

## The Return to the Office:

### Can directing employees to return to the office when they have been working from home get you in to hot water?

**The Public Service Commission recently reported the average number of work-from-home days for staff at the Ministry for Ethnic Communities is 2.2 per week, followed by 1.8 at Land Information NZ, 1.7 at Statistics NZ, 1.7 at the Inland Revenue Department and 1.6 at MBIE.<sup>1</sup>**

As technology has better enabled remote working, working from home has become part and parcel of many employment relationships. Flexible working arrangements have been acknowledged as an effective method for attracting and retaining employees across various demographics. It has also been shown to enhance employee engagement and productivity while improving overall wellbeing and happiness. However, many companies around New Zealand now want to encourage employees to return to the office to promote

culture, build experience and skills, and foster better relationships in-person.

But, is it reasonable for an employer to direct employees to return to the office when they have been predominantly working from home? If so, how should employers go about this?

Working from home and flexible working arrangements are not guaranteed entitlements. However, Part 6AA of the Employment Relations Act 2000 has provided employees the right to request flexible working arrangements since 2008. Under Part 6AA, employers can only decline such requests if they cannot be accommodated for specific reasons, including a negative impact on quality, performance, or the ability to meet customer demand.<sup>2</sup> Furthermore, an ability to work from home is commonly featured as an agreed term in an employee's individual employment agreement, or is provided for within a policy, or simply has become an accepted common practice.

An employer must give consideration to these factors when considering how to direct an employee to return to work physically from the office.

In a recent case of *Martick v First Credit Union Inc*<sup>3</sup>, the Employment Relations Authority (ERA) held that an employee (**Ms Martick**) had been unjustifiably disadvantaged due to a failure by her employer (**First Credit Union**) to consult when directing her to return to its Avondale office.

First Credit Union's letter of offer (which formed part of Ms Martick's employment agreement), specified that the place of work for position was at the Avondale office. However, it was accepted practice during her employment that she undertook her duties from her home north of Auckland and attended the Avondale

<sup>1</sup> [Article in The New Zealand Herald regarding working from home data in the public service.](#)

<sup>2</sup> [See article discussing working from home arrangements.](#)

<sup>3</sup> *Martick v First Credit Union Inc* [2024] NZERA 511

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office infrequently to attend training or functions such as the work Christmas party.

Specifically, Ms Martick's employment agreement detailed the following express term in relation to her place of work:

*While the employee is initially assigned to a specific Branch, the employee agrees to work at any Branch as required by business conditions on a day-to-day basis is, subject to this requirement being reasonable in terms of travel distances.*

Ms Martick's employment agreement also specified that her position may change in response to changing business needs at the discretion of the employer, and that the employer will consult with the employee prior to such change.

In early 2023, First Credit Union was struggling to recruit staff in its branches, leading to staff shortages and certain branches needing to close on certain business days. First Credit Union considered whether remote employees could be directed to work in its branches. First Credit Union reviewed Ms. Martick's employment agreement and decided she should work at the Avondale branch.

On 3 May 2023, First Credit Union informed Ms Martick that it had made the business decision that staff needed to be in the branches and directed her to perform her normal hours at the Avondale branch from the following Monday.

Ms Martick responded saying that she had been employed on a work from home basis from the outset of her employment and the place of work clause had never been exercised and was not applicable. She confirmed her preference was to continue to work from home because she was used to it and found it convenient.

On 10 May 2023, First Credit Union commenced a restructuring process proposing to disestablish Ms Martick's role due to its view that her role being based

from home did not suit its business needs. On 2 June 2023, following consulting with Ms Martick and considering her feedback First Credit Union made the decision to disestablish her role. As part of this decision, she was offered the opportunity to be redeployed into similar roles based at either the Avondale or Whangarei offices.

On 6 June 2023, Ms Martick raised concerns that when she objected to the "relocation" the discussion had shifted to redundancy and this appeared to be in response to her objections rather than a genuine organisational need for redundancy. She also confirmed that she wished to remain home based in her current role. The next day First Credit Union confirmed that as Ms Martick had not accepted one of the redeployment options, her one month's notice would be paid out and her employment would end effective 6 July 2023.

Ms Martick raised a personal grievance claiming:

1. She had been unjustifiably disadvantaged by First Credit's Requiring her to work from the Avondale office when she has only ever worked from her home; and
2. She was unjustifiably dismissed for redundancy.

The ERA rejected the claim that Ms Martick was unjustifiably dismissed for redundancy. It considered that this decision was based on a genuine business need and that First Credit Union ran a fair process that adequately consulted with Ms Martick.

However, the ERA found Ms Martick was unjustifiably disadvantaged due to First Credit Union's failure to consult when she was directed to return to the office. In particular, it considered:

1. The employment agreement required reasonable travel distances to be a consideration in any requirement to work at a branch other than that to which the employee was initially assigned;

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2. Ms Martick's consistent working from home was a feature of her employment and as such was a factor that should have been considered;
3. First Credit Union had enabled Ms Martick to work from home by providing her with the tools to perform her position remotely; and
4. First Credit Union was required under the employment agreement and under the duty of good faith to consult with Ms Martick making changes to her position.

The ERA held, given these known circumstances, Ms Martick had at least an acute interest in where she would perform her duties and therefore was entitled to be provided a reasonable opportunity to comment on working from the Avondale branch before a final decision was made. As this did not occur she was unjustifiably disadvantaged. She was awarded \$12,000 under 123(1)(c)(i) of the Employment Relations Act 2000.

While not all employment agreements contain an express duty to consult or that travel distances will be a consideration when directing employees to return to the office, this case demonstrates that the circumstances of the entire employment relationship need to be adequately considered when making decisions about an employee's employment that will or is likely to, have an adverse effect on the continuation of employment.

In some circumstances, a unilateral decision to direct an employee to return to the office will be justified. However, it may often be the case that a failure to adequately consult an employee on a return to work can unfairly disadvantage that employee, particularly when working from home is or has become a feature of the employment relationship in the circumstances.

As employers continue to balance the needs of having employees physically in the office against the inclusion of flexible working arrangements, consideration needs to be given to how these decisions are fairly made.

### Want to know more?

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