Boundless requests

29 MAY 2014

CATEGORY:
ARTICLE

The current flexible working regime will change significantly at the end of June when the right to make a request will open to all employees with at least 26 weeks' service. At the same time, the procedure for dealing with a request will become far less formal. Is this good or bad news for employers?

The flexible working regime has been in place since 2002 since when the right to make a request to work flexibly, which was originally available only to parents of children 5 and under, has extended by increments to more and more of the employed workforce who have caring responsibilities. The extension of the right to everyone for whatever purpose is therefore on the face of it a somewhat radical departure.

Reasons to say no

The significance of the change is likely to be limited in practice by the fact that the right remains a right to request, rather than a right to be given, flexibility in the way that work is done, or when it is done. One aspect of the new regime that remains entirely unaltered is the set of legitimate reasons for refusing a request. The employer need only point to one of those if it decides that a request cannot be accommodated. These statutory grounds for refusal are comprehensive and include:

- The burden of additional costs.
- Detrimental effect on ability to meet customer demand.
- Inability to re-organise 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.
- Planned structural changes.

Hence a wide range of business reasons can be put forward for refusing a flexible working request without any regard to the reason the employee wants to work flexibly. Also unchanged is the limit on the number of requests an employee can make to one in any twelve month period.

New procedure

The second significant change in the new regime is in the procedure for handling requests. Gone is the prescriptive procedure with set statutory time limits, in favour of an overall time limit of three months (unless the employee agrees to an extension) and an obligation to handle requests 'reasonably'. ACAS has produced both a statutory code of practice and non-statutory guidance to accompany the new rules (both remain in draft form at the time of writing). The code takes a light touch approach, referring to the need to weigh the benefits of the requested change for the employee and the employer's business against any 'adverse business impact' of implementing it and suggesting, rather than positively requiring, that requests are discussed in meetings and that an appeal is offered against refusal. As the Code is a statutory code however a tribunal is likely to look to its suggestions as a benchmark of good practice in deciding whether or not a request has been handled 'reasonably'.

Some employers might find the vagueness of the new regime difficult to work with and might prefer a more structured approach. There is nothing to stop an employer devising its own procedure provided that it does not detract from the legal rights conferred on employees. So, for example, a workplace procedure that declined to deal with requests unless they were submitted in a particular format or imposed a rigid timetable would probably not meet the 'reasonableness' test.

Risky refusals

The real risk to employers in mishandling flexible working requests remains the risk of discrimination claims. Historically, women have been able to show that statistically they represent the majority of people who combine work with caring responsibilities, meaning that refusing a flexible working request is likely to be indirectly discriminatory against women. Hence women have been able to require employers to objectively justify refusing to allow them to work flexibly – a more difficult hurdle to overcome than meeting the statutory tests listed above. Occasionally employers who have met this risk head on by being favourably disposed towards requests for flexible working from women, but not so disposed when the requests come from men, have then found themselves facing direct discrimination claims from men who argue that the employer's policy amounts to less favourable treatment because of sex.

The extension of flexible working rights to all qualifying employees will not remove these risks and may well exacerbate the difficult task of balancing competing requests. The capacity of some employers to accommodate flexible working patterns is limited, for example by the need to provide continuity of service to clients, customers or service users. This means that they will inevitably find themselves involved in 'rationing' requests for flexible working. There are various ways of doing this, including simply operating a first come first served system, but that might be difficult for an employer to sustain if faced with a request for a compelling reason such as the serious illness of a child.

The problem of attempting a value driven approach was illustrated by the recent case of *Solicitors Regulation Authority v Mitchell*. In that case, Ms Mitchell had a flexible working arrangement put in place when her children were not yet at school. Some years later Ms Mitchell acquired a new manager who decided to withdraw the arrangement as Ms Mitchell's children were now of school age and others in the department wanted to work flexibly. Ms Mitchell brought a sex discrimination claim to the Tribunal, comparing her treatment to that of a colleague, Mr Singh, whose flexible working arrangements had been left undisturbed, ostensibly because Mr Singh's son had health difficulties and he worked a long way from home.

The outcome of the case turned on the fact that the Tribunal did not believe the manager's reasons for withdrawing Ms Mitchell's flexible working arrangements and took an unfavourable view of her assessment of Ms Mitchell as an unwilling team player, which it found to be unsubstantiated. The Employment Appeal Tribunal agreed with this approach and also upheld the Tribunal's finding that although his circumstances were not exactly the same as Ms Mitchell's, Mr Singh was a valid comparator in her sex discrimination claim.

Practical points

The *Mitchell* case is a clear example of the dangers for employers of managing competing requests for flexible working by making judgments about whose request is more worthwhile. An employer facing the challenge of too many requests might be better off making it clear from the outset that flexible working arrangements are time limited and will be reviewed after an agreed period, to allow room for others to work flexibly at periods of particular need, although that approach might prove unpopular with employees. In some ways the first come first served approach is the most straightforward and transparent, but can lead to retention problems if employees' requests are turned down.

Employers might also consider reserving some flexible working capacity for employees who are confronted by unexpected occurrences such as serious illness of family members.

Authors

Meriel Schindler

PARTNER | LONDON

Employment

 +44 20 7597 6010

 meriel.schindler@withersworldwide.com

Christina Morton

PROFESSIONAL SUPPORT LAWYER | LONDON

Employment

 +44 20 7597 6654

 christina.morton@withersworldwide.com