Employment news: Flexibly associated?

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During this difficult economic period employers are likely to be considering all their options in managing the cost of their workforces. This means that they are likely to be scrutinizing policies on matters such as flexible working, family related leave and sabbaticals, and assessing whether they are being used in the most cost effective way. The case of Sharon Coleman is an important reminder that employees have a complex array of rights, but that employers still retain considerable discretion as to how those rights are exercised.

When the European Court of Justice decided in July 2008, in the case of Coleman v Attridge Law, that European law on disability discrimination covers discrimination by association with a disabled person, the decision was justifiably hailed as a landmark for the rights of those with caring responsibilities for children and adults with disabilities. The next stage in the process of establishing how far those rights extend, was for the employment tribunal in the UK to consider whether Sharon Coleman, whose claim against her employer Attridge Law gave rise to the case, could continue with her claim without the UK Government having to make any changes to UK law.

The tribunal made a decision in November 2008 confirming that Mrs Coleman can proceed her case without the law needing to be changed. This means that it is now reasonably clear that UK law makes it unlawful for employers to discriminate against employees who are 'associated' with a disabled person. Mrs Coleman alleges that in her case this involved calling her lazy when she sought time off to care for her disabled son and subjecting her to various other detriments such as accusing her of attempting to manipulate her working conditions. The facts of Mrs Coleman's case still have to be considered fully by the tribunal but its November judgment is highly significant for carers.

That said, its implications are not quite as extensive as has sometimes been suggested. What is clear is that employers must not discriminate directly against their employees or harass them because they have caring responsibilities for disabled persons. That would include mocking or insulting them or suggesting that their responsibilities were exaggerated or not genuine. However the case does not go so far as to say that an employer must take special measures to accommodate the employee. Hence a request to work flexibly by an employee who cares for a disabled person, would not, as a result of this case, have to be dealt with any differently from a flexible working request by any other employee and the employer could use same criteria for accepting or rejecting the request. Plainly it must not use stricter criteria or deal with an application more harshly (that would be direct discrimination). But it is not required to be more lenient or to adjust its normal rules because the person for whom the employee is caring is disabled.

In practice employers would be well advised to consider requests of this kind sensitively and with understanding, whilst making it clear, through properly drafted policies, that they are required to balance the competing demands of their employees and not to favor one group over another. It may be however that many employers will welcome applications for reduced working hours whilst business conditions are difficult. Both sides need to remember that a statutory flexible working request means a permanent change to working conditions unless it is agreed at the outset that the change will be temporary or reviewed after a period. And of course the right to request flexible working will be extended from April to parents of children aged 16 and under, in spite of equivocation by the Government on this issue late in 2008.

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