

## How to Handle Remote Working Requests? First WRC Decision Lands

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Last year, the Work Life Balance and Miscellaneous Provisions Act 2023 (“the **Act**”) gave employees the statutory right to request to work remotely and / or flexibly for the first time. At initial glance, this entitlement appeared to herald an automatic right to work from home indefinitely. However the important nuance for employers and employees alike to be aware of is that it is simply the right to request such an arrangement that is now copper fastened in Irish employment law.

Earlier this year, the relevant conditions and procedures to accompany such a request were built upon by the Workplace Relations Commission’s (the “**WRC**”) Code of Practice for Employers and Employees on the Right to Request Remote Working (“the **Code**”).

This month, the WRC weighed in further - publishing its first decision in response to an employee claim that such right had been breached.

### *How to Request Remote Working – and the Conditions to be Aware Of*

- Employees can request to work remotely from the first day of employment, but must have six months of continuous service before the arrangement starts.
- Consideration of requests must be fair, objective, and reasonable.
- Employers may terminate an approved remote/flexible working arrangement with four weeks’ notice.
- Employees have seven days to propose adjustments to continue the arrangement.
- The Code provides guidance to employers and employees in relation to applications for remote / flexible working arrangements.
- While failure to follow the Code is not an offence in and of itself, the content of the Code is admissible as evidence in proceedings. As such, the strong recommendation is to build the requirements of the Code into an employer’s approach to requests for remote / flexible working.

Last month, the Department of Enterprise, Trade and Employment reported that, as of July 2024, 18 employee claimants had made complaints to the WRC regarding their respective requests for remote or flexible working. The first such decision, in the case of *Karabko v TikTok Technology Ltd*, issued this month.

### *Karabko v TikTok – what happened?*

Ms Karabko, the employee, began working for TikTok in 2022. Her employment contract stated that her place of work was TikTok's Dublin office. However, due to the pandemic, she was initially permitted to work remotely on the condition she would return to the physical office at TikTok's request.

Later that year, TikTok announced a return to office policy requiring employees to attend the office two days a week. The employee was granted an "*individual exception*" to work fully remotely at that time. In October 2023, employees were required to return to the office three days a week on a hybrid-basis. However, the employee continued to work fully remotely despite lacking express authorisation to do so.

Following the introduction of the Code, the employee, who was renting outside of Dublin, submitted an application to work fully remotely, in which she detailed (i) the proposed working arrangement, (ii) the duration and (iii) the reasons for the request. TikTok acknowledged the request and notified the employee that it required four additional weeks to properly consider it. TikTok ultimately refused the request, notifying the employee in writing of the rejection coupled with the reasoning why.

The employee lodged a complaint to the WRC, challenging TikTok's consideration of the decision. She alleged that, by failing to consider her needs, TikTok's decision-making process was not carried out in an objective, fair and reasonable manner.

*What did the WRC decide?*

In a welcome decision for employers, the WRC found in TikTok's favour and further clarified the considerations to be taken into account in properly addressing requests for remote/flexible working.

In reaching this decision, the WRC confirmed that, as outlined in section 27(6) of the Act, the WRC is not authorised to review the merits of a decision regarding a remote working request. Rather the WRC is strictly confined to assessing whether the employer considered a request in line with both (i) section 21 of the Act; and (ii) in accordance with the requirements of the Code.

The Adjudication Officer ("**AO**") noted that TikTok issued a decision in respect of the request in writing to the employee (i) informing her that her request had been refused and (ii) providing reasons for the refusal. The AO noted that TikTok opted not to grant the exception following a "*careful consideration of a variety of factors*" including TikTok's "*desire to ensure better team collaboration and knowledge sharing*".

Significantly, the WRC confirmed that an employee's view that a job can be carried out remotely "*does not take precedence*" over an employer's "*evidence-based view*" that a return to the physical workplace "*results in an increase in productivity and accuracy*". Further, and helpfully from the employer's viewpoint, the WRC concluded that it is within an employer's "*remit to decide what is best for the business*". Here the WRC was persuaded that the employer's reasons for refusal were "*logical and reasonable*".

The AO found in favour of the employer.

While the AO acknowledged that the refusal to grant an exception to the employee could be perceived as harsh from her perspective, in circumstances where TikTok had developed and communicated a hybrid working arrangement for its Dublin based staff, it concluded that it was necessary to apply it consistently. The WRC found that, to not do so and to consider each individual case on its individual merits could perversely result in decision making that was not objective, fair and / or reasonable.

The WRC affirmed that section 21 of the Act places three distinct duties on employers who receive a remote working request: Briefly, employers must:

1. consider a remote working request having regard to (i) its needs; (ii) the employee's needs; and (iii) the requirements of the Code;
2. approve a remote working request as soon as reasonably practicable, or notify the employee in writing providing reasoning of its refusal within four weeks of its receipt. Employers can extend this period by a further eight weeks if necessary to adequately consider a request before responding; and
3. if the remote working agreement is signed, employers should maintain a copy of this and provide it to the employee.

### *Key Practical Takeaways for Employers*

- This seminal decision reiterates that employees have the right to *request* to work remotely – employees do *not* have an automatic right to work remotely. This case highlights that an employer can, following considered review, deny a request from an employee to work remotely / flexibly.
- Employers must demonstrate that they have followed statutory procedures and timelines and given proper and adequate consideration to remote working requests. The WRC will ultimately only assess the rigours of the decision-making process, *not* the merits of the decision itself.
- Employers should use the outcome of this case, coupled with the requirements of the Act and the Code, as an opportunity to put in place or update their remote, hybrid, flexible-working policies, contracts and procedures. This step should be accompanied by relevant training to staff regarding how to assess and respond to (including but not limited to evidencing consideration of) such requests in order to mitigate potential exposure to future legal claims.

According to recent figures released by LinkedIn, Ireland ranks second in Europe for hybrid and remote work opportunities. While it is here to stay for the foreseeable, remote working is a two-way street and employers are well within their rights to decline remote working requests if business needs call for it – provided due account is taken (and noted) of the obligations of the Act and Code in respect of such requests.

For more information please contact our Employment, Pensions and Benefits team or your usual contact at Matheson.

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