

ELA Covid-19 Working Party

Sub-group: Issues around school closure and working parents

24 March 2020

Definition of Key Workers and non-essential workers **Section 1**

Issues Relating to Disabled Employees Working at Home **Section 2**

Introduction

The Employment Lawyers Association's ("ELA") Legislative and Policy Committee has set up a standing working party to respond and make recommendations on measures relevant to employment law during the current coronavirus crisis.

ELA is a non-political group of specialists in the field of employment law and includes those who represent claimants and respondents in courts and employment tribunals. It is not ELA's role to comment on the political or policy merits or otherwise of proposed legislation or regulation, rather it is to make observations from a legal standpoint. ELA's Legislative and Policy Committee consists of experienced solicitors and barristers who meet regularly for a number of purposes including to consider and respond to proposed legislation and regulations.

A sub group of the working party has prepared the paper below to consider employment law issues relating to the closure of schools and working parents. The sub group members are as follows and the full ELA Working Party is listed at the end of this paper.

Shubha Banerjee, Leigh Day
Peter Edwards, Devereux Chambers

1. Definition of Key Workers and non-essential workers

The Department of Education published a list of those workers whom it considers to be 'critical' or 'key' workers for the purposes of determining which workers can continue to send their children to school/nursery. However, there seem to be some omissions here – for example petrol station workers. In addition, the Ministry of Housing, Communities and Local Government (MHCLG) produced Guidance on businesses and premises to close, and further guidance following the Government's 'lockdown measures' of 23 March 2020.

There remains significant confusion over what is classed as ‘non-essential work’ where workers should no longer attend, and work which is classed as essential and which workers should continue to attend (where they cannot work from home) and clarity over this would be helpful.

In addition, there may be some gaps between the various pieces of guidance from the MHCLG and the Department of Education, such that, for example, dry cleaners and laundrettes are listed as essential services for the purposes of the MHCLG’s guidance, but workers in this sector are not included in the Department of Education’s list of ‘critical’ or ‘key’ workers and so may suffer from a lack of childcare provision.

It would be helpful if guidance from these two departments could be more joined up. For those workers with childcare responsibilities who do not classify as ‘key/critical’ workers, there are some statutory safeguards in the form of time off for domestic emergencies (provisions are in the Employment Rights Act 1996) and parental leave (from the Maternity and Parental Leave etc Regulations 1999) but both have their drawbacks, the main one being that both such periods of leave are, under statute, unpaid.

The other main difficulty with time off for domestic emergencies in terms of its application to the current situation is that it is usually envisaged as leave to deal with an immediate lack of childcare and to enable the worker to make provision for other childcare, which in the current pandemic, may not be possible. Parental leave is also not quite the right fit for this situation, in that it usually relates to planned periods of leave, with appropriate notice being given to an employer – which would not be the situation during this pandemic. Possibly a better solution would be to enable workers who have not been classified as ‘key/critical’ workers but who need childcare provision to apply for school/nursery places giving their reasons why, and for those to be considered by a school/nursery on a case by case basis.

2. Issues Relating to Disabled Employees Working at Home

This section addresses issues that may arise for both Employers and Employees when Disabled Employees and Workers (i.e. those that properly fall to be classified as “Disabled” as defined in section 6 and Schedule 1 to the Equality Act, 2010) are either required to, or request to, work at home.

It seems to us that this is an area which does not require any legislative change or amendment. The existing statutory provisions and protections continue to apply and continue to provide adequate protection for Disabled workers/employees in the current, difficult climate. It will simply be necessary for employers to properly consider and apply the existing provisions of the EqA, 2010.

The issues that may arise from home working – and the need to make reasonable adjustments - include the following:

2.1 Reasonable Adjustments to the Workplace (Physical Features/Auxiliary Aids)

The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled (section 20(4) of the EqA, 2010).

The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled (section 20(5) of the EqA, 2010).

2.1.1 In the event of an employee/worker working at home, their home becomes their “workplace” at which physical features can put the employee/worker concerned at a substantial disadvantage. It also becomes the location at which auxiliary aids will be required.

2.1.2 Finally, the home becomes the workplace for the purposes of all of the health and safety Acts and Regulations (the most relevant being the Health and Safety at Work Act, 1974, and the so-called ‘Six Pack’ of Regulations, including the Display Screen Equipment Regulations and the Manual Handling Regulations).

2.1.3 The Health and Safety Executive (HSE) very recently (20/03/20) issued Guidance, confirming the requirement on an Employer to conduct a home workstation assessment for all employees/workers now required to work at home on anything other than a very short-term basis.

2.1.4 Given the issues created by the Coronavirus for formal home workstation assessments by external agencies – or by specialist staff working for the employer – the recommendation is that the worker himself/herself should carry out the assessment at home. The correct form to be used can be found here - <https://www.hse.gov.uk/pubns/ck1.pdf>

2.1.5 The home workstation assessment – combined with the old-fashioned method of asking employees/workers what reasonable adjustments are required (using the method of telephone calls, video conferencing and/or e-mail, rather than in-person meetings) – will become the key document in determining what reasonable adjustments are required by way of changes to physical features and the provision of auxiliary aids.

2.1.6 Given that the employee/worker will, obviously, be living at home, it is unlikely that adjustments will be required to a physical feature of the premises. The most likely requirement will be for auxiliary aids to make the home a suitable workplace for the Disabled employee/worker.

2.1.7 The issues to which thought will need to be given by the employer, include the following:

- (a) Computer Equipment: The Disabled worker/employee may well have been provided with individually assessed/adapted or ergonomically correct keyboard, mouse and/or screen in the office. In most cases, it will be necessary for the worker/employee either to be permitted to take the special equipment for use at home or to be provided with such equipment at home.
- (b) Workstation (Chair, Desk & Riser etc.): The same applies to larger items of equipment. The home workplace assessment should highlight whether the employee/worker already has a suitable desk and chair at home. That will often be the case. There is, obviously, no requirement to provide another desk/chair etc. if a suitable one is already in place.
- (c) Video Conferencing Facilities: It may well be necessary for the employer to arrange, and pay for, video conferencing facilities that are compatible both with IT equipment that the employee/worker has at home and that which is used by the business and its clients.

2.1.8 Although slightly off-topic, all employers will need to consider the Data Protection implications of employees/workers working at home. The key issues will be the transfer of physical documents between the normal workplace and home (selection of appropriately vetted couriers etc.) and secure storage of physical documents.

2.2 Reasonable Adjustments (Provisions, Criteria or Practices – PCPs)

The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage (section 20(3) of the EqA, 2010).

- 2.2.1 There is little doubt that a requirement to work at home is a PCP that is now in force in many workplaces (for entirely understandable reasons).
- 2.2.2 The issue for employers is to identify situations in which that requirement/PCP puts Disabled workers/employees at a substantial disadvantage (and to consider the reasonable adjustments that are required to seek to alleviate that disadvantage).
- 2.2.3 Perhaps the most obvious example is employees/workers with a mental health condition and/or learning difficulties who require additional supervision and guidance when in the workplace which may not be available at home. It should not be assumed that the employee/worker will ask for assistance – that may be difficult because of his/her condition. Rather, proactive steps should be taken for managers to call the employee/worker to ensure that all is well.

- 2.2.4 As a rule of thumb, it is probably worth an employer taking the starting point that if reasonable adjustments to PCP's are made in the workplace, then those same adjustments may well be required for home working. That may well be the case, for example, with reduced working hours (although it may be possible for an employee/worker to increase actual working hours when a commute is not required).
- 2.2.5 The most important thing is for the employer to give pro-active thought to the situation of an employee/worker who is now required to work at home and, even more importantly, to consult with the employee as to his/her requirements (and, as always, to take a proper – preferably agreed – note of that consultation/discussion).

Members of ELA Covid-19 Working Party

Co-chairs: Paul McFarlane, Weightmans; Kiran Daurka, Leigh Day
Shubha Banerjee, Leigh Day
Emma Burrows, Trowers & Hamlins
Shantha David, Unison
Peter Edwards, Devereux Chambers
Howard Hymanson, Harbottle & Lewis
Nadia Motraghi, Old Square Chambers
Louise Skinner, Louise Skinner, Morgan Lewis & Bockius UK
Catrina Smith, Norton Rose Fulbright
Caroline Stroud, Freshfields Bruckhaus Deringer
David Widdowson, Abbiss Cadres