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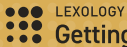
REMOTE WORKING 2021

Global interview panel led by McDermott Will & Emery



LEXOLOGY

Getting the Deal Through



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United Kingdom

Katie Clark at McDermott Will & Emery LLP has significant experience advising on all aspects of contentious and non-contentious employment matters. Katie's client base spans multiple business sectors and includes global corporations, financial institutions, FTSE 100 companies, manufacturing companies, service providers and start-ups.

Katie is noted for her commercial approach to assisting clients to deal with employment issues ranging from day-to-day employee relations, to negotiating public limited company board director contracts and significant business restructuring. Katie has particular experience litigating complex employment disputes, including those relating to team moves, restrictive covenants, discrimination and whistle-blowing. Katie also advises on the employment aspects of corporate transactions.

Paul McGrath advises clients across a broad range of industry sectors in all areas of contentious and non-contentious UK employment law. His practice covers all aspects of UK employment legislation and day-to-day employment matters, including appointments and terminations, employment status and worker classification issues, employment policies, employee data privacy, disciplinary and grievance issues, and restructuring and redundancy exercises.

Paul regularly advises on contentious claims for unfair dismissal, discrimination, whistle-blowing and breach of contract. As part of his non-contentious work, Paul advises on the employment aspects of all types of corporate transactions. Paul also has particular experience advising on the handling of employee-related privacy and data protection issues.

1 | What are the most consequential issues that an employer should consider when determining its post-covid-19 remote work policies?

The immediate issues to consider are primarily non-legal ones.

At its core, what does the business actually need from its workforce to meet the needs of its customers and produce the operational outputs required to grow? To what extent is in-person attendance by staff undertaking particular roles essential (noting that organisations in some sectors have actually experienced increased productivity during extended periods of homeworking)? To what extent is it simply desirable for a certain reason? And to what extent might it actually be undesirable?

Aligned with that, forward-thinking employers will want to consider where they see their particular market heading over the next decade, the sort of culture they want to develop and, ultimately, what impact that is likely to have on their ability to attract and retain top talent.

Against that backdrop, the potential legal issues that employers will need to consider include:

- Acting reasonably and consistently (as opposed to reasonably consistently!) – UK employment contracts contain an implied term that an employer will not do anything calculated or likely to destroy the mutual trust and confidence necessary to maintain the employment relationship. It will be important for employers to properly explain the rationale for any post-covid-19 working arrangements proposals, to consult with employees in some meaningful way about them and engage with any concerns raised.
- Avoiding unlawful discrimination and continuing promoting diversity and inclusion – this will include ensuring that any policies do not unjustifiably disadvantage groups of a particular characteristic, ensuring that remote working policies are applied consistently to the extent possible and considering any reasonable adjustments. To the extent many organisations may eventually land on some form of hybrid working arrangement, with many more employees splitting time between the office and working remotely, it may become increasingly the norm for interactions to involve people participating remotely and others together in person. It would be advisable to train employees in the sorts of behaviours (often subconscious or unintentional) that could be problematic, for example, asking colleagues when they are next planning to work from the office rather than when they are coming back to work.
- Health and safety – employers are required to take steps that are reasonably necessary to ensure the health, safety and welfare of all employees, and to provide and maintain a safe system of work. This duty, including the obligation to undertake an individual risk assessment, applies equally to employees working



from home. Both the UK Health & Safety Executive and Acas have produced guidance to help employers in this regard.

- Property law considerations – is the individual subject to any restrictions (for example, restrictive covenants in title or mortgage deeds that restrict an employee's ability to undertake certain work activities from their home).
- Confidentiality and proprietary information – what additional risks does a remote working environment pose? And how can these sensibly be mitigated?
- Tax – depending on the precisely where an employee is working relative to their employer's place of business (notably, if they are in different jurisdictions), there could be income tax, social security and corporation tax or permanent establishment-related risks to consider.

2 | Pragmatically speaking, is there a threshold to determine when working remotely requires local rules to apply?

In the UK there are no specific additional employment laws that apply just to remote workers and so there is no threshold by which to determine whether a worker is

“Generally, employers in the UK cannot unilaterally impose changes to an employee's compensation package.”

to be classed as working remotely for UK employment law purposes. However, existing rules and obligations must be applied to them in the usual way.

As we mentioned earlier, one employer obligation that relates to work environment, and that an employer should not forget about, even if the worker is only working remotely one day a week, is the obligation to safeguard worker health and safety.

An employer is responsible for an employee's welfare, health and safety, so far as is reasonably practicable and must carry out a risk assessment of their employees' workplace. The assessment should identify any potential risks so the employer can then seek to remove or mitigate the risk. If an employee's workplace for one day a week is their home, then, strictly speaking, the risk assessment should be carried out. However, the assessment does not require a home visit and does not have to be burdensome.

There are certain threshold considerations to bear in mind when it comes to taxation matters, which will be discussed in more detail below.

3 | If employees voluntarily move away from their main work location, can employers unilaterally impose locally appropriate compensation packages?

There are a couple of aspects to consider here; the mechanics of validly implementing a contractual change, and the legal sense in doing so.

Generally, employers in the UK cannot unilaterally impose changes to an employee's compensation package. Ultimately, it will depend on what individual contracts of employment (and, where relevant, collective bargaining agreements) say and how

those terms apply to the particular circumstances. But it would be uncommon in our experience for a contract of employment to contain language specific enough to justify a unilateral pay reduction. So, any such proposal is likely to require agreement from the employee. In some circumstances, there could potentially be a redundancy situation (although this is more likely to be where a proposal is initiated by the employer).

There is, of course, a bigger practical question to consider here, which is what would the employer's rationale be for reducing the compensation package and is that coherent? For example, an employer might be tempted to say that it is because the employee will have cheaper living costs. That may be so, but that will typically be too simplistic an argument. For instance, any cost saving may be offset for the employee by higher commuting and overnight costs.

The focus should remain on the required outputs of the role in question and what the rate that role commands (including relative to other employees undertaking work of an equal value). Otherwise, even if the employee agrees to the lesser compensation package, an employer may be unwittingly opening itself up to discrimination or equal pay type issues. At the least, depending on the profile of the particular workforce, any disparity could potentially have an adverse impact on an organisation's gender pay gap.

4 | Do you anticipate a rising trend of employers hiring remote workers as opposed to managing office-based employees who subsequently go remote? What practical issues should employers bear in mind when considering remote hiring?

Many employers have had their eyes opened to the efficacy of remote working. It gives them the potential to save on real estate costs while maintaining productivity and giving employees the flexibility many want. Therefore, it seems almost certain that there will be a significant increase in employers hiring new staff on the basis of increased flexibility, allowing employees to work from home for at least some, if not most, of the time.

Having workers based overseas, for instance, is a step beyond allowing staff to work from home periodically and has its challenges. However, it is a model that has worked during the pandemic and it also significantly expands the pool of talent available to the business. Therefore, it does seem likely that there will be an increase in employers at least considering the concept of overseas remote working for the right candidate. There are some issues to bear in mind.

- Immigration – If the worker is based in their country of domicile, then immigration should not be a concern. However, if a worker intends to travel between countries, then care should be taken to ensure that they will not breach local immigration laws by working in a particular jurisdiction. The term 'working' means different



things in differently countries and so assumptions should not be made about what is permissible.

- Tax issues – a UK national who elects to work abroad for an extended period may cease to be a UK tax resident. An individual is no longer automatically a UK tax resident if they spend fewer than 183 days in the UK in a tax year, although they may remain UK-resident depending on how many days they spend in the UK in any given tax year and how many connecting factors they retain with the UK. They can become liable to income tax in the country in which they are working, and employer and employer could also be liable to pay social security contributions in that country – though if the individual is still tax resident or performing the duties of their employment in the UK, he or she may still be liable for UK tax or national insurance contributions on some or all of their earnings. Perhaps significantly, the presence of a worker in another jurisdiction could create a taxable permanent establishment for an UK employer in that jurisdiction. It is, therefore, important for the employer to understand where the worker will be based, and what the relevant tax rules are.
- Insurance and benefits – the employer should consider whether the rules of its company provided benefit and insurance schemes cover workers who are based overseas. Private health insurance schemes in particular might not. The employer will need to consider whether it is appropriate to purchase extended international health cover for the individual, together with any National Insurance or social security-related implications.
- Health and safety – the employer's health and safety obligation explained in question 2 applies equally to workers based overseas. Therefore, the individual should complete a homeworking risk assessment. Local health and safety rules may also apply.
- Time difference – the employer should consider how any time difference between the UK and where the worker intends to be based might impact their ability to work as part of the team or productivity. The employer may require the individual to work during normal UK hours. If that is the case, it should be clearly communicated and agreed in writing.
- Trial period – the employer may wish to include a trial or probationary period that will allow both parties to see how the arrangement works in practice.
- Employment rights – depending on the jurisdiction in question and applicable local rules, it is conceivable that an overseas employment relationship will be governed by the laws of the local jurisdiction. These may differ (sometimes considerably) from the laws in that employers in the UK will be familiar with.

5 | Do local laws provide remote employees with more generous leave entitlements, such as sick leave? Can employees avail themselves of leave entitlements in both the primary work location and the remote work location?

UK employers with workers based overseas

UK employers need to be aware that an employee who is based abroad could be entitled to the benefit of mandatory employment rights and protections applicable in the country in which they are based. These often include minimum rates of pay, holiday entitlement and rights on termination. This is the case even if the employee has signed a contract that provides that the employment relationship is governed by English laws. The worker and employer cannot generally contract out of local mandatory employment laws.

The protections that apply will depend on the country in question. For example, French employment law provides that if workers carry out the majority of their work in France, they are entitled to five weeks' holiday plus 11 bank holidays, regardless of whether or not they are employed by a French entity or where the employer is based. This is more than the UK statutory entitlement of 5.6 weeks (which includes bank holidays).

Therefore, before taking on the remote worker, it will be important for the UK employer to satisfy itself that it knows what those entitlements might be.

However, as is often the case, an employee who has managed to secure an employer's agreement that he or she may work abroad is unlikely to raise these matters until the time comes for the relationship to end. If the UK employer is considering terminating the employment of a worker who is based abroad, it will be important to get local advice on whether there are any procedural steps to follow or additional entitlements on termination.

Non-UK employers with employees based in the UK

In line with the principles set out above, workers based in the UK will benefit from UK mandatory laws. This includes the right for employees with at least two years' service not to be unfairly dismissed, which requires certain processes and procedures to be followed prior to dismissal.

6 | What are some best practices for protecting confidential and proprietary information in a remote work environment?

The initial step is to assess the particular or additional risks that might apply in respect of confidential information when an employee is working remotely. For

“If the UK employer is considering terminating the employment of a worker who is based abroad, it will be important to get local advice on whether there are any procedural steps to follow or additional entitlements on termination.”



instance, what devices will the employee use to carry out their work? Who else could have access to their workspace? What hardcopy material could or will they be handling? The risk profile will differ slightly from organisation to organisation, role to role.

Having identified those key risks, the next step ought then to be to develop suitable policies and procedures to address them. In many instances, the core principles are likely to already be enshrined in existing policies that may simply need tweaking. In other instances, new procedures, facilities or equipment may be required. For instance, permitting access to employer-provided technology to avoid company business being handled on personal devices (potentially shared by others in the same property), providing a facility for the safe disposal of confidential waste and setting clear expectations of expected behaviours.

The third aspect of this is promoting awareness of the employer's expectations in this regard and providing training where appropriate. The thrust of this will be reminding employees that risks to the business apply equally, and may even be greater, when working remotely and of the need to maintain their guard and comply with company policies at all times. While the primary focus of this will necessarily be on protecting confidential and proprietary information, it would also be advisable to ensure that clear expectations are set of what steps employees should take in the event of a breach of confidentiality.

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Longer term, employers may wish to review their contracts of employment and consider introducing additional homeworking provisions, certainly for new hires. For instance, incorporating some core requirements as contractual obligations. Conceivably, this could also include a right to access the home workplace at reasonable times to maintain any company property and, if not returned voluntarily, recover company property and confidential and proprietary information on or after termination of employment.

It is worth bearing in mind too that this is not simply a question of an employer protecting its confidential and proprietary information for its own purposes. Any information that contains personal data is likely to trigger compliance obligations under the Data Protection Act 2018, UK General Data Protection Regulation and potentially other applicable privacy legislation. This will include the obligation to take appropriate technological and organisational steps to ensure the protection of personal data, and to report data breaches promptly. In this regard, there is some additional best practice guidance provide for employers and employees alike in guidance issued by the Information Commissioner's Office.

7 | How does a remote employee affect the employer's tax obligations? Do the employee's activities render the employer to be 'doing business' in the remote location? Will these activities create a taxable presence for the foreign employer in the local jurisdiction?

We have alluded to this a few times already. It is a really important issue for employers to consider.

The biggest issue for employers generally is that an employee working remotely in another jurisdiction may create a taxable presence in that jurisdiction for the employer. The threshold for creating a taxable presence will depend on the domestic tax law provisions of the jurisdiction in which the employee is working.

However, where there is a double tax treaty in place between the two jurisdictions, a taxable presence will normally only arise where the employee's activities give rise to a 'permanent establishment' in the relevant jurisdiction. In most tax treaties, a 'permanent establishment' is defined as a fixed place of business or an agent (other than one of independent status) who has and habitually exercises authority to conclude contracts on behalf of the enterprise, although some tax treaties (particularly those to which developing countries are party) use a broader definition to catch the provision of services within the jurisdiction. Some jurisdictions have introduced temporary changes to law or guidance during the pandemic to accommodate individuals working remotely during lockdowns, but it would not be advisable to assume that these will continue indefinitely.

The precise analysis will generally depend on the nature of the activities being performed by the employee and the manner in which they are being performed. The longer the individual works remotely, the greater the risk of creating a taxable presence. The exposure is, broadly, likely to be greater for individuals engaged in revenue-generating roles or those engaging directly with the employer's customers than it is for individuals working purely in internal, administrative or back office roles.

Separately, and regardless of whether it has a taxable presence in respect of the employee's activities, an employer may also be subject to an obligation to withhold income taxes from salary payments made to the employee in the jurisdiction in which he or she is working, and be obliged to make social security or similar contributions. The terms of any applicable double tax treaty or social security contribution will need to be considered in this regard too.

So, in short, any proposed arrangement that involves an employee working in a different jurisdiction needs to be considered particularly carefully at the outset.

8 | What are some best practices for tracking remote work arrangements?

The individual needs to understand the potential liability that could arise from the employee working from a location the employer does not know about. It must be a written term of the engagement that:

- the worker must inform the employer at the outset where he or she will be based throughout the engagement;
- the worker must tell the employer in advance, in writing, if he or she intends to change location;
- the employer reserves the right to refuse consent for the individual to work from any location, other than those disclosed at the outset of the arrangement; and
- the worker agrees to indemnify the employer against any liability incurred by the employer as a result of his or her non-compliance.

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The Inside Track

What do you think are the most exciting and promising opportunities of remote working? How do you think it will affect the future of work?

Not having to spend considerable time commuting is a significant benefit for remote workers. They are able to use the extra time with family, friends or in rest and relaxation. This can prevent workers feeling as though they are on a treadmill and increase satisfaction with work-life balance. That can lead to a happier (and potentially more loyal) workforce, better focus on work and higher productivity and efficiency.

That, combined with the potential for lower business infrastructure costs, means a potential win-win for employer and employee. Remote working also opens up the job market to those for whom working away from the home would have been a challenge. Parents and those with disabilities are particularly likely to benefit.

In your view, what are the most difficult challenges raised by the rise of remote working? How do you think employers should tackle these challenges and adapt accordingly?

We have seen over the period of the pandemic that more senior employees, perhaps with more living space at home, have tended to be able to more comfortably embrace home working. There is a risk that many will not want to return to the office full time. In certain organisations, that absence of experience in the office day to day may negatively impact the learning curve of more junior team members, who would ordinarily have 'learned by osmosis', which is more difficult to replicate in a remote environment. Employers should ensure that line managers are trained in the different ways of managing remotely and understand that the development of junior staff members is a key performance target that they need to meet if they want to continue working remotely.

What do you enjoy most about practising and advising in this area?

Employment law is multifaceted, fast-paced and ever-evolving. No two days are ever the same. Ultimately, for us it's about using our knowledge of the law to help our clients recruit and maintain a happy, motivated and productive workforce that allows them to achieve their commercial objectives. Remote working practices are clearly high up the corporate agenda currently and they provide a real opportunity for employers to distinguish themselves – for better or worse – in the sector in which they operate.

Lexology GTDT Market Intelligence provides a unique perspective on evolving legal and regulatory landscapes.

Led by McDermott Will & Emery, this Remote Working volume features discussion and analysis of emerging trends and hot topics within key jurisdictions worldwide.

Market Intelligence offers readers a highly accessible take on the crucial issues of the day and an opportunity to discover more about the people behind the most significant cases and deals.

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