

COVID-19 & Remote Working – Key Considerations for IR practitioners

A recent WRC decision “stresses the importance of actively engaging with employees’ health and safety concerns, while also serving as a timely reminder that requests for remote working will continue to be a feature of the modern workplace”, according to Ellen Nolan, Senior Associate, McCann FitzGerald.

As reported in last week’s IRN, the Workplace Relations Commission (“WRC”) recently found in favour of an employee who resigned and took a claim for constructive dismissal under the Unfair Dismissals Acts, following her employer’s refusal to address COVID-19 related health and safety concerns, including refusing her request to work remotely, between February and May 2020.

A constructive dismissal occurs where an employee resigns from their employment due to the conduct of the employer being such that it is considered reasonable for the employee to terminate the contract of employment. Such claims are generally difficult for an employee to succeed in, as the burden of proof rests with the employee, and they are expected to exhaust all internal grievance procedures prior to resigning. The fact that the employee was successful in this claim is therefore particularly noteworthy.

It is not sufficient to state the employer provides essential services

The employee worked as an operations co-ordinator for a facilities management company, providing on-site services in a client university’s student accommodation office. The role was office-based and a similar role was carried out by two other employees. All three were required to attend the office during the outbreak of the COVID-19 pandemic.

The WRC adjudication officer did not dispute that the role was an essential service. However, the employer’s refusal to adapt work processes, trial rotated on-site working, or facilitate any form of remote working in light of the significant health and safety risks posed by COVID-19, led to the employee successfully claiming constructive dismissal. The compensation award was low as the employee commenced alternative employment five weeks after resigning.

While this appears to be the first WRC adjudication decision dealing with a COVID-19 related constructive dismissal claim, many more such claims are likely to come before the WRC.

WHAT DOES THIS MEAN?

As a starting point, employers should be mindful that the current guidance under Level 5 restrictions is to “[w]ork from home unless essential for work, which is an essential health, social care or other essential service and cannot be done from home.” However, as highlighted by the WRC’s decision, it is not sufficient for an employer to simply state they are an essential service where an employee raises health and safety issues and/or submits a request to work remotely.

Employers must comply with their existing health and safety obligations under the Safety, Health and Welfare at Work Act 2005 (the “Act”). In its decision, the WRC stressed that compliance with these statutory duties is an implied term of an employee’s contract of employment.

Under the Act, employers have legal obligations to ensure that their employees are working in as safe an environment as is reasonably practicable. In the context of COVID-19, employers must

also adhere to the Work Safely Protocol, which sets out the minimum measures to be implemented in workplaces to prevent the spread of COVID-19, including developing a COVID-19 Response Plan, and updating existing risk assessments and safety statements, all in consultation with workers.

In terms of health and safety risks identified, the WRC stressed that “the most effective way to address a risk is to eliminate it” and that physical measures and the use of personal protective equipment “is the last resort and the least effective measure.” On this basis, employers must ensure that their COVID-19 protocols comply with this risk elimination and mitigation hierarchy.

ENGAGE WITH EMPLOYEES

Where an employee raises health and safety concerns, employers must consult with the employee, consider and address their concerns, and engage with any proposals or potential solutions the employee might suggest to eliminate risks. One such solution, as had been suggested by the employee in this case, could be facilitating a form of blended remote working, where employees rotate their presence in the office, to ensure social distancing is maintained, particularly where roles are interchangeable and/or certain aspects of their role can be completed online.

Many organisations had implemented this approach as part of their COVID-19 strategy during the summer of 2020, as restrictions began to ease, by splitting their workforce into, for example, “Team A” and “Team B”, and rotating each team’s presence in the office. This is likely to be a feature of many workplaces in the coming months as we gradually move out of lockdown.

This case is also interesting in the wider context of remote working post COVID-19, particularly given the Government’s commitment in the National Remote Work Strategy to legislate for a right to request to work remotely. While the case itself does not deal with a general right to work remotely; undoubtedly, the prevalence of such requests will continue to rise beyond the COVID-19 pandemic.

MANAGING REMOTE WORKING REQUESTS

Employers should consider their current approach for dealing with employees’ requests to work remotely. It is essential for all businesses to have a written remote working policy in place which sets out clear and objective criteria for considering remote working requests, and outlines a comprehensive procedure to deal with such requests, including providing a right of appeal where such requests are refused.

Organisations that have not introduced remote working as a result of COVID-19 should review their current business models to examine whether remote working might be suitable for their workforce (or certain roles within their workforce), even where they are an essential service. Where an organisation deems certain roles unsuitable for remote working, it would be important to set out objective, business rationale for such decisions, particularly where remote working requests are refused on this basis.

However, this case does not mean that all requests to work remotely must be granted, even in the context of the current pandemic. Remote working is not suitable for all roles and industries, particularly those that require employees to be physically present on-site and in sectors such as construction, manufacturing and healthcare.

Nevertheless, we recommend that organisations in all sectors review their current work practices and processes, and engage in open dialogue with their workforce, to determine whether remote

working might be facilitated for roles that traditionally required a physical presence in the workplace. This might be achieved through the use of technology, such as virtual communication platforms, or the provision of other software or equipment, such as laptops.