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White Paper – HR Law Conference

In the spotlight of Covid-19, how do you contend with employee requests to work 100% from home; they've shown they can do it, but it just isn't what you want right now?

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Case study



Jackie is a PA/Executive Assistant to a board member, Tom, for whom she has worked for five years. Tom doesn't know how he would manage without Jackie as she is his right-hand person, anticipating his every move. Jackie has received the highest appraisal score for the last four years, with "exceeds expectations" ratings each year.



Since lockdown, both Tom and Jackie worked exclusively from home, and apart from a few initial hiccups with technology, it has worked successfully and seamlessly. Tom is back in the office now four days a week and although he asked Jackie to return, she was initially hesitant. She came into the office for one day but has now asked to work permanently from home.



Tom wants to refuse because he feels they work better together when he can see her and call out instructions from his office. He is prepared to let her work from home one day, and very occasionally twice a week, but not five days a week.

Case Study



In Jackie's request, she has indicated that her husband is extremely vulnerable health wise as he has severe COPD, and was required to shield during lock-down. She feels very anxious about the commute as when she tried it, the trains were busy with many commuters not wearing masks. Jackie thinks that there will be no impact on the business as it has worked successfully for six months and, if anything, allowed Jackie to work longer hours as she had no commute.



Tom is adamant that Jackie must return, and has asked HR to work out the best reason for refusal.

Refresher on flexible working rights



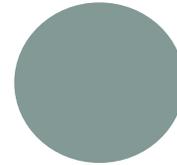
Eligibility

- Employee
- 26 weeks' continuous service
- Only one request in any 12-month period



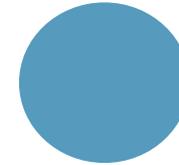
What type of flexible working?

- Wide-ranging
- Changes to:
 - Hours
 - Times
 - Place



Process

- Request must be in writing
- Must state that application is made under statutory procedure
- Outline the change required, and when the change is to take effect
- Explain what effect the change will have on the workplace and how that should be managed



Employer's obligations

- Deal with request in a reasonable manner
- Notify the employee of decision within 3 months of the application
- Refusal can only be based on permitted grounds
- Appeal – not mandatory but recommended by Acas

Case Study – Reasons for refusal of request

HR are pushing back on the refusal as none of the permitted categories are appropriate, particularly because Jackie has proved remote working can be done equally effectively

- ✓ Burden of additional costs
- ✓ Detrimental effect on ability to meet customer demand
- ✓ Inability to reorganise work among existing staff
- ✓ Inability to recruit additional staff
- ✓ Detrimental impact on quality
- ✓ Detrimental impact on performance
- ✓ Insufficiency of work during the periods the employee proposes to work

Tom has suggested that it is refused on the broad ground of “Detrimental impact on quality” and as a disincentive to work remotely, tell Jackie that her salary will be reduced by 20% because she has no commute

Case Study – the employee’s response to refusal



Jackie has submitted a grievance alleging breakdown of trust and confidence, disability discrimination on the grounds of associative discrimination, indirect sex discrimination, bullying by Tom, which has caused her stress and anxiety. She has also told HR that she is sick with anxiety and has now been signed off sick from her GP for one month.

Managing flexible working requests

Entrenched positions

- No win/no win situation
- Post lock-down, harder to refuse requests where remote working was successful

Risks

- Non-compliance with statutory regime: limited remedies of up to 8 weeks' pay (capped)
- Most claimants bolt on discrimination claims
- Covid-19 has opened the door to more wide-ranging claims because of potential disability/associative discrimination, and the number of vulnerable groups who are more at risk of contracting the virus
- However, there is no right to reasonable adjustments as a result of associate discrimination (Hainsworth v. Ministry of Defence)
- Health and safety
- Reputation risk
- Creating precedent
- Breach of contract and repudiatory breach for reduction in salary

Approach

- Take a step back and look at situation objectively – ask others how the reaction lands
- Enter dialogue
- Don't just reject arrangements, propose alternatives
- Opt for a temporary arrangement or trial period
- Be reasonable – see the bigger picture and wider impact (keep a valued employee who will feel loyal)

Questions?

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