The employment-rights impact of remote working

With place being a key determinant of many employment rights, what are the potential legal ramifications of working from home?

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The COVID-19 pandemic has shunted office workers home and online and although abundant articles have debated the merits and demerits of remote working, few have considered the effect on employment rights. Many sectors and industries will continue with home working on either a full- or part-time basis well into 2021, with potential legal ramifications in the general employment rights sphere. These inlude: 'Section 1 Particulars'; redundancies with links to the place of work; monitoring of employees for Working Time Regulation (WTR) purposes; privacy; conflicts of law; and discrimination/equality of opportunity.

While there will be no sweeping legal changes, there will be tension at times. There is not only 'flexibility' in the workforce – moving from office to home – but 'flexibility' in the interpretation of the key statutes and case law. For example, many employment rights have been applied to so-called gig workers without Parliamentary intervention (although with room for improvement).

The changes go wider than employment law and impact the practicalities of working life. Such considerations fall outside this article, but, as an example, if a car insurance policy lists 'commuting to work' as part of the insured cover, there may be (positive) implications for the cost of premiums. On the negative side, remote working may have capital gains tax implications on the sale of the home/office.

Section 1 Particulars

An important aspect of wage-work bargain is the place of work; so much so that requiring an employee to work elsewhere, if not provided for in a contract (eg mobility clauses), may well be a repudiatory breach. Further, key worker rights need to be provided in what is often referred to as 'Section 1 Particulars' (from s 1 of the Employment Rights Act 1996 (ERA)) which from 6 April 2020 have been applied to new workers, not just new employees. In terms of long-term remote (home) working, the place of work (s 1(4)(h) ERA) may well be incorrect for those 'pre-pandemic' employees and they should have been provided with an updated statement within a month of the change (s 4(3)(a) ERA). The result is potentially an award of two to four weeks' pay in limited circumstances, but more importantly something that could eventually be relied upon as evidencing a contractual variation to the place of work.

Redundancies

It is a sad fact that many redundancies have taken place, and are likely to continue. The place of work is important in the statutory definition of redundancy, it being a dismissal due to: ceasing or intending to cease to carry on in the place where the employee was employed by the employer; or the requirements of the business for employees to carry out work of a particular kind have ceased or diminished or are expected to cease or diminish in that place (s 139(1)(a)(ii), (1)(b)(ii) ERA). It is well established that having a mobility clause in the contract will not, of itself, support an argument that the place where an employee has in practice habitually worked is not the '*place of work*' for redundancy purposes: *High Table Ltd v Horst* [1997] IRLR 513. But if an employee moves from office to home working on a permanent or semi-permanent basis, then dismissal following a cessation or diminution of work at the former workplace may not bring entitlement to a statutory redundancy payment. It may also remove entitlement to a contractual redundancy payment, since many voluntary schemes incorporate the statutory definition of redundancy. Again, this underlines the importance of employers making clear to the employee exactly what is being permitted by way of remote working and the likely duration of any such change.

Monitoring of employees for WTR

A key aspect of WTR health and safety policy, is the ability to monitor and record working hours; reg 9(a) WTR requiring records to show that limits imposed have been met. There is a need to have '*objective, reliable and accessible system enabling the duration of time worked each day by each worker to be reviewed*' (C-55/18 *CCOO v Deutsche Bank SAE Case* at [50]). The problem with a large amount of work suddenly being done at home is how to measure and record the time. Is internet connection time sufficient (if having to sign into a virtual desktop)? What about any additional off-line working? Is the onus being pushed to the employee to accurately record their time? Or will additional software be required to monitor?

Privacy

The point above, on the use of software to measure 'working time', illustrates a tension. On the one hand, there is an employer's need to measure properly for health and safety reasons, WTR requirements, and in the employee's interest. On the other hand, there is a danger of mission creep and the problem of (or rather intrusion on) the privacy of the worker and other members of their family. In brief, proportionality is in play to discern any infringement of Art 8 of the European Convention on Human Rights (right to respect to private and family life). In effect, much of the analysis that was required in the ECHR case of *Bărbulescu v Romania* (App No. 61496/08), where it was held that interception of an employee's emails gave rise to a breach of Art 8 rights to privacy, will be required in the home working context. It will not always be easy for employers to know how to strike the right balance.

Conflicts of law

Additionally, the location of work is often the focal point of conflicts of law questions. Many employment rights are statutory, and the statute is silent in terms of territorial scope, hence the test, per *Ravat v Halliburton Manufacturing & Services Ltd* [2012] UKSC 1, is the '*the connection between Great Britain and the employment relationship… sufficiently strong*' [28]. Traditionally, the territorial location of the work is a strong pull (in *Ravat* at [27] it was said the place of employment is generally decisive). It is not hard to imagine more fluidity of workplace meaning the majority of work is done outside of the UK, and the strong

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pull of location of work watered down or, more likely, the relevant case viewed as an exception. Equally, questions of forum in the EU are classically determined by domicile, which for an individual in the UK seeking to bring a case here requires it be the place of residence and the nature and circumstances of residence indicates a substantial connection with the UK (Art 62 Brussels IA Regulations). The same is true for determining which law is applied: where no choice of law is found in an employment contract the starting point is the place where the employee habitually carries out work in performance of the contract (Art 8(2) Rome I Regulations). In a fluid remote working context, the changes may be temporary, so the answer may be that the contract is governed by the law of the place where the business engaging him/her is situated, or taking the circumstances as a whole it is more closely connected with another country (Arts 8(3) and 8(4) Rome I Regulations).

Discrimination/equality of opportunity

The current resilience of home working may well affect future flexible working requests should office work resume. Such requests can no longer be turned down on the basis that working at home is not possible or sufficiently effective. On the other hand, there is a real danger of unconscious bias and discrimination resulting from having so many people in different locations. It is trite to say that home working may disadvantage those combining work and childcare, a situation predominantly affecting women. Workers will need to speak up and allocating tasks may be more difficult where there is not clear oversight. Equally, people may not know about office events or meetings, and one may be reliant on people being more willing to ask for help, or they could be left behind.

Concluding remarks

To conclude, the place/location is often a key determinant for many rights. Working from home, from remote locations, also brings in a tension with the need to monitor, and develop the right to privacy. These raises interesting questions as to how the law will be applied as and when such issues come before the tribunals and courts. In the writers' view, specific legislative change to deal with these challenges is unlikely. Instead, through case law, we may see a general loosening of the importance of location as a factor in determining employment rights, coupled with a heightened understanding of the new tensions brought by a movement away from traditional working patterns. ●