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**In the spotlight of Covid-19, how do you contend with employee requests to work 100% from home; they've shown they can do it, but it just isn't what you want right now?**

Gillian MacLellan

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# Agenda

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Homeworking in 2020

Non-legal considerations

Legal considerations around handling a request

- Flexible working request process
- Discrimination
- Health and safety
- Constructive unfair dismissal

My answer

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The context: homeworking in 2020

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## 2020: Covid-19 and the year of workplace change

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In April 2020 46.6% of people in employment in the UK were working from home

Before the pandemic in 2019 4.7% of people worked from home

Studies vary regarding figures, but in one study\* 88% of employees wanted to continue working from home in some capacity after lockdown

But only 47% said they would like to do this often or all of the time

\* Felstead, A and Reuschke, D (2020) 'Homeworking in the UK: before and during the 2020 lockdown'

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## The impact of the Covid-19 spotlight

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- While the law around homeworking in the UK has not changed, the context has
- So what is considered “**reasonable**” or “**proportionate**” in a legal sense has shifted to take the global pandemic into account
- Workplace risk **has** changed – previous low risk workplaces like offices have become riskier environments simply because other people are present
- **Personal risk profiles** have changed – many people have serious health concerns about travelling to work, and many people have now shown that they can make homeworking operate effectively

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# How are other countries tackling the growth in homeworking?

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## Germany

- Proposing a bill to give employees the legal right to work from home
- Employers must have a compelling business or operational reason to reject a mobile working request

## Ireland

- Carried out a consultation this summer on remote working to put in place guidance for employers

## Spain

- Employers and employees can enter into a written voluntary agreement to regulate remote working
- Employees who have worked at least 30% of their total hours remotely in the last 3 months will be protected by the right to flexible working hours, full expenses, digital switch off and privacy

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What are the non-legal considerations an employer should take into account if an employee asks to work from home 100% of the time?

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## Non-legal considerations

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- Test the thinking!
- Why does the employer not want to agree to the arrangement?
- Are there strong business reasons?
- Or is it because “that is how we have always worked”?
- Think longer term
- Consider what your competitors are doing?
- Think about the impact from a diversity perspective

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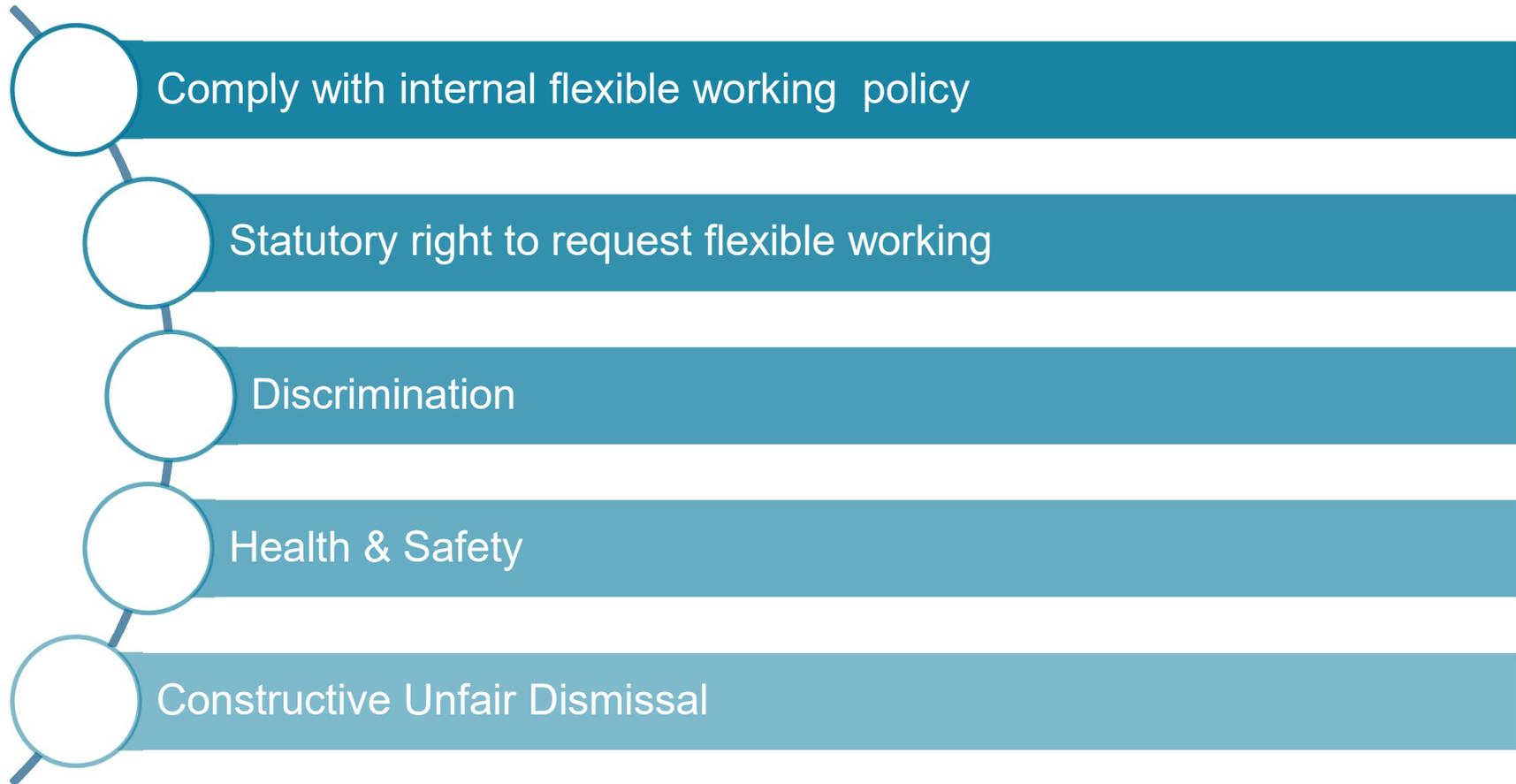
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What are the legal considerations an employer should take into account if an employee asks to work from home 100% of the time?

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## Legal considerations when dealing with a request

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## Compliance with the internal flexible working policy and statutory process

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- An employee making a request to work from home is likely to do so through the **organisation's flexible working policy**
- As a starting point employers should ensure that their internal process is followed and that the policy complies with the statutory process
- The statutory process is only **a right to request**. If the employer does not want to agree to the request there is sufficient scope with the regulations to validly reject a request
- The real legal risk does not lie with the right to request procedure but other remedies such as discrimination, health and safety and in extreme cases constructive dismissal
- The maximum remedy for failure to follow the procedure is £4304

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## Flexible working requests in the UK – the statutory process

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### Qualifying employee

- 26 weeks' service
- One application per year
- Request should be made in writing

### Types of change

- Hours of work
- Working times
- Place of work

### Responding to a request

- Employer must consider request
- 8 statutory grounds for refusal
- 3 month period to respond

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# Statutory grounds for rejecting a flexible working request

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## Handling a flexible working request of this nature

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- Important to emphasise that there are differences between the enforced lockdown homeworking period we are still in and making a choice to work from home on a permanent basis
- An employer faced with such a request will need to assess:-
  - Are other team members back at work either part time or full time?
  - If not is it likely that other people plan to go back?
  - Is the employee a supervisor – can management continue remotely?
  - Significant difference between a temporary enforced arrangement where everyone is in the same position but the position changes when people return to work
  - What are the needs of the role? Are they in an autonomous role or do they interact with team members? Are they an expert/specialist in their role? How will this affect the team?
  - Can a compromise be reached? 1 day a week, 1 day a fortnight?

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## Other factors to consider

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- Acas recommend that where requests are received **individually** then they should be considered that way and in the order that they are received
- However employers may face a number of these requests when the government lifts the stay at home instruction
- Where **multiple requests** are received you can look at them together – however the reality is that some will carry greater legal risk than others
- For this reason many employers are taking a proactive approach and allowing all workers to work 2-3 days a week from home rather than wait for requests to come in

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## Discrimination

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**Why** does the employee want to work 100% of the time from home and does the reason relate to a protected characteristic?

- Indirect Sex Discrimination
  - A number of successful cases have involved mothers who have challenged the refusal to grant homeworking because of childcare reasons as amounting to indirect sex discrimination
- Direct Sex Discrimination
  - We have also seen a claim from a father who was refused flexible working in circumstances where female employees were granted the request
- Disability Discrimination
  - If a person has a disability – for example they have been shielding or are in the vulnerable category then a permanent reasonable adjustment may be to work from home

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## Health and safety

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- Are there health and safety reasons why the employee wants to work from home 100% of the time?
- For example, are they required to use public transport and work in a busy workplace?
- Do they have concerns about social distancing when at work, and are these concerns valid?
- Do they have health concerns or do they care for others with health concerns ?
- If so they may argue that they have valid concerns for their safety and the rejection of their request to work from home amounts to a detriment under s.44 of the Employment Rights Act and potentially s.100
- Reasonable belief they are in “**serious and imminent**” danger

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## Constructive Unfair Dismissal

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The employee may claim that the failure to grant the request amounts to a fundamental breach of contract and they resign alleging that the employer has;

- Failed to protect their health and safety
- Breached the employer's duty of care or the implied term of trust and confidence

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**The answer?**

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## Contact us

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