Employment*Brief*

July 2014

New Flexible Working procedures
Coming into force from 30 June 2014

The right to request flexible working is being extended to all employees with at least 26 weeks' service, except agency workers unless they are returning from parental leave.

Employees may make a written request to change their hours of work, the times or place that they work.

Employees may only make one request within a twelve month period, but whilst failing to consider an informal request made within a year will not breach the flexible working regime there could be other claims such as discrimination.

The employer must deal with the request in a reasonable manner and inform the employee of its decision within three months, unless the parties agree a longer period. 'Reasonable manner' is not defined in the legislation but Acas have produced statutory guidance which makes recommendations, including to discuss the request with the employee as soon as possible at a meeting to which they are given the option of being accompanied.

Employers should weigh up the benefits of the request for the employee and the business with any negatives, possible costs and logistical implications. Following this consideration, the employer must let the employee know in writing as soon as possible whether the request is accepted or whether a compromise is possible, the employer could also offer a trial period.

Unless the employee is ineligible, a request may only be refused on one of the following grounds:

- the burden of additional costs;
- detrimental effect on ability to meet customer demand;
- inability to reorganise work among existing staff;
- inability to recruit additional staff;
- detrimental impact on quality;
- detrimental impact on performance;
- insufficiency of work during the periods the employee proposes to work; or
- planned structural changes.

Accepting the request will vary the employment contract and the employer must issue a statement to the employee confirming the change. Any further changes, including reverting to the previous work pattern will be a further contractual change.

If the employer rejects the decision, the guidance states that the employee should be allowed to appeal.

An employee is entitled to bring a claim against the employer for breach of the flexible working regime, for example for failing to deal with the request in a reasonable manner. Where a claim is well founded, the Tribunal may make an order for reconsideration of the request. As well as or instead of this it may also order the employer to pay compensation of up to eight weeks' pay.

WHY HAVING RESERVISTS IS GOOD FOR BUSINESS

On 13th May the Army Engagement group hosted a series of presentations at Oakwood House addressing this very question. Current plans to restructure the army involve reducing the regular Army size and relying more on the Army Reservists (formerly known as the TA). The Government is investing £1.8 billion over the next 10 years to meet this aim.

Many employers are concerned about the possible loss of key personnel with very little notice. Those presenting likened the process to accommodating maternity leave, and pointed out that financial assistance to deal with the cost to the business of recruiting replacements and bringing the Reservist back up to speed on their return was available. Notice periods were much longer than previously and they are willing to accommodate an employer refusing to release the member of staff.

Much was made of the training and skills that employing an army Reservist would bring to an organisation. The army training results in many transferable core skills such as IT, first aid, personnel management and team leading, to name but a few. Core skills such as leadership, planning and communication would be beneficial to any organisation.

For further details contact The Army Reform Group at ArmyReform-AR-EmpSO1@mod.uk

Confidentiality during employment and after termination

In what appears to be one of the few times that a judge has felt justified in allowing the inspection and imaging of employees' computers, the High Court has ordered that an employer may instruct an independent computer expert to inspect and take images from the personal computers of two former employees.

The business was granted a mandatory injunction after information came to light which suggested that the individuals had misused confidential information belonging to the employer during their employment. The court took into account the fact that it had a high degree of assurance about the strength of the employer's claim, and that the business had taken years and used significant resources to create the confidential information at the heart of the proceedings. The fact that the inspection and imaging would be carried out at the employer's expense is also likely to have been an important factor in the judge's decision making.

What is a mandatory injunction?

A mandatory injunction is a court order requiring a person to take a particular action.

What is confidential information?

Almost any type of information can be regarded as confidential information. For example:

- Business plans.
- Financial information.
- Statistical information.
- Customer lists.
- Plans, sketches and drawings.
- Improvements to products or processes.

Confidentiality during employment and after termination

During their employment, an employee must not:

- Disclose to third parties the employer's confidential information and trade secrets obtained during the course of, and as a result of, the employment.
- Use the employer's confidential information for his own purposes.

After employment has ended, this duty survives but only to the extent that it protects trade secrets. Other confidential information may be protected but only by means of an express term in the employment contract.

Constructive Dismissal and Notice

Constructive dismissal claims are risky for employees at the best of times. Aside from proving that the employer breached the employment contract and that the breach was sufficiently serious, the timing of the resignation is also key and they will need to show that they resigned in response to the breach. Waiting too long to resign runs risk of being deemed to have 'waived' the breach, and so the contract will be 'affirmed' and continue. For this reason, when considering constructive dismissal, it is important not to delay.

Although the employee must resign in response to the breach, employees often don't realise that the resignation does not always have to be without notice and it is possible to continue to work the notice period after resigning.

In a recent case Cockram v Air Products plc, Mr Cockram, who was senior and well-paid, resigned in response to the outcome of a grievance that he had raised. His contract provided for a three month notice period, but in the event he gave seven months notice. Following the end of his employment he brought a claim for constructive unfair dismissal.

The Employment Judge struck out the claim and found that Mr Cockram had given the long notice period for his own financial gain and that he had thereby affirmed the contract, meaning that he could not then rely on the employer's breach of contract. Mr Cockram appealed to the Employment Appeal Tribunal and the decision was upheld. Giving notice in excess of the contractual notice period had the effect of affirming the contract. All of the circumstances in the case, including length of notice and the reason notice had been given should be considered when looking at whether an employee has affirmed the contact and the question is fact-sensitive in each case.

This is a difficult area for employees and they would be well-advised to seek advice at an early stage. Whilst it can be acceptable to give notice, this will be taken into account by the Tribunal. On the facts of the case, it could lead to the decision that the employee waived the breach and giving notice in excess of the contractual notice period will run a high risk and realistically will only be acceptable in the most exceptional of circumstances.

QUICK REFERENCE SECTION

Statutory minimum notice periods
An employer must give at least:

- One week's notice to an employee who has been employed for one month or more but less than 2 years.
- One week's notice for each complete year of service for those employed for more than 2 years.
- Once an employee has more than 12 years service the notice period does not extend beyond 12 weeks.

National Minimum Wage

From October 2013

16 – 17	£3.72
18 – 20	£5.03
21+	£6.31
Apprentices	£2.68

From October 2014

16 – 17	£3.79
18 – 20	£5.13
21+	£6.50
Apprentices	£2.73

Statutory Sick Pay
from April 2014
£87.55 per week

Statutory Maternity/Paternity/ Adoption Pay
Basic rate from April 2014
£138.18

Statutory Holiday
5.6 weeks for a full time employee.
This can include bank and public holidays.

Redundancy Calculation

- 0.5 week's pay for each full year of service when age is less than 22.
- 1 week's pay for each full year of service where age during year is 22 or above, but less than 41.
- 1.5 week's pay for each full year of service where age during year is 41 and over.

Calculation is capped at 20 years. Maximum week's pay is capped for dismissals after 6th April 2014 under the Statutory Scheme at £464.00.

Is Obesity a disability?

Recent press coverage has returned to this debate which is not a new issue for employers. There have been cases involving employees being unable to fit in uniforms and drive due to issues of size.

Under the Disability Discrimination Act 1995 a person had a disability for discrimination purposes if they had a "physical or mental impairment which has a substantial and long-term effect on his ability to carry out normal day-to-day activities". When this was repealed and replaced by the Equality Act 2010 in October 2010, the definition of disability remained the same.

There has been a decided case on the issue back in 2013 when the Employment Appeal Tribunal (EAT) considered whether an obese employee was disabled for the purposes of the disability discrimination legislation.

Mr Walker suffered from "functional overlay" compounded by his obesity. He had numerous physical and mental conditions. He brought a disability discrimination claim against his employer, but an employment judge found that he was not "disabled" for the purposes of the DDA 1995. In doing so, he noted that an occupational health specialist had not been able to identify a "physical or organic cause" for his conditions other than his obesity.

The EAT allowed Mr Walker's appeal. Deciding that when considering whether an individual is disabled, a tribunal must concentrate on whether they have a physical or mental impairment. Plainly, Mr Walker had been substantially impaired by both physical and mental impairments for a long time, and the disability discrimination legislation does not require a judge to focus on the cause of such an impairment.

Obesity does not itself render a claimant disabled. However, it might make it more likely that they are. A tribunal might conclude more readily that an obese claimant suffers from an impairment or a condition such as diabetes. Further, the obesity might affect the length of time for which the impairment is likely to last (with regard to whether the impairment has a "long-term effect").

It is plain that it is the impairment itself that should be considered rather than its cause. This is so even if the cause of the impairment is a condition which is excluded from the definition of disability. An example is liver disease caused by alcohol dependency: alcoholism cannot be a disability under discrimination law, but the liver disease would qualify as an impairment.

NEWS IN BRIEF

The Queen's Speech

On 4th June the Government announced its legislative agenda for the year ahead in the Queen's Speech. There are 11 Bills to be presented to Parliament over the next year and three that have been published in draft form for pre-legislative scrutiny. Employment issues feature repeatedly with tougher penalties for firms flouting minimum wage rules and "abusing" zero hours contracts. Highly paid public sector workers will be prevented from claiming redundancy and returning to the same line of work within 12 months.

Pensions

Although small businesses will not be subject to the pensions auto-enrolment requirements until June 2015 at the earliest, they should nevertheless take note of a recently published Pensions Regulator report.

The report highlights key points for employers to consider to ensure they comply with their auto-enrolment duties. It suggests that employers experiencing difficulties in meeting their auto-enrolment duties should contact the Regulator to discuss their situation. In addition, they should test their payroll systems well in advance of their staging date to ensure they are able to fulfil the auto-enrolment requirements.

Restrictive Covenants

A 12-month non-competition post-termination restrictive covenant in an agreement between a financial adviser and his employer was held to be enforceable in a recent case. Under a "goodwill agreement", the financial adviser had been paid for the goodwill in the client base he brought with him to the firm, but was prevented from working in any capacity in competition with his employer for 12 months after his employment terminated. The court held that the non-competition restriction was enforceable because the goodwill agreement was akin to a business sale agreement into which the parties had entered with equal bargaining power.

CONTACT

If you would like any additional information on any of the subjects discussed in this newsletter please do not hesitate to contact us.

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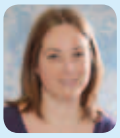

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