

***FLEXIBLE AND ATYPICAL WORKING
POST-COVID***

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Working patterns will change, but...

- Do current employment laws allow for that?
- What about from the employer's perspective?
- What could possibly go wrong?

People » Work

Work » People

Stats:

Pre-lockdown – 5% working from home

1st lockdown – 86% to some extent

Dec 2020 – 38% mainly from home
nationally; 59% London (ONS)

Nine out of ten (88.2%) of employees who worked at home during the lockdown would like to continue working at home in some capacity with around one in two employees (47.3%) wanting to work at home often or all of the time. Furthermore, employees with little previous experience of homeworking had not been put off by the experience of working at home – half (50.0%) of new homeworkers would like to work at home often or always even when Covid-19 restrictions permit a return to ‘normal’ working. This suggests that a key characteristic of the new normal will be much higher levels of homeworking than in the past. (A. Felsted; Homeworking in UK)

Flexible working

- Part-time
- Flexitime
- Compressed hours
- Homeworking
- Annualised hours
- Term-time
- Note: Staggered hours – i.e. when ‘an employee has different start, finish and break times from other workers.’

Statutory right to request contract variation

- (1) A qualifying employee may apply to his employer for a change in his terms and conditions of employment if—*
- (a) the change relates to—*
- (i) the hours he is required to work,*
 - (ii) the times when he is required to work,*
 - (iii) where, as between his home and a place of business of his employer, he is required to work, or*
 - (iv) such other aspect of his terms and conditions of employment as the Secretary of State may specify by regulations,*

Making an application

***3.** An employee who has been continuously employed for a period of at least 26 weeks is entitled to make a flexible working application.*

***4.** A flexible working application must—*

(a) be in writing;

(b) state whether the employee has previously made any such application to the employer and, if so, when; and

(c) be dated.

An employer shall only refuse if...

- *(i) the burden of additional costs,*
- *(ii) detrimental effect on ability to meet customer demand,*
- *(iii) inability to re-organise work among existing staff,*
- *(iv) inability to recruit additional staff,*
- *(v) detrimental impact on quality,*
- *(vi) detrimental impact on performance,*
- *(vii) insufficiency of work during the periods the employee proposes to work,*
- *(viii) planned structural changes,*

What about the employer?

- **Mobility clause:** under an express mobility clause will be a matter of construction. *Tapere v South London and Maudsley NHS Trust* 2009 ICR 1563, EAT
- May imply a **'temporary' mobility clause** into a contract of employment. In *Millbrook Furnishing Industries Ltd v McIntosh and ors* 1981 IRLR 309, EAT

Flexibility clauses

- Must be clear and unambiguous
- Discretion, so test of rationality (Braganza etc)
- Can **be implied** into a contract of employment where such a clause is necessary to give business efficacy to the contract (or where it reflects the presumed intentions of the parties or is in accordance with custom and practice) — *Aparau v Iceland Frozen Foods plc* 1996 IRLR 119, EAT,

Future patterns and problems

Dear workforce

- We are going to have staggered working hours (7-2; 2-9)
- Everyone will work alternate days from home
- The sales team will be based at the warehouse
- Starting Monday

Discrimination (obviously)

Indirect discrimination:

- Legitimate aims probably straightforward to establish
- Proportionality harder – is this the only way of achieving the legitimate aim?

Disability discrimination

- Difficulty of making reasonable adjustments

Thank you

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