



WELCOME

Employment – HR Forum



SA
LAW



HELLO

CHRIS COOK

Head of Employment & Data
Protection

Partner

Chris.Cook@salaw.com



Where are we now?

Furlough

- 9 million people were furloughed at its peak
- Estimated 1 million people still on furlough when scheme ended

Return to office

- The Government is no longer instructing people to work from home (for the time being!)
- 79% of senior business leaders said it's likely people will never return to offices at the same rate as before the pandemic (BBC Survey)

Mental health in the workplace



- Stress and mental ill-health were among the most common causes of long-term absence (CIPD: Absence Management Survey)
- 25-35% of senior managers do not consider stress, anxiety or depression a serious reason for absence (AXA PPP Healthcare)
- Approximately 1 in 4 adults have been diagnosed with a mental illness, with 1 in 5 experiencing mental health issues without diagnosis (Craig R, Fuller E, Mindell J Health Survey for England)

Risks of neglecting mental health

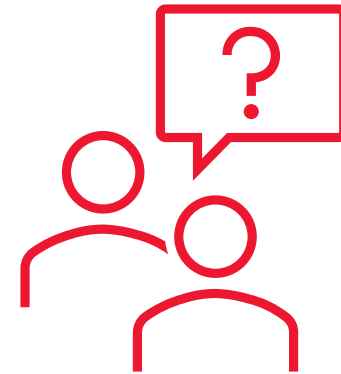
- Financial
 - 91 million working days are lost in the UK each year, costing £30 billion (ACAS: Promoting positive health at work)
 - The average cost of mental health related absence per employee per year is £522 (CIPD: Absence Management Survey)
 - The average cost of making reasonable adjustments is just £75 (Disability Rights Commission)
- Negative PR
- High turnover of staff
- Potential personal injury claim
 - All employers have a common law duty to take reasonable care for the safety of their employees
 - General and special damages

Disability discrimination

- A person has a disability if –
 - (a) they have a physical or mental impairment, and
 - (b) the impairment has a substantial and long-term adverse effect their ability to carry out normal day-to-day activities
- A person who is suffering from work-related stress or mental ill health may therefore be "disabled"
- EHRC Code – "mental impairment" is intended to cover "a wide range of impairments relating to mental functioning, including what are often known as learning disabilities"

What can you do?

- Stress and mental wellbeing policy
- Train staff
- Mental health plans
- Mental health champions and first aiders
- Good working conditions
 - Home working issues?
 - Check in regularly
 - Make sure homeworkers work collaboratively
 - Organise events all staff can be involved in regardless of location



How to manage long- term sickness

- Recent trend – mental ill health much more likely to be a causal factor due to Covid
- Deal with matters formally when absence levels present an unacceptable level of disruption to the business
- Follow your sickness absence procedure

Case study

- Mike is a 42 year old estate agent for a small firm
- History of stress, anxiety and depression
- Company has always given Mike time off for his mental health when needed
- Asked for a 'few days off' but that was 3 weeks ago and he hasn't returned
- Has sent a few texts saying 'be back soon' but he won't answer calls
- Busy time for company and are struggling to complete viewings
- Mike is a good estate agent when at work, but his absence causes difficulties for the small team

Suggested procedure for long-term sickness

1) First formal meeting

- Reasons for absence
- Expected return date
- Discuss reasonable adjustments
- Alternative options

2) Obtain medical evidence

3) Further meeting to discuss medical evidence

- Write to employee setting out nature of meeting
- Consider arrangements – Neutral venue? Right to be accompanied?

Dismissal for ill-health

1) Follow previous steps

2) Write to employee

- Inform you are contemplating dismissal + invite to meeting
- Outline length of absence, impact on business, summarise medical advice

3) Meeting

- No decisions made before meeting
- Minutes
- Consider adjustments, availability of alternative roles
- Listen to mitigating circumstances
- Consider adjournment if necessary

4) Allow opportunity to appeal

Instructing Occupational Health



- Rather than seeking medical information generally, it should be in relation to:
 - Ability to perform current job
 - Viability of redeployment to other available positions
 - Making reasonable adjustments for current role



- Be as detailed as possible in giving instructions
 - Better quality report



OCCUPATIONAL
HEALTH SERVICES

DEBBIE HOLDER

Director of Occupational Health Services Ltd.

www.occupationalhealthservicesltd.com

New website, due to go live soon...

www.ohsltd.uk

Debbie@ohsltd.uk / 07790807088



When to refer to OH

- Short term absence (frequent)
- Long term absence (>4 weeks with no foreseeable RTW date)
- Health affected by work (e.g. work-related stress)
- Prolonged adjustments
- Underlying health issue already
- Performance/behaviour changes or concerns for welfare
- Fitness to attend disciplinary or grievance meeting/engage in the process
- Individuals working with vulnerable people and concerns on psychological fitness
- An opinion on disability
- Advice on possible ill-health retirement/dismissal



OCCUPATIONAL
HEALTH SERVICES



Getting the best from a referral

- Understand where you are going with the case/why you are making the referral
- Say where you plan to take the case managerially
- Be clear on what you've already done to help the individual and what (if anything) you can do further
- Don't ask a question if you don't know what to do with the answer
- Frame your questions with your plan in mind
- Phone OH if you want advice on making the referral
- GP report Vs OH report



OCCUPATIONAL
HEALTH SERVICES



Referral form – forms part of OH assessment

- Relevant background detail – organization’s perspective, otherwise we just have the employee’s perspective
- Role /job description summary
- Current problem/effect on work/sickness data
- Employee’s concerns
- Concerns about performance/disciplinary warnings
- Context –grievances/relationship difficulties
- Actions taken to address issues
- If you can’t accommodate certain adjustments – tell us
- Questions to be answered by OH practitioner
- “Off the record” conversations



OCCUPATIONAL
HEALTH SERVICES



What the report should include and what it will help you to do

- Purpose/use of report
- Summary of relevant health history and nature of current health issue
- Diagnosis (if consent given)
- Treatment
- Prognosis if known
- Opinion on fitness for work
- Advice on possible adjustments (temp/perm) or support that may help
- Advise individual on where to access other support/self-help strategies



OCCUPATIONAL
HEALTH SERVICES

SA
LAW



HELLO

BETH LENG

Employment Partner

Beth.Leng@salaw.com



Flexible working and the pandemic: measuring the impact

- “Agile working”
 - flexible working rebranded
 - flexible working for men
- Increase in uptake
- Greater diversity
- Changing expectations

~~‘women’s issue’~~



Flexible working and the pandemic: measuring the impact

- Focus on effective flexible working
 - Profile
 - Policies
 - Policing
- Flexible working fatigue
- Sustainable flexibility?
- Closer scrutiny of cases where requests are rejected

Flexible working

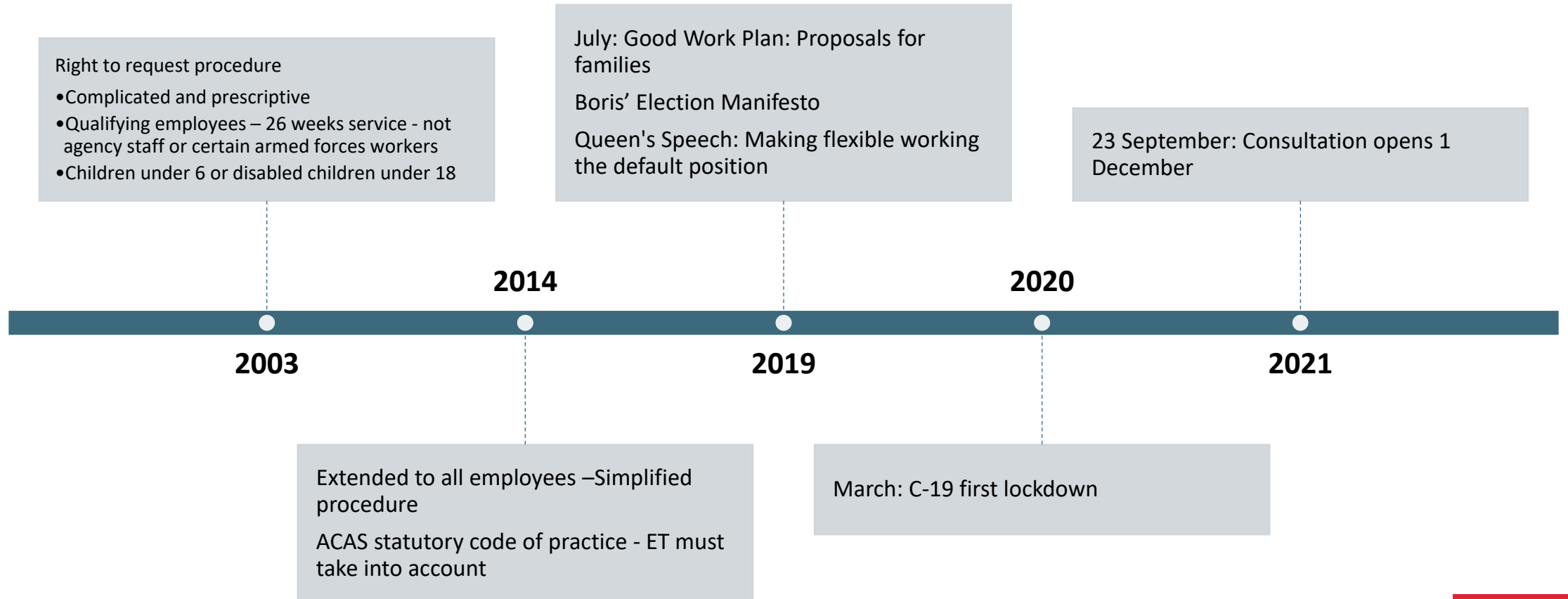


Now and Next



The risks of getting it wrong

20 years on: the direction of travel

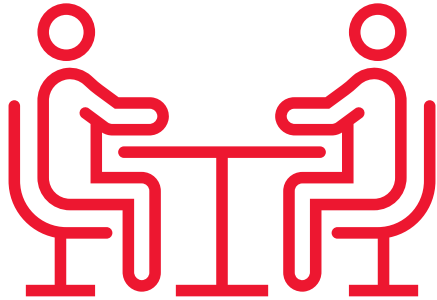


Now: the right



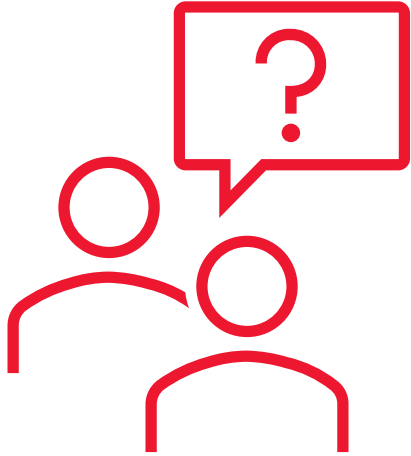
- Simple procedure
 - all employees (not agency workers and some armed forces workers)
 - 26 weeks' service
 - request for
 - where
 - how
 - when
 - include temporary arrangements

Now: the right



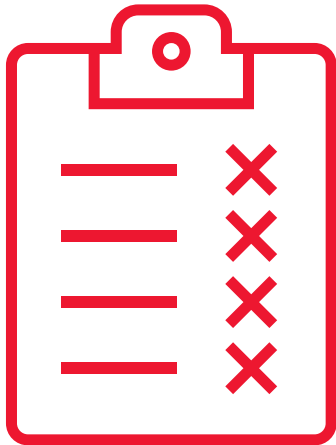
- Valid request
 - in writing
 - dated
 - state that it is being made under the regulations
 - specify change requested and explain the impact they may have
 - any previous requests
- meeting
- right to be accompanied?

Now: limits



- Duty to act reasonably
- 3 months
- 8 refusal grounds
 - The 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
 - Planned structural changes
- Appeal?

Now: remedies



- Rights to complain
 - fails to deal with their application in a reasonable manner
 - fails to notify them of the decision on their application within the decision period
 - fails to rely on one of the statutory grounds when refusing their application
 - bases its decision on incorrect facts
 - treats the application as withdrawn when the grounds entitling the employer to do so do not apply

Now: remedies (or lack of)



- Tribunals can
 - review the procedure followed by the employer
 - consider whether the request was taken seriously
 - consider whether the decision was based on correct facts
 - consider whether the reason given falls within the permitted grounds
- Tribunals cannot
 - question the commercial rationale or business reasons
 - substitute its own view
- Regulations remedy
 - an order for reconsideration
 - damages of up to eight weeks' pay – subject to the statutory cap the maximum being £4,352
- Unlawful detriment and dismissal claims
 - uncapped
 - no QS needed

Now: the real risk



- Indirect discrimination claim
 - Sex
 - Disability
 - Age
 - Religion/belief
- Uncapped damages claim
- Injury to feelings awards
- Negative publicity
- Floodgate claims

Indirect discrimination: a quick reminder

- A applies to B a provision, criterion or practice (PCP)
 - All staff have to be in on Monday and Friday
 - All sales staff must work full time
 - Everyone must work one weekend in four
- B has a protected characteristic
- A also applies (or would apply) that PCP to persons who do not share B's protected characteristic
- The PCP puts or would put persons with whom B shares the protected characteristic at a particular disadvantage compared to others "group disadvantage"
- The PCP puts or would put B to that disadvantage
- A cannot show the PCP to be a proportionate means of achieving a legitimate aim

Case Study 1: the real appeal

Facts

- Sales role – highly competitive
- Maternity leave
- Request rejected as “simply not feasible”
- Right of appeal offered
- Employee resigned but was persuaded to reconsider
- Appeal granted request on 3 months trial
- Employee claimed constructive dismissal, harassment and all failed
- Tribunal Findings
 - There was a PCP – that all sales execs work full time
 - The PCP would disadvantage the claimant and women in general
 - BUT the PCP had been disapplied and so the woman in question did not suffer that disadvantage

Case Study 1: the real appeal

Take aways

- Appeals matter
- Second chance
- Trial periods are useful tools – anticipated increase in use

Case Study 2: reasons matter

Facts

- Old case
 - Senior Financial Accountant
 - Exceptional and commendable performance
 - Maternity leave – return 3 days per week
 - Offered to be “extremely flexible”
 - Rejected for numerous reasons
 - Questions

Case Study 2: reasons matter

- Constructive dismissal claim failed
- Harassment claim failed
- Claims under regulations failed – compliant process
“Given that we are not permitted to evaluate those reasons or substitute reasons with our own view, we conclude that the claim in this respect fails.”
- Indirect discrimination claim succeeded:
 - Balancing exercise between requirements of business and Claimant’s wish to spend more time with her new baby
 - Employer made assumptions that the role could not be done on any other basis than full time
 - Degree of inefficiency inevitable in part time working
“If the fact that there were those inefficiencies was always an acceptable reason for refusing a request for atypical patterns of work, no indirect discrimination claim would ever succeed.”

Case Study 2: reasons matter

Take aways:

- Well reasoned outcomes
Employer had failed to show "a shred of evidence that proper enquiry and proper investigation" was carried out when dealing with the request ."
- Evidence of thought process – balancing interests
- Avoid assumptions

Case Study 3: Who's in, who's out?

- Nurse
- 3 children – 2 disabled
- Mainly female team – 8 women
- Existing arrangement in place
- Review – requirement for everyone to work limited weekends on a rota - PCP
- Dismissed and offered re-engagement

Case Study 3: Who's in, who's out?

- Claims for indirect sex discrimination and unfair dismissal
- Employer argued
 - no disproportionate impact
 - other women were fine with it
 - no evidence presented of disproportionate impact on women
 - PCP justifiable as increasing opportunities for flexible working
- Trust won
- Appeal
- Employee won
 - Employer had looked at too small a group when considering group disadvantage
 - The Childcare Disparity was already well established

Case Study 3: Who's in, who's out?



Risk assess your rules



Wide lens

Case Study 4: Claims with teeth

Take aways

- Post pandemic – profile/attitudes
- Estate agency
- High performing full time worker
- Maternity returner and backstory
- Limited request
- Significant flexibility offered including trial basis
- Opportunities to re-visit: appeal and grievance processes
- Claims for discrimination, unfair dismissal, harassment and indirect discrimination

Case Study 4: Claims with teeth

- Employee lost on dismissal direct discrimination and harassment claims
- Employee won on indirect discrimination
- Employer had failed to show that the PCP of requiring all estate agents to work until 6pm everyday was justified as a proportionate means of achieving a legitimate aim
 - unclear on reasons
 - concerns employer had did not outweigh the discriminatory impact on the employee.
- Award:
 - £184,961.32 compensation (based on a leaving salary of £60K plus commission plus benefits)
 - £13,500 injury to feelings.

Case Study 4: Claims with teeth

Take aways

- Training for managers
- Risk assess possible outcomes at each stage

Next!

Consultation closing date 1 December 2021

- Day one right
- 8 reasons
- Alternatives
- Simplification of the process
- Encouraging use of existing legislation

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1019526/flexible-working-consultation.pdf

When it works, it works...

Flexibility cuts
both ways

Start from a
positive

Tech works

Model from
the top

Active
management



THANK YOU

CHRIS COOK

Chris.Cook@salaw.com

BETH LENG

Beth.Leng@salaw.com

DEBBIE HOLDER

Debbie@ohsltd.uk

Discover more about SA Law's webinars,
services and further reading at salaw.com

