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Career Progression and the duty of care towards employees working from home

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Working from home statistics

In the UK, 34% of the adult workforce worked from home at least some of the time before the pandemic.

13% worked from home all of the time, and 6% worked from home most of the time. (YouGov, Feb 2022)

Post pandemic, 51% of employees say that they have flexible working arrangements with their current role, with 57% of employers saying that they would offer employees the opportunity to work from home on a regular basis.

Women (55%) are more likely than men (47%) to have flexible working arrangements (CIPD report *"An Update on Flexible and Hybrid Working Practices"*, April 2022)

Issues – Working from Home

Flexible Working Requests

Place of work and changes to terms and conditions

Health & Safety

Discrimination

Proximity Bias & a Duty of Care?

Proximity Bias

- Proximity Bias is the practice of employers favouring employees (consciously or unconsciously) who are in the office over those that work from home some or all of the time.
- Employers need to be careful not to show proximity bias when considering which employees to give work, training opportunities or promotions to.
- In a survey from 2021 by the 'Working from home during the COVID-19 lockdown project', only 57.4% of managers who were asked said that flexible workers in their organisations were just as likely to be promoted as their peers.

Employer Duty of Care

- A Legal Duty of Care?
 - Contract of Employment
 - Express Terms
 - Implied Terms
 - Discrimination
- Maximising Inclusion?



An obligation to provide work?

- It may be an implied term of the contract that the employer is obliged to provide the employee with work – *William Hill –v- Tucker 1998* and *SG & R Valuation Services –v- Boudrais 2009*

- Considerations:-

Terms of the contract

Nature of the role

Need for employee to exercise their skills/contacts

- Remedy – constructive unfair dismissal

Implied Duty of Trust and Confidence

- The Duty
 - "The employer must not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee"
- Intention not required but still an important consideration
- Circumstances where it might apply
 - Decision not to award bonus/pay rise – if wholly unreasonable
 - Singling out an employee for different treatment on capricious grounds – *Transco –v- O'Brien 2002*
 - Discrimination – discriminatory acts may also breach the implied term
- Limitations
 - Not an obligation to act reasonably
 - Restrictions on the extent that it gives rise to positive obligations on employers - *University of Nottingham v Eyett and Another 1999* "the implied duty of mutual trust and confidence did not include a positive obligation on an employer to advise an employee on how best to exercise valuable rights under the employment contract... the university was not in breach of contract in failing to advise the complainant of the financial benefits of deferring his retirement".
- Remedy – Constructive Unfair Dismissal

Discrimination - Indirect

- A discriminates against B if A applies a provision, criterion or practice (PCP) to B which is discriminatory in relation to a relevant protected characteristic of B's; and:-

A applies PCP to others not sharing B's characteristic;

It puts B, and others with whom he shares the characteristic, at a particular disadvantage in comparison to others; and

A cannot show it is a proportionate means of achieving a legitimate aim.

- Identify the PCP – EHRC Employment Code “any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions.”
- One –off discretionary decisions – *British Airways -v- Starmar 2005*
- Decisions re work allocation/promotion as PCP's?

Discrimination – Arising from Disability

- Discrimination arising from disability
 - A treats B unfavourably because of something arising in consequence of B’s disability; and
 - A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
- What is the “something”?
 - Inability to attend the place of work – *Hemati –v- Sportec (UK) Limited 2012*
- What is the unfavourable treatment?
 - No promotion
 - No pay rise/bonus
- Lack of knowledge of disability is a defence (actual and constructive)

Discrimination – Reasonable Adjustments

- Reasonable Adjustments - Employers have a duty to implement reasonable adjustments where a PCP puts a disabled person at a substantial disadvantage compared to persons who are not disabled.
- Identify the PCP
- Substantial disadvantage = more than minor or trivial
- Reasonable adjustments
 - Working from home
 - Performance criteria/Promotion criteria
- Lack of knowledge of disability is a defence (actual and constructive)

Ways to maximise Inclusion (1)

Invest in software such as Microsoft Teams and Zoom so that colleagues can keep in touch with one another and attend meetings whether they are working in the office or not.

When conducting hybrid meetings over video conferencing software, make sure that there is the opportunity for colleagues working from home as well as those in the office to contribute. This will require the chairperson to have firm control of the meeting.

Ensure as far as possible that all materials required to do the relevant job are accessible online via the company intranet as well as in the office.

An objective system for the allocation of work, to avoid work only being allocated to people in the office.

Ways to maximise Inclusion (2)

Make sure that training opportunities can be accessed by colleagues working from home through video-conferencing software as well as office colleagues.

Hold regular diarised catch ups with their employees working from home to check in on what they are getting on and ask whether they need support.

Hold social events so that all colleagues in a team can come together and socialise, improving staff morale.



Any questions



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