

**SIPTU Submission** on the  
Code of Practice for the  
Right to request a remote  
working arrangement –  
Work Life Balance and  
Miscellaneous Provisions  
Act 2023

**June 2023**



## Introduction

This submission is made in response to the Workplace Relations Commission (WRC) Public Consultation on the Code of Practice on the Right to Request Remote Working (COPRRRW) a right which derives from the Work Life Balance and Miscellaneous Provisions Act 2023 (the Act). SIPTU welcomes the opportunity to make this submission and welcomes any opportunity that may arise to elaborate on its position.

SIPTU, in its 2021 response to the Public Consultation on the Introduction of a Right to Request Remote Working called for the introduction of a Code of Practice in addition to any then proposed legislation on the right to apply for remote working.

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### *Work Life Balance and Miscellaneous Provisions Act 2023, Section 31 (1)*

*“The Minister may, following consultation with the Minister for Children, Equality, Disability, Integration and Youth, give a direction to the Commission requiring the Commission to prepare and submit to him or her a code of practice **for the purpose of practical guidance to employers, employees and any other persons as to the steps** that may be taken for complying with one or more provisions of Part IIA of the Act of 1998 or Part 3 “.*

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# Practical Guidance

## Workplace Policy - Internal Fair Procedures and Natural Justice

Under Section 27 (6) of the Act, the Workplace Relations Commission and the Labour Court are precluded from assessing the merits of the decision that the employer reached under s.21 (general requests), s.22 (termination of arrangements), s.24 (return to previous arrangements) and s. 25 (abuse of arrangements) of the Act. A similar provision exists in the Unfair Dismissals Act 1977 – 2015 and it is well established that in unfair dismissal cases an Adjudicator and the Labour Court will not take on the role of the employer in determining what was appropriate in the given circumstances or substitute their judgment for that of the employers.

However, for an employee's right of appeal to an independent third party to be maintained, the Adjudicator and the Labour Court are entitled to assess whether the decision made by the employer falls within a band of reasonable responses. This is determined by whether a fair procedure and natural justice was applied by the employer to the workplace process that led to their decision.

As a result, the ultimate focus of the Code of Practice must be on the parameters of fair procedures and natural justice and how they will apply to the workplace process of making an application for remote working, terminating, or altering an arrangement for remote working, requesting a return to work after an arrangement for remote working and having remote arrangements revoked due to allegations of abuse.

In this regard S.I 146 of 2000 Industrial Relations Act, 1990 (Code of Practice on Grievance and Disciplinary Procedures) (Declaration) Order 2000 provides such guidance for employees when raising a grievance and for employers in disciplining an employee:

*“In the interest of good industrial relations, grievance and disciplinary procedures should be in writing and presented in a format and language that is easily understood. Copies of the*

*procedures should be given to all employees at the commencement of employment and should be included in employee programmes of induction and refresher training and trade union programmes of employee representative training. All members of management, including supervisory personnel and all employee representatives should be fully aware of such procedures and adhere to their terms.*

*Procedures should be reviewed and up-dated periodically so that they are consistent with changed circumstances in the workplace, developments in employment legislation and case law, and good practice generally.”*

### **SIPTU Recommendation**

- The COPRRRW should offer guidance to employers on formulating a workplace policy and a transparent procedure that is based on fair procedures and natural justice for dealing with remote working applications, such that employees can clearly identify what is necessary to make such an application and internally appeal any decision made by their employer, if necessary, under the above-named sections of the Act.

### **SIPTU Recommendation**

- The COPRRRW should set out that where collective bargaining is in place, engagement with employees and union representatives is best practice ahead of the implementation of the workplace policy.

### **SIPTU Recommendation**

- The COPRRRW should recommend that employers provide training to the person/s they decide are responsible for handling requests in the employment.

## **Decisions and Refusals to be Evidence Based**

In addition to the above, there must be some integrity to the employer’s decision to refuse. To achieve such integrity, the employer should be able to evidence how they arrived at their decision.

Members of SIPTUs “Education Sector Remote Working Group” have made representations to our Union to call for a clear and transparent system to be included in the COPRRRW based on their “concern that certain managers are stating that roles [in their employments] can’t be done remotely as they personally dislike remote working”.

Whilst an employer may be able to state an objective of the employer’s workplace as the reason for refusal in accordance with the Act, if an employer does not have to produce evidence of this objective, the employee’s right to apply will have no real standing.

It has been SIPTUs experience in representing members in age discrimination cases that whilst an employer may state that they have objectively justified the implementation of a retirement age in the workplace, when they have been asked to evidence this objective justification, they have simply stated the reason for the retirement age and have been unable to explain or evidence how they arrived at that reason. This is because there had been no genuine or meaningful exercise of the various considerations before them.

### **SIPTU Recommendation**

- The COPRRRW should allow the Workplace Relations Commission and the Labour Court to explore the evidence of the needs of the employer (or the absence of same) upon which the employer has relied to make their decision and / or refusal.

### **Oral Representations**

To ensure fair procedures and natural justice are being adhered to and employers have all the information they require to meaningfully consider an employee’s request, meetings between the employer and the employee making the application should be allowed after a written application is submitted.

This would allow employees to clarify matters under Section 20 (3), (4) and 21 (1) of the Act (the needs of the employee and employer, the location of the arrangement and any other information that is required).

It would also allow employees to provide oral evidence under Section 22 (termination of remote working arrangement), Section 24 (employees request to return to previous arrangements) and Section 25 (termination of working arrangement due to allegations of abuse).

### **SIPTU Recommendation**

- The COPRRRW should provide for oral representations to be made by employees under the above-mentioned sections of the Act to ensure that fair procedures and natural justice is being adhered to in the decision-making process of the employer.

## **Employee Application for Remote Working**

The Act provides in Section 20 (3) (a) that employee applications must be in writing and signed by the employee. It is the experience of many of our members who have made such applications, outside of the legislation but in line with their employer's current policy on remote working, that it is considerably easier if their employer has a portal for receiving applications and but where there is such a portal employees must have access to a printed version of their application. Delays in employers processing applications have also been raised as a concern where there is an absence of information on the form which the employer then seeks later.

### **SIPTU Recommendation**

- The COPRRRW should contain a template application form and should state that an online application satisfies the Act's requirement to "be in writing and signed by the employee".

### **SIPTU Recommendation**

- The COPRRRW should recommend that the online application form is available through a portal provided by the employer, attached to the employees' work email address, and allows the employee to retain a copy of the application once it is submitted.

## Appeals Processes

SIPTU in its 2021 response to the Public Consultation on the Introduction of a Right to Request Remote Working requested that an internal right to appeal form part of the then proposed legislation. SIPTU now calls for an appeal process to be included in the proposed COPRRRW.

It is appropriate that an employee can appeal each of the decisions an employer makes under Section 21(1)(b)(ii) (decision to refuse applications), Section 22 (1) (termination of remote working arrangements), Section 24(3)(b)(ii) (refusal to allow a return to previous working arrangements) and Section 25 (2) (termination of arrangement due to abuse).

While these sections in the Act allow for the employee to be put on notice of the employer's proposal to refuse or terminate the arrangements and the employee can make representations at that stage, the Act does not provide an employee the right to internally appeal the employer's decision.

### SIPTU Recommendation

- An employee's right to internally appeal against a decision made by an employer is a fundamental principle of fair procedures and natural justice. The COPRRRW should allow employees access to an internal appeals process which consists of an oral hearing of their appeals in relation to decisions the employer has made under the above-mentioned sections of the Act.

## Representation

As the rights that have been afforded to employees under the Act are predominantly procedural rights it is vital that employees are afforded representation throughout these procedures.

### SIPTU Recommendation

- In line with S.I. 146 (referenced above) the COPRRRW should recommend that employee representation is afforded to employees under each section of the Act; in Section 20 and 21 (making a general application), in Section 22 (when remote working arrangements are

being terminated by the employer), in Section 23 (when negotiations are taking place to consensually end arrangements), in Section 24 (when the employee is requesting a return to previous arrangements) and in Section 25 (when arrangements are being terminated due to allegations of abuse).

### **SIPTU Recommendation**

- The COPRRRW should recommend that employee representation is afforded to employees at an internal appeal stage.

## **Health and Safety**

The obligations of both employers and workers under the Safety, Health, and Welfare at Work Act 2005 (SHWWA 2005) already extend to workers who work remotely. Several workers in Ireland were already working remotely prior to the Covid 19 pandemic and since March 2020 this number has increased. Many Irish employers were therefore already engaged in virtual and in person remote risk assessments prior to this and have continued to be throughout this time. In addition, the Health and Safety Authority has also issued helpful guidance on both employers' and workers' obligations in this regard.

Section 26 of the SHWWA 2005 relates to the obligation on employers to engage in consultation with and allow for the participation of workers in health and safety workplace matters.

### **SIPTU Recommendation**

- The COPRRRW should remind employers of their obligations under the Safety, Health, and Welfare Act 2005.

### **SIPTU Recommendation**

- The COPRRRW should remind employers that employees have the right to disconnect.



## SIPTU Recommendation

- To ensure that any concerns surrounding workplace safety, data protection, worker privacy and the confidentiality of workplace communications does not become a hindrance to the effectiveness of remote working, the COPRRRW should make further provision for the cost and maintenance of office equipment to be an obligation of employers.

## Equality Considerations

It is SIPTUs experience that employees' request remote working arrangements for several reasons and the needs of each employee making an application can vary greatly.

## SIPTU Recommendation

- The COPRRRW should refer to and distinguish between an employer's automatic obligation to provide reasonable accommodation under the Employment Equality Acts 1998 – 2015 and applications for remote working arrangements. SIPTU participated in the Irish Human Rights and Equality Commissions consultation on the draft Code of Practice on Reasonable Accommodation in 2022 and looks forward to its publication.

## SIPTU Recommendation

- The COPRRRW should caution against an employer's procedure containing provisions which either directly or indirectly discriminate against employees on any of the nine grounds under the Employment Equality Act.

## SIPTU Recommendation

- The COPRRRW should clearly distinguish between the right to request a remote working arrangement in accordance with section 21 of the Act and the right to request a flexible working arrangement for caring purposes in accordance with Part IIA of the Parental Leave Acts 1998 to 2019 as inserted by section 8 of the Work Life Balance and Miscellaneous Provisions Act 2023.

## Monitoring

Members of SIPTUs “Education Sector Remote Working Group” have made representations to our Union to call for “remote working to operate on the basis of trust and integrity and that there should be no difference between the current measurement of output/productivity of an employee’s work in the workplace and work that takes place remotely”. This call is supported by SIPTU.

### SIPTU Recommendation

- The COPRRRW should provide that excessive monitoring of employees who are engaged in remote working arrangements may be considered by the Workplace Relations Commission and the Labour Court to be a form of penalisation under Section 26 (2) and Section 26 (2) (d) of the Act.

### SIPTU Recommendation

- The COPRRRW should remind employers that the protection of employees’ privacy and workplace confidentiality are implied and/or expressed terms in an employee’s contract of employment.



Liberty Hall  
Dublin 1

Tel: 1800 747 881

E-mail: [info@siptu.ie](mailto:info@siptu.ie)

[www.siptu.ie](http://www.siptu.ie)

