The world of work has remained broadly the same for the last 100 to 200 years – offices might have lost the wood panelling, trains become less smoky (inside and out!), top hats turned into bowler hats then no hats, beards have gone in, out, then back into fashion, but the central tenet remains – I pay you money, I expect you to turn up to work and do your job. This holds true even for those industries that loudly trumpet their ‘disruptive’ ways – you only have to visit the newest glass palaces that stand for many modern offices to see the nattily dressed employees largely ignoring the free foosball, PlayStation, beanbags in the break-out rooms, etc., and glued to their desks in rows, just like the same battery chickens of a century ago. The more you fill the office with free fruit and things that look like play and relaxation, the more you are actually giving your staff the least possible reason to leave the building.

This assumption has been turned on its head by the current COVID-19 crisis. In a matter of hours following Boris’ announcement of a lockdown (and in some cases before), businesses were forced to adjust business continuity plans so that not only a handful of employees might work from home for a brief period, but that nearly all staff could do so for the foreseeable. Such a change is unprecedented in both scope and speed. It involves everyone in the business, from the post-room to the C-suite, in what is essentially the world’s largest homeworking trial period.
But this is all due to change soon, surely? – the government has started easing lock-
down, desperately searching for the Goldilocks timetable of ‘not too fast, but not too
slow’, and ‘normality’ has to return soon, doesn’t it? Even if it does (which seems
slightly farfetched given the speed and ease of transmission of COVID-19 and
absence of a vaccine), there are a number of practical challenges in actually
encouraging staff back to the workplace.

We have covered a number of these previously, including in particular reviewing
the government’s guidance and looking at the health and safety obligations on
employers. However, even if employers do all they can to bring employees back, the
fact remains that some employees may simply refuse to return, so what should
employers do then? To mix our fairy story genres, there are at least 50 shades of
grey in this answer – in particular, much depends upon why the employee is refusing
to come back – health & safety, a mental or physical disability which prevents them
returning, or the simple newly-discovered pleasure of time with one’s family, etc.

For example, employees prone to panic attacks on public transport or otherwise
suffering from mental health issues linked to COVID-19 (whether obsessive
compulsive disorders, anxiety, stress, depression, etc.) may find that triggers to
their conditions are more common. If these meet the criteria to be a legal disability,
then a duty to make reasonable adjustments will arise. As with an employee having
panic attacks in the ordinary course, looking at alternatives to regular commuting
would likely be a reasonable adjustment, whether these are staggered start times,
continued working from home or something else. Where there is no disability and no
health and safety risk they can point to, there is always the possibility of an
application for flexible working. In practice to date, this has been a relatively
limited option — in most cases, an employer can find a reason for refusal falling
within the permitted grounds without too much difficulty (detrimental impact on
quality, the ability to meet customer demand or performance being common
favourites). There has also been a sense that, whatever the employer’s seemingly
encouraging words, asking to work from home could be career-limiting.

There is now a large Covid-19 shaped hole through that established order for those
businesses which have been able to operate remotely throughout lockdown. If the
proof is in the pudding, they have eaten enough to know that WFH, broadly speaking,
works. But does that mean that there are no grounds now for refusing such
applications?

There remain a number of arguments that employers may still be able to bring. For
example, it may be that there are additional costs in having some employees
working remotely which, whilst manageable in the context of the imperative to keep
the business running through lockdown, are less so in day to day operations – ‘the
burden of additional costs’ of course being one reason why a request can be
refused. It may be that if there is an adverse effect at the margins of efficiency, that
has been tolerable while all your competitors have the same constraints but if they
start to fire on all six back in the office, are you going to be able to maintain your
stance on this – is “good enough” actually good enough? Equally, there may be
challenges in having some staff in the office and some working remotely in terms of
technical issues which can be said to impact on work quality or performance. Or
circumstances where you could accept the slight dislocation caused by one out of a
team of ten working from home, but seven of them doing it is a different proposition. Further, there may be arguments around training and development of junior staff (although this may need some work given the amount of training which is going on over Zoom and other virtual links at the moment), again potentially impacting on work quality or performance.

The underlying law around flexible working has not changed, but the balance of power in relation to flexible working certainly has – in relevant cases there now exists more evidence than anyone thought possible three months ago of the actual viability of home working when the need arises. It will mean that in industries where working from home in lockdown has been common, employers disinclined to grant WFH must show that something they have permitted (and indeed encouraged and facilitated) for the last 10 weeks or so just doesn’t work. It is not likely that many employers will have picked employees up on problems arising during their enforced home-working – after all, it was no more their choice than the employer’s and they are doing their best in difficult circumstances – and so there may also be a dearth of evidence for the employer to rely upon even where there have been issues which would in normal times have led to the WFH arrangement being questioned or ended.

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