SOLICITORS
Magrath Sheldrick

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employment insight

REMOTE WORKING ABROAD - THE ULTIMATE IN WORKPLACE FLEXIBILITY

When COVID 19 hit, every business that could had no option but to roll out homeworking to ensure their business continued to function in unprecedented circumstances. There was no time to plan or decide on policy and, in firefighting mode, most businesses gave little or no thought to what the working world would look like post pandemic. Many businesses were incredibly flexible, more than they would have been in any other situation (including now) – allowing employees to work from just about anywhere – whether home or overseas (for example if they returned to family, or got stuck in location because of lockdown).

Businesses are now dealing with the post COVID "hangover" of staff who enthusiastically adopted this new way of working and are reluctant to give up their newfound freedom and the work-life balance it provides. Some businesses have fully embraced the flexibility that pandemic working conditions demonstrated was possible.

Few have returned to pre-pandemic working conditions. The majority are somewhere in between, trying to implement working conditions that are sufficiently attractive to bolster recruitment, embrace flexibility to a degree that satisfies staff who very quickly got used to remote working, and simultaneously maintain some of the business ethos that existed pre pandemic.

In this edition

Remote working can carry significant benefits, but is also presenting businesses with significant challenges, such as:

- Monitoring work performance, and performance managing underperforming remote working staff.
- Managing employees that want to work from home all of the time, a la pandemic, with arguments by employees ranging from childcare commitments, to cost of travel, to mental health requirements, stress of commuting, work-life balance and relocated homes that make the journey "impossible".
- Managing requests to work remotely outside of the UK on a permanent basis or because of extenuating circumstances.
- Requests to "wrap work around holiday" – i.e., work in the holiday location before or after (or both) a period of holiday.

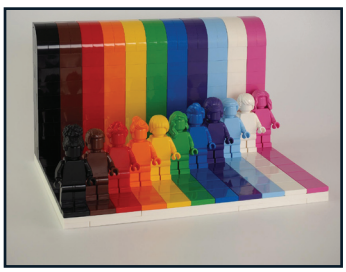
All of these issues present significant challenges for a business – and, whilst a sensible approach is to have a solid policy that is clearly articulated, no policy can plan for every eventuality. Policies make managing situations easier and communicating difficult decisions less painful ("I'd love to but.... policy!). However, businesses first need to decide how they will address some of the challenges presented – especially when requests are to work not just remotely, but abroad.

Working Remotely from Abroad

Requests to work remotely from abroad are on the increase. There are a few businesses that have actively embraced the model - a June article in The Times newspaper reported that a British digital bank was permitting staff to work for up to 120 days per year overseas, without any change in pay, having apparently identified 13 countries where employees could base themselves without onerous tax, legal and right to work obstacles. Other businesses are being encouraged to by staff (often inspired by friends or social media influencers and digital nomads "living their best life" on social media whilst working remotely). Add to that the sense that the pandemic gave many people that they need to embrace opportunity (and travel) whilst they can, and employers are finding themselves dealing with a multitude of different requests.

Before being too accommodating, perhaps in an effort to attract, engage or retain talent in a difficult recruitment market, there are a lot of overlapping issues to consider. In addition to potential tax and social security risks (for the individual and the business) it is important to consider the following, which may or may not apply to certain locations or to some but not all employees.

Work Abroad Requests – What to Consider.....



- Place of Business / Corporate Values / Regulatory issues – is there a risk of establishing a "place of business" in a jurisdiction in which the business does not already operate. This can be an important consideration for many employers and may be influenced by the type of work the employee performs, meaning that a business might be able to grant a request for some employees and job roles but not others. Are there regulatory issues that need to be met? Other considerations may be whether the employee will be working from a jurisdiction that raises potential political issues (embargos / deemed exports / sanctions etc) or is at odds with the core values of the business (for example LGBTQIA etc rights).

- Immigration status – does the employee have the right to work in that jurisdiction – are additional visas / permits required. An individual is normally permitted to work from the country of which they are a citizen, but if they are not a citizen they are likely to need appropriate work permissions to work and reside in the chosen location. Specialist advice is likely to be needed in each instance and consideration given to what this means for the business when some requests can be granted and not others.

- Discrimination arguments – permitting work from one jurisdiction but not another may create resentment and potential arguments of discrimination if one employee can substantiate that they have been treated less favourably than another.

- Local employment rights – mandatory rules of law cannot be overwritten by contract, meaning that local employment rights (some of which will be acquired from day one) will need to be considered in terms of how employees are contracted, treated whilst employed (sick pay, hours of work and local holidays for example) and rules that may apply should an employee need to be dismissed. Local advice will need to be sought for every jurisdiction. In some instances, local mandatory rules of law will not only affect obvious issues such as termination rights or discriminatory treatment, but also contract terms that must be provided to employees working locally (overseas equivalents of s1 Employment Rights Act).

- Health and Safety Obligations – will need to be checked in each jurisdiction to ensure the business is meeting local obligations in terms of health and safety and workplace assessments / requirements. For example, office set up, provision of equipment, COVID risk assessment etc. What if an employee becomes unwell or suffers an injury in the local jurisdiction, will this cost be the responsibility of the business?

- Insurance / cost contributions – Will someone working from their home / a parent's home abroad invalidate home insurance cover by working there? Is a specific policy required? Who will be responsible for checking, implementing and footing the bill? In some jurisdictions an employer may be required to contribute to utility costs incurred in connection with homeworking.

- Health insurance – many employees working abroad (especially temporarily) will not be entitled to local healthcare (even if this is available). Will private healthcare be provided? Many private policies will not cover employees when working rather than travelling for tourism purposes. What happens if an employee is injured or becomes unwell whilst abroad? Whilst this may have been a lesser consideration within Europe whilst the UK remained in the EU, that is no longer the case. Healthcare that is needed without appropriate insurance cover in place could prove very costly.

- Data protection rights – as a result of the employee working overseas is there a risk that personal data will be transferred? If this is the case (and it will be in many instances) businesses will need to ensure compliance with GDPR and local data protection rights. With the UK no longer being in the EU this is even more likely to mean ensuring appropriate agreements in place in terms of overseas transfers.

Any business willing to engage in remote working overseas will, at the very least, need to be comfortable with the level of risk they are taking and ensure that in addition to compliance with local legislation, appropriate policies and procedures are in place to afford the employing entity as much protection as possible. Ultimately the situation will be complicated by the fact that the rules for each country are different and what will be permitted in some jurisdictions, will not be permitted in another. Consider your policy, articulate your policy, stick to your policy.

GLOBAL MOBILITY PACKAGES: EQUALITY FOR ALL?

Though recession appears to be looming, the UK recruitment market remains hot with employers vying for the best candidates, whether those candidates are based at home or overseas. With such competition for skilled staff, rewards packages are becoming ever more important as employers looking to attract and retain the best staff. But what does that mean for those transferring intra company to the UK?

Many multinational employers have historically sought to provide broadly standardised benefits globally, with regional variations linked to legal and regulatory requirements in the local territory. That is changing in response to candidate demand for packages which are tailored to the individual's needs. This shift away from uniformity can, if not carefully managed, lead to differential treatment which may fall foul of UK discrimination laws.

Staff who transfer to the UK may, depending on the length and purpose of their assignment, work under their overseas employment contract or, more commonly, under the terms of a UK contract or UK secondment / assignment agreement. It is imperative that whatever arrangements are in place, they are well documented and kept under review because as the employment relationship changes and develops, so might the laws which protect the employee.

Rules on territorial scope will dictate whether an employee is entitled to benefits (such as minimum paid annual leave and family leave rights) under UK laws. For an employee on a UK contract who spends all of their time working in the UK for a UK based entity, the situation is straightforward, they will benefit. However, the matter is less clear cut for employees who spend part of their time overseas and it's worth remembering that some employees might want to argue that UK laws don't apply to them (particularly if their home rights are more generous).

Beyond rights under law, employers should be careful to avoid differences in benefits packages which cannot be clearly justified. Differences in treatment between workers hired in the UK and those transferred to the UK from an overseas group company should be minimised, if they cannot be eliminated entirely, to reduce the risk of discrimination claims. Additionally, employees with two years continuous service (and in many cases employment overseas will count towards the employee's continuous service) are protected against unfair dismissal. Differential treatment which is for no apparent reason may well breach trust and confidence entitling an employee to resign and assert that they have been constructively unfairly dismissed.

EMPLOYMENT ISSUES FOR IMMIGRATION PRACTITIONERS

Since April 2020, under Section 1 of the Employment Rights Act 1996 (ERA) all employees and workers are required to be provided with a written statement of particulars on day one of their employment. As of that date, the information required became considerably more detailed, applied to workers, not just employees and on the first day of the engagement. This is commonly referred to as a 'Section 1 Statement', and must include the following: the identity of employer and worker; the date on which the work began; the length of any notice period; how much the worker will be paid and when; the days of the week the worker is required to work; whether the working hours are variable and how any variation will be determined; any other benefits provided by the employer that are not already included in the Statement; any probationary period, including any conditions and its duration; and any training entitlement provided by the employer relating to mandatory training that the worker must bear the cost of. Also, particulars that must be contained either in the Statement or in a reasonably accessible document referred to in the Section 1 Statement are any terms and conditions relating to incapacity for work due to sickness or injury, including any provision for sick pay, any terms relating to any paid leave (such as family-related leave), and any terms relating to non-compulsory training. Finally, any terms relating to pensions and pension schemes must be provided within 2 months of starting work.

Where there are no particulars for any of the matters listed above, the section 1 Statement needs to state that fact.

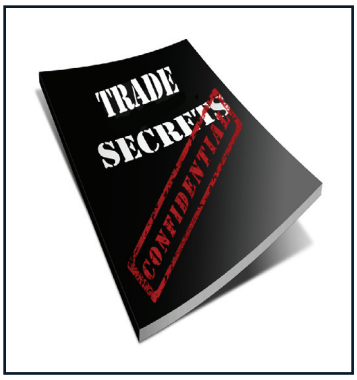
Section 4 ERA

In terms of secondment, an employer must also be aware of Section 4 of ERA which requires the employer to issue the worker with a statement detailing how any of the particulars required by Section 1 have changed, which will of course often be the case in any secondment situation. The Section 4 Statement must be issued at the earliest opportunity and, in any event, no later than one month after the change.

Remedies for Non-Compliance

If an employer fails to provide a Section 1 or Section 4 Statement within the permitted timeframe (or provides a statement that does not include all of the required information), the employee or worker will be entitled to ask an Employment Tribunal to make a determination of what their particulars are. Their terms will then be deemed to include the Employment Tribunal's additions and/or alterations. The amount of compensation payable in these circumstances will be two or four weeks' pay (subject to the statutory cap on a week's pay), depending on what the Tribunal considers is just and equitable in the circumstances.

POST TERMINATION RESTRICTIONS IN ASSIGNMENT CONTRACTS



Employers, keen to protect the stability of its workforce, trade secrets, confidential information, and client connections, often use post-termination restrictions in employee contracts to prevent employees from engaging in certain activities after employment ends. Such restrictions can range from preventing employees from competing for a specified period, or from poaching key members of staff from the business. Under UK law, such restrictions can be enforceable if there is a legitimate business interest to protect, and if the restrictions go no further than necessary to protect that interest. Widely drafted restrictions are unlikely to be enforceable in the UK (and in other jurisdictions). When drafting the restrictions, employers should consider fully the specific interests it is seeking to protect and draft the restrictions so that that they are no wider than reasonably necessary to protect those interests.

Employees within a global company are often placed on secondment or assignment in another part of the company in a different jurisdiction. One question that often arises is, should post-termination restrictions be included in an assignment agreement if they are already included in the employee's home country contract. The short answer is probably yes. It will certainly depend on the nature of the assignment, and what was considered when the initial restrictions were drafted. In an ideal world, the employer would have already had in mind the interests of any group company in the other jurisdictions for which the employee may work during their employment. If this was not the case, it might be necessary for the assignment agreement to either include its own new set of restrictions, or for the existing restrictions to be modified.

It is important to remember that what might be enforceable in one jurisdiction may not be in another – employers should always take advice on the likely enforceability of those restrictions in the new jurisdiction.

For further information on any of the topics discussed in this briefing or wider employment or data protection issues please contact:

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