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?

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Introduction

1. Before the pandemic, the proportion of UK workers who worked mainly at home was relatively small. In the 12-month period from January to December 2019, just over 26% of the total UK workforce did some work from home and just over 5% worked mainly from home.[1]

2. As we all know, the pandemic required office-based employers to pivot rapidly towards homeworking. On 23 March 2020 a "stay at home" order was put in place, meaning it was unlawful to leave home without a reasonable excuse. This meant that almost all office workers had to work from home, save for essential workers. Official figures show that by April 2020 over 46% of UK workers were doing some work from home, with the vast majority reporting that this was as a direct result of the pandemic.[2]

3. The stay at home order was lifted on 1 June 2020, meaning it was no longer unlawful to be outside the home without a reasonable excuse. But this was not the end of the homeworking experiment. Guidance remained in place which said that those who could work from home should continue to do so. From 1 August 2020, the guidance was softened slightly to allow employers greater discretion to return workers to the office, provided it was possible to do so safely.

4. When the second wave of the pandemic began to hit in October 2020, that guidance was tightened up to say that those office workers who could "work effectively" from home should do so over the Winter. Anyone who could *not* do so was permitted to attend the office, provided that it was safe to do so. This iteration of the guidance was flexible enough to leave it to the worker to decide what "working effectively" meant for them (within reason).

5. On 3 November 2020 a second stay at home order was put in place. Once again, this meant that almost all office workers had to work from home. This was lifted on 2 December 2020. However, we were back in lockdown just over a month later, with a third stay at home order in place from 6 January 2021.

6. The third stay at home order was lifted on 29 March 2021, however, guidance advised that office workers should continue to work from home, save where they could not work effectively from home, it was appropriate in the light of a worker's mental or physical health difficulties or it was appropriate in the light of a worker's "particularly challenging" home working environment.

[1] Coronavirus and homeworking in the UK labour market: 2019.
[2] Coronavirus and homeworking in the UK: April 2020.

7. On 19 July 2021 restrictions were relaxed to enable employers to return workers to the office. Guidance was that this should be done gradually over the Summer of 2021. Yet, just a few months later, the Omicron variant had hit. On 13 December 2021 office workers were asked to work from home once again. This time, the guidance was slightly more restrictive than previous iterations, with the emphasis on workers attending the office only where "necessary" or if they "must".

8. The guidance to work from home was lifted with effect from 19 January 2021. Employers were told that they could talk to staff to agree arrangements to return to the workplace. However, they were also urged to give special consideration to those who were at higher risk of severe illness from Covid, those facing mental and physical health difficulties and pregnant workers.

9. The remaining Covid restrictions and obligations affecting employers were gradually scaled back after this date. On 1 April 2022, all remaining rules and guidance were lifted, including the advice to individuals to self-isolate following a positive Covid test and the requirement for employers to conduct Covid-specific health and safety risk assessments. In addition, the sector specific "Working Safely" guidelines were lifted and replaced by generic public heath guidance.[3]

10. Taking stock then, with the exception of a five-month period in late 2021, office workers have either been required or largely expected to work from home for almost two years. With the worst of the pandemic behind us, does this signal an end to homeworking and a return to the old ways of working? And, if it does, will everyone be on board with that?

11. No doubt, many workers will be delighted to escape the confines of their home and reconnect with colleagues in person. However, it is likely that employers will encounter some degree of resistance to the prospect of returning to the office, even on a hybrid basis. There will be a proportion of employees who wish to remain home-based for most, or even all, of their working time, either indefinitely or for the foreseeable future.

12. Indeed, a recent survey of around 5000 UK workers revealed that 19% wished to work from home on a full-time basis in 2022, with a further 9% wishing to do so for four days per week.[4] The survey showed that the things most favoured about homeworking are: no commute (54%); better work/life balance (37%); saving money (35%); flexibility (31%); and casual dress (23%).[5]

13. While some employers will embrace permanent full-time or near full-time homeworking, many will wish to return staff to the office on either a full-time basis or a hybrid arrangement. A recent survey of employers cited concerns around reduced communication, a negative impact on working culture and reduced productivity as reasons for not committing to homeworking as a permanent business model.[6]

[3] https://www.gov.uk/guidance/reducing-the-spread-of-respiratory-infections-including-covid-19-in-the-workplace.
[4] https://voxeu.org/article/working-home-revolutionising-uk-labour-market.
[5] https://techtalk.currys.co.uk/computing/accessories/what-works-when-working-from-home/.
[6] Business and individual attitudes towards the future of homeworking, UK: April to May 2021.

14. In many cases, the employee's and employer's preferred working arrangement will align, or a compromise will be found. However, there is clearly scope for tension between employees who wish to work from home full-time and employers who want staff back in the office on either a full or part-time basis.

15. To understand the legal risks that arise for an employer in this position, it is necessary to understand the reasons why an employee might wish to work from home all or most of the time. Broadly, I think that there are three scenarios in which employees may be reluctant to return to work in the office:

    a. those who simply prefer working from home (or another location);

    b. those who wish to work from home because it facilitates the management of another demanding aspect of their lives; and

    c. those who are fearful about catching Covid.

16. In this paper, I shall explore each of these scenarios and consider the legal claims that may arise if an employer dismisses for failure to return to the office. Before doing that, it is worth reminding ourselves of the starting point when it comes to where an employee is allowed to work.

What is the starting point?

Generally

17. It is a legal requirement for employers to provide employees (and workers) with a written statement of particulars of employment. This includes a requirement to identify the place of work, or, where the employee is required or permitted to work at different places, an indication of this and the employer's address.[7] This requirement is usually satisfied by including a place of work provision in the contract of employment. Typically, such clauses are drafted in the employer's favour and will specify that the place of work is the employer's premises, but there is flexibility to move the employee to work at another location within a reasonable area.

18. Employers are also required to keep the particulars of employment up to date. Where there is change to the particulars, the employer must give the employee written notice of the change at the earliest opportunity and within one month of the date of the change.[8] However, it is not necessary for the employer to give each affected employee a separate written notification of a change. A written circular which is brought to the attention of affected employees would be sufficient.[9]

Instruction to work from home

19. In the context of the pandemic, where a place of work clause permitted flexibility, employers would have been able to rely on that provision to instruct employees to

[7] Section 1(4)(h), Employment Rights Act 1996 (**ERA**).
[8] Sections 4(1) and 4(3), ERA.
[9] Birmingham City Council v Wetherill and ors, [2007] IRLR 781; CA.

work from home on a temporary basis. Provided the employer did not breach any other express or implied terms of the employment contract when making the change, there will have been a valid change to the place of work.

20. Where a place of work clause did *not* allow flexibility as to the place of work, then, on the face of it, the employee's agreement would be needed to change this term of the employment contract. However, in exceptional circumstances, the Courts will imply a limited flexibility clause into the employment contract. In Millbrook Furnishing Industries Ltd v McIntosh and ors, the EAT said (obiter) that: *"We can accept that if an employer, under the stresses of the requirements of his business, directs an employee to transfer to other suitable work on a purely temporary basis and at no diminution in wages, that may, in the ordinary case, not constitute a breach of contract".*[10] In my view, it is highly likely that a limited flexibility term would have been implied into the employment contract on the basis that it was necessary to make the employment contract work during the pandemic. Additionally, or alternatively, the instruction to work from home on a temporary basis would have been a reasonable management instruction which the employee had to obey. Either way, an employee's agreement to change in place of work would not have been needed.

21. Where an employer relied on an express or implied flexibility clause to instruct an employee to work from home, the particulars of employment would not need to be updated since there would have been no change to them. However, in practice, most employers would have circulated a written notification to staff notifying them of the change. An employer relying on the "reasonable management instruction" route should have updated the written statement of particulars to reflect the temporary change to the place of work. Again, in practice, most office-based employers would have easily satisfied this requirement by notifying employees office working had been temporarily suspended and they were required to work from home until further notice.

Instruction to return to the office

22. The guidance to work from home was lifted altogether on 19 January 2022. From this date, employers no longer need to invoke the express or implied flexibility term (or issue a management instruction) to require employees to work from home on a temporary basis. The default position - unless an employee can overturn it - is that the employee's place of work will revert to that stated in the employment contract.

Scenario 1: Employees who simply prefer to work from home or another location

23. Could an employee who wishes to work from home (or another location) overturn this position? Possibly. I think there are three routes available to them.

Express agreement to vary the place of work

24. One option would be for the employee to show that there had been an express agreement to vary the place of work to the employee's home. The difficulty is that most office-based employers would have issued firmwide, or perhaps teamwide,

[10] [1981] IRLR. 309; EAT.

instructions about working from home temporarily during the pandemic. An employee might be able to show that they had had discussions with a manager and a sufficiently certain promise of permanent homeworking had been made. Whether or not any such promise was enforceable would depend on whether the manager had authority to make a binding contract on behalf of the employer.

25. Where a manager did have such authority, the employee would also need to evidence the promise. If made in writing, for example over email, then they would have a good chance of demonstrating that there had been an agreed variation. It gets much more difficult for the employee if they are relying on an oral promise. The Courts and Tribunals will not readily uphold oral agreements where they contradict written terms, in the absence of some corroborating evidence of the agreed terms and the intention for them to be binding.

26. Even if all of these hurdles could be surmounted, it's common for employment contracts to include "no oral modification" clauses which limit variations to those that are agreed between the parties in writing.

Implied agreement to vary the place of work

27. An employee could argue that an agreement to vary the place of work from office to home can be implied from the conduct of the parties. For example, an employee who continued to work from home after the stay at home orders were lifted could seek to argue that the employer's willingness to continue homeworking in those circumstances (i.e., permitting home working when there was no strict legal bar to returning employees to the office) meant that they had agreed that the arrangement could continue indefinitely. However, the difficulty with this argument is that most employers would have been quite explicit that full-time homeworking was permitted only during the course of the pandemic in order to comply with the applicable laws or guidance.

28. The case law authorities on implied agreements to vary employment contracts tend to concern situations where the employer wishes to assert the employee has impliedly agreed to a variation, rather than the other way around. However, it is worth noting that the Courts have generally been reluctant to find that employees have consented to contractual changes in the absence of an express agreement to that effect, particularly where the terms do not have an immediate effect. In Jones v Associated Tunnelling Co Ltd, the Employment Appeal Tribunal took the view that implying an agreement to a variation of contract is a *"course which should be adopted with great caution"*.[11]

29. Therefore, an employee seeking to argue that there had been an implied agreement to vary the place of work permanently faces an uphill struggle. Where an employee continues to work from home full-time beyond 19 January 2022 (the date the working from home guidance was lifted), then they may have a stronger argument that the employer had agreed to a permanent change. Employers wishing to continue full-time or nearly full-time homeworking for now but preserve their right to direct

[11] [1981] IRLR 477; EAT.

employees to return to the office in future, would be wise to stipulate that any such arrangement is temporary and there has been no agreement to a permanent change to the place of work.

Make a successful flexible working request

30. Where an employee is unable to show that there had been an express or implied agreement to vary the place of work, what else can they do to secure a permanent homeworking arrangement?

31. If eligible, they may make a statutory flexible working request asking for permanent homeworking.[12] The request must be made in writing. The employer would then have three months to consider the request, discuss it with the employee, notify them of the outcome and complete any appeal stage. Employers must handle such requests in a reasonable manner and may only refuse a request for one or more of the eight business reasons set out in the legislation. These are:

    a. the burden of additional costs;

    b. detrimental effect on the ability to meet customer demand;

    c. inability to reorganise work among existing staff;

    d. inability to recruit additional staff;

    e. detrimental impact on quality;

    f. detrimental impact on performance;

    g. insufficiency of work during the periods the employee proposes to work; and/or

    h. planned structural changes.

32. Where an employee can demonstrate that they have worked effectively at home over a sustained period during the pandemic, it will be difficult, but not impossible, for an employer to reject a request to work at home permanently. For example, a receptionist or secretary may have worked well from home during the period when their "clients" (i.e., visitors / colleagues) were also working remotely. However, as more people return to work in person, there will be a knock-on effect for in person support services. In that type of scenario, a combination of business reasons (b), (c), (e) and (f) may form the basis for rejecting such a request.

33. Each case will be fact-specific, but business reasons (e) and/or (f) may well arise in many cases where the majority of staff have returned to in-person working and it is

[12] They must have 26 weeks' continuous service at the date the request is made and not have made another request in the previous 12 months.

difficult for a remote colleague to work effectively alongside them (e.g., attending meetings or providing/receiving supervision).

34. Where an employee wishes to work from another location (e.g., a communal workspace or an overseas location), this could give rise to additional reasons for rejecting the request, such as the burden of additional costs. Such costs could be the cost associated with the communal workspace (where the employee expected the employer to pay for this) or with working overseas (which may give rise to tax and social security liabilities in that jurisdiction and require the employer to take steps to comply with local employment and immigration laws).

35. Employers wishing to refuse such requests must deal with them in a reasonable manner within the prescribed time frame and ensure that there is a genuine basis for refusal which aligns with at least one of the eight business reasons set out above. In particular, employers need to take care that they are not simply adopting a blanket policy that all staff must return to the workplace. Not only could this amount to a breach of the flexible working legislation, it could give rise to a claim for indirect sex or disability discrimination (these types of complaints are discussed further below).

Can an employer dismiss an employee who refuses to return to the office?

36. In a scenario where the employee is unable to show there has been an express or implied agreement to vary the place or work, and they are unsuccessful in any flexible working request, then the employer is entitled to expect them to comply with the place of work clause in the employment contract. In this situation the most likely outcomes are that the reluctant returner will either begrudgingly return to the office or vote with their feet and resign. Employers mandating office returns need to consider the impact upon employee relations and the possibility of losing staff altogether. Is this a price worth paying?

37. Although rare, there may be "standoff" situations where the employer mandates a return and the employee refuses to comply. In this scenario, can the employer dismiss the employee fairly for breaching the place of work provision in the employment contract?

38. The first thing to note is that not every breach of contract by an employee will be sufficient grounds to dismiss. For example, if an employee regularly arrived five minutes late for work, he would have breached the hours of work provision in the employment contract. Although the hours of work provision is an important term of the contract, the breach would, in most cases, be viewed as minor and insufficient to justify dismissal (this would, of course depend on the job role in question).

39. Even where the breach is more serious, the importance of the term will be scrutinised. For example, if an employee regularly arrived an hour late for work, this would be a serious breach of the hours of work provision. But if it transpired that, in practice, he and his colleagues came and went as they pleased, then the term may be viewed as one which was unimportant to the employer.

40. In my view, a refusal to attend the workplace is unlikely to be viewed as a minor breach of contract. It is possible, however, that it could be regarded as a major breach of an unimportant term. For example, if an employer permitted most employees to work from home but put their foot down about some employees returning without good reason, then the employee may be able to show that the place of work was, in fact, an unimportant term and breach did not justify dismissal. However, where an employer directs employees to return across the board, and they have good reasons for doing so, this line of argument falls away.

41. Therefore, in most cases, a refusal to return to work in the office will amount to a serious breach of an important term of the employment contract. Before concluding that a fair dismissal is possible, we should pause to note that a body of caselaw has developed which places limits on the unfettered use of managerial discretion under flexibility clauses in the employment contract. In United Bank Ltd v Akhtar, the employee was a clerical worker who lived and worked in Leeds and was asked to move to Birmingham on six days' notice.[13] His employer relied on the express mobility clause in the employment contract. The employee resigned and claimed constructive dismissal. The Employment Appeal Tribunal upheld the claim, holding that the express mobility clause was subject to three implied terms, namely:

    a. the general duty not to behave in a manner likely to destroy or seriously damage the relationship of mutual trust and confidence between the employer and employee;

    b. a duty to give reasonable notice of the intended move; and

    c. a duty to not to exercise an express term in a manner which made it impossible for the employee to comply with his contract.

42. In Prestwick Circuits Ltd v McAndrew, the Court of Session held that similar principles apply where the flexibility clause is itself an implied term.[14] Here, a flexibility term was implied into the employment contract, which permitted the employer to transfer the employee to a different place of work. However, the Court held that it was necessary to imply a further term that reasonable notice of any transfer would be given. In this case, notice of four days, which was later extended to 11 days, was held to be insufficient.

43. In my view, it is arguable that the body of caselaw limiting managerial discretion in the exercise of flexibility clauses does *not* apply when the employer is seeking to reinstate the original place of work agreed by the employee. The caselaw decisions discussed above are designed to address the potential unfairness caused by an employer being able to use a flexibility clause to change terms to their advantage, without the employee's agreement. Where an employer wishes to return employees to the workplace, they are undoing a temporary change permitted by the flexibility clause and reverting to the original place of work term which had been expressly agreed by the employee.

[13] [1989] IRLR 507; EAT.
[14] [1990] 1 WLUK 627; IH (Ex Div).

44. That said, the change may have been temporary, but it was not short. Moreover, the general duty not to behave in a manner likely to destroy or seriously damage the relationship of mutual trust and confidence *will* apply and this will regulate the employer's actions. However, it is not the case that instructions which are to the detriment or dislike of the employee will necessarily breach this duty. For example:

    a. in Hart Builders (Edinburgh) Ltd v Lyall the employer instructed the employee to transfer to another site, in accordance with the contract, but at short notice and with no opportunity for negotiation.[15] The employee resigned and claimed constructive dismissal. Distinguishing the case from Akhtar, the EAT said there had been no breach of contact. The employee was not required to move to a new house and even though the employer had taken a "cavalier attitude" to the situation, this did not amount to a fundamental breach of the duty of trust and confidence; and

    b. in White v Reflecting Roadstuds Ltd the employer moved the employee to work in a less well-paid job in another department, in accordance with the contract.[16] The employee resigned and claimed constructive dismissal. Allowing the employer's appeal, the EAT said that when an employer acts within the scope of the contract, the fact that loss is caused to the employee does not render that act a breach of contract.

45. In conclusion, my view is that a refusal to return to work in the office will amount to a serious breach of an important term of the employment contract. Although the employer must observe the general duty of trust and confidence, there are not necessarily any additional restrictions on the employer's decision-making will be implied. The duty of trust and confidence does not prevent the employer from instructing the employee to do something they would prefer not to do, or which is not to their benefit (or, indeed, is even to their detriment). The fact that an instruction to return to work causes an employee to experience the tedium and expense of the commute, as well as a general loss of flexibility in their daily lives, is unlikely to put the employer in breach of contract. Nevertheless, employers wishing to minimise the risk of this may wish to take the following steps before asking employees to return to the office:

    a. engage with employees about the rationale for returning and listen to their views;

    b. provide a reasonable period of notice of the date for return to the office;

    c. allow a phased return process; and

    d. consider offering compromises such as hybrid working (save where this has already been considered and discounted as part of a flexible working request).

[15] EAT 571/91.
[16] [1991] IRLR 331; EAT.

46. If, after all this, the employee still refuses to return to work in the office, the employer will usually have no option but to dismiss. A refusal to attend the workplace would amount to a deliberate and serious breach of an important term of the employment contract. As such, it would justify dismissal without notice. However, to avoid an unfair dismissal claim, the employer would also need to:

    a. identify the potentially fair reason for dismissal (here, it would be misconduct);

    b. show that it acted reasonably in treating that reason as sufficient to dismiss; and

    c. follow a fair procedure prior to dismissal (such procedure would need to comply with the various requirements set down in the Acas Code of Practice on Disciplinary and Grievances (**the Acas Code**)).

47. Alternatively, there may be cases where the employer's primary reason for dismissal is the breakdown in trust and confidence between them and the employee. In such cases, the potentially fair reason for dismissal would be "some other substantial reason" (**SOSR**) rather than misconduct. The employer would still need to show that it acted reasonably in treating that reason as sufficient to dismiss and that it followed a fair procedure prior to dismissal. Strictly speaking, that procedure would not need to comply with all the elements of the Acas Code, since this applies to disciplinary and performance matters only. However, an SOSR dismissal of this nature would be closely linked to the employee's misconduct. Therefore, the employer would be wise to plead SOSR and misconduct as alternative reasons for dismissal and ensure that the dismissal procedure complied with the requirements of the Acas Code. A failure to do so could mean that the dismissal is procedurally unfair and may lead to an uplift to any compensation awarded to the employee

48. Assuming these hurdles are overcome, then it should be possible to dismiss, fairly, an intransigent employee who refuses to return to work in the office because it does not suit them. However, the pathway to dismissal is more complicated for employees with more compelling reasons for not wanting to return to the office. This is discussed below.

Scenario 2: Employees who wish to work from home because it facilitates the management of another demanding aspect of their lives

49. There will be employees who wish to continue working from home on a permanent basis because it helps them to manage another demanding aspect of their lives. Employers will need to be more cautious about how they handle such employees, since if a protected characteristic is engaged it is possible that a refusal (and eventual dismissal) will give rise to a discrimination claim.

Employees with childcare responsibilities

50. One such category of employees are parents who find that working from home enables them to manage their childcare responsibilities more effectively. For

example, it may enable them to perform nursery and/or school drop offs and collections at a reasonable time, without the need for additional wrap around care to precisely dovetail with their working hours plus additional commute time. It would also mean that they are in close proximity to their child's nursery or school in the event of illness or another emergency.

51. Dismissal for refusing to work full-time in the office has the capacity to disadvantage female workers and give rise to claim of indirect sex discrimination under the Equality Act 2010. This is because women still bear the primary responsibility for childcare. This "childcare disparity" was recently accepted as a fact by the Employment Tribunal in the case of Dobson v North Cumbria Integrated Care NHS Trust Foundation, meaning that it is not necessary for evidence to be submitted to prove that this is still the case.[17]

52. If the employee has also been personally disadvantaged, the employer will only be able to escape liability if they can objectively justify the discriminatory measure. This requires them to show that they had a "legitimate aim" in returning staff to the office and that dismissal was a proportionate way of achieving that aim. Importantly, the employer will need to show that it had considered whether any less discriminatory alternatives were available.

53. The "legitimate aim" must correspond to a real business need. Therefore, a mere desire by managers to have people back where they can see them will probably not be enough, save perhaps where there had been a drop in performance. However, there will be legitimate reasons for wanting employees to return to the office, for example, enhanced opportunities for teamwork, collaboration, supervision and training or to service clients and customers in person.

54. The difficulty for employers will be showing that dismissal for refusing to return was a proportionate means of achieving that aim. Where an employee has worked successfully from home throughout the pandemic, it will be hard for an employer to show that there were no less discriminatory alternatives available. This does not necessarily mean going to the other extreme of allowing the employee to work from home full-time (as this would prevent the employer from achieving their legitimate aim). Rather, there may be a compromise which would allow the employer to meet their aim and also assist the employee with their childcare responsibilities, for example, some form of hybrid working pattern.

Employees with caring responsibilities for a disabled person

55. Another category of employees is those who have caring responsibilities for a disabled person (which will often include elderly relatives). Again, working from home may well make the challenge of balancing work alongside those responsibilities much easier. Conversely, dismissal for refusing to return to the office will cause them to suffer a disadvantage.

[17] [2021] ICR 1699; EAT

56. Although not disabled themselves, employees in this situation are able to bring indirect disability discrimination claims based on their *association* with the disabled person. Indeed, in the recent case of Follows v Nationwide Building Society, a highly regarded employee was dismissed after she refused to move from a homeworking arrangement to an office-based arrangement, because this would hinder her ability to be the principal carer for her disabled mother.[18] The employee claimed that her dismissal was indirect disability discrimination by association.

57. In the same way that the childcare disparity is accepted as fact without the need for evidence, the Employment Tribunal in Follows accepted that carers of disabled people would be disadvantaged by a requirement to be office-based compared to non-carers. They also accepted that the employee was personally disadvantaged.

58. The next question was whether Nationwide could justify the dismissal. The Employment Tribunal said they could not. The legitimate aim put forward was the need for staff to be office-based to provide on-site supervision. The Employment Tribunal said that could not be a legitimate aim because it was inherently discriminatory (in that it presupposed a need to be on-site). They were also not satisfied that it corresponded to a real business need, rather it was the subjective view of some managers that onsite supervision would be better, but this was not based on evidence. Further, even if it had been a legitimate aim, dismissal was not a proportionate means of achieving that aim. Less discriminatory alternatives were available, such as hybrid working.

Employees who are disabled

59. Finally, full-time homeworking arrangements might assist those with certain disabilities to manage those disabilities more effectively. For example, those with disabilities that cause high levels of fatigue will benefit from the absence of the commute and the ability to take proper rest breaks at home in a way which is not usually possible in an office environment (e.g., ME, CFS, long Covid or menopausal symptoms). Similar benefits might also be experienced by those with mobility problems and certain mental health impairments such as agoraphobia or anxiety.

60. As with the examples given above, dismissal for refusing to return to the workplace could give rise to an indirect disability discrimination claim. A disabled employee would have additional claims. They may argue that they had been subjected to "discrimination arising from a disability". Here, they would say that the dismissal for misconduct (i.e., the refusal to return to the office) was discriminatory as their refusal arose out of their disability. Although it would be open to the employer to objectively justify the dismissal), the same problems regarding proportionality will be encountered i.e., it is likely that less discriminatory alternatives would have been available.

61. A disabled employee could also claim that the employer failed to make reasonable adjustments to alleviate a substantial disadvantage suffered by them when compared to others. There is no opportunity for an employer to justify a failure to make such an

[18] ET Case No: 2201937/2018V.

adjustment. Accordingly, before moving to dismiss such employees, employers should always seek medical advice on the risk presented to them by a return to the office and what, if any adjustments would be reasonable.

Can such employees be dismissed?

62. In respect of all three categories of employees discussed above, the pathway to dismissal for refusing to return to work in the workplace is more complicated, although not impossible. In each case, the employer will need to give careful thought to the reasons for wanting to return staff to the office and whether dismissal for failing to return is a proportionate step. In many cases it simply won't be.

63. This does not necessarily mean that the employer has to succumb to what the employee wants. It will be a case of balancing the employer's legitimate aim against the employee's needs and finding a compromise, such as hybrid working or moving to a different role which would permit homeworking (if any exist). If an employee refuses to agree to such a compromise, then dismissal may be the only alternative. If the employer does dismiss, it will also need to ensure that it identifies a fair reason for dismissal and follows a fair process prior to the dismissal (as discussed above).

64. However, if the employee is disabled then the employer will also need to consider whether full-time homeworking amounts to a reasonable adjustment. If it is, then it should be permitted.

Scenario 3: Employees who are fearful about catching Covid

65. There may also employees who wish to continue working from home full-time for the time being because they are fearful about catching Covid and believe they are put at greater risk by attending the office. Employers will need to be more cautious about how they handle such employees, as they may have additional employment law protections.

66. Where an employee raises such concerns, or takes certain actions in connection with them, and is later dismissed (either expressly or constructively), they may be able to say that they have been "automatically unfairly dismissed". Such claims could be brought on one or more of the following grounds:

    a. dismissal for bringing to the employer's attention circumstances connected with work which the employee reasonably believed were harmful or potentially harmful to health and safety (s.100(1)(c), ERA);

    b. dismissal for leaving or staying away from a dangerous workplace where the employee reasonably believed that they were in serious and imminent danger and could not be reasonably expected to avert it (s.100(1)(d), ERA);

    c. dismissal for taking or proposing to take action to protect themselves or others from circumstances of danger which they reasonably believed to be serious and imminent (s.100(1)(e), ERA); and/or

d. dismissal for having blown the whistle about dangers to health and safety (which would require the employee to have a reasonable belief that the information they have disclosed tends to show a danger to health and safety) (s.103A, ERA).

67. In each case, the employee does not need to show that there was an actual health and safety danger. Instead, the question is whether they had a reasonable belief that there was such a danger.

68. There is no qualifying service requirement to bring such claims and compensation is uncapped. In addition, in whistleblowing dismissal claims the employee can also seek "interim relief" to force the employer to continue employing them (or, failing that, to continue paying their salary) until the claim is finally determined.

69. A number of such claims have already reached the Employment Tribunal and, so far, there has been mixed results.

70. In the following two cases, the employees were held to have been unfairly dismissed.

71. In Preen v Coolink Ltd and anor, the employee, P, was an air conditioning engineer who refused to attend a routine job on 24 March 2020 (the day after the first national lockdown was announced).[19] P sent a message to his manager that such routine jobs should not go ahead as they put him and others at risk. He said he would stay at home in accordance with Government instructions, but he was prepared to attend urgent or essential jobs. P was dismissed about a week later, ostensibly on the grounds of redundancy. P claimed he had been automatically unfairly dismissed contrary to s.100(1)(c), ERA 1996. The Employment Tribunal upheld the claim, deciding that it was reasonable for P to form the impression that staying at home was the right course of action. He had been dismissed for raising concerns about health and safety.

72. In Quelch v Courtiers Support Services Ltd the employee, Q, lived with his girlfriend who was classed as clinically vulnerable.[20] In mid-March 2020 (before the national lockdown), it was agreed that Q could work from home due to his concerns about his girlfriend. Despite working well from home, the employer required Q to return to the office in July 2020. Q raised health and safety concerns on several occasions, namely that the employer was not taking appropriate measures in the office and not complying with guidance on homeworking and social distancing. His requests to continue homeworking until Government guidance on homeworking was changed were refused. He was placed on unpaid leave and eventually dismissed for gross misconduct. Q claimed he had been automatically unfairly dismissed contrary to s.100(1)(d) and (e), ERA 1996. The Employment Tribunal upheld the claims, deciding that Q had genuinely and reasonably believed that there were circumstances of serious and imminent danger were he to return to the office. Q had been dismissed for refusing to return to the office. In particular, the employer was concerned that if it allowed him to do so this would set a precedent and encourage

[19] ET Case No. 1403451/2020.
[20] ET Case No: 3313138/2020.

other employees to make the same request. The employer's approach was contrary to the Covid health and safety guidance in place at the time.

73. In the following three cases, the employees were held to have been fairly dismissed.

74. In Rodgers v Leeds Laser Cutting Ltd the employee, R, sent a message to his manager in March 2020 stating that he would be staying away from the workplace "until the lockdown has eased" because he was worried about catching Covid and infecting his vulnerable children.[21] He was dismissed a month later. R claimed he had been automatically unfairly dismissed contrary to s.100(1)(d) and (e), ERA 1996. The Employment Tribunal dismissed the claims, deciding that R's decision to stay away from the workplace was not directly linked to concerns regarding the workplace. He had raised no health and safety concerns or identified any specific workplace risks. A risk assessment had been carried out and measures had been put in place. It was not enough that he was concerned about the fact that Covid was circulating in society.

75. In Moore v Ecoscape UK Ltd, the employee, M, did not feel safe attending work at the outset of the pandemic.[22] Her employer suggested she could have a separate office with her own equipment and invited her to come in and have a look at the proposed layout. M did not want to do this and asked to work from home. The employer refused as her job role required her to be in the workplace. M resigned and claimed that her constructive dismissal was automatically unfair under s.100(1)(d) or (e), ERA. The Employment Tribunal held that the employer was not in repudiatory breach of contract and M had not been automatically unfairly dismissed. The Tribunal accepted that M had significant concerns about Covid but considered that she had a general fear about being required to leave her home, rather than a specific concern about workplace safety. The Tribunal noted that the employer had taken reasonable steps to accommodate her concerns, reacted patiently allowing her time to regain her confidence and engaged with her on a regular basis. Ultimately, M was unwilling to explore compromises and wanted homeworking or nothing.

76. In Accatattis v Fortuna Group (London): the employee, A, was employed in a "key worker" role related to the supply and distribution of PPE equipment.[23] In late March 2020, A asked to work from home. His request was refused as his job required office attendance. Alternatively, he was told he could take paid or unpaid leave. A asked to be furloughed. His employer refused as they needed him to work and did not believe he fell within the remit of the furlough scheme. A complained that he was uncomfortable travelling into work on public transport and repeatedly asked to be furloughed. He was dismissed about a month later for failing to support and comply with company policies and guidelines. A claimed he had been automatically unfairly dismissed contrary to s.100(1)(e), ERA 1996. The Employment Tribunal dismissed the claim, deciding that A did reasonably believe there to be circumstances of serious and imminent danger, but he had not taken steps to protect himself and others from

[21] ET Case No: 1803829/2020.
[22] ET Case No: 2417563/2020.
[23] ET Case No: 3307587/2020.

danger. His demands to work from home on full pay or be furloughed were not appropriate steps but were aimed at improving his economic position.

77. All of these decisions are highly fact-specific first instance decisions. Nevertheless, we can conclude that an employee who is dismissed for not returning to the workplace on health and safety grounds must be able to show that they had a reasonable belief that there was a serious and imminent danger arising within the workplace, rather than a general concern about Covid circulating in wider society. Where an employer has taken appropriate health and safety measures, complied with relevant guidance and engaged with the employee about the return plans, it will be challenging for an employee to get over this hurdle.

78. Further, what makes such claims even more difficult is that the situation today is very different to the early months of the pandemic. The circumstances of danger have reduced, with the presence of vaccines, treatments and lower death and hospitalisation rates. The Government guidance to work from home was lifted on 19 January 2022 and the Covid-specific health and safety guidance were lifted on 1 April 2022. New (and brief) public health guidance replaced it on the same date and provides that employers should: [24]

    a. support and enable staff to be vaccinated;
    b. keep the workplace well ventilated and clean;
    c. give special consideration to those workers who are most at higher risk of serious illness from Covid (discussed below);
    d. conduct risk assessments – although there is no longer an explicit requirement to consider the impact of Covid, the guidance says employers may choose to consider it; and
    e. consult with staff on health and safety matters

79. Most employers will be able to demonstrate compliance with these recommendations, meaning it is difficult to see how an employee will meet the threshold of showing that they had a reasonable belief that there were circumstances of serious and imminent danger at work.

80. However even if it is not reasonable for an employee to say that they believed they were in serious and imminent danger, they may still claim that they have been dismissed for having raised the concerns with the employer (under s.100(1)(c) and/or s.103A, ERA) (and, in practice such concerns will have been raised before the employee communicates their refusal to return to the office). If the employee can show that the raising of such concerns was the reason or principal reason for their dismissal, then they will have been automatically unfairly dismissed. Employers need to be careful to listen and respond to concerns that are raised and make it clear that any subsequent dismissal is attributable to the refusal to return to the workplace. In this way, the dismissal should be treated as genuinely separable from the raising of the concerns.

Complicating factors

[24] https://www.gov.uk/guidance/reducing-the-spread-of-respiratory-infections-including-covid-19-in-the-workplace.

81. The position is more complicated for certain groups of employees who have specific reasons to be fearful of catching Covid.

Employees who at higher risk of serious illness from Covid

82. An employee's own health status (or the health status of someone they live with or have caring responsibilities for) will be relevant to the question of whether they had a reasonable belief that there were circumstances of serious and imminent danger. Where an employee (or someone close to them) is clinically extremely vulnerable (**CEV**), or otherwise at higher risk of severe illness from Covid, their perspective on danger will be different to the average employee. Although the shielding programme for CEV individuals ended on 15 September 2021, guidance still suggests a cautious approach should be taken with respect to such individuals and anyone else who is at higher risk of serious illness from Covid.

83. Current guidance suggests that people in those groups should work from home if possible and speak to their employer about what arrangements can be made to reduce risk (noting that such arrangements may amount to reasonable adjustments).[25] In addition, Acas guidance[26] for those who are at higher risk from Covid says that a doctor may still advise an individual to stay at home and, if so, the employer should consider whether the employee can work from home (and, if not, whether other adjustments could be made). It also says that employers should consider what support they can offer to people who live with someone who is at high risk of serious illness from Covid – including offering home working.

84. Therefore, employers should be cautious about mandating that such employees must return to the workplace. Medical advice should be sought as soon as possible and before taking any action against the employee for refusing to return. Depending on the advice, the employer may need to permit the employee to work from home for a further period of time. A failure to do so may mean that the employee could succeed in a claim for automatically unfair dismissal. In addition, if they qualify as disabled (which is highly likely) then they may have claims for indirect disability discrimination, discrimination arising from disability and failure to make reasonable adjustments. Alternatively, if they are not disabled themselves, but live with, or care for, someone who is, then they could argue that the dismissal amounts to indirect disability discrimination by association.

Employees who suffer from severe anxiety about returning to the office

85. An employee who suffers from severe anxiety about returning to the office may qualify as disabled. If they do, and they are dismissed for failing to return to the workplace, then they could succeed in a claim for automatically unfair dismissal and may also have claims for indirect disability discrimination, discrimination arising from disability and failure to make reasonable adjustments.

[25] https://www.gov.uk/government/publications/covid-19-guidance-for-people-whose-immune-system-means-they-are-at-higher-risk/covid-19-guidance-for-people-whose-immune-system-means-they-are-at-higher-risk#who-this-guidance-is-for
[26] https://www.acas.org.uk/working-safely-coronavirus

86. As with high-risk employees, medical advice should be sought as soon as possible to decide if the employee is disabled and, if so, what adjustments may be made to help them continue to work. One such adjustment may be to permit homeworking for a further period of time.

Pregnant employees

87. Employers have special health and safety duties to protect new and expectant mothers in the workplace. Employers must assess the risks posed to such workers and alter their working conditions or hours to avoid any significant risk. Where it is not possible to alter their working conditions or hours, or if this would not avoid the risk, then the employer should offer suitable alternative work on terms that are not substantially less favourable. Where there is no such work available, then the employee should be suspended on full pay.

88. When assessing risk, employers will need to bear in mind that pregnant employees may be unvaccinated (although the vaccine is available to pregnant women, some will have elected not to have it). Consideration should also be given to evidence that women who catch Covid in the later stages of pregnancy have a higher risk of becoming very unwell.

89. Ultimately, most employers would prefer to permit homeworking for a further period of time (i.e., until the employee departs on maternity leave) than suspending them on full pay.

Employees who have a philosophical belief that prevents them from returning to the office

90. Employees who are not disabled or pregnant could attempt to engage protection from discrimination by arguing that they have a protected belief that prevents them from returning to the office.

91. This argument was raised in the recent case of X v Y. Here, the employee took the decision not to return to the workplace on the grounds of health and safety following the lifting of the first national lockdown.[27] In addition to concerns about health and safety in the workplace, the employee said she was fearful of contracting the virus herself and passing it on to her vulnerable partner. She explained her position to her employer and said she would not be returning to work. Her employer stopped paying her wages. She brought various claims in the Employment Tribunal, including that the employer's actions amounted to discrimination on the grounds of her protected belief, which was described as "a fear of catching COVID and a need to protect herself and others".

92. Workers are protected from discrimination in employment on the grounds of their religion or their religious or philosophical belief. However, only philosophical beliefs which meet a certain standard are protected. In order to be covered, a philosophical belief must:

[27] ET Case No: 2413947/2020.

a. be genuinely held;

b. be a belief and not a mere opinion or viewpoint based on the present state of information available;

c. concern a weighty and substantial aspect of human life and behaviour;

d. have a certain level of cogency, seriousness, cohesion and importance; and

e. be worthy of respect in a democratic society and not be incompatible with human dignity or conflict with the fundamental rights of others.

93. The Employment Tribunal decided that (a), (d) and (e) had been met, but (b) and (c) had not. It was decided that the employee's fear did not amount to a belief. Rather, it was an instinctive reaction to a threat of physical harm and the need to take steps to avoid or reduce that threat. Further, a view that certain actions (e.g. attending a crowded place) would increase the risk of contracting Covid, was an opinion based on the state of information available at the time.

94. In addition, the Tribunal said that fears about the harm caused by Covid are weighty and substantial, not minor or trivial, and concerned aspects of human life and behaviour. Further, the fact that such a fear could be descried as time-specific (i.e., for length of the pandemic) would not, in itself, mean this criterion could not be met. However, in this case, the employee's fear concerned herself and her partner only – there was no wider concern for others. Accordingly, the discrimination complaint was not allowed to proceed.

95. This decision suggests that if an employee is dismissed for refusing to return to the workplace, they are unlikely to succeed in a philosophical belief discrimination claim. Even if an employee could demonstrate concern for a wider group of people (to satisfy the third criterion), it is difficult to see how they would satisfy the "belief not viewpoint or opinion" requirement.

Conclusion

96. In summary, employers faced with reluctant returners should take the following steps:

a. ensure that health and safety risk assessments are updated prior to any return to the office (with consideration given to the heightened risks to CEV/high risk, disabled and pregnant employees);

b. seek medical advice in respect of any CEV/high risk and/or disabled employees and consider what adjustments, if any, should be made (including continued homeworking for a period of time);

c. consider what adjustments should be made for pregnant employees (including continued homeworking for a period of time);

d. engage with employees about the rationale for returning and share workplace risk assessments with staff to reassure them of the steps taken at work to protect their wellbeing;

e. listen and respond to any concerns raised and identify which employees are high risk in terms of potential legal claims and consider what adjustments can be made for them;

f. provide a reasonable period of notice of the date for return to the office and allow a phased return; and

g. instigate disciplinary action against any remaining employees who refuse to return, ensuring a fair procedure is followed prior to dismissal.

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