

Flex in the City!

The right to request flexible working has been around for some years now; having first been introduced in 2002 and embodied in the Employment Rights Act 1996 at sub sections 80F-I. It was further expanded upon in a number of sets of Flexible Working Regulations that included a formal procedure that must be followed in respect of any requests.

It initially applied to those with children under the age of 6 (or those with disabled children under 18 years old). In April 2007 the right to make a request to work flexibly was extended to carers of adults under the Work and Families Act. Then in November 2007 the Prime Minister announced that this right to request flexible working was to be extended further still to all parents/primary carers of children most likely under the age of 16, although this is still under consultation. This is anticipated to affect around 4.5 million of the population and is likely to come into force as from April 2009. It is a further stride towards the work life balance that we have seen over the last few years in the legislative changes coming through Parliament.

John Hutton the Business Secretary said “...(this) will give a big boost to busy parents who need more help balancing work and family life. It can also help employers who often find they get the best out of mums and dads when they allow them to work flexibly.”

What can be a flexible working request could range from a request to work reduced or more flexible working hours, to job sharing or home working and anything in between. I reiterate the words “request” quite deliberately as the right is to “request” to work flexibly not to have the request granted, nor is it an absolute right to work flexibly. However, do bear in mind that any claims will be considered by a Tribunal Judge who may be part time, along with their two wing members who may also work for the Tribunal Service part time!!! Interestingly too, the BERR (Department for Business Enterprise & Regulatory Reform, formerly the DTI) reports that 91% of workplaces who received requests in the last year approved them paving the way for a mind set that the requests should be granted where possible. In fact we may even start to see many employers offering the right to request to work flexibly to all their employees of their own volition, rather than to just those employees with children.

The request itself is just the first step of the statutory procedure which details a clear timetable of how the request should be considered and what it should include. This includes the employee’s view of where their request may cause difficulty for the Employer. The procedure details the meeting and notification timetable and appeal procedures. There are also prescribed grounds upon which a flexible working request can be turned down by the employer to balance the employer’s perspective. The procedure is therefore not as pro employee as on first blush it may seem.

Something often also forgotten is that there is no right to return back to the same working pattern as before the person worked flexibly – the metaphorical elephant in the corner! This in itself is a further flexible working request and so must be dealt with in accordance with the statutory flexible working request procedure and may not be accepted!! The employer may have already made arrangements to accommodate the request, such as creating a job share, so a change back to the previous work pattern in itself could be problematic. Although any rejection would have to again be on the prescribed grounds. Also worth noting is that employees are only entitled to make one flexible working request in any 12 month period. Beware therefore of an informal style email request as this could invoke the statutory procedure.

The employee has the right to be accompanied at the meetings throughout the procedure and can bring a claim in the Employment Tribunal if the employer has failed to deal with their request or has rejected an application on an incorrect factual basis. The Tribunal cannot order that the request for flexible working be granted but can award up to 8 weeks' pay as compensation and order the employer to reconsider the application. Many flexible request claims are also pleaded as sex discrimination claims for this reason; as the flexible working legislation itself is reasonably toothless. There is a common misconception that flexible working is of itself a 'woman's issue' but this is just not borne out by the statistics. The latest government figures show there are currently 14 million employees working flexibly with 45% of those being men so it really is an issue that affects everyone with children. So remember, the futures bright, the future's all about flexibility!

If you have any queries regarding flexible working or any other employment related issues, please do contact me at Brethertons.

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