

Global Workplace Law & Policy

Responses to Covid-19: Remote Work

David Mangan (Maynooth University (Ireland)) · Thursday, May 26th, 2022



A framework that subtly discourages remote work

Making Remote Work a Reality

The Covid-19 pandemic precipitated the largest remote work experiment the world has seen. The fact that working from home was mandatory (except for essential work) meant that discussions surrounding how viable it may be were put aside. The best was made of the situation. [Data suggests that productivity did not necessarily suffer](#). This may be somewhat of a surprise to some who, prior to the pandemic, disagreed with the concept of remote work (which was undertaken from workers' homes).

While it cannot be said that we are beyond the effects of Covid-19, 2022 has seen much more movement towards a return to normalcy, particularly where normalcy includes workers returning to their employers' places of business. Nevertheless, workers have contended that a return to pre-pandemic work at employers' premises is not desirable. Instead, a hybrid arrangement (as a move to complete remote working may not be likely in the short term) has been advocated. Governments have responded in various ways, including drafting legislation to put in place a means through which workers have a 'right' to request remote working. The focus of this discussion is on Ireland.

Ireland's unhelpful proposal

Whether you are a worker or an employer, the [Irish government's proposal \(the Right to Request Remote Work Bill\)](#) released on 25 January 2022 does not assist in navigating remote work. Instead, it provides for greater informal grievances at the workplace level.

A May 2022 report from the [Department of Enterprise, Trade and Employment](#) noted some points to monitor, but came down on the side of remote working having a "positive impact on the Irish economy and society." If the concept of remote working is deemed viable, the January 2022 proposal has some ways to go in order to effect this optimism.

While this outline critiques the proposal, the government's initial approach should be lauded. It published a national Remote Work Strategy in January 2021 which contained three pillars:[1]

1. Pillar One is focussed on creating a conducive environment for the adoption of remote work.
2. Pillar Two highlights the importance of the development and leveraging of remote work infrastructure to facilitate increased remote work adoption.
3. Pillar Three is centred on maximising the benefits of remote work to achieve public policy goals.

The proposed bill seems to fit within Pillar One. If this is the case, it is a reasonable step because it endeavours to create an environment in which remote work can be discussed by employers and employees. Pillar Two requires more infrastructure than the country currently has in order to make remote work a truly viable national option. As of 2019, 74% of premises in Ireland have access to highspeed broadband. This leaves approximately 1.1 million people (23% of the population), including 56,000 farms which constitutes 68% of the total number of Irish farms,[2] without reliable broadband access. Pillar Three suggests a more mature stage in which remote work may be further refined in line with public policy.

The Right to Request Remote Working Bill 2022

In this part, the Bill is outlined, and, in certain places, provisions are situated within a critical context. Part II of the Right to Request Remote Working Bill 2022 sets out a detailed process for an employee to make such a request. Issues arising from these requests fall within the scope of the [Workplace Relations Commission](#) (s.19). Care must be taken with the language used in this bill. It only sets out a right to request remote working. An employer is not obliged to grant the request. The right extends to protection for requesting remote work only because the employer cannot penalise[3] an employee "for proposing to exercise or having exercised his or her entitlement to request remote working" (s.15(1)). If the employee is dismissed as a result of proposing to exercise or exercising this right, then relief may only be granted.

a) Remote working policy

The bill requires employers to have a formal remote working policy. As outlined in the bill, this policy provides employers with an opportunity to set parameters for a request for remote working. As well, employers will be repositories for data on remote working as they are also obliged to maintain records to “show whether the provisions of this Act are being complied with in relation to the employee and those records shall be retained by the employer for at least 3 years from the date of their making” (s.20(1)). A failure to do so is an offence (s.20(3)) which is subject to, upon summary conviction, a fine.

b) Who may make a request

Those who may make a request may be a narrower group, than it may at first seem. The right is limited to “employees” (a person “who has entered into work works under a contract of employment”)[4] who have “at least 26 weeks continuous service with the employer from whose employment the employee is seeking the arrangement to work remotely.”[5] Once a request is made, another request cannot be made until “after 12-months’ continuous service following the later of the employer’s final [response] to the employee under [Head 10] and the date of the final decision in any appeal process under [Head 16].”[6]

The limitation to employees recalls the debate surrounding employment status which has been supercharged by platform economy litigation. [Ireland, according to a study by the European Trade Union Institute, has one of the highest percentages of workers engaged in platform labour.](#)

c) Process for an employee to make a request to work remotely

Employees requesting remote work face a challenging process as set out in this bill. Written notice of the “full details of the proposal” must be submitted to the employer, though an employer may devise a template,[7] containing the following points:

- (a) proposed remote working location
- (b) Proposed start date for the remote working arrangement
- (c) proposed number, and timing, of working days to be worked remotely
- (d) if the employee made a previous request to the employer under this Act and the date of the most recent previous request
- (e) A self-assessment of the suitability of the proposed remote working locations regarding specific requirements for carrying out the job such as data protection and confidentiality, minimum levels of internet connectivity, ergonomic suitability of proposed workspace and any equipment or furniture requirements.

Employers may request “further particulars and evidence”, and may also set up a meeting during working time to discuss the request.

The self-assessment stands out as a particularly challenging portion of the request because it may also provide the basis for an employer to refuse the request. The provision identifies a start date for the arrangement, but it does not seem to contemplate a duration during which the arrangement may be trialled. While it may be suggested that duration is up to the parties, the bill, in other places, has been quite precise (see for example the reasons for rejecting a request). The current wording suggests the arrangement may be indefinite; itself unlikely to be something to which an employer may agree.

The absence of duration is unhelpful for employers. There would be understandable hesitation for

employers agreeing to an indefinite arrangement. The lack of discussion about duration is additionally unhelpful for employees because the lack of duration can lead to a rejection of the proposal by employers on business grounds, a concept which the bill offers some notable level of detail with 13 grounds expressed (though this is not an exhaustive list). The rejection is further addressed in the next subsection.

d) Processing of a request by an employer

An employer is obligated to return a written decision “within a reasonable time” which shall not exceed 12 weeks from receipt of the request.[8] A Remote Work Policy is again referenced, and it should, amongst other points, specify the time period for return of a decision. Section 11(1) contains mandatory information which must appear in the written decision where the employer agrees to the arrangement.[9] The employer is free to refuse the request but to offer an alternative (s.11(2)). The employee has one month to consider this alternative, and if it is rejected the employee must provide written reasons (s.11(3)).

If the employer refuses the request, it has limited obligations, such as giving “the application due consideration”, and providing reasons in writing. Section 12 elaborates on the denial of a request on business grounds with thirteen instances that may fit within this broad term.

There is much to discuss with these, and further guidance would be welcome. For example, an employer may decline a request based upon the suitability of the proposed workspace on health and safety grounds (s.12(3)(g)). There are several related questions, including: Would this require an inspection by the employer of the employee’s home workspace? Since the workspace was likely similar to the one in which remote working was conducted during lockdown, this basis seems fraught with challenges. This provision (s.12) also seems to underplay employers’ statutory obligations, including those set out in the [Safety, Health and Welfare at Work Act 2005](#), as well as requirements set out in case law (see [An Operations Co-Ordinator v A Facilities Management Services Provider ADJ-00028293](#)).

Another example is that employers may reject the proposal based upon the state of internet connectivity of the proposed remote working location (s.12(3)(i)). This must be viewed as a problematic premise. As noted, the government has not sufficiently addressed reliable access to broadband throughout all parts of the country. And so, geographical location of a home would seem to be a legitimate reason to reject a proposal. There are evident public policy goals related to this topic. And so, this blunt provision is surprising.

Questions also arise with other grounds such as “Potential Negative impact on performance of employee or other employees”; “Burden of Additional Costs, taking into account the financial and other costs entailed and the scale and financial resources of the employer’s business”.

e) Appeals

Classifying the bill as containing an appeals process is generous. An employee may appeal based on the following grounds:

- (a) his employer has failed to return a decision in compliance with Head 10;
- (b) his employer has failed to provide a notice of the grounds for refusal in compliance with Head 12(2), or

(c) the employer's notification under Head 9 was given in circumstances that did not satisfy the requirements in Head 9(1) or (2).

An appeal based upon any of these can only be made two weeks after the commencement of an internal appeal process which is to be outlined in the employer's remote working policy. The guidance in the draft bill explicitly restricts the remit of s.13(2): "this Head is not intended to extend to a right to complain in respect of the substance or merits of an Employer's decision to decline a request under Head 12(1)." While employees clearly have much to criticise, this provision also does a disservice to industrial relations more generally. This draft provision suggests a view of employees as a group that must accept employers' decisions and move on. The provision prompts questions as to whether there is a belief in a right to request remote work. It seems closer to creating a useless motto out of remote work. Legislating to address the perception of the worst employee has not yielded much here. A mature view of the Irish workforce must be possible; one which provides for employers to reject a request, but that also respects that employees may have good reasons for making this request, such as family caring responsibilities. Again, a public policy opportunity seems to have been missed. [Appeals is one topic that the Government has noted is being reconsidered.](#)

Further Considerations

In its impact assessment, the Department of Enterprise, Trade and Employment wrote: "The State is committed to increasing remote work adoption in Ireland through removing barriers, developing infrastructure, providing guidance, raising awareness and leading by example in this area".^[10] This statement as a benchmark of the Bill may yield some critical commentary. For the present, some broad points are offered for further consideration.

a) Inclusive workplaces

The remote work bill is a blunt tool if one considers it as a means of facilitating inclusion. Gender has been a particular area for consideration with regards to the pandemic. Taking the UK as a comparison, there have been more women employed in critical (nursing, grocery stores) and locked down sectors (tourism and retail) than men.^[11] It has been contended that women value flexible work schedules and shorter commutes more than men.^[12] And yet, there have been reports that the lock down and forced telework has predominantly negatively affected women more than men.^[13]

Data suggests a similar impact in Ireland, where almost half of HR professionals (48%) found that women were more negatively affected by childcare issues stemming from measures taken during the pandemic (such as the cessation of in-person learning at schools). About half of managers had to redistribute work amongst staff to facilitate childcare responsibilities.^[14]

b) A human-centred approach to digitalisation of work?

CIPD Ireland's 2021 HR survey found that about a third of respondents "disagreed that HR is influencing a people centered approach to technology, showing little change since last year."^[15] The concern to draw from this finding is the timing. The present should be a time of momentum for human-centred efforts: the EU has endeavoured to focus on a human-centred approach to technology at work; the pandemic has compelled many to rethink their work situations. And yet, a third of HR professionals do not see a human-centred attitude manifesting.

c) The right to disconnect

In March 2021, the Workplace Relations Commission released a *Code of Practice for Employers and Employees on the Right to Disconnect*.^[16] Its purpose, amongst other aims, is “to protect employees from working excessive hours.”^[17] One of the objectives of this *Code* is to “[a]ssist employers and employees in navigating an increasingly digital and changed working landscape which often involves remote and flexible working.”^[18]

The *Code* is linked to remote work, but it may not be overt to the general public. The EU Parliament’s Committee on Employment and Social Affairs’ recommendation of a right to disconnect noted, amongst other points, that those who work from home “are more prone to working longer and more irregular hours”.^[19]

Remote work can facilitate greater work-life balance, but it also blurs the boundaries between work and home life.^[20] The *Code* sets out three elements to the right to disconnect:

1. The right of an employee to not routinely perform work outside normal working hours.
2. The right to not be penalised for refusing to attend to work matters outside of normal working hours.

iii. The duty to respect another person’s right to disconnect (e.g., by not routinely emailing or calling outside normal working hours).

According to the Irish Government, Ireland has a right to disconnect.^[21] However, the right only exists as part of a Workplace Relations Commission *Code of Practice*. Failing to adhere to such a *Code* does not constitute an offence. Instead, the fact of such failure may be admissible as evidence (pursuant to s.20(9) of the Workplace Relations Act 2015), and this may be considered by any trier of fact insofar as any *Code* provision appears to be relevant to the immediate proceedings. Something more explicit, direct, and based in statute is likely needed for there to be an actual ‘right to disconnect’ that is more meaningful than rhetoric.

Conclusion

The OECD has put forward two approaches (which are not mutually exclusive) to view the effect of remote working on productivity: an efficiency approach which considers any deviation (up or downward) in productivity when remote working is implemented; and a cost-reduction approach which seizes the opportunity to reduce costs through remote working (such as reduction in office space).

The January 2022 proposal does not provide an opportunity to engage in either of these approaches. The proposal should leave employers and employees uneasy. The bill seems to create more difficulties for both parties, thereby constituting an unhelpful piece of legislation.

References

[1] Department of Enterprise, Trade and Employment, *Making Remote Work: National Remote*

Work Strategy (January 2021).

[2] Department of Communications, Climate Action and Environment, *Delivering the National Broadband Plan* (May 2019), 7.

[3] Section 15(3) defines penalisation as: “any act or omission by an employer or a person acting on behalf of an employer that affects an employee to his or her detriment with respect to any term or condition of his or her employment, and, without prejudice to the generality of the foregoing”

[4] Section 2. See also the long title of the bill: “An Act to provide employees with a statutory right to make, or to have made on their behalf a request for remote working...”

[5] Section 6(1).

[6] Section 7.

[7] Section 8(1).

[8] Section 10.

[9] This provision is tied to the *Terms of Employment (Information) Act 1994*, s.5(1).

[10] Impact Assessment 4.

[11] Claudia Hupkau & Barbara Petrongolo, ‘Work, care and gender during the Covid-19 crisis’ *Centre for Economic Performance Working Paper No.002* (London: May 2020), 3.

[12] *Ibid*, 6.

[13] Abi Adams-Prassl, Teodora Boneva, Marta Golin, & Christopher Rauh, ‘Inequality in the Impact of the Coronavirus Shock: Evidence from Real Time Surveys’ *IZA Discussion Paper No. 13183* (April 2020). See also, Eszter Zalan, ‘Women hit hardest by corona economic crisis’ *euobeserver* (23 April 2020) <https://euobserver.com/coronavirus/148155>.

[14] CIPD, *HR Practices in Ireland 2021* (May 2021), 7.

[15] CIPD, *HR Practices in Ireland 2021* (May 2021), 4.

[16] Workplace Relations Commission, *Code of Practice for Employers and Employees on the Right to Disconnect* (March 2021).

[17] *Ibid* 5.

[18] *Ibid* 3.

[19] European Parliament, Committee on Employment and Social Affairs, *Draft Report with recommendations to the Commission on the Right to Disconnect*, 2019/2181(INL), 28 July 2020, 5.

[20] A Eurofound study found that 24% of respondents to a telework survey reported working during their free time: D. Ahrendt, J. Cabrita, E. Clerici, J. Hurley, T. Leonikas, M. Mascherini, S. Riso, E. Sándor (Eurofound), *Living, working and COVID-19, COVID-19 series, (Publications*

Office of the European Union, 2020), 33.

[21] “I have signed a new Code of Practice giving all employees the Right to Disconnect. This is effective immediately”: Statement by Tánaiste and Minister for Enterprise, Trade and Employment Leo Varadkar TD as found in Department of Enterprise, Trade and Employment, “Tánaiste signs Code of Practice on Right to Disconnect” (1 April 2021) <https://www.gov.ie/en/press-release/6b64a-tanaiste-signs-code-of-practice-on-right-to-disconnect/>

This entry was posted on Thursday, May 26th, 2022 at 2:00 am and is filed under [Covid-19](#), [Future of work](#), [Ireland](#), [Labor Law](#), [Labour law](#), [Telework](#)

You can follow any responses to this entry through the [Comments \(RSS\)](#) feed. You can leave a response, or [trackback](#) from your own site.