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Implications of the UK Equality Law for tele-homeworking: COVID-19 and beyond

Abstract

Purpose

The purpose of this study is to examine the practical and legal complexities associated with tele-homeworking in the context of the UK Equality Law. First, the paper provides a background to the recent growth of tele-homeworking as a result of the COVID-19 pandemic, outlining the tenets of the UK Equality Act 2010 and referring to additional legislation pertinent to the ensuing discussion. Second, illustrative case law relevant to the UK Equality Law is put forward to demonstrate the potential challenges that employers and employees might encounter with continued and longer-term tele-homeworking arrangements. Third, the paper outlines implications for employers and human resource managers in terms of policies and practices that might shape the nature of the employment relationship.

Design/methodology/approach

This study is based on a review of the literature and an examination of UK case law applicable to tele-homeworking, taking into consideration equality, diversity and inclusion concerns in the workplace.

Findings

Remote working can be beneficial to both employers and employees. However, there are a number of significant concerns surrounding the management of tele-homeworkers in the aftermath of the pandemic that can act as a stimulus for legal disputes around discrimination, infringement of human rights and breach of contract claims. Several policy implications surface from the analysis that relate to equality and fair treatment associated with both current and future work arrangements.

Originality/value

The paper is significant in offering legal insights into how the UK Equality Law relates to the complexities associated with the management of tele-homeworkers. The study also highlights how return-to-office undertakings might need to consider wider legal issues. COVID-19 and its repercussions have demanded the reorganisation of work, which can give rise to a greater possibility of legal challenges and the study highlights the importance of employers undertaking an evaluation of their equality practices and complying with the legal framework.

Keywords: Discrimination, Equality law, Labour law, Employee rights, COVID-19, Labour rights

Introduction

During the COVID-19 pandemic, both employers and employees have demonstrated resilience and adaptation to newer ways of working, primarily aided by information and communications technologies (ICTs). In facing threats of multiple pandemic waves, uncertainties emanating from variants of the coronavirus and reservations relating to the risks of virus transmission at the workplace (TUC, 2021a), organisations and their staff are likely to see traditional work organisation recontextualized *en masse*. According to UK Government statistics, over 46% of people in employment did some work at home during 2020 with 86% of them doing so as a result of the pandemic (ONS, 2020). Homeworking is anticipated as becoming a “permanent fixture” for many businesses (BBC, 2020). The tele-homeworking phenomenon has indeed come a long way from the time when it was described, nearly 40 years ago, as an “extreme case” of remote working (Olson, 1983, p. 183). As businesses and individuals further adjust to the initial shock of the pandemic-generated work relocation, options such as using remote coworking spaces closer to home are also being seen as a viable alternative to tele-homeworking. With several organisations, however, suspending their use of traditional buildings combined with employee preferences and reservations about returning to offices (Paton, 2021), permanent tele-homeworking capabilities and practices might indeed become imperative in sustaining businesses and safeguarding employment.

Remote working opportunities have often been heralded as a lynchpin for attracting talent and enabling gender, age and disability diversity within organisations (Olson, 1983; McNair, 2006; Schur *et al.*, 2020). On the positive side, tele-homeworking might be beneficial in offering greater job autonomy (Baruch, 2000), providing more opportunities to integrate work demands and non-work activities (Grant *et al.*, 2013), eliminating travel-to-work strains and facilitating fewer work interruptions (Haddad *et al.*, 2009). Simultaneous concerns, however, have been raised about its detrimental effects on employees. The negatives outcomes might include work intensification (Kelliher and Anderson, 2010), the impairment of career prospects due to lower “visibility” (Maruyama and Tietze, 2012) and greater work-to-life or life-to-work conflict, particularly for women (Moore, 2006). Remote working has the potential to fragment employee relations on both contractual and spatial terms through the introduction of a more complex employment relationship with direct employees, the launch and management of varied flexible working options, the individualisation of the employment relationship and the organisation and management of smaller and more socially isolated work entities (Donnelly and Johns, 2020, p. 86).

The deleterious effects of tele-homeworking could also be intensified by pandemic-induced pressures. Generalised health-related anxiety and perceptions of poor physical and mental health because of employment alterations necessitated by remote working might exacerbate negative employee experiences (Taylor *et al.*, 2021). The likelihood of using inadequate and makeshift homeworking spaces, balancing co-inhabitant or familial responsibilities with work demands and perceiving a lack of current or future work alternatives can all give rise to job-related stress and general life anxiety (Allen *et al.*, 2021; Toscano and Zappalà, 2020; Maurer, 2020). Furthermore, for many workers, the steep learning curve associated with adopting newer ICTs and unfamiliar ways of working, social isolation, inadequate training support, poor work-life boundary management or the experience of longer and more erratic working hours could induce or heighten work-life conflict and emotional and physical exhaustion (Palumbo, 2020; Park *et al.*, 2020; Toscano and Zappalà, 2020). Indeed, whilst many firms might have indicated an intention to relinquish office buildings entirely, voices have emerged that caution against making tele-homeworking mandatory, so as to appraise the long-term risks and benefits

and to safeguard employee volition (Churchill, 2021). In the post-COVID-19 era, three models of working are viable:

1. Permanent office-based work.
2. Permanent remote working.
3. A hybrid working model.

The hybrid tele-homeworker would be on a spectrum of the office-to-home locational anchor, depending on the length of work-related time spent at either of the premises. Each of the aforementioned will bring to the fore a variety of legal issues relating to the contract of employment, health and safety, data protection, monitoring of performance and equality. Working from “personal spaces” not only has experiential ramifications that relate to workplace equality but also raises a number of broader issues relevant to legalisation-specific discrimination. In this paper, we specifically focus on the legal ramifications of the UK Equality Law for direct employees who telework from home. Based on a review of the literature and various case law, we specifically elaborate on discrimination on the grounds of sex, pregnancy and maternity, age, disability, religion or belief and race. The article firstly highlights the tenets of the Equality Act 2010 and other UK legislation relevant to tele-homeworkers within the remit of the paper. The subsections then review specific case law examples that demonstrate the challenges and potential consequences associated with equality issues. The paper concludes with the policy implications associated with the UK Equality Law in the context of homeworking, which feeds into the situational awareness of the current pandemic and beyond.

The Equality Law and other relevant legislation

The Equality Act 2010

An employer must not contravene prohibited discrimination on the grounds of the following protected characteristics listed in s4 of the Equality Act 2010: age (s5); disability (s6); gender reassignment (s7); marriage and civil partnership (s8); race (s9); religion or belief (s10); sex (s11); sexual orientation (s12); or pregnancy and maternity (s18). Discrimination, in employment or otherwise, can be direct and overt or indirect and inferential (Cavico and Mujtaba, 2011). Prohibited conduct, which is unlawful under the Act includes direct and indirect discrimination, harassment and victimisation.

Direct discrimination (s13) arises when a person (A) discriminates against another (B) if because of a protected characteristic, A treats B less favourably than A treats or would treat, others. The definition includes discrimination by association (treating one person unfavourably because of their association with another person who does have a protected characteristic) or perception (treating someone unfavourably because of an incorrect and maybe stereotypical belief about their attributes, abilities or beliefs related to a protected characteristic). There is no defence to direct discrimination except on the grounds of occupational requirements. Indirect discrimination (s19) arises if A applies to B a provision, criterion or practice (PCP), which is discriminatory in relation to a relevant protected characteristic of B. The defence of justification applies when the employer can show that the practice is a proportional response to a legitimate aim in the particular circumstances [s19(2)(d)].

Harassment (s26) includes three different categories:

1. Characteristic-related harassment involves unwanted conduct, which is related to a relevant characteristic and which has the intention or effect of violating one's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment.
2. Unwanted conduct of a sexual nature that has the same intention or effect as in (i) above.
3. Treating someone less favourably because that person has either submitted to or rejected sexual harassment or harassment related to sex or gender reassignment.

Victimisation (s27) protects anyone who has asserted their right under the Equality Act 2010 (e.g. made a complaint) or someone supporting them, from subsequent unfavourable treatment by their employer.

The right to flexible working 2014

The right to request flexible working in the UK has been in existence since 30 June 2014. The law is set out in ss 80 F-80I of the Employment Rights Act 1996 and the Flexible Working Regulations 2014 (SI 2014/1398). The law provides that all employees with at least 26 weeks' continuous employment can request to work flexibly if the change relates to the number of hours, the times or place of work. The employer must deal with an application "reasonably", and can only refuse a request on one of the following grounds, namely, additional costs; detrimental effect on the ability to meet customer demand; inability to reorganise work amongst existing staff; inability to recruit additional staff; detrimental impact on quality; detrimental impact on performance; insufficiency of work during the periods the employee proposes to work; and planned structural changes. An employee can complain to an employment tribunal if, for example, the employer does not deal with the application reasonably or rejects it on non-statutory grounds (ACAS, 2014). The degree of scrutiny possessed by the tribunal does not, however, extend to the power to question the commercial viability of an employer's decision to refuse an application. The employment tribunal's remit, therefore is to determine whether the employer has considered the request seriously and that a refusal is for a legitimate reason.

The Health and Safety at Work Act 1974

An employer has a duty "to ensure as far as is reasonably practicable the health, safety and welfare of all employees" (s2 Health and Safety at Work Act 1974), and this includes homeworkers. The reference to practicality indicates that the resources of employers may be relevant in judging how much can be expected of them (Adams *et al.*, 2020, p. 417).

Working Time Regulations 1998

The Working Time Regulations 1998 (implementing the Working Time Directive) imposes limits on the number of hours an employee can be asked to work and includes requirements for minimum rest breaks and annual paid holidays. Employers have an obligation to monitor and log hours [Reg 9(a) Working Time Regulations 1998] to demonstrate that the limits imposed have been complied with.

Human Rights Act 1998

The European Convention on Human Rights (ECHR) came into operation in 1953. It requires signatories to abide by a number of fundamental civil rights, including the rights to liberty and security (Article 5), freedom of thought, conscience and religion (Article 9), freedom of

expression (Article 10) and freedom of assembly and association (Article 11). The rights to life (Article 2), a fair trial (Article 6) and privacy and family life (Article 8) are also included. Prior to the introduction of the Human Rights Act (HRA) 1998, the convention was not directly enforceable in the UK courts. Claimants had to take cases alleging breaches by the government to the ECHR at Strasbourg. With respect to the HRA 1998, Section 3(1) provides, so far as it is possible to do so, that primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the European Convention on Human Rights drafted in 1950 (Adams *et al.*, 2020).

Tele-homeworking and the Equality Law: employment-related developments and illustrative cases

This section examines the practical and legal challenges that employers and employees might need to consider in relation to tele-homeworking and the Equality Law in the UK. We draw on legal cases derived from the UK to illustrate employee concerns and organisational practices and to illuminate potential complexities that could arise from tele-homeworking arrangements. The review additionally points to various issues that might surface with a return to the traditional office space, subsequent to remote working. The cases presented do not aim to be all-inclusive and they collectively provide distinctive insights into the implications of current and future work organisation in view of the UK Equality Law.

Sex discrimination and pregnancy and maternity discrimination

The extant scholarship on sex discrimination in the workplace surrounds various issues including gender pay inequalities (Rubery *et al.*, 2005; Peruzzi, 2015), sexual harassment (Lockwood, 2008; McDonald, 2012) and matters around maternal, paternal and parental leave (Kaufman, 2018). Research in the UK has revealed a number of reasons that reflect the lack of female representation at senior levels and account for distinct sectoral shortages (e.g. investment banking). The explanations include traditional gender-related norms both within and outside the workplace, unconscious bias and discrimination, women's personal preferences and priorities and the type of opportunities available within organisations and the broader job market (Chevalier, 2007; O'Reilly *et al.*, 2015; Tomlinson, 2006). Whilst unemployment levels increased by similar proportions for men (27%) and women (28%) as a result of COVID-19, more women held jobs that were eligible for furlough (UK Parliament, 2021) and the sectors deemed most at risk from job losses tended to be female dominated (e.g. food and accommodation) (PwC, 2021). In relation to pregnancy during the pandemic, a recent TUC (2020) survey found that one in four pregnant women in their sample had experienced unfair treatment at work, which included being unable to access health and safety risk assessments and being singled out for redundancy or furlough.

Black women, working mothers and women in senior leadership roles are said to experience additional burdens as a result of the pandemic (Forbes, 2021). McMunn *et al.* (2020) indicate that for couples in the UK, gender equality relating to the division of work is rare and women continue to spend a disproportionate and greater amount of time on caregiving and unpaid domestic tasks. The pandemic has seemingly exacerbated this burden of care assumed by women (ONS, 2021a). Nevertheless, where women are employed in critical sectors and their male partners are unemployed or work from home, the allocation of traditional responsibilities might be reversed (Hupkau and Petrongolo, 2020). As revealed by Sevilla and Smith (2020), there has been a general increase in men contributing to childcare responsibilities as a result of the pandemic. A father's up-take of work-life balance policies, nonetheless, is a

consequence of the “complex dynamic” between traditional gender regimes and reinforcements through organisational culture and policies, which might prevent men from feeling entitled to flexible working options (Gregory and Milner, 2011).

The challenges of handling working arrangements for both men and women under these circumstances have legal implications relevant to the UK Equality Law and the Flexible Working Regulations. If a person makes a request to work from home, an employer will need to ensure that the request is considered properly and fairly with regard to gender. For example, in *Hodgson v. Martin Design Associates* (2019), it was held that the refusal of a female employee’s request to work remotely constituted direct discrimination, as several male colleagues had been granted permission to work off-site. The employment tribunal accepted that much of her work as an office manager could have been completed remotely because of the employer’s virtual network. Furthermore, as women are statistically more likely to be the main carers for children, it is possible that a tribunal would accept that a refusal to allow remote working or being required to cease a flexible work arrangement and return to on-site working, might constitute indirect discrimination.

Employers should similarly pay attention to the converse, where flexible working requests made by men are given equal credence, particularly in light of pandemic-generated life pressures. As a case in point, in *Armstrong v. DB Regio Tyne and Wear Ltd* (2011), the claimant, a train driver applied for a flexible work roster to enable him to help with the childcare of his daughter who suffered from a rare medical condition. The flexible working request was refused by his manager who expressed the view that the applicant had a “poor reason” for the request. The employment tribunal found that this amounted to sex discrimination as the employer accepted flexible working requests from two female drivers with comparable circumstances. In this instance, the employer had prioritised the flexible working requests of female staff over applications by male employees. By way of further example, in *Pietzka v. PWC* (2014), a male employee requested flexible working to spend more time with his daughter following the breakdown of his marriage. The flexible working request was refused and the applicant was informed that his career advancement opportunities would be negatively affected by flexible working arrangements. The manager handling the request expressed the view that he could not understand why the employee in question would want to put his family life ahead of his career. The claimant went on to succeed in a sex discrimination claim.

An employer also needs to ensure that the process by which work is allocated or training offered, does not discriminate on grounds of gender and that the organisation can justify the measures that are deployed. For example, in *Marsland v. Sky in Home Services Limited* (2020), the male claimant alleged direct discrimination on the ground of sex, contending that his automatic exclusion by virtue of being male, from a trainee programme for home service installation engineers which was restricted to women, discriminated against him. The employment tribunal were satisfied that there had been less favourable treatment of the claimant by reason of his sex than was afforded to a comparable woman. However, the tribunal held that the employer’s training programme amounted to permissible positive action in accordance with s158, and hence, did not amount to discrimination. Therefore, s158 of the Equality Act 2010 allows an employer to take action to compensate for disadvantages that it reasonably believes are faced by people who share a particular protected characteristic.

It is important to note that employers have the same legal obligations to tele-homeworkers as they do to employees working on-site, and therefore, need to ensure that their equality policies include remote working. Employers will need to take reasonable steps to protect staff from

sexual harassment when working online, for example, when taking part in meetings on Zoom or Microsoft Teams. In *Campbell v. Free Test Company* (2019), the female employee's claim for harassment that took place outside of work, on the grounds of sex was held to be well-founded. An employer must guard against a culture of sexist and derogatory comments being tolerated in the workplace, whether on-site or online (*Piper v. Nairobi Coffee and Tea Company Ltd and others*, 2018). Legal action on the grounds of discrimination (e.g. sex or religious discrimination) can manifest itself if, for example, female employees are asked to dress more provocatively or wear make-up during online meetings to project a certain image (Nath *et al.*, 2016).

Any switch to tele-homeworking must not discriminate against pregnant women or women on maternity leave. If a pregnant woman is dismissed or made redundant on the grounds of her pregnancy, this would automatically be deemed as unfair dismissal. In *Larkin v. Liz Earle Beauty Company* (2018), the employment tribunal were satisfied that a digital marketing manager was discriminated against on the grounds of pregnancy, both in the failure to consider the claimant for a vacant managerial position and in the treatment of her subsequent consultation process with respect to her dismissal. It is worth clarifying that whilst a woman enjoys a protected status in relation to unfavourable treatment during pregnancy and maternity, it is restricted to treatment that is proportionate to compensate them for the disadvantages occasioned by their condition (Phillips and Scott, 2016). For example, in *Eversheds Legal Services Ltd v. De Berlin* (2011), a male employee was found to have suffered discrimination when selected for redundancy in preference to a female employee on maternity leave. One of the selection criteria included an assessment of the time taken to secure payment for each employee's work. The male employee was appraised based upon his actual results, whilst the female employee received maximum marks because she had been absent on maternity leave. The court emphasised that special treatment designed to avoid discrimination must not favour an employee beyond that which is necessary to compensate for the disadvantage. By elevating the female employee too far, the employer committed an act capable of amounting to sex discrimination – here the male employee suffered less favourable treatment due to his gender. The court considered that the employer should have found a less discriminatory way of removing the maternity leave disadvantage, for example, by measuring the performance of both employees at an earlier date when they were on an equal footing. Comparably, if an employee suffers any mental or physical disadvantages as a result of COVID-19, the employer is advised to balance interests in an impartial manner, for example, when undertaking appraisals and in determining career advancement.

Age discrimination

Traditionally ageism has been associated with older workers, with Butler (1975, p. 35) describing the concept as “a process of systematic stereotyping and discrimination against people because they are old”. Since then, there is increasing acknowledgement that age stereotypes are associated with various generations, including younger employees (Perry *et al.*, 2013) and attitudes towards workers of various ages can be both positive and negative in their assumptions (Iversen *et al.*, 2009). Studies have highlighted that certain sectors of the economy, such as those relating to information technology, finance, accommodation and food services, appear to be more discriminatory towards older workers (Adler and Hilber, 2009; Posthuma and Campion, 2009). It has also been found that when presented with the opportunity for developing older workers or offering them “exit routes”, employers demonstrate a preference for providing older workers with retirement options (Van Dalen *et al.*, 2015). In the UK, managerial attitudes that draw on stereotypical views of older workers

(e.g. as being less adaptable to change and more deficient in technological skills than younger workers) continue to persist (Parry and Tyson, 2009). Relatedly, Vickerstaff *et al.* (2015) report that older workers have lower accessibility to regular training and the updating of their skills.

Compared to their older peers, studies have demonstrated that younger workers are generally perceived as less dependable and not as loyal (Chiu *et al.*, 2001). Recent research has additionally dubbed workers under the age of 25 as the “COVID generation” (Major and Machin, 2020), being susceptible to greater risks associated with job loss and future job insecurity (Adams-Prassl *et al.*, 2020). Younger individuals work in sectors that have been hit harder by the pandemic (e.g. retail and hospitality services) and have concurrently had their general learning opportunities disrupted (Major and Machin, 2020). Similar concerns, nevertheless, have also been raised for workers over the age of 50 years who have seen their employment rates fall and discrimination worsen, particularly in recruitment processes (Trenaman, 2021). In terms of their characteristics, the Resolution Foundation reports that older workers tend to work part-time and be self-employed and traditionally take longer to return to employment, making them particularly vulnerable to the crisis (Cominetti, 2021). The report further confirms that in sectors such as hospitality and leisure, older workers are much more likely to have experienced a negative employment change (such as being furloughed or losing pay) as a result of the pandemic compared to other groups, with older Black employees (particularly Black women) being affected to a greater extent than their White counterparts.

As the nature of work demands have changed in response to the pandemic, jobs for digital and technical roles in the UK have reportedly increased by 21% from April 2020 to April 2021 (City and Guilds, 2021). The expansion of tele-homeworking therefore, has evident implications for the recruitment, training and retention of employees. To illustrate the point, whilst employees have an implied duty to adapt themselves to new methods and techniques of work introduced in the course of their employment, the onus of providing the necessary training lies with the employer (Creswell v. Inland Revenue, 1984). Businesses must ensure that they do not discriminate against older workers in relation to the provision of such training. In *Baker v. National Air Services Ltd* (2007), the defendant employer refused to allow Mr Baker, aged 50, to train as an air traffic controller. It claimed that the age limit of 35 was a legitimate and proportionate aim because of safety concerns and the need for applicants to be in the job to justify the cost of training. It was held that the defendant had committed direct discrimination – whilst the employer’s aim was legitimate, it was not proportionate. It reflected historical and ingrained stereotypes “that air traffic controllers must start young and older individuals will not be suitable”. Arbitrary age bans in relation to training access would, therefore, be considered unreasonable and would display employer prejudice. It is important to note that where persons of a particular age group are disadvantaged, have particular needs or are participating in a business area with disproportionately low numbers, an employer can take action under Section 158 (provided it is proportionate) to enable that age group to overcome the disadvantage, meet particular needs or encourage increased participation. For instance, if an employer identifies that older employees are under-represented in the ICT department, this might include offering a mentoring scheme or technology training course aimed at that particular age group.

In a similar vein, employers must guard against basing decisions on stereotypical assumptions about younger workers, for example, perceiving that they are too young to effectively work remotely without constant supervision. A blanket rule refusing access to particular work roles

or declining requests of homeworking by younger workers due to unfounded perceptions (e.g. a lack of maturity) is discriminatory (Thomas v. Eight Members, 2007; Brooke Shanks v. Heat Source Solutions, 2019). Employers must also take particular care when handling redundancies that might arise from a switch to tele-homeworking so as to ensure that they do not discriminate on grounds of age. In Canadian Imperial Bank v. Beck (2010), the Employment Appeal Tribunal were satisfied that the claimant who was made redundant from his post as marketing director at the age of 42 and replaced with someone aged 38, was discriminated against on the ground of age.

Older workers are more likely to report having a disability as compared to younger workers (Cominetti, 2021), and employers should make reasonable adjustments and protect their staff from harassment that might arise from the disability. In Walsh v. Rose Medical Ltd (2018), the claimant who worked in a pharmacy was mocked for hearing and memory-related reasons from the outset of her employment in April 2017. This derision generated a climate at work which was hostile to the claimant and was related to her age. The other employees did not mock each other when they forgot things or misheard something. The applicant complained to her manager about the behaviour, however, the complaint was not taken seriously and was not investigated. She subsequently made a complaint to a director of the business, who similarly refused to take the allegations seriously. The applicant went on sick leave due to osteoarthritis caused by the type of work she had to undertake, but on return from sick leave, was dismissed. Her claims for disability discrimination and age discrimination were deemed as well-founded, and therefore, succeeded. Relatedly, it is useful to note that based on a survey of over 35,000 employees, the TUC (2021b) has demanded from the UK Government that “long COVID” (e.g. with symptoms of brain fog, difficulty concentrating and memory problems) in all age groups be recognised as a disability under the Equality Act, and employees therefore, be provided with reasonable adjustments, compensation and a gradual return-to-work flexibility in this context.

Disability discrimination

Individuals with physical and mental disabilities are recognised as being disadvantaged in employment, experiencing poorer access to the labour market and facing workplace discrimination and bullying (Konur, 2002; Foster and Fosh, 2010). Prior to the pandemic, remote working was one of the most “requested but refused accommodation for disabled people in the workplace” (Hirst and Foster, 2021). Indeed, homeworking has been publicised as a key ingredient in improving employment for disabled workers, advantageous in facilitating easier access to needed equipment, providing an opportunity to work flexibly and effectively in avoiding co-worker prejudice (Spark, 2017). Disabled employees in the UK, however, have had reportedly higher than average redundancy rates than non-disabled workers during the pandemic (ONS, 2021b). The digital measures adopted for tele-homeworking during COVID-19 have allegedly led to a greater *exclusion* of people with disabilities, due to the lack of access to the appropriate equipment and necessary digital tools (ILO, 2021). Furthermore, the solutions to accommodate the needs of disabled workers cannot follow a uniform approach when it comes to tele-homeworking. For example, a deaf employee might need a sign language interpreter with expert knowledge of specialised areas, whilst a DeafBlind employee may require screen-reading equipment or other tools and services to access captioning (HLAA, 2020). As a case in point surrounding this principle, in Rowley v. The Cabinet Office (2020), the claimant, a deaf and visually impaired individual alleged a breach of the Equality Act 2010. The High Court of Justice held that in failing to provide a British Sign Language interpreter for scientific briefings about developments in relation to COVID-19, that this

constituted a breach of the Cabinet Office's obligations to make reasonable adjustments pursuant to s20 and s21 of the Equality Act 2010.

Not only do employers need to consider flexibility requests in relation to access to suitable support mechanisms (Tarling v. Wisdom Toothbrushes, 1997) and the location where work is carried out but also how particular disabilities might impact workload allocation. In Home Office (UK Visas and Immigration) v. Ms Kuuranchic (2016), the applicant who had a physical disability made a flexible work request whereby she worked compressed hours: that is, a 36-h week over four, rather than five days, with either Monday or Friday as her non-working day. The employer, however, required the applicant to complete the same volume of work as her colleagues. It was argued that this placed the claimant at a substantial disadvantage compared to her colleagues who were not disabled, and involved the applicant working extra hours as a result of the effects of her disability. The applicant claimed disability discrimination and succeeded. The Employment Appeal Tribunal held that a reasonable adjustment, in this case, would have been to reduce the employee's workload, even though she did not request this modification, to remove the disadvantage she suffered because of her disability. Employer responsibilities, therefore include the need to identify and take reasonable steps to reduce potential disadvantages suffered by disabled employees, even if the employee has not made specific and explicit requests.

In some cases, however, the reasonable adjustment requested by an employee, for example, to work mainly at home might not be feasible in the context of particular roles. In Shah v. TIAA Ltd. (2019), the claimant suffered from a back problem, which meant that she found it uncomfortable to travel any distance. The nature of her employment involved auditing the performance of National Health Service bodies and was "customer facing", requiring her to visit those organisations. She requested to work mainly at home thereby reducing her requirement to travel. The employer rejected this request because the claimant would not reach her financial targets (the amount of fee income from customers) – the income generated from customers funded her salary and there were an insufficient number of clients within a short travelling distance from her home. The Employment Appeal Tribunal held that the adjustment of allowing her to work mainly from home was neither reasonable as it would mean she could not attend client sites, which was an intrinsic part of her job, nor was it a reasonable adjustment for her target chargeable hours to be reduced, as that would involve paying her a full salary whilst she would only be able to charge about one-fifth of the target amount (leaving her 80% below target and the employer in deficit). Therefore, whilst an employer should consider a reasonable adjustment request from a disabled employee to work from home, there might be some situations where homeworking would not be a reasonable adjustment because the available roles involve direct contact with the public or dealing with confidential information (Secretary of State for Work and Pensions v. Wilson, 2011).

Specifically relating to mental health, an ONS (2021c) study has recently revealed that 19% of employed adults in the UK experienced some form of depression between January and March 2021. There is further speculation that when the economic consequences of the pandemic become even more apparent, there could be additional and significant mental health deterioration for individuals (Pierce *et al.*, 2020). In terms of interpersonal relationships at work and the use of virtual technology, it has also been noted that even though the use of digital platforms such as email allows for the easier exchange of information across time and place, it equally makes it harder to interpret interpersonal communication, heightening threats of perceived harassment, making it more difficult to forge and maintain relationships and adding to one's workload through the volume of messages that need to be processed (Adam,

2002; Germain and McGuire, 2014). Indeed, in their analysis of case law, Lockwood *et al.* (2017) found that the causes of workplace stress most commonly alleged in litigation included excessive workloads, poor management practices, aggressive management styles, bullying by co-workers and organisational, economic or technical change. Such distress might be compounded for some individuals by social isolation and anxiousness about their felt “invisibility” or lack of progression opportunities as a result of tele-homeworking.

If an employee is suffering from stress and anxiety in the workplace, the employer should make reasonable adjustments to alleviate such anxiety. To illustrate this, if an employee is apprehensive about the safety of an organisation’s hot-desking arrangements due to virus transmission threats, the employer must act on these concerns seriously. In *Roberts v. North West Ambulance Service* (2013), the claimant was employed as an emergency medical dispatcher from 2008, but suffered such significant anxiety and stress that he was deemed disabled for the purposes of the then Disability Discrimination Act 1995. He resigned in January 2012 and claimed for constructive unfair dismissal and disability discrimination. His complaint was that that in operating a policy of hot-desking in the control room, the employer had failed to make a reasonable adjustment to ensure that a particular seat on the periphery of the office was exclusively available for him when needed, so as to allay his feelings of anxiety generated by being proximal to other workers. While it was not always practicable to keep his chosen seat free, the employer did make arrangements for another occupant to move when the claimant came on shift. The tribunal concluded that the employer had made a reasonable adjustment. Therefore, what constitutes reasonable adjustment is subject to questions of practicability in the context of the facts and the overall circumstances of the case. What is reasonable is dependent on the situation and any changes must be proportional not only to the needs of the employee but also the employer.

The importance of giving considered attention to flexible working arrangements in relation to mental health is further illustrated in *Frost v. Retail Design Solutions Consultancy Ltd* (2017), where the claimant informed her employer that she had suffered from anxiety “all her life with fluctuations”. She told the employer that when she commenced employment with the establishment, the anxiety was under control, but that it was progressively getting worse. She explained that she was taking medication and using cognitive behavioural therapy to cope, however, she had difficulties attending meetings and undertaking site visits to clients. In response to this information, the employer altered her role, however, she was informed that she would find it difficult to progress until she managed to resolve her issues. The Employment Tribunal found that the employer’s position on the limitations on progression (arising from her mental health) constituted unfavourable treatment and concluded that the employer had not shown a proportionate means of achieving a legitimate aim. Here, neither did the employer take any advice from the claimant’s general practitioner or from occupational health experts as to how she might be supported to attend meetings, nor did they consider whether, occasionally, another colleague could attend instead of the claimant or support her in joining meetings (Paragraphs 121 and 122, page 26). The outcome brings to attention the need for organisations to fully consider the various alternatives that might constitute a reasonable adjustment. It is important to note that for an employee to be covered by the disability provisions contained in Section 15 (discrimination arising from disability) and Section 20 (reasonable adjustment), the employer must be aware of the worker’s disability.

Race discrimination and religion or belief discrimination

In terms of race in the UK, the McGregor-Smith review (McGregor-Smith, 2017) has indicated that inequalities between ethnic minorities and their White counterparts take several forms, including obstacles in career progression, lower pay and poorer access to jobs. Research further suggests that the demonstration of one's religious identity at work is contentious (Squelch, 2013) and can have both positive (e.g. feeling empowered and receiving respect) and negative (e.g. being the target of prejudice) consequences for individuals (Nath *et al.*, 2016). Whilst expressing some religious opinions and choices might appear banal, there are some others that can be received as political statements (Syed and Pio, 2010) or the purposeful "othering" of oneself. Indeed, in relation to tele-homeworking, the "broadcasting of racial identities from personal living spaces" through virtual videoconferencing mechanisms is suggested to entail vulnerability to biases and judgements of professionalism (Harvard Business Review, 2020). Black and ethnic minorities have also been highlighted as facing greater COVID-19-related health risks relative to their White counterparts, largely owing to occupational influences, household location and composition and pre-existing health conditions (Iacobucci, 2020). Relatedly, Unison (2021) has issued specific guidance for their Black members around employment and return-to-work, citing a breach of the Health and Safety Act and unlawful discrimination if employees are put in a vulnerable situation. Such guidelines would patently imply the need for organisations to accommodate flexible working requests by workers who are deemed as particularly susceptible to health risks.

As mentioned previously, an employee has an obligation to update his/her skills and embrace new technology (Creswell v. Inland Revenue, 1984). With the introduction of tele-homeworking, employees might be required to complete online training assessments. However, employers will need to ensure that the assessments do not result in indirect race discrimination. In *Essop and others v. Home Office* (2015), one of the claimants was employed by the Home Office as an immigration officer. The Home Office required all employees to take and pass assessments to become eligible for promotion, however, the claimant failed the tests and alleged indirect discrimination on grounds of race and/or age. An evaluation of the tests revealed that Black and Minority Ethnic (BME) candidates and older candidates, had lower pass rates than White and younger candidates. No one could explain why the proportion of BME or older candidates failing was significantly higher than the proportion of White or younger candidates failing. The legal issue posed was whether the claimant was required for the purposes of Section 19(2)(b) and/or (c) of the Equality Act 2010 to prove the reason for the lower pass rate. The Supreme Court held that he did not have to prove the reason. It was enough to show that the group had suffered or would suffer, a greater risk of failure and that each individual had in fact suffered the disadvantage of failure. The decision is pertinent because it demonstrates that to succeed in an indirect discrimination case it is not a requirement to prove the reason for the particular disadvantage. The crucial factor is a causal link between the PCP and the disadvantage suffered not only by the group but also by the individual.

Specifically centring on religion and belief and the COVID-19 pandemic, despite efforts by the UK government to engage with several places of worship, there has been mistrust from various minority communities around the uptake of vaccinations. A recent report exemplifies this by pointing to a belief held by certain African evangelical Christians "that the vaccine could be a sign of the apocalypse" (BBC, 2021), making such individuals wary of being vaccinated. A compulsory vaccine policy by employers, therefore, has the potential to raise several difficult legal and employee relations issues (Langdon, 2021). If an employer does not handle these matters sensitively, it could lead to disgruntled employees, damaged organisational loyalty and

legal challenges. For example, an employee might view a mandatory vaccine policy as oppressive or unreasonable and if introduced unilaterally, it might give rise to an action for breach of contract. It would need to be established that the employer's action constituted a breach of the implied duty of mutual trust and confidence (*United Bank v. Akhtar*, 1997). This might entitle an employee with two years continuous service to leave and claim unfair constructive dismissal. However, an employer might well argue that under the Health and Safety at Work Act 1974, there is an obligation to protect the health and welfare of their workers and compulsory vaccination might constitute a legitimate step to take, in pursuance of that objective.

It should be noted, however, that any attempt to force vaccination on the entire workforce could be problematic. Contracts of employment would need to be altered to make vaccination mandatory and even if such contractual provisions existed, workers would still need to provide their consent. A compulsory vaccination policy for workers might infringe the Equality Act 2010, as it is likely to constitute indirect discrimination, not only on the grounds of religion or belief and race but also on the protected characteristics of sex, age, disability and pregnancy and maternity (Equality and Human Rights Commission, 2021, p. 17). With respect to the HRA 1998, a claim can be brought under Article 8 (respect for private and family life) and/or Article 9 (freedom of thought, conscience and religion). If the worker is a public sector employee, he/she may have a freestanding claim under Article 8 or Article 9. A private sector employee, however, cannot argue Article rights directly against their employer, although, he/she may be able to rely indirectly on Articles 8 or 9 in discrimination, unfair dismissal or a breach of contract claim.

As pointed out by Lockwood and Nath (2021), workforce monitoring is likely to see an increase as a result of a shift to tele-homeworking. In some religions, the implanting of microchips to track worker performance and gleaning biometric data on employees could contravene their religious beliefs and amount to direct discrimination or if constituted as a general policy for all employees, an indirect discrimination claim. Additionally, employers need to be cautious in terms of the manner in which they attempt to monitor employees away from the workplace and should make sure that any monitoring is legitimate, undertaken for a non-discriminatory reason and is not too intrusive into an employee's personal life. In *Spragg v. Richemont UK Ltd* (2018), the claimant alleged that her employer had subjected her to various acts of less favourable treatment based on the fact that she was Black and of Jamaican descent. The claims before the tribunal related to direct discrimination because of race, harassment in relation to race and victimisation. It was alleged by the claimant that as a result of making a complaint of race discrimination, the employer responded by instructing a professional surveillance company to engage in covert surveillance outside work on the grounds that the claimant was being untruthful about a back problem. The employment tribunal concluded that the organisation's actions in instructing and undertaking the covert surveillance were disproportionate. They found that the employer had victimised the applicant in instructing and undertaking surveillance in response to her making a claim of race discrimination.

To summarise, the cases above demonstrate that a wide variety of equality, diversity and inclusion issues arise in relation to remote working, linked to the protected characteristics listed in Section 4 of the Equality Act 2010. Employers might need to give special attention to equality and diversity policies to ensure that they are applicable to the homeworking environment and guard against potential infringements of equality and human rights law.

Conclusion

Organisational and individual responses to external material shocks can manifest themselves in the modification of the employment context on a temporary basis or in a more enduring manner. On the one hand, the COVID-19 pandemic has demonstrated employer and employee determination in their collective motivation and ability to adjust to fast-developing circumstances; on the other hand, however, the crisis has exposed how certain existent inequalities in the workspace have remained unchanged or have even been exacerbated. To briefly reiterate, studies are increasingly demonstrating how women and ethnic minorities are more likely to be adversely affected by the pandemic in domains such as well-being, job satisfaction and career progression (Iacobucci, 2020; Milliken *et al.*, 2020; PwC, 2021).

As organisations have had “little choice but to pivot operations online and accelerate digital transformation” (City and Guilds, 2021, p. 13), not only has the demand for ICT skills and the ability and willingness of workers to learn new technologies been paramount but also their access to compatible homeworking spaces and tools that might facilitate their learning and job-related tasks. Whilst COVID-19 generated remote working trends might have longer-term benefits for workers with disabilities by “mainstreaming” homeworking arrangements (Schur *et al.*, 2020), recent scholarship on the experiences of disabled employees raises questions about the business approach to ensuring digital inclusion and making appropriate skills training accessible (ILO, 2021). The growth in homeworking as a consequence of the pandemic presents practical and legal challenges that employers and employees might need to confront in relation to equality, diversity and inclusivity. Moving forward, the disruption of the status quo nevertheless presents organisations with various opportunities for development and positive change (Milliken *et al.*, 2020).

Employers will need to implement guidance and policy to uphold consistency and non-discriminatory practices in homeworking arrangements. An employer should ensure that the opportunity to work from home is determined by adopting a fair decision-making process such that it does not discriminate because of sex. For example, with a likely increase in flexible working requests from men (Sevilla and Smith, 2020), management might benefit from re-examining whether the workplace culture is conducive to equal treatment relating to the sexes. Balancing interests for fair appraisals and career advancement opportunities is an important consideration in treating employees equitably. With respect to age discrimination, employers must not draw on stereotypical assumptions, such as older workers being less adaptable to change and more deficient in technological skills than younger workers or conversely that younger workers are not mature enough to work at home unsupervised.

In relation to disability discrimination, the duty to make reasonable adjustments could require significant probing into why an adjustment might be refused/not implemented. Management might look for excuses with regard to making alterations to the workplace because of the inconvenience of making changes and it falls upon tribunals and courts to guard against such situations so as to accommodate disabled workers in employment. As Employment Judge Jones observed in (*Lancashire Care NHS Trust v. Reilly*, 2010: paragraph 12):

In obviating any discriminatory provision, criterion or practice, employers usually have to depart from any arrangement they regard as ideal. It is a question of proportionality, balancing the disadvantageous effect of the discriminatory practice to the employee against any disadvantage caused to the employer’s organisation.

In certain cases, a reasonable adjustment requested by an employee, for example, to work mainly at home might not be feasible in the context of particular job roles. Employers also need to be aware that some individuals might experience social isolation and feel anxious about their “invisibility” and progression opportunities as a result of tele-homeworking. An employer should respond to this possibility by ensuring regular contact is maintained with homeworkers to check on their well-being and to provide fair appraisals. In relation to the use of assessments and training, it will be important to make sure any such initiatives do not result in indirect discrimination on the grounds of any of the protected characteristics in Section 4 of the Equality Act 2010. Additionally, if an employer is considering the implementation of a compulsory vaccination programme for employees, this might raise the spectre of various discrimination claims (e.g. on the grounds of race/religion or belief/pregnancy and maternity) and human rights claims against the employer. Fundamentally, employers need to ensure that any decisions on redeployment, changing contracts of employment, redundancy and the treatment of vulnerable and “shielding” workers, do not have a disproportionate impact on any group and that any relevant statute law and common law provisions are complied with. In particular, any consultation or contractual requirements will need to be fulfilled.

In employment discrimination cases, the burden of proof is on the claimant to establish that he/she has been the victim of unlawful discrimination (Phillips and Scott, 2016). It is useful for employees to appreciate that whilst homeworking might bring benefits (e.g. greater autonomy), there are likely to be trade-offs in terms of increased accountability and a closer scrutiny of work outcomes. Remote working might result in a greater degree of control being exercised by employers (Lockwood and Nath, 2021). Employees should be aware that they have a responsibility to update their skills, embrace new technology and a duty to obey reasonable and lawful directives from their employer. Workers should be cognisant of the terms and conditions of homeworking arrangements to avoid committing a breach of their contract, for example, by taking excessive or non-negotiated work breaks. Employees also need to be conscious of the possibility of employers inserting flexibility clauses into their contracts of employment that might enable the organisation to change the method or place of work.

The growth in homeworking raises interesting questions for future research; including what the impact of remote working arrangements are on more precarious contracts (e.g. part-time workers and freelancers), as there is research evidence to suggest that such workers are at a higher risk of discrimination and unfair treatment in the workplace (Standing, 2011) and to what extent existing workplace inequalities are unchanged or exacerbated, as a consequence of increased homeworking arrangements. These are important questions to be addressed to determine the practical impact of the extension of homeworking arrangements on individuals and on groups. Such ongoing research would help identify the possibility of developing additional legal protections that might benefit homeworkers.

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