The legal aspects of teleworking

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This article discusses teleworking from a legal perspective. Although spreading rapidly, the many legal aspects of teleworking are under-represented in the literature. The main issues covered in this article are the definition of teleworking, employment relationships and employment contracts, civil liability, and other legal considerations. Lastly, implications are discussed for both the management of organisations and the legal establishment.

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Already in the 1950s the literature on technological change suggested that telecommunications, combined with computing technology, could enable work to be relocated away from traditional offices (Jones, 1957-58). Toffler (1980) suggested that the information age 'could shift literally millions of jobs out of the factories and offices into which the Industrial Revolution swept them and right back to where they came from originally: the home'. Widespread interest in teleworking started in the 1970s when the term first came into usage to indicate remote working from the office (Nilles *et al*, 1976). Teleworking was expected to be the 'next workplace revolution' in the 1980s (Kelly, 1985) and over-optimistic estimations suggested that as much as half the population would telework by 2000. Today, interest is still growing among employees, employers, policymakers (*eg* transport planners), communities, the telecommunications industry and many others (Handy and Mokhtarian, 1996).

The actual scope of teleworking is not clear, partially due to lack of clear definition (*see* below), with various estimations of 2-10 per cent of the workforce in the industrial world involved (IDS, 1996: 616; Qvortrup, 1998: 29). The US figure for 1997 was 11 million – triple the number in 1990 (McCune, 1998; Scott and Timmerman, 1999). Huws (1996) found that 12 per cent of UK employers were using some home-based workers, with 5.8 per cent using teleworkers. In Australia the figure is 4 per cent (Australian Bureau of Statistics, 2000), whereas evidence from Europe showed that less than 1 per cent of employers were using teleworking (Brewster *et al*, 1994), although Tregaskis (2000) indicates that 8 per cent of employed people telework, with strong variations among nations even within Europe. There is evidence of the growth in teleworking practice and its mostly positive outcomes; for a recent comprehensive literature review see Baruch (2001).

As happens whenever a novel type of work arrangement is introduced, teleworking challenges the legal system with new issues and questions. More people and organisations are facing situations and problems that have no precedents to learn from. Control mechanisms that fitted managerial systems in the 20th century (*cf* Littler, 1982: 80) require new approaches that match the emergence of strong individualism within the workforce (Hakim, 2000). The phenomenon of teleworking is changing some

labour markets and such changes call for adaptation of the legal system to fit the new work patterns.

Perhaps the first legally related issue is the problem in definition and measurement of teleworking. Although it has been discussed for many years, a universal definition is still not in place (IRS, 1996; Moon and Stanworth, 1997). There is not even an agreed term: 'teleworking,' 'telecommuting', 'working at home' (or 'homeworking'), 'working at a distance', 'remote work' and recently 'virtual work' are some the terms used to cover different working policies and practices. Qvortrup (1998) and Felstead (1996) refer to the problems and ambiguity of the definitions. Much of the early work concerning homeworking focused on people working from home in manufacturing or low level service jobs (*eg* Hakim, 1985; Felstead *et al*, 1996). Some studies focused on the gender issue (Allen and Wolkowitz, 1987; Phizacklea and Wolkowitz, 1995), with later studies reflecting the technology developments and their impact on the types of work carried out. In fact, in their *Future of Work* working paper, Felstead *et al* (2000) distinguish between the two stereotypes of homeworkers: one comprises mostly women and ethnic minorities working in low-paid, low-level jobs, and the other consisting of professionals and managers, using information technology (IT) to work in their home environment. This article focuses on the latter group, although many of the legal aspects of working from home apply to both groups.

The lack of a universally accepted definition makes comparative analysis difficult and hinders the practice of benchmarking. From a legal point of view, it prevents a coherent approach so that, for example, precedents based on one type of teleworking may not be relevant to a different type of teleworking. A simplistic definition might be reduced to 'working at home' (Shamir and Salomon, 1985) or 'work remote from the office' (Grant, 1985; Kelly, 1985). Gray *et al* (1993), Cross and Raizman (1986) and Olsen (1988) have pointed out the role computers and IT play in enabling teleworking. Trodd (1994) proposes several forms of teleworking: individual, corporate, executive and contract. The EC (1994) and Korte and Wynne (1996) encompass the above discussion by asserting that teleworking comprises at least three main elements: location of the workplace, which means it is partially or fully independent from the location of the employer, contractor, client *etc*; use of IT – mainly personal computers, email, faxes and telephones; and organisational form and communication link to the organisation.

Examining a number of different definitions of teleworking, and excluding self-employed people (whose legal status is different from that of employees), we will use a simple and general definition for practical and academic purposes, although readers should be aware that differences in definitions may have implications for legal aspects:

Teleworking is a mode of work in which employees perform all or a significant part of their roles from a base physically separated from the location of their employer – usually their home – and use information technology as their main tool for operation and communication.

Teleworking spreads steadily, and the trend is expected to continue. It fits well with the new set of career aspirations that characterise the present generation, in particular for females entering the labour market and for males recognising the importance of a balanced life (*cf* Arthur *et al*, 1999; Peiperl and Baruch, 1997). Teleworking provides a unique solution for both employers and employees but it is a complex and complicated mode of work, characterised by ambiguous boundaries between work, family, employment and leisure. Another important feature is a low

level of unionisation, which is associated with many of the flexible policies of large companies (*cf* Flood and Toner, 1997). Traditional control mechanisms do not necessarily apply for teleworking, creating a situation that calls for a different interpretation by the legal system.

The nature of employment relations is changing with technology's impact, in particular teleworking (Cox and Parkinson, 1999). Teleworking reflects a shift in industrial relations systems that moved away from traditional models, such as Dunlop's 1958 classical model, and into 'New Deals' that represent the flexible, boundaryless concurrent workplace (Herriot and Pemberton, 1995). It usually involves reduced power for both employee representation systems and government and public bodies. The primary role the authorities can take to exercise their power is by involving the legal system, *via* relevant legislation and its application by the judicial system.

While much attention has been paid to work arrangements, work attitudes toward and performance implications of teleworking, the literature lacks a discussion of its legal aspects and implications. With the contemporary trend towards a litigious society, many managerial concerns focus on the legal considerations of processes and practices, thus it is surprising how little attention has been paid to this in teleworking literature (for an exception *see* Smith and Baruch, 2000). We will now move on to discuss two important legal elements of teleworking: employment contracts and civil liability aspects. We will then conclude with a set of best-practice considerations for organisations.

EMPLOYMENT CONTRACTS AND TELEWORKING

The employment relationship is explained in jurisdictions based on English common law in terms of the employment contract, the extent and terms of which are used by courts and tribunals to govern that relationship legally. Not surprisingly, the basic law on contracts of employment grew up (in the late 19th century and the first three-quarters of the 20th century) in the context of manual, full-time male employment in agriculture or manufacturing, with a clearer hierarchical structure of management and control, and at a time when the demarcations between master and servant and between the self-employed professional and the hired worker were far more obvious, although even then by no means free of difficulty at the margins. The last quarter of the 20th century did, however, see enormous changes in industrial organisation and flexibility such as the rise of service and IT industries and of female employment, to the extent that the old model for the employment contract is no longer dominant.

What used to be rather dismissively referred to as 'atypical employment' – non-standard employment in terms of space and time – has in many areas become the norm, especially in those industries that have seen the bulk of their job creation in the late 1980s and 1990s. Such industries include those involving consultancy, IT and temporary work agencies. On the other hand, other sectors – *eg* self-employed small retailers – have contracted significantly. All in all, it has been essential for the law to keep pace of these developments to ensure that these new and evolving forms of employment are covered by employment rights, both statutory and contractual. However, the distinction between employees and self-employed becomes blurred for 'non-standard' employment such as teleworking (Burchell *et al*, 1999).

At the forefront of these important developments has been that ancestor of the modern teleworker – the 'homeworker'. Although in some ways very different, in

particular often involving repetitive manual work such as finishing clothing (Stanworth and Stanworth, 1989), homeworking has set at least some of the agenda, with the UK courts holding that a homeworker could in law be an 'employee' and so entitled to employment rights. This was the case when a homeworker who made heels for shoes was held to be an employee and so able to claim unfair dismissal (*Airfix Footwear Ltd v Cope* [1978]), and when the homeworker who sewed pockets into trousers was held to be an employee, a case approved by the Court of Appeal in *Nethermere (St Neots) Ltd v Gardiner* [1984]. The application of such existing developments to more modern forms of teleworking raises the legal points below.

Determination of employment status

Originally the test for whether an individual was an employee or self-employed was the 'control' test, *ie* whether employers could control not just what individuals did but also the way they did it. This naturally presupposed a high level of supervision, usually on the employer's own premises, and was often allied to a rigid system of hours, breaks and payments. The position of the teleworker could be said to be the antithesis of the control test, and so on that basis would start off as being *prima facie* a case of self-employment. However, the control test was an early casualty of diversified employment patterns after World War II, especially the increasing number of professional people in employment relationships – *eg* doctors, surgeons and government lawyers – where it could not realistically be said that the *modus operandi* was directly under the employer's control (Smith and Wood, 2000; Leighton, 1984, 1986; Dickens, 1992; Fredman, 1997).

Teleworking requires a high level of trust and a supportive organisational culture to flourish (Baruch and Nicholson, 1997). However, contemporary work design and career systems in organisations are considered to be boundaryless, and the so-called alternative work arrangements use non-traditional modes of work, with teleworking as one of the notable ones (Arthur and Rousseau, 1996). In contrast to the fast-changing nature of work arrangements, legal systems respond and develop at a much slower pace.

The current common law approach to defining employment tends to be the 'pragmatic' or 'multiple' test, namely weighing all relevant factors in the relationship. This includes the form of hiring, method of payment, elements of control, organisation of the work, provision of tools and equipment, power to delegate, method of termination, and determining where the balance of those factors lies. Although this is a much broader test, it could still raise strong arguments that a particular teleworker was self-employed. Moreover, there is a second hurdle for teleworkers who seek legal protection; in any particular state or jurisdiction there may be requirements of qualifying continuous service by individuals before they can claim a legal right, even once it is clear that they are an 'employee'. In the UK an employee must work for the employer continuously for two years before claiming a statutory redundancy payment and, since it was lowered in June 1999, for one year before being able to claim unfair dismissal. There is a danger that, if the work done is in some way sporadic, the employer might argue that the individual was an employee but on separate non-continuous employment contracts each time.

To counter both of these hurdles, UK courts have developed broader concepts capable of bringing the atypical worker into employment. In particular they have included an important factor called 'mutuality of obligations' and the idea of a

'global' or 'umbrella' contract. The first can mean that a relatively loose arrangement between employer and individual can, after a period of time, assume the sort of *de facto* mutuality normally expected in an employment relationship. However, the recent decision of the House of Lords in *Carmichael v National Power* [2000], holding that 'casual-as-required' power station guides were not employees, is a reminder that this analysis does not always work. The global or umbrella contract can be used to link a series of apparently separate contracts into one overall employment contract, thus providing the necessary continuity of employment. Both developments could be used by a teleworker where the arrangement with the employer is not just to work at home but also for the individual to have more control or discretion over the amount and timing of the work to be done.

One aspect of the future controversies over teleworkers' status that has become increasingly clear over recent years is that, in the UK at least, an employer cannot expect simply to apply the magic phrase 'casual worker' to a teleworker and thereby avoid all employment rights. The common law tests previously mentioned have been used to attack this easy assumption and, significantly, the current Labour government's recent legislation – in particular in relation to working time, minimum wages and whistle blowing – has tended to be applied on a wider basis anyway; instead of applying only to 'employees' it tends to apply to 'workers', usually defined as anyone under a contract of employment or under any other contract to execute personally work or services for another person other than in a professional capacity (Ewing, 2000).

Again, this could be useful for teleworkers; provided the personal service element was present, they could claim rights under this legislation even if doubt remained whether they were an employee under the classic tests. Moreover, within the European Union (EU), atypical workers are increasingly being protected by directives issued under the 'social Europe' provisions of the treaties, which have to be implemented in all the member states. At the time of writing, the Part-Time Workers' Directive (97/81/EC) has recently been brought into force, banning discrimination against part-time workers, and a further directive giving similar protection to fixed-term workers is awaiting implementation. A teleworker whose contract was on a part-time or fixed-term basis could claim this protection just as much as a more traditional worker.

Modern statutory intervention

The UK Conservative government of 1979-1997 followed the American model of a flexible, deregulated labour market, leaving employment terms as primarily matters of contract and market forces. While the current government has espoused large parts of this approach, there are now some trends towards re-regulation by laws that will inherently prove more difficult to apply to teleworkers. For example, the UK now has a national minimum wage, set at a low level and largely aimed at low-paid manual labourers such as homeworkers. There are, however, problems applying legislation such as this to teleworkers. They may seem to be remunerated at well above the minimum rate but, in order to determine this, teleworkers' actual hourly rate must be calculated. If they are paid on an hourly rate for work done there is little problem, but as soon as there is payment on a salary or piecework (*ie* work-done) basis, the problem arises of how to determine their actual hours. This can be difficult enough when the individual works on the employer's premises, but if one aim of teleworking is to provide employees with more flexible work patterns, this

could be a particular problem. One way that UK legislation seeks to resolve these difficulties is by allowing employer and employee to agree in advance on a realistic average number of worked hours, to be used in any minimum wage calculation.

The other source of re-regulation is the EU. The principal manifestation of this so far has been the Working Time Directive (93/104/EEC), enacted in the UK as the Working Time Regulations 1998. These seek to establish a normal weekly maximum of 48 hours per week, restrictions on night working, mandatory rest periods and a minimum of four weeks' paid holiday per year. They are not restricted to full-time workers or to those working on the employer's premises or directly under the employer's control. At present, there are many loopholes and exceptions – negotiated into the directive as permissible 'derogations' by the previous Conservative government – so that, for example, an individual can opt out in writing of the 48-hour maximum, and a trade union or workforce agreement can be used to amend or even disapply the night working and rest break provisions. However, the onus remains on the employer to show that, one way or another, the regulations are being observed. Once again, a regime such as this would be much easier to organise when the employee is working on the employer's premises.

In the case of teleworkers, compliance may require record keeping of hours worked – especially where the teleworker is paid on a salary basis – that is contrary to the increased flexibility and informality that the teleworking may well have been designed to encourage. This may be bad enough under the present regime, but at the time of writing there were moves within the EU toward another directive removing some or all of the derogations, in which case this highly regulatory structure would really start to bite, placing even more stringent requirements on employers of teleworkers within the EU.

A further area of EU involvement worth mentioning is the increasing emphasis on mandatory consultation with the workforce. This already exists with collective redundancies, business transfers and health and safety arrangements. There are also moves toward consolidation into a general requirement for employers to establish works councils, or at the very least some other form of institutionalised informing and consulting of the workforce on employment-related matters. It is again important that such requirements are not, or would not be, restricted to that part of the workforce working on the employer's premises. For this reason, an employer of teleworkers would need to be aware of any legal obligations to involve teleworkers in the necessary consultations, although of course the machinery for doing so might be more complex.

Dismissal

To a large extent, teleworkers would have no special position in relation to redundancy and other forms of dismissal. Once it was clear that they were employees, the normal laws, *eg* on length of notice and fair dismissal procedures, would apply to them. However, three particular possible complications exist. The first is that computer misuse could be a particularly difficult disciplinary matter when the employee is a teleworker. It is already causing problems within traditional office settings – for example, in relation to personal use during working times, the downloading of pornography or other offensive material or the sending of offensive or defamatory emails. In the UK it was held, at an early stage in computerisation, that almost any form of deliberate computer misuse during employment can potentially justify summary dismissal (*Denco Ltd v Joinson* [1991], which concerned hacking into computer programs to which the employee had not been given access).

However, the position could be more complex where the misuse was more 'recreational' or 'humorous' and the company's approach had previously been lax.

In the case of teleworkers, the boundaries between personal and business use could be even more difficult to lay down and police, possibly even more so if teleworkers use their own machinery. Even where the employer provides the equipment, would this legitimate any form of surveillance of the teleworker in their own home, or a right of access to the equipment at any time? To what extent would the employer have to show tangible detriment to the business through the teleworker's activities in order to justify a dismissal? Potential problems with email could be significant when it constituted the teleworker's principal means of communication, both work-related and personal.

The second complication, in a sense following on from the first, arises from the normal common law requirement that, except in a case of summary dismissal for gross misconduct), a dismissal must be with contractual and/or reasonable notice. This causes a problem when employees work with computers because of the possibility of employees under notice wreaking revenge by interfering with their employers' computer systems. In the normal situation of an office worker, this is usually countered in practice by giving pay in lieu of notice, so that the notice requirement is paid out and the employee is discharged immediately, before any damage is done. However, with a teleworker this sort of physical neutralisation would not be possible, and the employer would have to devise other ways of isolating the employee from the firm's systems, either electronically or by physically impounding the machinery if it belongs to the company.

The third complication could arise where the firm faced a redundancy situation. If it was operating on any sort of basis that viewed office workers as the core staff and teleworkers as peripheral, there could well be a temptation to select teleworkers first. However, this could be legally dangerous, either on ordinary grounds of unfair dismissal – why select only from one group if the work being done is similar? – or, more dangerous still, if there was evidence that the teleworkers were in practice predominantly of one gender or with a high proportion of disabled employees, because it could then be argued that the method of selection constituted indirect sex or disability discrimination.

Drafting contracts

As with any other form of employment, common law does not actually require a teleworker's contract of employment to be in writing; if necessary, the law will imply such a contract on an unwritten basis. The only formal requirement of writing is that certain basic matters must be set out or given to a new employee in writing (Employment Rights Act 1996 s.1), but this remains in law a 'statement' of those terms, falling short of a binding contract. However, the normal principle in employment law, that a proper written contract is preferable, would apply particularly strongly here because of the desirability of expressly covering some of the untypical aspects. Also, the traditional way of filling in gaps in informal contracts – the implied term – may not work well because it relies on a high level of impliedly shared expectations and assumptions, but with something as novel as teleworking the parties may actually be starting with very different assumptions or desires. The conclusion of this article includes some practical advice for organisations in drafting such contracts.

CIVIL LIABILITY ISSUES

When civil liability laws are applied to teleworkers, a similar picture to that in relation to employment law appears, namely that the same laws will apply but with new adaptations and challenges. Again, these laws have evolved in the traditional context of work being done on the employer's premises, with fairly clear lines of control and discipline. New challenges could arise in the two main areas detailed below.

Civil liability of the employer toward the teleworker

In common law an employer has a duty of reasonable care to an employee, which may be supplemented by statutory duties under the industrial safety legislation. Breach of either the general duty of care or the statutory duties may enable the employee to sue the employer for damages where an accident has been caused by that breach. This is well-established law, and industrial accident cases usually account for about half of all personal injury litigation, along with road accidents and, increasingly, medical malpractice suits. However, the advent of teleworking could place new emphasis on two longstanding problems in this area of law and adds a new dimension to them.

The first problem is to delineate which accidents the employer may be liable for. Generally, employers are only potentially liable for work-related accidents, not for mishaps occurring away from work while the individual is acting in a 'private' capacity. In many simple cases the distinction is obvious – *eg* falling off a ladder at work, as opposed to falling off one at home – but even in the case of traditional factory or office-based work the borderline has been notoriously unclear and has spawned much litigation. Just what is meant by the famous phrase 'in the course of employment'? To give a flavour of the problem, in one leading UK case (*Smith v Stages* [1989]) the question was whether a car crash suffered by a peripatetic worker returning from a job in a fellow employee's car had occurred in the course of employment. The facts were neatly balanced since he was travelling back home (normally not included), but his time was being paid by the employer, and on balance it was held that he still had been acting in the course of his employment. This problem could be particularly acute in the case of the teleworker, where the parameters of the work itself are likely to be uncertain.

When are teleworkers 'at work'? What is the position if they are travelling for a purpose arguably related to the work, *eg* shopping for stationery required for the work, but they are also buying groceries? What if they are attending a training course thought beneficial to their professional development but not actually required by the employer? What is their position during mealtimes? Questions such as these are crucial in preparing an injured teleworker for litigation. If decided in the teleworker's favour, that would not mean automatic success because the employer's obligation is only one of reasonable care. An exception to this would be if the claimant's action was for breach of statutory duty, rather than for common law negligence, and the legislation on the point adopted strict liability on the employer, as a matter of policy.

Here again, teleworking presents problems, in particular the question of what can reasonably be expected of employers in the case where employees work at home in a relatively flexible manner; what level of training, advice and/or checking could be expected? Could employers be expected, for example, to check the safety of materials and furniture provided by the employees themselves? Could the employer be liable

for ergonomic problems incurred by employees while working long hours at a computer? Thus, the linked questions of what constitutes 'work' and how far the employer can reasonably be expected to take steps to advance the safety of that work could cause acute difficulties in the case of teleworking.

The second problem concerns the types of injury for which the employer may be liable. The law of civil liability for personal injury grew up around cases of physical injury from one-off accidents, such as the amputation of an arm by an unfenced machine. Such 'traditional' accidents could befall a teleworker – *eg* electrocution from faulty machinery – but that is much less likely to be the case than in the manufacturing industry. Instead, teleworkers may gain protection from two vitally important developments in civil liability law in the last 30 years. The first is that the law is no longer restricted to what might be termed the static condition of the workplace – Was that machine fenced? Was that handrail secure? – but now looks more broadly at whether safe systems of work have been provided. This can be a much more dynamic approach, involving questions of planning, supervision, training and general good management. If something goes seriously wrong for a teleworker, it is likely to be in this area, *ie* in how the work was organised.

A good current example is the problem of repetitive strain injury (RSI) in people who use computer keyboards. This is not a traditional accident, but it may have much to do with the organisation of the work, good keyboard practice and taking rest breaks. The RSI example also demonstrates the second development, which is that the law no longer covers only definable, one-off accidents but can now also apply to illnesses or diseases that have longer onset periods and can – increasingly, in the light of modern medical research – be shown to be work related. Lung diseases in miners forced the pace on this in the UK, leading to the development of laws that could then be used in other areas, such as the major litigation over asbestosis and mesothelioma. Ailments that were once thought to be simply an unfortunate part of life in some industries – *eg* early deafness and asthma – may now be compensated by damages if the employer failed to take reasonable care to prevent them, once it is reasonably established and known that the occupational link exists. This development could be essential to teleworkers whose form of work might expose them to long-term risks of RSI, musculo-skeletal problems or, if it is eventually proven, exposure to radiation from certain forms of electronic machinery such as mobile phones.

There is, however, one other form of non-accident liability that currently concerns employers and which could be a particular difficulty. This is liability for occupational stress, leading to definable psychiatric injury. This hit the UK headlines in one high-profile case, *Walker v Northumberland County Council* [1995], when a council was found liable for a social worker employee's second, debilitating, nervous breakdown. This was caused by excessive pressure from a mounting caseload when the employer took no measures to lessen it, even though it was aware that this might damage the health of the employee who had already had a nervous breakdown. An appeal in the case eventually was discontinued and a settlement was reached for £150,000, a substantial amount in UK damages law. This case had a major effect on HR professionals.

This situation has been a source of serious debate ever since, especially in forms of employment that have a long-hours culture. Of course, this example of stress cases reiterates the point made above that in common law there are no guarantees of safety, and the issue is what reasonable steps the employer should have taken. As before, this might be an easier question to resolve in the case of traditional staff

working on premises, where signs of stress-related illness might be more easily detected in good time. What is the employer of teleworkers reasonably expected to do? At one end of the spectrum, the employer who unreasonably insists on an excessive workload, in spite of complaints, could expect to be found liable but, at the other end, what would be the position of one who provided only the amount of work that most teleworkers could deal with comfortably? At what point and in what way would that employer be expected to realise that this teleworker was having serious problems coping? Employers may be tempted to think of teleworking as a way of isolating themselves from stress claims; 'How could I do anything? They were working at home'. On the other hand, if this area continues to evolve as it seems to be at present, so that employers are expected to have systems in place to combat workplace stress, the inherent uncertainties of teleworking could ultimately cost the employer.

Civil liability of the employer for the teleworker

The other principal issue that might arise in civil liability law is when the employer might be liable in damages for the teleworker, *ie* to a third party injured by the teleworker's acts or negligence. In the case of a client who received poor workmanship or advice, or a poor product because of bad work by the teleworker, there may not be a problem because the client will have paid and therefore will have a breach of contract action directly against the employer, the status of the person doing the work being irrelevant. However, if a third party suffered harm independently inflicted by the teleworker – either physically, emotionally, or economically, *eg* by receiving poor advice directly from the teleworker – the question would arise of whether the employer was vicariously liable for that harm. It is well established in common law that there can be liability for negligent mis-statements leading to financial loss, especially where bad advice is given in a business or quasi-business context (*Hedley Byrne & Co. Ltd v Heller & Partners Ltd* [1964]). For this reason, employers may wish to restrict teleworkers from direct contact with clients, if that is feasible, to restrict the possibility of such liability for which the employer might then be vicariously liable. Once again, the cases on this are legion and the distinctions can be thin and difficult, even in the case of an ordinary worker working under direct supervision on the employer's premises.

For reasons already given, problems could be particularly acute in the case of teleworkers because of the flexible and discretionary nature of the work and their lack of supervision. Three further aspects of this point bear noting. The first is that liability could also arise because of accidents occurring to a third party in the teleworker's home, *eg* a visiting client, a person repairing the electronic equipment or even fellow employees attending a team meeting there, in particular that part of the home being used for the work. In that case, who would be liable? The second aspect is that, in the light of such uncertainties, the employer and teleworker would be well advised to come to a clear agreement when contracting as to who will insure against this form of public liability. In cases of doubt as to where liability ultimately would lie it may be advisable to include indemnity clauses to determine who eventually pays.

The third aspect is that the employer could also be vicariously liable for any unlawful discrimination perpetrated by the teleworker, *eg* any racial or sexual harassment by electronic means. In the UK a particularly strong approach to this has been taken by the courts; the employer will be held liable for almost any discriminatory practices carried out by individuals while at work unless the employer

can prove that it took all reasonable steps to stop that action, or actions like it, from happening (*Jones v Tower Boot Co Ltd* [1997]). Anti-discriminatory policies, training and monitoring can be important here but, again, these matters could be more difficult for employers of teleworkers.

CONCLUSIONS

The legal aspects of teleworking have been neglected in the literature, probably for two reasons: on the management side, from a lack of awareness and having to deal first with more practical issues and, on the legal system's side, from the long period that typically characterises the system's response in most countries to rapid social changes. These problems strongly suggest that employers and, in particular, legal advisers should pay considerable attention to facts and circumstances that result from teleworking and incorporate these into updated employment contracts. By applying a proactive approach, employers can avoid future embarrassment in court. It would be much better for all involved if terms and conditions were set, as clearly as possible, in advance. As one example, with regard to the crucial issue of what is work, the contract can seek to define this.

Ideally, a legislative system should be developed that copes properly with the variety of issues concerning teleworking. Basic laws need to be adopted to deal with questions specific to teleworking; in certain areas, a change of the legal regime is called for. Specific directives have been passed recently and applied in the EU concerning part-time employment and fixed-term temporary workers. These cover not only the banning of discrimination against such workers but also obligations to improve their conditions and treat them more as a valued and integral part of the workforce. Perhaps it is now the time to consider a public regulatory system along similar lines for teleworking.

Organisational implications are wide. There is a need to establish a set of 'best practices' on both the operational level of teleworking and the legal level of appropriate employment contracts. These will help employers avoid potential claims, *eg* resulting from the Fair Labor Standards Act in the US or EU legislation. When drafting a written contract, in addition to the standard terms – required by the 'section 1 statement' (*see* 'Drafting contracts') – the parties may need to give careful attention to matters such as the following:

- **Working hours** Can these be left flexible or is some quantification of 'normal' working hours necessary for the purpose of minimum wage or working time legislation? Must the employer get the teleworker's written agreement to exceed or disapply any normal legal requirements on matters such as maximum hours, rest breaks or night working?
- **Payment issues** Is payment to be on an hourly or work done basis or on a salary basis? If the latter, what is the expectation of the work to be done? Where, if at all, does overtime fit in, and how is it to be measured?
- **Records** What records must the teleworker keep for pay calculation and legal purposes?
- **Holiday entitlements** How do these fit in with a highly flexible regime, and will they satisfy any minimum legal requirements (*eg* the minimum four weeks' paid holiday across the EU)?
- **Sickness issues** When is the teleworker considered to be 'off sick' – an intrinsically

difficult concept, given the setup – and what evidence is to be required?

- **Personal completion of the work** Is this to be a contractual requirement or could the employee use family or friends, or delegate?
- ***Force majeure*** If work becomes impossible – *eg* electrical or electronic failure – do employees still qualify for pay or do they have to make the work up later?
- **Ownership of electronic machinery** Where does it lie? Who is liable for installation, insurance, maintenance and repair? What rights does the employer have to hardware and software on termination of employment?
- **Liability insurance** Who is liable to arrange and pay for public liability insurance for the teleworker?
- **Employer participation in payments of office-related maintenance** Who is to pay the phone and electricity bills?
- **Confidentiality** In addition to normal common law implied terms, what does the employer want to specify in relation to the teleworker's access to and handling of sensitive information, including information on or belonging to customers?
- **Disciplinary issues** What needs to be clarified in relation to computer use and misuse, and what is likely to be the disciplinary result of misuse?
- **Post-termination restrictions** If teleworkers have access to confidential information or trade secrets and/or are likely to be subject to headhunting by other firms, does the employer need to specify a restraint of trade clause limiting competition for a period after termination of the employment? If so, what would be reasonable limitations for such a tie, in the light of the work that teleworkers have been doing, and the fact that they may have had much wider electronic contact with customers, suppliers *etc*, anywhere in the world than the traditional office worker?
- **Health and safety issues** What particular rules and limitations need to be spelled out to the teleworker in order to safeguard the employer under modern domestic and EU health and safety laws?
- **Indirect discrimination in terms of career advancement** If women or disabled people are especially encouraged to telework, this may mean indirect sexual discrimination or disability discrimination, *eg* not everyone may be able to afford a spare room. Thus, by offering only teleworking employment contracts employers might face future claims of indirect discrimination, although at the moment this is unlawful in the UK only on grounds of sex, marital status and race, plus religion in Northern Ireland.

These major areas need to be covered under individual contracts, as 'standard' contracts may be neither applicable nor sufficient. The above list can be used in developing contracts for new staff members destined to telework and when employees who work on conventional terms transfer to teleworking terms. It seems best for employers and employment solicitors to draft contracts that anticipate possible options and difficulties, and then cover these exceptions by specific terms designed for teleworkers, rather than leaving this to a court to decide.

Individuals should be proactive, realising that teleworking is a relatively new mode of work and, before opting to work at home, investigating whether their individual and home situation can support teleworking. They should be careful when

agreeing to new contracts and make certain, for example, that the contract permits a reversal of the transfer if teleworking proves to be impractical. There are also differences between the self-employed, subcontracted and employed teleworker. The benefits and possible pitfalls for each vary considerably, and the distinction should be taken into account when a new teleworking contract is signed or when changing an old contract into part or full-time teleworking arrangements.

Final note

We hope our readers will have obtained useful guidance and advice from this analysis, whether as employee or employer, with regard to employment contracts, civil liability matters and certain wider issues outlined above. If it sometimes appears that we have been more concerned with raising questions than providing specific answers, it is because to date many of these questions have not been properly asked. Much of this area deserves further exploration, including what few precedents exist, and lateral thinking about the problems that may arise. At the very least, what we hope we have established is that doing nothing is no longer an option.

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