



A flexible future?

Sarah Rushton & Sophie Georgiou
explore international developments in
flexible working & the right to disconnect

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IN BRIEF

► Changes made across Europe to flexible working policies in the wake of the COVID-19 pandemic.

► The current position for English employees, and possible developments for the future.

Somewhere among the chaos and negativity of the COVID-19 pandemic emerged a rebalancing exercise for staff. Forced lockdown meant less time travelling to and from work, and for some, more time with family. Others used the time they were no longer spending commuting to take on new hobbies like exercise and cookery, or they decided to acquire a four-legged best friend.

February 2022 saw Prime Minister Boris Johnson announce the end to all COVID-19 legal restrictions. Although many staff have now returned to the workplace, the flexibility and balance the pandemic meant for some has not been forgotten. This article explores some of the changes that have been made around the world, and what, if anything, the pandemic has meant for English employees.

Four-day week

In February 2022, the Belgian government approved a new right for Belgian employees to request a four-day working week. They will still work full-time hours, but these will be compressed into fewer days. Employees will also gain the right to ask to redistribute their hours, so they work more every other week. Although an employer is permitted to refuse an employee's request, they must justify this in writing. Alexander De Croo, Belgium's

prime minister, explained that: 'The Covid period forced us to work in a more flexible way. The labour market had to adapt to this'.

Belgium is not the first country to rethink the conventional working week. Prior to the COVID-19 pandemic, Iceland ran two studies between 2015 and 2019 in which working hours were reduced from 40 hours a week to a maximum of 36, while salaries remained the same. The results included an improvement in employee wellbeing, while productivity either increased or stayed the same. This study highlights how a reduced working week may be mutually beneficial to employees and employers alike.

Belgium has also caught the attention of another European country: Germany. A survey by Forsa found that 71% of individuals working in Germany would like their employer to adopt the Belgian model, and grant them the option to compress their hours into four working days a week. German unions have gone a step further, and are campaigning not just for fewer working days, but also reduced working hours overall to avoid extra pressure for workers. IG Metall, a German union representing approximately four million employees, secured an agreement with its members' employers to offer a 32-hour working week as an option, which would see employees paid for 34 hours.

Last year, the Spanish government agreed to pilot a 32-hour working week over three years. Íñigo Errejón, president of the Más País party, which suggested the initiative, noted that while 'Spain is one of the countries where workers put in more hours than the

European average', it is 'not among the most productive countries'. His party proposed a government-backed project worth €50m, with the government sharing a tapering amount of companies' costs, with the aim of reducing working hours but not salaries or jobs.

Closer to home, the Scottish National Party (SNP) confirmed last year that a £10m pilot scheme would be developed and conducted. The proposals involve workers receiving the same remuneration for working 20% fewer hours. More recently, non-profit 4 Day Week Global started a six-month pilot in Ireland from February 2022. Participating companies will trial shorter working hours. Joe O'Connor, 4 Day Week Global's pilot program manager, explained that the 'remote working revolution has forced companies into a space where they've had to design much better metrics for actually measuring what people are getting done'—which 'opens the door' for the question of whether people can work fewer hours.

Right to disconnect

Exactly what is meant by the 'right to disconnect' can vary, but it is essentially the principle that employees are entitled not to deal with work communications outside of their working hours.

From 1 January 2017, French employees have had a right to disconnect, where their employer has 50 or more workers. Such companies must create a charter of good conduct, which states hours when employees shouldn't send or answer emails. The COVID-19 pandemic has prompted a number of other countries to follow suit.

Prime Minister De Croo announced in February 2022 that Belgian companies with more than 20 employees will be expected to grant them the right to disconnect. This means that staff would not be required to respond to emails or answer calls between the hours of 11pm and 5am.

Irish employees have had a right to disconnect from work since 1 April 2021 under a new Code of Practice, including the right not to respond immediately to telephone calls, emails, or other messages. The Irish government's minister of enterprise, trade and employment Leo Varadkar stated that the 'pandemic has transformed working practices, and many of those changes will be long-lasting... the pandemic... offers an opportunity to make permanent changes for the better'. The Code also includes a duty to respect other people's right to disconnect, for example 'by not routinely emailing or calling outside normal working hours'.

Portuguese bosses have been banned from emailing, texting, or telephoning staff outside of working hours since November 2021. Those that breach this risk being fined thousands of Euros.

On 9 December 2021, the SNP pledged that it would have meaningful discussions about whether the right to disconnect should be introduced for government employees, as well as staff in devolved agencies. The SNP said that the right should be considered by all public sector employees.

What is the English position?

There is a clear appetite for flexible working following the COVID-19 lockdowns. A survey by Working Families published in June 2020 found that nine in ten carers and working parents surveyed want their workplace to retain flexible working after COVID-19.

Over 30 UK companies have agreed to trial a four-day week between June and December 2022. The trial is led by 4 Day Week Global, thinktank Autonomy, and university researchers. Mr O'Connor of 4 Day Week Global explained that the scheme 'takes the focus off time spent at work and instead allows business to focus on the actual output. It also reduces sick leave and work burn out and... will be good for the retention of staff'.

There are existing legal rights for staff to ask to work a different pattern. These were introduced from 2003 for parents and other carers, and then from 2014 for all employees with at least 26 weeks' service. Employees with the requisite length of service who would like to change their working pattern can make a statutory flexible working request. The change may be to their working hours, the times they are required to work,

and to the employee's place of work. There are numerous working patterns covered by these three categories, including for example a full-time employee wanting to compress their working hours into a four-day week, or simply asking to go part-time.

Under the statutory scheme, an employee starts their flexible working request by writing to their employer, who then has three months to respond, unless a longer time is agreed with the employee. Employers have a duty to handle flexible working requests reasonably, and they can only refuse a request for reasons specified in the statute. Once a request has been made under the statutory scheme, the employee cannot make another request for 12 months.

However, it is relatively easy for an employer to find a reason for refusing a request. Acceptable reasons under the statutory scheme include the burden of additional costs; inability to reorganise work among existing staff or to recruit additional staff; insufficiency of work in the periods the employee proposes to work; and detrimental impact on quality or performance. The ease with which employers can decline a request has led to the statutory scheme often being described as 'toothless'.

Time for change?

On 23 September 2021, the government's Department for Business, Energy & Industrial Strategy published its 'Making flexible working the default' consultation, which proposed to reform the statutory flexible working procedure. The consultation explains that COVID-19 working practices 'have opened our eyes to what may be possible, and we now have the chance to seize the moment and make flexible working—in all its forms—part of business DNA. This is an opportunity for employers and employees to free themselves from the default 9-to-5 in order to recruit and retain the talent that we need to build back better'.

There were a total of five proposals. The first was to allow employees to request flexible working from day one of their employment, rather than having to wait until they have 26 weeks' service. This is a controversial proposal. From an employer's perspective, imagine your new employee asking to change the working pattern you have hired them under, on their very first day. On the other hand, the Chartered Institute of Personnel and Development's #FlexFrom1st campaign has called for the right to request flexible working to be available to employees from day one on the basis that it could 'boost the number of people using flexible working arrangements', which will help 'promote fairness and inclusion at work'.

The consultation also asked whether the permissible reasons an employer can give for

refusing a request remain valid. It noted that 'employers' experience of flexible working has changed dramatically since the Right to Request Flexible Working was first brought in, particularly over the course of the pandemic'. The consultation asks whether the 'business reasons for rejecting a request that were considered reasonable in 2014 remain so'.

Another proposal was to require the employer to suggest alternatives to the employee where possible. Under the current scheme, if an employer rejects the request, they simply need to confirm this to the employee, and provide a permissible business reason why. The consultation explains that 'effective flexible working, balancing both employer and employee requirements, needs to be a negotiation'. If implemented, the proposal would involve, for example, not just telling an employee that their request to make a change on all working days has been declined, but also looking at making the change on some working days only as an alternative.

A further proposal included allowing employees to make more than one request in a 12-month period. The consultation sought to explore 'whether allowing employees to make more than one statutory request per year would make the legislative framework more responsive to changes in an individual's circumstances', for example if a person is a new parent or becomes disabled after their first request.

The consultation closed on 1 December 2021, and the government's response is awaited. Overall, although the consultation is called 'Making flexible working the default', it does not go that far. Under current proposals, even if an employee was to make a flexible working request on day one of their employment, an employer can still say no for a permissible reason. What the proposals would do if implemented is broaden the scope of the current right.

Separately, the government has yet to announce any plans to introduce a legal right to disconnect.

This is despite reports by Autonomy of an 'epidemic of "hidden overtime"', where workers never quite "switch off" and continue to do bits of work throughout the evening and weekend'.

Conclusion

The COVID-19 pandemic has clearly prompted a number of countries to rethink the conventional working week, and recognise the importance of a work-life balance. It will be interesting to see how these changes develop.

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