can these employees overturn the default place of work?

- **Option 1:** Has there been an express agreement to vary the place of work?
- **Option 2:** Has there been an implied agreement to vary the place of work?
- **Option 3:** Can the employee make a successful flexible working request?

# Can these employees be dismissed fairly if they refuse to return to the office?

- Do they have qualifying service for unfair dismissal?
- If yes,
  - Is non-attendance a breach of an important term of the employment contract?
  - Are there any limitations on the employer's decision-making?
  - Fair process in accordance with Acas Code

## **Scenario 2**

**Employees who wish to work from home because it facilitates the management of another demanding aspect of their lives**

# Employees with childcare responsibilities

- Risk of indirect sex discrimination:
  - **What is the practice that is apparently neutral?** Dismissal for refusal to return to the office
  - **Does it disadvantage women?** Yes, due to the “childcare disparity” – see: *Dobson v North Cumbria Integrated Care NHS Trust Foundation*
  - **Is the discrimination justified?** Is there a legitimate aim? Is dismissal a proportionate means of achieving the aim? Challenge will be to show that there were no less discriminatory alternatives available (e.g. some form of hybrid working or a different role)

# Employees with caring responsibilities for a disabled person

- Risk of associative indirect disability discrimination:
  - **What is the practice that is apparently neutral?** Dismissal for refusal to return to the office
  - **Does it disadvantage carers of disabled people?** Yes, see *Follows v Nationwide Building Society (ET)*
  - **Is the discrimination justified?** Is there a legitimate aim? Is dismissal a proportionate means of achieving the aim? Again, the challenge will be to show that there were no less discriminatory alternatives available

# Employees who are disabled

- Homeworking may help those with certain disabilities to manage their impairments more effectively
  - e.g. ME, CFS, mobility problems, anxiety, agoraphobia
- Possible claims:
  - Indirect disability discrimination
  - Discrimination arising from disability
  - Failure to make reasonable adjustments

# Can these employees be dismissed fairly if they refuse to return to the office?

- Pathway to dismissal is more complicated but not impossible:
  - Give careful consideration to rationale for wanting a full-time office return
  - Balance your aim against the employee's needs and consider compromises
  - If disabled, obtain medical evidence regarding risk and adjustments
  - Identify the fair reason and follow a fair process

## Scenario 3

**Employees who are fearful about  
catching Covid**

# Possible legal claims from fearful employees

- Automatically unfair if dismissed for:
  - Bringing employer's attention to health and safety issues
  - Leaving or staying away from a dangerous workplace
  - Taking or proposing to take actions to protect self or others
  - Raising concerns about health and safety which employee reasonably believes to be real
- Employee only needs to show they had a reasonable belief that there was a health and safety danger (not that there was, in fact, such a danger)
- No qualifying service needed to bring such claims and damages uncapped
- Interim relief available

# How have Tribunals dealt with such claims?

Unfairly dismissed	Fairly dismissed
Employee who wished to stay at home in accordance with Government instructions but agreed to do urgent or essential work	Employee who wished to stay at home because he was worried about catching Covid and infecting his vulnerable children, even though his employer had put health and safety measures in place
Employee who refused to return to the office while the WFH guidance was in place and who had concerns about health and safety risks in the office and the risk posed to his CEV girlfriend	Employee who wished to work from home because she felt unsafe attending work, even though her employer had put health and safety measures in place and offered compromises
	Employee who wanted to be stay at home and be furloughed, even though the employer needed him to perform work

# What are the learning points?

- Fear of Covid in general is not enough – belief must be that there is a danger arising **in the workplace**
- Employers who have taken health and safety measures, complied with guidance and engaged with employees will be in the best position
- These cases all concern the early part of the pandemic – the circumstances of danger have reduced, at least for now
- Ensure that any dismissal is for refusal to return not the raising of concerns



## But note that certain factors raise the risk

- Higher risk of serious illness
- Severe anxiety about returning
- Pregnancy
- Philosophical belief that prevents return

# Conclusion: how to deal with reluctant returners

1. Update health and safety risk assessment before return
2. If disabled / at higher risk of illness, obtain medical advice about risks and possible adjustments
3. If pregnant, assess risk and consider adjustments or suspension on full pay
4. Engage with employees about rationale, share risk assessments and respond to concerns
5. Give reasonable notice of return date and allowed a phased return
6. Instigate disciplinary action for remaining reluctant returners and follow a fair process before dismissal

# Contact details

Gareth Brahams, Managing Partner  
[garethbrahams@bdbf.co.uk](mailto:garethbrahams@bdbf.co.uk)  
020 3828 0352



**BDBF**