

RELUTANT RETURNERS: DO YOUR EMPLOYEES HAVE THE RIGHT TO WORK FROM HOME FOREVER?

Polly Rodway, Partner
Rebecca Rubin, Associate

*Thank you for joining
The webinar will begin shortly*



Reluctant returners: Do your employees have the right to work from home forever?

LUNCHTIME WEBINAR – 26 APRIL 2022

With the last of the Covid restrictions lifted on 1 April 2022, the path is clear for employers to embrace a return to office working. Yet one barrier remains: the reluctant employee.

Many employers will encounter resistance to the prospect of returning to the office. Some pockets of the workforce will wish to continue homeworking, either indefinitely or for the foreseeable future. What can employers do when faced with reluctant returners?

Our expert team will discuss the following issues:

- How do you determine an employee's place of work?
- Has the pandemic changed the place of work from office to home?
- If not, can a reluctant returner make a flexible working request to work from home?
- Can you fairly dismiss an employee who simply refuses to return?
- Should those with special reasons for wanting to work from home (e.g. childcare responsibilities) be treated any differently?
- Is a fear of catching Covid enough to justify a refusal to return?

Date: Tuesday, 26 April 2022

Time: 12.00pm – 12.45pm

Please click [here to register](#) for the webinar.



Polly Rodway
Partner



Rebecca Rubin
Associate

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

What 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**

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

Three types of “reluctant returners”

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

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 to 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?

A reminder of the eight reasons for refusing a flexible working request

1. Burden of additional costs
2. Detrimental effect on the ability to meet customer demand
3. Inability to reorganise work among existing staff
4. Inability to recruit additional staff
5. Detrimental impact on quality
6. Detrimental impact on performance
7. Insufficiency of work during the periods the employee proposes to work
8. Planned structural changes

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

- Is it a serious breach of an important term of the employment contract?
- What about the duty of trust and confidence?
- Dismissal:
 - ✓ **Reason:** Misconduct or possibly SOSR
 - ✓ **Process:** Fair process in accordance with Acas Code (sensible to comply even if SOSR dismissal)

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 discrimination?** Dismissal for refusal to return to the office
 - **Does it disadvantage women?** Yes, due to the “childcare disparity”
 - **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 discrimination?** 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 return to the office
 - 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 dismissal for health and safety reasons and/or blowing the whistle
- 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

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 changed
- Ensure that you can show that any dismissal is for the refusal to return itself and 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. Handle flexible working requests carefully and beware of requests to work overseas
2. Update health and safety risk assessments
3. If disabled / CEV, obtain medical advice about risks and possible adjustments
4. If pregnant, assess risk and consider adjustments or suspension on full pay
5. Engage with employees about rationale, share risk assessments and respond to concerns
6. Be mindful of complicating factors
7. Give reasonable notice of return date and allowed a phased return
8. Instigate disciplinary action for remaining reluctant returners and follow a fair process before dismissal

Our contact details

Polly Rodway, Partner

pollyrodway@bdbf.co.uk

020 3828 0357

Rebecca Rubin, Associate

rebeccarubin@bdbf.co.uk

020 3176 0485