Statistics show that 63% of full-time employees work flexibly already with the remaining 37% having no flexibility whatsoever. Of those who do not work flexibly, 64% would like to do so.

There are many reasons that employees would like to work flexibly such as work/life balance, reducing commuting time, health concerns, to enable them to care for children or dependants, other work commitments and leisure or study time.

An employer who allows flexible working is more likely to attract and retain a diverse workforce which is loyal and motivated.

Furthermore, employees have the statutory right to request flexible working provided they have 26 weeks continuous service and have not made a request in the last 12 months. Therefore, such a request must genuinely be considered by an employer, particularly as there is also the risk of a discrimination claim if it is rejected without a rationale.

Although the current statutory procedure is now far less prescriptive than in the past, the employee does need to be notified of the outcome within three months of making the request.

Below we have set out some top tips for dealing with flexible working requests:

- Ensure that you have an up to date policy in place which staff are aware of to ensure that all requests are dealt with consistently.
- If a request can be accepted, forgo the procedure and simply advise the employee of this.
- Do not reject requests due to a “technicality” but instead advise the employee of the issue and encourage them to re-submit their request.
- Ensure that all requests are genuinely considered and start from a positive position with a view to overcoming possible issues.
- Bear in mind that you may need to consider the position under the Equality Act 2010 (and protected characteristics).
- Rather than rejecting the request, consider a trial and/or whether an alternative arrangement may suit both parties
- If the request is rejected, ensure that it is for a genuine reason which not only satisfies one of the 8 statutory prescribed reasons but can be demonstrated with supportive evidence.
- Set out fully and clearly the reasons for a rejection ensuring that the facts relied upon are correct.
- Keep a record of decisions to help ensure that there is consistency across the business.
- Advise those taking family leave of their right to request flexible working and encourage them to make any request at least three months prior to their proposed return.

The HR & Employment team at Clarke Willmott LLP are able to assist with review and drafting of flexible working policies as well as the process itself.

Welcome to another edition of Employment Matters.

Kevin Jones
Head of Employment & HR

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Gig Economy: Where are we now?

Background
In the past couple of years there have been several important cases considering the employment status of individuals working in the gig economy. In general, these cases provide an indication that the majority of individuals working in the gig economy are workers as opposed to self-employed independent contractors. However, it has become increasingly clear that the current law does not provide the much needed clarity on this and there have been calls for reform in light of modern ways of working, including the gig economy.

The Government has shown a willingness to consider reform by releasing a consultation specifically aimed at employment status. The Government has also acknowledged that there should be clearer tests to distinguish the employment statuses and that the level of control exercised by the employer should be given greater importance when determining worker status. This is in contrast to the approach of the Courts, which has seen cases turn on whether or not the individual is obliged to perform the work under a contract personally. One thing that is clear is that both organisations and individuals would benefit from clearer tests on employment status to ensure that they know their rights and obligations under the law.

What is the gig economy?
The term ‘gig economy’ refers to the prevalence of companies using self-employed individuals or freelancers for short-term assignments. In the gig economy, individuals are able to supply their skills across multiple markets and with many organisations rather than just one. Technology has facilitated the gig economy’s expansion into the world of apps which has made it even more accessible. Many people working in the gig economy now access individual assignments quickly and easily via companies’ apps.

There are now around 1.1 million people working in the gig economy in the UK and this figure is only set to rise. The gig economy’s popularity might be due to its flexible nature and how this can benefit both individuals and companies. It allows individuals to have control and flexibility in their working life and enables companies to effectively manage the ebbs and flows of the labour market.

Worker or self-employed independent contractor?
Gig economy organisations may find it more attractive to employ individuals on a self-employed basis as the individuals will only have the rights given to them under their contract to provide services and will not have any statutory rights. However, increasingly gig economy organisations are labelling individuals as self-employed but treating them as workers without giving them the accompanying statutory rights, such as the national minimum wage, working time protection and holiday pay. The current legislative tests for employment status are not sufficiently comprehensive to provide an answer to whether these individuals are workers or self-employed contractors and it has therefore fallen to the Court to determine this on a case by case basis.

Cases
The case of Uber B.V and others v Aslam and others brought the gig economy into the public consciousness in 2017 as it involved a household name. It was decided that the claimant taxi drivers were workers rather than self-employed in spite of the contractual documentation between Uber and the drivers insisting otherwise. Uber is set to appeal this decision in October 2018. Several more cases followed this decision and the vast majority of the individuals concerned were held to be workers.

However, the case of Independent Workers’ Union of Great Britain (IWGB) v Roofoods t/a Deliveroo (“Deliveroo”) shook the feeling of certainty that individuals in the gig economy were workers. It was held in this case that the claimant cycle couriers were genuinely self-employed. This was decided on the basis that the couriers’ almost unconditional right to substitute another person to carry out their work meant that they were not under an obligation to carry out the work personally which is a characteristic of worker status.

2018 saw the conclusion of Pimlico Plumbers Ltd and another v Gary Smith in the Supreme Court. In this case the Claimant’s obligation to perform the work personally was sufficient to constitute worker status. It is clear that the Courts place a great deal of importance on the extent to which an individual must perform work under the contract themselves.

It is important for organisations to be confident that they are assigning the correct status to the individuals working for them, as the consequences of denying a worker their rights can be severe. The case of King v Sash Window Workshop confirmed that in such circumstances an organisation may be required to pay back pay which in this case was a significant sum - from the beginning of the individual’s employment.
Mental health support
More should be done to help employees who struggle with mental health in the workplace

Over recent years, mental health has become a prominent issue to tackle in the workplace. The Mental Health at Work Report 2017 found that approximately 1 in 4 people in the UK will experience a mental health problem each year – the symptoms can include anxiety, depression, (or a mixture of the two), phobias, OCD, panic disorder, and post traumatic stress disorder (PTSD). More life-long mental health issues may also have an impact on some people such as bipolar disorder, psychotic disorders and personality disorders.

Impact of mental health in the workplace

A recent study by the mental health charity, Mind, revealed that 48% of British workers have experienced a mental health problem in their current job.

The Health and Safety Executive published statistics in 2017 that showed that in 2016/2017 the UK lost 5 million working days due to work related stress, depression or anxiety. This could be greatly reduced if employers do more to support their staff at an earlier stage.

Resources available for employers

There is already a wealth of information available online and, only this month, Prince William announced the launch of a new website to support mental health in the workplace. The website has been created in partnership with Mind and gives details of information, resources, and training designed to help managers help employees who may be struggling at work.

So what should employers be doing?

**TALK**
- Send a clear message to staff that mental and physical health has the same priority.
- Use initiatives such as The World Mental Health Awareness Day (10th October 2018) as a platform to engage staff of the topic of mental health.
- Introduce well-being days that allow staff to seek support for both physical and mental well-being – e.g. financial advice clinics, reflexology, meditation, healthy-eating, fitness and exercise events.
- Discuss any particular cases or trends that arise concerning mental health and agree suitable strategies and action plans to support.

**TRAIN**
- Train managers on how to spot mental health issues and how to support their staff.
- Introduce Mental Health First Aiders who focus on supporting these issues and warning signs within the workforce. ½ day to 2-day courses are available from organisations such as St John’s Ambulance.
- Provide stress and resilience training to employees to help them deal with stress, work/life changes and mental health.
- Train managers on the formal business policies and procedures to ensure that these are followed correctly.

**TAKE ACTION**
- Review job designs, work environments, patterns of work, and general expectations of employees to ensure that, where possible, you minimise potential workplace stress triggers.
- Introduce a Stress Policy to provide process guidance to managers and staff. Ensure that there are also other robust procedures that deal with issues such as bullying and harassment, absence at work, grievance and performance problems.
- Create the right environment and support culture.
- Consider external support options such as Employee Assistance Programmes (EAPs) and access to trained Counsellors.

We can help you!

If you would like help in designing and/or delivering mental health line manager/employee training, drafting your Managing Stress Policy (or any other policies), or with case-specific advice and support, please do get in touch.

Please contact Bex Sinclair, Head of HR Consultancy.
(Tel: 0345 209 1831 or Email: bex.sinclair@clarkewillmott.com)
Employers must show dishonesty to defeat a victimisation claim

The case of Saad v Southampton University Hospitals NHS Trust UKEAT/0276/17/JOJ determined that to defeat a victimisation claim an employer will need to show that information given in connection with the protected act in question was false and was given dishonestly. The employer must be able to show that the Claimant knew the information was false at the time of giving it and it was therefore given dishonestly. If the Claimant believed the information was true at the time it was given, they have not acted dishonestly in giving that information.

Victimisation

Victimisation occurs where a person (A) subjects another person (B) to a detriment because B has done, A believes B has done or A believes that B may at some point do a protected act. ‘Protected act’ involves bringing Equality Act 2010 (EqA 2010) proceedings, doing anything (including giving evidence) in relation to such proceedings or making an allegation that there has been a breach of the EqA 2010.

An employer can defeat a claim of victimisation if it can show that the act in question was not a protected act and the Claimant therefore cannot rely on it to claim victimisation. It can do this by showing that the information given in relation to the act is false and, if so, the act is not a protected act if this information was given in bad faith. However, if the information was false but given in good faith or true but given in bad faith, a claim of victimisation may be brought.

Facts

After nine years of training to be a cardiothoracic consultant, the Claimant was informed that he had failed his training. The reason given was that the Claimant had made several mistakes in the course of his training. Shortly after this, the Claimant raised a grievance in which he claimed that an incident had occurred a number of years before where his trainer at the time had made jokes about his ethnic origin to others while he was not present. The Claimant was then signed off work due to work related stress. He informed the Respondent, his employer, that he would withdraw the grievance if he was allowed to return to work in a different position. The Claimant never returned to work and his fixed term contract expired. The Claimant claimed he had suffered victimisation and detriment due to making a protected disclosure.

Decision

The Employment Tribunal rejected the Claimant’s claim for victimisation on the basis that, although the Claimant believed his trainer had made the comments he claimed, it was not reasonable for him to have held this belief. It also held that he had raised the grievance for his own benefit and it was therefore not done in good faith.

On appeal, the Employment Appeal Tribunal overturned this decision. The test that should have been applied is whether the act was done in bad faith and the crucial factor to consider in determining this is whether the Claimant acted dishonestly. Motivation can be relevant when assessing whether the Claimant has been dishonest, but placing too much weight on this could dissuade an employee from making a complaint in the first place which is not the purpose of the law.

ACAS guidelines on referencing

ACAS have published new guidance for employers and employees about the rules around employment references. References are obviously an invaluable tool for employers to ensure they recruit effectively and choose the right candidates for their vacancies. References are an area with some common misconceptions. This has led to ACAS publishing guidelines to clarify any potential issues.

Firstly, there is usually no legal obligation to give a reference however where a reference is given it must be fair and accurate (some, as those regulated by the Financial Services Authority, are required to give references by law). Employers who ask for references must also handle them fairly and consistently. In most cases employers can choose whether they wish to supply a reference or not and how much information they wish to provide. Therefore, a reference could range from basic information about the role that was performed by the employee through to a very detailed and comprehensive reference. Generally employers should have a policy to help them handle requests detailing what information will be revealed.

The reference can include a range of information such as;

- Basic facts such as employment dates.
- Answers to questions that the employer has specifically asked (e.g. absence levels).
- Details about the applicant’s skills and abilities.
- Detail about the character, strengths and weaknesses of the applicant. Importantly, a reference must be a true, accurate and fair reflection of the applicant and when opinions are used they should be based on fact. If an applicant was to be unhappy about the reference they can ask for a copy and potentially claim damages in court if they can prove that it was misleading or inaccurate and resulted in the withdrawal of a job offer.

Can employers give a bad reference?

If an employer chooses to give a reference, it must be fair and accurate. Therefore, references must not include misleading or inaccurate information and should avoid giving negative subjective opinions that are not supported by facts.

Some useful guidelines for employers include:

- Employers must only seek a reference from a job applicant’s current employers with their permission.
- If a conditional offer is made then it can be withdrawn if the job applicant doesn’t provide satisfactory references.
- Employers who are unable to obtain a reference from a nominated referee should inform the job applicant and consider whether there are any other suitable references that could be obtained.

Please get in contact with our team if you need assistance with any queries.
New legislation introduces parental bereavement leave and pay

The Parental Bereavement (Leave and Pay) Act 2018 achieved royal assent on the 13th September. The act will enable employees who have lost a child who is under the age of 18 (or those who suffer a stillbirth after 24 weeks of pregnancy) to two weeks away from work. The act is expected to come fully into force in 2020. This is the first law of its kind within the UK and aims to provide support to those affected by child mortality.

Employed parents will be able to claim for pay during this period, subject to meeting eligibility criteria. Further detail is expected with the publishing of regulations detailing the exact mechanic of the way in which the Act will function. Importantly this is expected to include detail of the eligibility criteria for employed parents to be enable them to claim pay during the leave period.

The act could also affect some existing legal rights to parents in this position. Currently pregnant employees who suffer a stillbirth after at least 24 weeks pregnancy are entitled to 52 weeks statutory Maternity Leave and (if eligible) up to 39 weeks of statutory Maternity Pay or Maternity Allowance. Similarly, if a child is born alive but dies during the mother’s Maternity Leave then her right to the remainder of this leave is not affected. Employed father’s or partner’s can still take Paternity Leave and pay (subject to eligibility) if the baby is stillborn after at least 24 weeks pregnancy or if the baby dies during within the Paternity Leave period (up to 8 weeks’ following birth). The new Act is anticipated to come into force by 2020.
Does giving notice always amount to a resignation?

In the case of East Kent Hospitals University NHS Foundation Trust v Levy the Claimant was working as an administrative assistant in the trust’s records department and had also received a conditional offer for a position in the radiology department. The Claimant proceeded to hand in a letter stating “please accept one month’s notice from the above date”.

However, the conditional offer was withdrawn and the Claimant attempted to revoke her ‘notice of resignation’. Once the Employer had refused and the Levy’s employment had ended she brought an unfair dismissal claim. The employment tribunal held that the notice was ambiguous as the letter was not necessarily referring to resignation and this conclusion was confirmed by the Employment Appeals Tribunal (EAT).

In this instance the Tribunal found that the Trust had believed the notice to be merely notice that the Claimant was moving from the records department to the radiology department and not of resignation. Importantly, the wording was interpreted objectively. The Trust attempted to rely on the wording of the Claimant’s later retraction of her ‘notice of resignation’ although the Employment Appeals Tribunal warned against taking account of subsequent events. The EAT stated that this could only be done where the subsequent event genuinely explains the intention and found that it did not in this case.

This case was an unusual set of circumstances as the employee was moving internally when her original department did not want to continue employment once the conditional offer was revoked.

For more information or further assistance with any employment termination or redeployment, please contact a member of the team.