



## **The evolving landscape of work post-pandemic and implications for labour**

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**There are a few historical events that define a turning point in the evolution of society. The outbreak of the Corona virus in 2019 was one such an epochal moment of our time. So seismic are the changes brought by the outbreak that life has never been the same since then. The work environment has been most affected and so, too, have been industrial relations. How to adapt and thrive in this new environment is a question that all serious labour unions must ponder. Public-sector unions must, therefore, explore both the challenges and opportunities presented by this new environment to remain relevant and serve their constituencies optimally. This is the object of this article.**

### **Changing concept of work**

The outbreak of the COVID-19 pandemic and the wave of the Fourth Industrial Revolution have been altering the workplace. A hybrid work environment in which people can work from office as well as from the comfort of their home is the new normal. This represents the future of work. The idea of working from home is here to stay beyond the confines of disasters and many workplaces are adapting their work in line with these new developments. The Public Service cannot afford to be left behind. It has no choice but to adapt to new methods of working and new tools.

Yet, in adapting to these new conditions, the Public Service must implement a just, fair, and equitable system. It must regulate the process, be transparent about eligibility criterion and the process thereof. It must introduce systems to monitor and measure the work done; recognize and incentivise those who do well. However, working from home must not be implemented at the expense of service. The Public Service must, at all times, prioritise citizens and serve the public well.

Meanwhile, the idea of working from home has given rise to a number of challenges for labour relations and created uncertainties and implications for employee benefits. Issues of occupational health and safety and compensation for injuries on duty have become a major concern for both the employer and employees. Physical buildings and offices have become redundant as a definition of workplace. Whilst employers are taking advantage of being fully operational with remote employees, some have tended to shift from permanent employment to part-time, temporary, and freelance employment. This has, in turn, deepened the crisis of casualisation of work.

The lack of a regulatory framework or policy has left many employees suffering at the hands of unscrupulous employers who are looking for faults instead of empowering workers to be productive in

this new environment. Many workers were asked to work from home with neither the tools nor the necessary training to enable them to perform their duties optimally. The introduction of monitoring tools has left many implications and questions about their legality and conformity with standard labour practices. All these issues must be examined deeply as we strive towards a framework for remote work.

However, uncertainties around issues of compensation for injuries on duty and occupational health and safety have the potential to strain labour relations. Clarity on how these should be dealt with in the new environment is necessary for both employer and employees. The beginning of that clarity is in how relevant pieces of legislation define the workplace and how these relate to the evolving concept of work that now includes working from home.

## Legislative framework

Whilst the concept of **workplace** is clearly defined in the *Labour Relations Act (LRA)* and the *Occupational Health and Safety Act*, the clearest definition of an **employee** is found in the *Compensation for Occupational Injuries and Diseases Act (COIDA)*. *COIDA* defines an "employee" as a person who has entered into or works under a contract of service or of apprenticeship or learnership, with an employer, whether the contract is express or implied, oral or in writing, and whether the remuneration is calculated by time or by work done or is in cash or in kind.<sup>i</sup> This definition is empowering, broad, and all encompassing. Although remote working may not have been in the minds of the drafters of *COIDA* back then, by virtue of their contract and scope of work, those working from home are clearly not excluded from this definition. This means they are entitled to compensation in the event of injuries that may occur whilst doing their work, regardless of where they are stationed. Hence both the employee and his/her dependents or beneficiaries can file for compensation in the event of an accident within the framework of *COIDA*.

Meanwhile, the *LRA* definition of the workplace emphasizes the "collectivity" of employees rather than the actual location as a "workplace." Thus, accordingly the workplace means the place or places where employees of an employer work.<sup>ii</sup> It does not matter whether the employer has one or two sites of operation, the place, or places where employees work in connection with each independent operation, constitutes the workplace for that operation. This means that even if the contract of an employee has designated a certain office or place and yet the employee is required to perform some duties at another site not specified in the contract, the other place not mentioned in the contract is also treated as a workplace. This, however, requires that the employer communicates in writing to instruct or delegate the employee to perform duties there. Whilst the *LRA* had not envisioned a home as a workplace, the idea that the employer may delegate in writing for the employee to work from home suggests that a person's home could be designated as a workplace, provided that a clear instruction has been issued to that effect.

The clarification about the workplace came into sharp focus in the Constitutional Court in 2017 in the case of the *Association of Mineworkers and Construction Union and Others v Chamber of Mines of South Africa and Others 2017 (3) SA 242 (CC)*. In this case, the Judges highlighted the statutory meaning of workplace when they said:

"[24] Two things are immediately notable about the way the statute [*LRA*] defines "workplace". The first is its focus on employees as a collectivity. The second is the relative immateriality of location. Both signal that "workplace" has a special statutory meaning."

"[25] First, "workplace" is not the place where any single employee works – like that individual's workshop or assembly line, field, desk, or office. It is where "the employees of an employer", collectively,

work. The statute approaches the concept from the point of view of those employees as a collectivity. This accords with the role the term “workplace” plays in the *LRA*. This sees workers as a collectivity, rather than as isolated individuals. And that in turn squares with the statute’s objects. The promotion of orderly bargaining by workers, collectively, is one of the statute’s express primary objects. That the focus of the definition of “workplace” is on workers as a collectivity rather than as separate individuals fits.”<sup>iii</sup>

These assertions of the Constitutional Court are supported by the *Basic Conditions of Employment Act (BCEA)* and the *Occupational Health and Safety Act (OHSA)*. By defining the workplace as any place where employees work, the *BCEA* has, by implication, covered all ground, including remote working.<sup>iv</sup> Meanwhile the *OHSA* was even more clear when it said that the “**workplace**” means any premises or place where a person performs work in the course of his/her employment. This means whenever the employee is performing the services of the employer at home, the home is designated as a workplace. Section 8 of the *OHSA* gives both the employer and employee joint responsibility to ensure health and safety in the workplace and to mitigate against any risk.<sup>v</sup>

It must be clear from the mentioned pieces of legislation that the broad definition of the workplace is all encompassing and may include home as a workplace. Employees who are working from home are, therefore, not to be excluded from any benefits by virtue of them performing their duties remotely.

### **Challenges or missed opportunities?**

The above definitions notwithstanding, there has not been a framework to regulate and manage remote working for employees. The absence of such a framework makes the management of this arbitrary. Employers have not developed adequate standard tools and procedures to manage and assess the work done by employees working from home.

There is also a need to identify potential hazards associated with remote-working environments. It cannot be the responsibility of the employee to worry about issues such as cyber security or the speed of internet connectivity, *etc.* These issues should remain the responsibility of the employer.

One of the challenges that remote working poses for industrial relations relates to the monitoring of performance. It has been challenging for the employer to find appropriate performance metrics for employees working from home. The use of surveillance tools to monitor workers is a very controversial issue among unions. Whilst the PSA supports a performance-based system, it aligns with section 2 of *the Regulation of Interception of Communications and Provision of Communication Related Information Act 70 of 2002*, which prohibits all workplace monitoring and interception.<sup>vi</sup> The PSA would like a system that adheres to the requirements of the *Act* to ensure that where such tools are used, there is clear consent from employees concerned and that any interception must be related to the work of the employee. Anything outside this purview will be found objectionable by the PSA. The PSA does not want a big brother syndrome where employees’ privacy is infringed in the name of monitoring.

The privacy, including private communication of the employee with associates cannot be used at the employee’s expense. The PSA urges that the employer to adhere to the letter and spirit of section 14 of the *Constitution* where it protects the right to privacy. Similarly, the *Protection of Personal Information Act 4 of 2013* must also be respected, observed, and complied with thereby ensuring that employees are informed prior that they are being monitored, the period within which they are monitored is also indicated and the reasons for the surveillance and the data being collected are clearly explained.

The legislative environment is limited in terms of the extent to which it can regulate conduct whilst a person is working from home. A person's home is a private space governed by the people who live in it. An attempt to enforce workplace rules and standards on an employee who is working from home can be intrusive, let alone infringe on the person's right to privacy. Rules such as dress code, personal hygiene, breaks, when to sleep *etc.*, are difficult to enforce when people are working from home. However, there is still room to deal with extreme cases of misconduct such as an employee being under the influence of alcohol or drugs whilst in the line of duty. These kinds of misconduct can be dealt with through internal disciplinary processes and sanctions can be issued against an employee who commits such misconduct. Serious acts of criminality committed whilst a person is working from home may be the purview of law enforcement agencies and may be dragged to the employer's desk once a sanction has been issued against the employee. Only then can sections of the employment policy that deals with criminal record be invoked against an employee.

### **Disadvantage for workers**

Working remotely has serious disadvantages for employees. It destroys the spirit of team work, mitigates against collegiality whilst encouraging a silo mentality. It encourages workers to focus on their individual tasks with the risk of losing site of the bigger picture or direction the department or company is taking. This lack of teamwork can create challenges with communication amongst workers. It can promote competition amongst colleagues instead of collaboration. Soon colleagues begin to see each other as rivals and not team members whose collaborative efforts can uplift the organisation to greater heights.

When employees are dislocated and working remotely from each other there is little or no room for mentoring and coaching of junior staff. The long-term impact of this could be dire for continuity and the growth of the organisation as there is no skills transfer from senior to junior staff. An even bigger challenge is the potential displacement of support staff. Remote working renders support staff such as personal assistants, cleaners, and *au pair* services redundant as their jobs are dependent on people being in the office.

### **What is to be done?**

#### Consultative processes

There is an urgent need for the development of a policy framework to regulate remote working. The PSA suggests that a consultative process between the employer and labour must begin in earnest. The PSA calls for the establishment of a health and safety committee or, where such a committee already exists, the extension of its mandate to also regulate compliance with the remote-working policy. Such a committee must be open and ready to, from time-to-time, receive concerns, ideas, and inputs of employees and their union representatives and act expeditiously to ensure that those concerns are addressed.

#### Just and equitable framework

The PSA's perspective of a policy framework to regulate and guide remote working has already been articulated in previous inputs and articles. The PSA remains steadfast in its view that a fair, equitable, and just framework is required. Equally, those who work from home must be given due recognition for their sacrifice. Working from home must be regulated and criteria used for eligibility must be clear and transparent.

The decision on who gets to work from home or not should not be on the whim of bosses. It must be a function of well-articulated criterion, the type of service involved, and the extent to which its implementation does not compromise service delivery. A consultation process with labour is imperative.

#### People first

The Public Service in its entirety is at the coal face of service delivery. Thus, it is crucial that the framework that guides the implementation of the concept of working from home should take into cognizance the implications for service delivery. The Public Service exists to serve the public. The method and approach of working from home in the Public Service should never compromise this important objective.

As there are positives, let alone, benefits for working from home, there are also serious constraints. Working from home demands a high level of self-discipline on the part of the employee. Temptations and distractions away from work are high. A system of working from home cannot succeed in the absence of a strong work ethic and a culture of service. A culture of service that puts people first, *Batho Pele*, must be inculcated. A Public Service imbued with a culture that puts people first, that shows compassion and dedication towards service, should form the foundation on which the idea of working from home should be based and introduced.

#### Monitoring system

A system to monitor and measure the work being conducted must also be put in place if performance and outcomes are to be guaranteed. Yet, it is true that it would be easier for output-driven work to be measured than work that is monotonous. Similarly, even in the same sector or work environment, there are functions that can be performed at home and those that cannot. A clerk at a health department can take files to compute these at home whilst a medical doctor cannot perform surgery from the comfort of his/her home. An administrator at the department of transport can hold an online meeting from home, but a road maintenance worker cannot repair potholes from home. Hence, a blanket approach – a one-size-fits-all approach – cannot work.

Workers, too, are different. There are those who are self-driven and those who require constant supervision of their work. The regulation and systems to monitor and measure work being done cannot be the same. What is clear, though, is that a system of accountability should be put in place whenever public servants are expected to work from home. That system should be clearly defined in the framework and must not trample upon the worker's basic rights, including the right to privacy.

#### Fostering collaboration

The interdependent nature of the Public Service calls for a system that is dynamic and outward-looking in its approach. The reality is that what happens in one department can affect services rendered by another. Allowing road-maintenance workers to stay home may be a right thing to do during a state of disaster. However, it could also have serious consequences. For instance, ambulances transporting patients needed to drive on well-maintained roads. Thus, decisions on who is eligible to work from home must be cognizant of implications for other departments. Hence, there is a need for interdepartmental conversations and a comprehensive overview of implications of decisions made in silo or in a sector.

#### Guidance to workers

The PSA's view is that a remote-working policy must be clear and specific in its definition of the workplace. Workers must be given the necessary guidance to enable them to identify an appropriate place in their home to be designated as their working area. However, such designated areas must be free from hazards that can cause personal harm and risk their health and safety.

Employment contracts must stipulate times required for employees to work online. Such times must be within the relevant working hours and in line with policy. Employees, on their side, must ensure that they are available and contactable during working hours, irrespective of whether they are working from home or not. This necessitates that the employer makes provision to extend cell-phone benefits and allowances to all employees working from home, irrespective of rank or position.

### Training

One of the major shortfalls during the COVID-19 state of disaster was that there was no time or consideration for training of employees. Workers left offices without clear guidelines or training on what would be expected of them when working from home. Consideration should be made to provide training to all employees who are working remotely to familiarise them with the expected code of conduct and equip them with the necessary skills to use virtual platforms optimally and account for time spent on work duties. Such training must also include issues of occupational health and safety to empower them to know what would be permissible or ineligible in the case of accidents happening when working remotely. It must be borne in mind that *COIDA* is neither location nor premises based. The main consideration will be whether when an injury happens, the employee was acting in the course and scope of employment.

### References and endnotes

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<sup>i</sup> Parliament of the Republic of South Africa, 1993, *Compensation for Occupational Injuries and Diseases Act 130 of 1993*

<sup>ii</sup> Parliament of the Republic of South Africa, 1995, *Labour Relations Act No 66 of 1995*

<sup>iii</sup> Constitutional Court, 2017, *Association of Mineworkers and Construction Union and Others v Chamber of Mines of South Africa and Others* [\[2017\] ZACC](#)

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<sup>iv</sup> Parliament of the Republic of South Africa, 1997, *Basic Conditions of Employment Act no 75 of 1997*

<sup>v</sup> Parliament of the Republic of South Africa, 1993, *Occupational Health and Safety Act 85 of 1993*

<sup>vi</sup> Parliament of the Republic of South Africa, 2002, *Regulation of Interception of Communications and Provision of Communication Related Information Act 70 of 2002*