A&L Goodbody

Remote working: WRC gives clear message to employers

Remote working is on everyone's minds these days as so many of us have been doing it since last March due to the COVID-19 pandemic.

What started out as a novelty has quickly become a routine part of many people's lives. Remote working is likely to remain an ongoing feature of our lives as the government has recently proposed new legislation to provide for a limited right to request remote working arrangements for employees.

But what is the legal position while we wait for remote working legislation to be enacted?

At the moment, there is no right to work remotely. The government's current Level five restrictions advise that we should all work from home unless it is essential for our work, which is itself an essential health, social care or other essential service which cannot be done from home.

The vast majority of employers are complying with the government's ongoing guidance that anyone who can work from home should do so until further notice. However, as Chief Medical Officer Dr Tony Houlihan commented previously, it is also clear from the levels of traffic on our roads that there have been relatively high levels of non-compliance with the government's guidance to work from home.

An employer's duty to provide a safe workplace under the Safety, Health and Welfare at Work Act 2005 (the **2005 Act**) is central to underpinning the current trend of employers facilitating working from home arrangements. This reasoning, coupled with the unprecedented circumstances of a pandemic, was emphasised in a recent decision from the Workplace Relations Commission (**WRC**) which awarded €3,712 in compensation to a former employee who resigned after being refused the ability to work remotely, notwithstanding that she was providing an essential service.

Executive summary

Importantly, the award in this case was relatively low only because the employee had secured alternative work within five weeks of her resignation. Interestingly, the claim in this case was made under the Unfair Dismissals Act 1977 (which limits compensation to actual economic loss suffered by a dismissed employee). However, employers should beware that if an employee claims to have been penalised for raising health and safety concerns (such penalisation culminating in their enforced resignation) there is potential for a case with similar fact patterns to be taken under Section 27 of the 2005 Act, which would allow for uncapped compensation awards.

While the facts of the case played a major role in the outcome, employers should heed the ruling and ensure that their organisations are in a position to justify requiring any employees to attend the workplace even where they are providing an essential service. This is particularly so if some or all of an employee's duties may be performed remotely (and even if the job may be performed to a better standard or more comprehensively by attending the office).

In this case note, we break down the recent WRC decision, and highlight some of the key points employers should consider.

What happened in this case?

The case concerned the resignation of an employee after she (and her co-workers) had repeatedly requested and been refused permission to work from home. The employee (an operations coordinator) was responsible for supporting the management of student accommodation for a client university. As part of her role, she worked in a small office, which was shared with two other colleagues.

Over the course of several weeks, the employee experienced stress and took sick leave due to her concern of being exposed to COVID-19 by working in such close proximity in a confined space with other employees. During this time, she repeatedly voiced her concerns to management by email, but she asserted that her complaints had been "brushed under the carpet". She also believed that her working arrangements represented a health risk to her husband who suffered from severe asthma. Indeed all three employees in that office lived with "high risk" category individuals.

The employees in the office suggested to management that they could rotate their presence in the office to mitigate the risk of infection. The employees believed that the vast majority of their duties could be performed from home, but to the extent that an on-site presence was required, under their suggested in-office rotation there would be at least one employee on site at all times.

All three employees working in the small office submitted formal grievances to management regarding their working arrangements, but the employer continued to refuse to allow the employees to work remotely, and also refused the suggestion regarding in-office rotation. The employer maintained that, although it was conscious of the employee's personal circumstances, the decision to allow remote working was a matter solely for the employer to determine and it was satisfied that it had sufficient health and safety measures in place (e.g. provision of PPE, screens between desks, realignment of desks), and that no other employees had raised concerns about these measures. The employer noted that no one had suggested that these roles could be performed remotely prior to the pandemic, and that this remained the case. Finally, the employer advised the employees that if they remained unhappy with the situation, they *"could absent themselves from work and check if they are entitled to a State benefit"*.

Having had her grievance refused, the employee resigned and subsequently filed a complaint with the WRC.

Case outcome

The adjudication officer concluded that by continuing to insist that the employee attend the workplace in spite of the health and safety risks, the employer was not in compliance with health and safety legislation, and that this amounted to a fundamental breach of the contract of employment.

The adjudication officer concluded that the employee was entitled to consider herself to be constructively dismissed for three reasons:

1. The suggestion by the employees regarding rotating attendance in the workplace was a sensible suggestion as all employees had interchangeable duties which required on-site presence. Accordingly, the employer acted unreasonably by not implementing the rotation suggestion at least on a trial basis.
2. There was no evidence presented that the client (i.e. the university) had objected to remote working. The employer therefore did not provide an adequate reason for refusing remote working.
3. The provision of PPE did not absolve the employer of their duty to eliminate risks in the workplace. Of note here was the small size of the shared office, which was not considered carefully enough by the employer.

Due to the fact that the employee had secured alternative work since her resignation, the compensation award made by the WRC was relatively minor.

Constructive dismissal

Ordinarily, claims under the Unfair Dismissals Act 1977 feature a reversal of the burden of proof, whereby all dismissals are presumed to be unfair unless proved otherwise by the employer. However, in constructive dismissals cases the burden of proof is on the employee to demonstrate that they had no choice but to

resign. Therefore, claims of constructive dismissal can be significantly more difficult for employees to succeed in proving.

In general, employees who take constructive dismissal are required to prove:

- that the employer's conduct amounts to a fundamental breach going to the root of the contract, or shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, or
- that the employer's behaviour was so unreasonable that the employee, having exhausted all internal grievance procedures, could not be fairly expected to put up with it any longer.

Do employees have a right to work remotely?

There is currently no general legal entitlement for employees to work remotely. However, as illustrated in this most recent WRC decision, employers must consider and deliberate on requests for remote working very carefully during the ongoing pandemic.

Employers must continue to heed the current public health guidance, which currently advises that employees must continue to work from home unless absolutely necessary for an essential service. Health and safety risk assessments should be undertaken in workplaces and all measures reasonably practicable should be put in place to mitigate the risks to employees – it is likely that remote working would be expected to be seriously considered in any such risk assessment.

Employers should not rely on generic business reasons for denying remote working requests, and instead should undertake a careful individual assessment of an employee's role, the impact it may have on the business, and any specific health considerations relating to an employee (and potentially their dependents) in determining whether work can be performed remotely.

Finally, it should be noted that a statutory right to request flexible working arrangements (which may include remote working) does exist for employees who return from parental leave, and therefore may need to adjust their working hours.

The Irish government recently published a strategy on remote working entitled "Making Remote Work". As part of this strategy, legislation is promised to provide for a general statutory right to request remote work. While little is known yet about the extent of this planned right to request remote working, it is envisaged that employees will have a right of appeal against any refusal. You can read more about "Making Remote Work" in our recent note here.

Key takeaways for employers

This decision of the WRC serves as a stark warning to all employers that requests for remote working arrangements should be considered very carefully and individually. In summary, employers should:

- have a robust and up-to-date remote working policy, risk assessment and safety statement in place
- ensure that internal grievance procedures adequately address health and safety concerns
- factor employee suggestions and input into health and safety decisions
- consider all requests for remote working carefully and individually

For more information in relation to this topic, please contact Ciaran Ahern, Associate, Joe Mahon, Solicitor, or any member of the A&L Goodbody Employment team.

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