KIPPEN CAMPBELL LLP

EMPLOYMENT BULLETIN
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This will be one of a series of Bulletins providing regular updates on developments in Employment Law which should be of interest to all Employers. In addition to employment updates, I have decided to provide links to various online employment resources which many Employers are unaware of. I hope that you will find the Bulletins to be of interest and of practical use.

4 POINTS WE THINK YOU SHOULD KNOW AND WHICH MIGHT AFFECT YOUR BUSINESS/ORGANISATION

1. FLEXIBLE WORKING (1)

Some Employers are having difficulty dealing with flexible working requests particularly since the law extended the statutory right to ask to work flexibly to all Employees once they have had 26 week's employment service.

Many Employers are unaware that the Employee can only make a statutory request once in any 12-month period but also are unaware that a failure to deal with the request reasonably, or at all, can result in an Employment Tribunal application with the cost and time that this entails.

I have attached a link to the ACAS Code of Practice on handling a flexible working request reasonably.

https://www.acas.org.uk/acas-code-of-practice-on-flexible-working-requests/html

This provides clear guidance on what is required but take legal advice if you are in any doubt.

2. FLEXIBLE WORKING (2)

A number of Employment Tribunal decisions have been issued recently which give examples of what can go wrong in flexible working requests.

One of these which I would highlight is a case called Maher v Taylor Engineering and Plastics Limited.

I believe this case highlights a number of issues facing Employers post-Covid (where working from home became the "norm" in many businesses) as well as, in this case, a female internal sales manager for a plastics manufacturer returning to work after maternity leave.

Mrs Maher, towards the end of her maternity leave, wrote to her Employer to request a move to shorter working hours on her return to work. She expressed a preference for working Wednesday to Friday in the office and mentioned daily travel time and childcare issues as the reasons for the request.

The following week the HR Department sent Mrs Maher confirmation that the Company was rejecting her request. The Company stated that it was a "business decision" made because her role "requires a full-time manager".

It was also noted, that despite the Company having a flexible working policy, no meeting was held to discuss the request.

Mrs Maher attempted to change the Company's decision in a request directly to the Managing Director and offered to step down to a sales administration role (which the Company was advertising at the time) if she could do that role part-time.

As an alternative suggestion, she also offered to work full time but two days remotely from home.

However, the Employer stated that her role was full-time, and office based, required "full contact with external clients and internal production departments within the business", needed extensive customer contact and attendance at daily production meetings and was not suitable for home working.

Mrs Maher raised a formal grievance and when that was not resolved in her favour she resigned and took the Company to an Employment Tribunal with claims of indirect sex discrimination and constructive dismissal.

The Tribunal upheld Mrs Maher's indirect sex discrimination claim and observed that many of Mrs Maher's tasks could have been done by telephone or email and whilst some of her duties were better undertaken in person, these could have been "easily accommodated" on the days when she was in the office.

The Tribunal highlighted that "the more serious the impact on the Claimant the more cogent must be the justification for it". The Tribunal was critical of the Employer for giving no serious consideration to her proposal to return to work full-time but working remotely two days per week. The Tribunal also held that Mrs Maher had been constructively dismissed and fixed a Hearing to decide on the amount of her compensation.

This case is a good example of the requirement for Employers to act reasonably and to consider flexible working requests appropriately or they may face serious consequences.

3. WHISTLEBLOWING

In a recent case before the EAT a teacher expressed concerns that he and other teachers were working excess hours and breaching "statutory directed time". The Employment Tribunal held that none of the five "qualifying disclosures" relied upon were protected disclosures so dismissed his detriment claims. He appealed to the Employment Appeal Tribunal who held that the Tribunal had erred in its approach and reiterated a five-stage test to establish if something is a protected "whistleblowing". The five steps are as follows:-

1. There must be a disclosure of information;
2. The worker must believe the disclosure is made in the public interests;
3. That belief must be reasonably held;
4. The worker must believe that disclosure tends to show one of the matters in the relevant section of the legislation e.g. a criminal offence has been committed; and
5. That belief must be reasonably held.

A protected disclosure gives an Employee/Worker numerous rights and a potential Tribunal claim if he or she suffers any detriment. Often in my experience a complaint, like above is a pre-cursor to an Employment Tribunal Claim so it is important you take advice if such a disclosure is made and act upon it appropriately.

4. COVID AND DISMISSAL FOR REFUSING TO ATTEND WORKPLACE (COVID)

In a recent Employment Appeal Tribunal case (Rodgers v Leeds Laser Cutting Limited) the EAT upheld a Tribunal's decision that the

Employee's dismissal for refusing to return to the workplace because of concerns about Covid was not automatically unfair for a health & safety reason.

This case is a good reminder that Section 100 of the Employment Rights Act 1996 has existed for some time (and pre-Covid) and that a dismissal will be automatically unfair if the reason or the principal reason is "health & safety". The exact requirements for which are detailed on the link to Section 100 below.

https://www.legislation.gov.uk/ukpga/1996/18/section/100

The positive outcome for the Employer in "Rodgers" may not always be the case, especially if the circumstances and handling of the case are different.

Therefore, if you are considering dismissing anyone in circumstances that might be health & safety related you should have consideration of this section and take legal advice.

Kind regards
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