

Flexible working

How to deal with employees' requests

On 6 April 2003, the *Flexible Working (Procedural Requirements) Regulations 2002* ('the Regulations') came into force. The Regulations give an employee who has responsibility to look after a child the right to apply for flexible working, namely for a variation to their employment contract in respect of the hours, time and place they work. This is something that parents have been able to do in the past, albeit informally.

New procedure

The Regulations require employers to follow a prescribed procedure in considering such requests:

- the employee's application must be in writing and dated
- the employer must either agree to hold a meeting to discuss the application or agree to the contract variation in writing within 28 days of the application being made
- the employer must notify the employee of its decision within 14 days of the date of the meeting
- the employee has the right to appeal but this must be exercised within 14 days of the notice of the decision being given
- the employee has a right to be accompanied at the meeting to discuss the application or appeal. The companion must be a fellow worker employed by the same employer.

Employer's refusal

An employer may refuse an application if it can establish a good business reason for doing so. The refusal must be in writing and fully explain the reasons. Examples of business reasons include:

- burden of additional costs
- effect on ability to meet customer demands
- inability to reorganise work amongst existing staff
- inability to recruit new staff
- detrimental impact on performance
- insufficiency of work during the period the employee is prepared to work

Employment tribunal

If the employer fails to comply with the prescribed procedure, an employee may make a complaint to an Employment Tribunal which may:

- make an order requiring the employer to reconsider the application for flexible working, and/or
- make an award of compensation up to a maximum of 8 weeks' pay. A week's pay is capped at £260 and hence the maximum an employee could receive is £2,080.

The Regulations underpin existing sex discrimination legislation and an employee may be able to claim indirect sex discrimination if the employer has failed to consider a request for part-time work or flexible work.

An employer can put forward a defence of justification for business reasons to defeat a claim for indirect discrimination. Such a defence would require the employer to show a real need to impose its particular provisions, criteria and practice and that the employer has balanced this need against the disparate impact on the employee.

Overleaf – our advice on how to implement the new regulations

Flexible working continued

Our advice

It is important to remember that an employer is not obliged to vary the employee's contract, but simply to comply with the procedural requirements and give the matter due consideration.

Employers may consider that the compensation awards for failing to follow the prescribed procedure under the Regulations are not significant. However, they should be wary of ignoring the Regulations because of potential indirect sex discrimination claims for failure to consider a request for part-time or

flexible working. There is no cap on compensation for sex discrimination!

Employers should introduce a policy which sets out the procedure and relevant business factors for consideration when requests for flexible working are received. All managers should be made aware of the policy and trained in implementing it. If you have any questions, please contact:

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Pensions crisis

What employers can do about final salary schemes

Robert O'Donovan reviews the current state of final salary schemes in the light of discussions which arose out of our workshop on pensions on 19 February 2003.

Hardly a week now passes without some reference in the press to the sorry state of British pension provision. Stakeholder pensions have hardly been a great success with 90% of stakeholder schemes offered by employers having no members. At the other end of the spectrum, final salary schemes are closing their doors to new entrants and some employers are considering the abandonment of the final salary concept altogether.

Costs of final salary schemes

The reason for abandoning final salary can easily be identified – expense. Schemes were established on the expectation that the fund would grow during a member's life by investment in shares which could be expected to increase in value over the years. Yet over the last three years, and so far this year, share prices have fallen.

When members retired, adequate pensions could be secured by direct investments in 'gilts' (government fixed-interest securities) or by purchasing annuities which would be secured by gilts. With interest rates half what they were ten years ago, it follows that the cost of a given income flow is roughly double what it was.

Taken together, the result is deficit in most final salary pension schemes. The position is made worse by legislation introduced in 1992 which forces the employer to make up the deficit, and by new accounting standards which focus attention on the extent of deficit.

The medical profession has done its bit too. Every year life expectancy increases, and with it the duration of the pension to be funded.

Withdrawing schemes

Small wonder that employers are asking whether the final salary concept can be abandoned. Arguably, now is the time to change, with employees concerned about unemployment and perhaps more willing (or less unwilling) to accept change.

Pensions crisis continued

Extraordinary though it may seem, the best way of eliminating final salary pensions is by a business transfer, provided the transfer can be justified as being for commercial reasons. The reason is that the Transfer of Undertakings (Protection of Employment) Regulations 1981 ('TUPE') fail to protect future pension accrual in final salary schemes on a business transfer and the government has not decided how to remedy this. Accrued rights up to the time of transfer remain secured in the transferor's scheme.

Leaving aside the effect on morale, the concern if an employer withdraws final salary pension rights is the risk of staff alleging constructive unfair dismissal and seeking compensation. On the other hand, there may be ways of withdrawing final salary pension benefits without substantial claims.

First, if staff contracts permit pensions to be withdrawn, there is no breach of contract and no unfair dismissal. Unfortunately, contracts are rarely clear-cut. The power to withdraw may be in the booklet or even buried in the Trust Deed. Has adequate notice been given of the contract term? Quite possibly not. In addition, withdrawal might be a breach of the employer's duty of trust and confidence, in particular where there is an expectation that the scheme will continue. Therefore, unless your staff contracts are unusually specific, it would be unwise to rely on a contractual power to withdraw pension rights.

A better route would be to assume that pensions are a contractual right, and announce to staff that current contracts will terminate in say six or twelve months' time and be replaced by new contracts. The long period of notice should mean there is no breach of the existing contract and may take some of the heat out of the change. Staff would not therefore be entitled to walk out alleging unfair dismissal.

Even so, the termination of a contract with notice and the substitution of a new contract with altered pension rights is still a dismissal. So, to minimise claims the new contract would need to provide money purchase benefits

actuarially estimated to be equivalent to final salary benefits. Thus there would be no immediate loss to staff and therefore no claim for compensation. However, the employer would avoid further increases in contribution rates if, for example, life expectancy were to increase or stock markets fall. On the other hand, while increases would be avoided, the employer would be locked into the current contribution rates which are fairly high in historical terms.

Possibly the new contract could go further and provide for 1% reductions in pension contributions over a period of years until old final salary scheme members and new entrants to money purchase schemes are treated equally in terms of contributions. This would not entirely eliminate the risk that staff might claim unfair dismissal compensation for the automatic reductions as an Employment Tribunal has looked up to ten years ahead in assessing pension loss. Yet given the uncertainties, staff may well hesitate before taking action. If claims were to be brought, employers would at least know within three months of the new contracts being introduced, and could back-track if needed. Employers would still have made the main switch from final salary and stopped their pension commitments increasing further.

There are other aspects of pension provision change to consider as well as those mentioned in this article, but they do not affect the point that the climate may now be right for the abandonment of final salary schemes.

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Our services

As well as advising on the closure of final salary schemes, RadcliffesLeBrasseur can also draft announcements and documentation for pension scheme rules. We can assist employers on queries and disputes in relation to pension rights, early retirement, trustees' duties and other pension issues.



Meet the team

Alex Leslie, partner in the Employment team, answers some questions.

Why did you become a lawyer?

I cannot remember, but I decided when I was 14 or 15, many moons ago! If I had not become a lawyer I would have become a sailor but I thought the law would be more comfortable, and I realised that I needed to earn a living before I could sail the boats I really wanted to sail.

What led you to specialise in employment law?

My grandfather was a Trade Unionist in Scotland so it was assumed I would support the workers but I actually advise both employees and employers. I became interested in employment law at university - it seemed an area that was changing and would continue to change and be fun. Fortunately, I have continued to enjoy the subject.

What was the best moment in your career?

Probably going to the House of Lords for an appeal when I was in my first weeks of training and all downhill since then! I have worked on some fascinating cases which in some instances have changed the law. In particular, I am proud to have been involved in the first case to go the Court of Appeal on the issue of whether someone could be sued for stopping a cheque. I am glad to report we won! I have also been involved in healthcare law which has produced some very interesting work as well.

Is it true you once tried to join the Turkish navy?

No, but we once lost our engine as we were mooring in Turkey, had to hoist sails and sail out double quick, could not raise anyone on Ch 16 until we heard Turkish warship 'Sultaniye' and they steamed up to us and sent across 3 engineers to fix the engine. By then no doubt the whole eastern Med was listening in. The charter company sent out an engineer who replaced the snapped control lint to the engine.

Increases in statutory awards

Annual increases in redundancy payments and unfair dismissal awards by Employment Tribunals are as follows:

- Maximum week's pay for purpose of calculating basic or additional awards of compensation for unfair dismissal or redundancy payments increased from £250 to £260. This takes the maximum statutory redundancy payment to £7,800.
- Compensatory award for unfair dismissal increased from £52,600 to £53,500. In an ordinary unfair dismissal claim, this produces a new maximum (basic + compensatory award) of £61,300.

The new limits apply where the 'relevant date' (i.e. the effective date of termination) falls on or after 1 February 2003.

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Workshop news

We are planning the following workshops:

Data Protection – a practical approach

12 June 2003

Harassment and Discrimination

18 September 2003

Annual Employment Seminar

November 2003 – date to be announced

For more information on workshops, please contact:

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If you require any further information regarding the issues mentioned in this bulletin please contact Robert O'Donovan or Kerry Scott.

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