

# White Paper Conference on Dismissal

Working from Home

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## The Question

Where are the traps when handling poor performance or absenteeism among employees working from home, particularly in relation to monitoring output, email activity and log-in times?



**Background**

## Working from home – the latest statistics

- Workers in Great Britain as at March 2025:
  - 15% work exclusively from home
  - 29% work on hybrid basis
  - 41% always travel to work
  - 14% don't travel or work from home
- Workers aged 30 to 49 are most likely to work from home some or all of the time

## Working from home - habits and behaviours

- Over 80% of hybrid workers watch television during working hours, averaging two hours daily
- 10% of homeworkers regularly nap whilst working from home, typically between 3pm and 4pm
- Some remote workers hold two jobs simultaneously
- Over one third of workers fake productivity when working remotely
- Economists at MIT & UCLA found that WFH resulted in 18% less productivity among data-entry workers in India

## **Legal risks and guidance**

## Legal risks in managing performance/attendance

- Breach of contract/constructive dismissal
- Unfair dismissal
- Discrimination
- Flexible working requests
- Data protection

## Unfair Dismissal

Dismissing fairly for poor performance/attendance

- Is poor performance/attendance the genuine reason for the dismissal?
- Does the employer have a reasonable belief in the employee's inability to meet the required standards?
- Has the employer conducted a reasonable assessment/investigation?
- Has the employee been given a reasonable opportunity to improve?
- Is it reasonable to treat the poor performance/attendance as a sufficient reason to dismiss taking into account all the circumstances, including prior warnings?
- Right of appeal



## Managing performance/attendance – key principles

### ACAS Code of Practice/Guidance

- Informal: employer should:
  - try to understand reasons for underperformance/poor attendance
  - take steps to support employee in improving performance
- Formal: follow performance management/attendance procedure
  - assess performance/attendance and identify areas where improvement is required
  - invite employee to capability meeting
  - confirm standard of performance/attendance required
  - establish reasons for underperformance/poor attendance
  - identify relevant support/training for employee
  - set improvement targets and timescale
  - issue appropriate warning(s)
  - monitor performance/attendance over review period

# Managing performance/attendance of employees WFH

## ACAS Guidance

- Supporting and managing staff
  - consult about how performance will be managed
  - agree performance measures and objectives
  - support employees with motivation/organisation, work-life balance and time management
  - consider appropriate training
- Monitoring performance
  - inform/consult with employees about how their performance will be monitored
  - conduct impact assessment in relation to any monitoring
- Keeping in touch
  - use appropriate variety of communication methods
  - agree how and when to communicate
  - be understanding and flexible about individual circumstances
  - hold regular one to one meetings
  - ask employees how they are feeling, be aware of changes in behaviour/tone of voice, listen carefully to concerns

# Monitoring in the workplace

## ICO Guidance

- Forms of monitoring
  - camera surveillance
  - webcams and screenshots
  - technologies for monitoring timekeeping or access control
  - keystroke monitoring
  - productivity tools which log how workers spend their time
  - tracking internet activity
  - body worn devices to track locations of workers
  - audio recording
- Employers must be clear about the purpose of the monitoring and select the least intrusive means to achieve it. Must identify lawful basis for processing:

1. Informed consent of employee	2. Necessary to perform contract with employee	3. Necessary to comply with the law
4. Necessary to protect someone's life	5. Necessary to perform a task in the public interest or an official function	6. Necessary for legitimate interests of employer or third party

# Monitoring in the workplace

## ICO Guidance

- Considerations when monitoring workers remotely:
  - employees' expectations of privacy are likely to be higher
  - higher risk of capturing data about family/private life
  - should be factored into impact assessment
- Before monitoring computer/device activity, employers must:
  - be clear about purpose of monitoring and document justification
  - identify lawful basis for processing
  - carry out an impact assessment if monitoring is likely to cause high risk to workers' interests
  - consider discussing with workers/ reps
  - inform workers of device monitoring and how information will be used

## Monitoring in the workplace

### ICO Guidance – data protection impact assessments

1. Identify the need for a DPIA
2. Describe the processing
3. Consider consultation
4. Assess necessity and proportionality
5. Identify and assess risks
6. Identify measures to mitigate risks
7. Sign off and record outcomes

# Discrimination

- Direct discrimination
- Indirect discrimination
- Failure to make reasonable adjustments for disabled employees
- Harassment

## Flexible Working Requests

Can the employer require the employee to return to the office?

- No right to WFH unless in contract of employment
- Employees can submit FWR to work from home
- Can only refuse FWR on one of eight grounds (e.g. detrimental impact on quality or performance)
- Must follow statutory procedure and ACAS Code including:
  - inviting employee to consultation meeting
  - communicating decision in writing
  - if rejected, explaining business reasons for decision
  - good practice to allow appeal
  - completing process within two months
- Proposal under ERB that employer will only be able to refuse FWR if reasonable to do so

## Key cases on requirement to work from the office

### *Wilson v Financial Conduct Authority (2023)*

- W was a senior manager at the FCA with responsibility for 14 members of staff
- W started WFH shortly before COVID-19 pandemic
- Following pandemic FCA mandated office attendance for 40% of time
- FCA rejected W's flexible working request to continue WFH
- W brought claim alleging that FCA had rejected FWR based on incorrect facts, namely that WFH would have detrimental impact on quality and performance
- ET rejected her claim



## Key cases on requirement to work from the office

### *Wilson v Financial Conduct Authority*

ET found that:

- W's line manager had genuinely considered merits of application
- W's role as a senior manager was important and this fed into test of performance and quality
- Line manager had taken into account W's strong performance to date and acknowledged that much of her work could be done remotely
- However, line manager considered that WFH would have detrimental impact on quality and performance of work, including welcoming new staff, internal training and supervision, need for in-person attendance at meetings/conferences

## Key cases on requirement to work from the office

### *Corrigan v The Parliamentary and Health Service Ombudsmen*

- C worked compressed hours over four days and required to attend office 3 days per week with 1 day WFH
- Following the pandemic C took part in pilot and was only required to attend office once per fortnight
- Following pilot, employer adopted policy requiring office attendance 2 days per week
- C submitted FWR requesting to WFH with office attendance only when necessary
- Request rejected due to detrimental impact on ability to meet customer demand and detrimental impact on quality and performance. Appeal also rejected

## Key cases on requirement to work from the office

### *Corrigan v The Parliamentary and Health Service Ombudsmen*

- In his claim C alleged that facts did not support reasons for rejecting FWR as his performance was excellent and productivity had improved whilst WFH
- ET found that:
  - C had not identified any specific incorrect fact which had formed basis of employer's decision
  - detrimental impacts referred to by employer were partly intangible (workforce cohesion/collegiality, impact on training and new starters)
  - application of mixture of existing facts (resulting from pilot) and opinion did not contravene legislation
  - decision supported by extensive research

## Key cases on requirement to work from the office

### *Morsing v Howden Joinery Group*

- M began employment in November 2022 when team was working 2 days from office and 3 days from home
- In December 2023 Howden announced adoption of hybrid working policy requiring office attendance 3 days per week
- M submitted FWR requesting to retain current arrangement
- Request was refused and appeal was rejected
- ET rejected M's claim and accepted line manager's evidence that there was a need to be on site to resolve critical issues and to improve ways of working, collaboration and performance

## Case study

## Case Study

- You are the HR director of Mainstream Media, a leading media planning agency based in Shoreditch
- Ahmed has been employed as an IT manager for the last 10 years
- Before the pandemic he worked full-time in the office
- Since the pandemic the company has adopted a policy “encouraging” staff to work three days from the office and two days from home. However, this has not been enforced and, on average, employees come into the office no more than two days per week
- Ahmed lives in Reading and rarely attends the office
- His line manager, Sarah, has been relaxed about this, but last week she told you that Ahmed’s responsiveness had declined and that he was becoming increasingly difficult to get hold of
- What would you do next?

## Case Study

- Sarah speaks to Ahmed and reminds him of the company's hybrid working policy
- She also mentions that he does not appear to be as contactable as usual and asks if there are any issues she should be aware of
- Ahmed says that he's worked for the company for 10 years, there have never been any issues with his performance, he's meeting his deliverables and that no-one else in the team is complying with the policy
- He queries whether he is being singled out because of his ethnicity
- What should you do now?

## Case Study

- You agree with Sarah that she will continue to keep the situation under review and that she will regularly check in with Ahmed and all of her other reports to see how they are doing
- Two months later, Sarah informs you that the situation with Ahmed seems to be getting worse. Although he is completing his work, this is not always done on time. He is still difficult to contact and often sends emails late at night or very early in the morning. Although he attends his scheduled 1-2-1s with Sarah via Teams, he tends not to put his camera on
- Sarah tells you that she is also concerned about resource because another member of the team has just resigned to take up a job where she can work exclusively from home
- What would you do next?



## Case Study

1. Would you suggest that Sarah speaks to Ahmed again informally about his time-keeping/performance?
2. Would you ask Ahmed to come into the office for an informal meeting with Sarah and HR?
3. Would you formally require Ahmed to attend the office at least three days per week?
4. Would you commence a formal performance management process?
5. Would you see if IT can review the times that Ahmed is logging onto the system?
6. Would you consider whether there is any other technology you can use to monitor Ahmed's activities covertly?

## Case Study

- IT report that Ahmed is logging into the system for long hours each day, but they cannot tell how much work he is carrying out unless they install some monitoring software
- Sarah and HR meet with Ahmed in the Shoreditch office and ask him about the hours he is working and the fact that he is not always contactable
- Ahmed says that he has been suffering from chronic migraines which have forced him to take regular, prolonged breaks from his workstation. He says that his doctor has advised him to continue working from home as the commute may aggravate his condition
- Although HR ask Ahmed to provide medical evidence, this is not forthcoming. Ahmed is also referred to OH but their report is inconclusive

## Case Study

- What would you do next?
- Would you ask IT to install software to monitor Ahmed's keyboard use?
- Would you explain to Ahmed that, unless he can produce the medical evidence:
  - you will commence the performance management procedure?
  - you will require him to attend the office at least three days per week?
- Would you do something else?
- What are the legal risks?

## Case Study

- Before you do anything further, the company receives an anonymous report via its whistleblowing hotline. The caller says that they have seen Ahmed several times over the last three months going into the offices of an IT consultancy company in Reading at around 8.30am
- What would you do now?

## Key points

- The same principles apply to managing the performance and attendance of home-workers as other workers
- Collating evidence of poor performance/attendance can be more difficult
- Monitoring must be done in compliance with relevant data protection laws and guidance
- Ensure that you have privacy notices in place which allow you conduct appropriate monitoring
- Tribunals currently appear sympathetic to employers' attempts to require employees to return to the office



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