HR in the East Midlands

January 2024

In Deep with Darren

Organisations and employees have changed their expectations on working arrangements over recent years. As we continue to adapt to new and hybrid working arrangements, and with the right to request flexible working shifting to first day of employment, Darren's article provides a timely focus on relevant case law relating to flexible working.

This April the Right to Request Flexible Working will be reformed to allow applications from the first day of employment – and making some largely cosmetic changes to the way in which such requests should be made by the employee and managed by the employer.

I have always had an uneasy relationship with this right. It has undoubtedly played a significant role in increasing the flexibility of employers when it comes to accommodating part-time and remote working. At the same time, however, the right itself is really quite limited and much misunderstood. Employees are entitled to request a change in their hours or to work from home and employers are obliged to handle that request in a reasonable way. But there is a difference between handling the request in a reasonable way and making a reasonable decision as to whether or not to grant it.

If the employer listens carefully to what the employee wants to do, considers the arguments for and against and then comes to a conclusion within the required time frame, there is little scope for the employee to argue that it has reached the wrong decision.

The nearest thing we have to an overall test of reasonableness is that an employee can challenge an employer's refusal if it is based on 'incorrect facts'. For example, if an employer refused to let an employee finish early on a Friday because Friday afternoons are a particularly busy time - when in fact they are the quietest part of the week - then the employee could win a claim. The Tribunal could not order the employer to grant the request, but could order them to reconsider it while taking the correct facts into account.

At a recent Employment Tribunal an employee tried to use this provision to argue that the refusal of the employer to allow her to work exclusively from home should be reconsidered. In Wilson v Financial Conduct Authority, the employer had a 60:40 policy under which employees would be expected to physically come into work on at least 40 per cent of their working days. The employee put in a request to work exclusively from home which the employer refused.

A number of reasons were given for the refusal, amounting to the assertion that allowing the request would have a detrimental impact on the work that the employee was doing. It was accepted that the employee was a good performer and that all of the tasks she was employed to do could be done remotely. However, the employer felt that as she was part of the management team, she should be available for face-to-face meetings with her team, attending in-person training sessions, welcoming new staff and being available in the office to provide in-person support to other employees.

At the Tribunal, the employee argued that the employer's decision was based on incorrect facts – there would be no impact on the quality of her work if she worked exclusively from home. She addressed each of the employer's points and argued that in each case, it was exaggerating the impact of working from home and not appreciating how effective remote working could be.

The Tribunal dismissed the case. The judge was satisfied that the employer had been right to identify weaknesses with remote working, saying "It is the experience of many who work using technology that it is not well suited to the fast-paced interplay of exchanges which occur in, for example, planning meetings or training events when rapid discussion can occur on topics". There was also a limitation on the ability of someone working remotely to observe and respond to non-verbal communication that may occur outside of actual meetings, but which nevertheless formed an important part of working with other individuals. This was particularly so for someone who was part of a management team.

A few things need to be noted about the significance of this case. First of all, Tribunal decisions do not set legal precedents. This case says nothing binding about the approach that employers should take when it comes to dealing with requests for remote working. Secondly the Tribunal was not being asked to decide whether the refusal of the employee's requests was the right decision – or even a fair one. It simply had to decide whether the employer's objections were based on a correct understanding of the facts. If the employer refused the request because working exclusively from home would have a detrimental impact on the work being done, then the question for the Tribunal was whether the employer had thought enough about the issue that it could be said that its decision was based on the facts. The issue of whether, given that impact it was proportionate to refuse the request does not arise.

The odd thing about this case was that it was brought exclusively under the right to request regime. Most cases involving refused requests for flexible working also allege indirect sex discrimination, based on the fact that women are more likely than men to have to make adjustments to their working arrangements in order to accommodate caring responsibilities. In an indirect discrimination case, once the basis of the claim has been established the employer has to show that the practice being challenged is a 'proportionate means of achieving a legitimate aim' – that is a high bar for the employer to clear and it involves the Tribunal balancing the needs of the employer against the discriminatory impact of the measure being challenged.

We don't know why the Wilson case did not include a claim for indirect discrimination. It may be that since the employee's need to work at home was not linked to any caring responsibilities, she did not think it was appropriate to claim. In fact, that should not have made a difference. The question is whether women are more likely than men to need to work at home. I would have thought that much the same issues around women needing to be available at home for caring responsibilities would apply to that issue as for part-time work. If so, then the employer would have to justify the practice – irrespective of the reasons why a particular employee made the request.

Another striking issue in this case is how inflexible the flexible working request was. It seems the employee

wanted to work exclusively from home and would not agree to come into the office at all – even sporadically. There may have been good reasons for this, but it is obviously easier for an employer to put forward reasons for a refusal when it is faced with a request as uncompromising as that.

The Right to request flexible working is drafted on the basis that a request is either accepted or rejected, but in my experience, it is much more likely that discussions between the employer and employee will result in a solution that both sides can live with.

That is one of the reasons why the right – whatever my initial scepticism - has been such a success.