

EMPLOYMENT LAW NEWSLETTER

WELCOME

We are pleased to share with you the latest edition of our Employment Newsletter. In this edition we consider the recent case of *Thompson v Sancrown Ltd* which made the news headlines not least due to the sizeable compensation awarded which was just shy of £185,000, our top ten tips for managing grievances, as well as menopause in the workplace ahead of World Menopause Day this month, plus notice of yet a further extension to the relaxation of right to work checks.

So go grab a coffee and enjoy!

SUPPORTING WORKING PARENTS

"How are mums meant to have careers and families? It's 2021 not 1971."

This is a quote direct from the claimant of the recent Employment Tribunal (ET) case of *Thompson v Sancrown Ltd*,⁽¹⁾ trading as Manors (Manors) in which the new mother, who had been refused her request for reduced working hours in order to pick up her child from nursery, brought a successful indirect sex discrimination claim against her employer.

Facts

Mrs Thompson had been employed as a full-time sales manager covering sales and lettings by Manors in October 2016 – a role that required her to work until 6pm on a daily basis. Manors is a small independent estate agent based in Marylebone with one office, a small number of employees and an international customer base. Mrs Thompson was a highly paid sales manager and had been in the industry for over a decade.



[1] *Mrs A. Thompson v Sancrown Ltd, trading as Manors ET Case No 2205199/2019*

Mrs Thompson took maternity leave from October 2018 to October 2019. Ahead of her return to work she asked Manors if she could finish at 5pm instead of 6pm in order to pick up her daughter from nursery and if she could work a four-day week. She explored a few variations to reduce her working hours to assist her with childcare but her requests were denied as her manager confirmed they could not afford for her to work part time. Manors relied on the importance of consistency and continuity for customers, the costs of the proposal, the inability to reorganise work among existing staff, and the inability to recruit additional staff, in refusing to accommodate Mrs Thompson's requests when giving evidence at the ET.

The new mother also lodged a grievance regarding her treatment when she was pregnant which was also rejected by Manors. As a result, Mrs Thompson resigned and brought several ET claims against Manors: discrimination and harassment because of pregnancy and maternity leave, unauthorised deductions, unfair dismissal, and indirect sex discrimination. Only the final claim succeeded.

Judgment

The ET upheld Mrs Thompsons' claim for indirect sex discrimination, finding that Manors' failure to consider flexible working to accommodate childcare put Mrs Thompson at a disadvantage with Manors failing to demonstrate that it had properly considered her request. The ET concluded, 'the respondent has not shown that refusal of the proposed reduction in hours of work was proportionate to the real need of the business to maintain successful relations with customers.' The judge awarded her almost £185,000 for loss of earnings, loss of pension contributions, injury to feelings and interest.

The ET accepts that notwithstanding an encouraging shift in societal attitudes, it is still the case that mothers are more likely to carry primary responsibility than fathers.

Conclusion

Employers need to take care not to refuse a flexible working request on grounds that may be seen as discriminatory. Note that such discrimination would be a breach of the Equality Act 2010 and potentially a fundamental breach of an employment contract which may lead to a claim for constructive dismissal against the employer. Further, an employee will have an automatically unfair dismissal claim where the principal reason for dismissal or redundancy selection is due to the employee making a flexible working request.

In light of the above, it is advised that employers put in place and follow a flexible working policy. Employees with a minimum of 26 weeks' continuous employment have the right to request flexible working under the statutory flexible working scheme. Under current law, the employer must handle such requests in a 'reasonable manner' and must respond to them within three months in total to include any appeals, absent any agreement with the employee to extend the response period. The employer must properly consider the employee's request and may only refuse it if it has good business reasons for doing so. s80G(b) Employment Rights Act 1996 provides the specific permissible grounds for refusal.

Employers should also be aware that the government has recently announced plans to give employees the right to request flexible working from day one. Feel free to read and respond to the government's consultation: "**Making flexible working the default**".

Lightfoots can assist in drafting flexible working policies and advising you how to deal with requests, specific or otherwise, in a way that helps you minimise the risk of claims.



TOP TEN TIPS FOR MANAGING GREIVANCES IN THE WORKPLACE

Employers should have a clear and accessible grievance procedure in place to help ensure best practice is followed consistently, to encourage positive resolutions and mitigate constructive dismissal and other Employment Tribunal claims. Below are top tips for managing employee grievances:

1) Train your line managers in basic grievance handling and conflict resolution. The first step of a grievance procedure, where appropriate, should be an informal employee and line manager discussion to see if the grievance can be simply resolved without escalation.

2) Initiate the formal route if the above route is not appropriate (e.g. the employee's grievance is about their manager) or it has not resolved the issue. Ask the employee to make their complaint in writing if they provided it verbally.

3) Follow your fair procedures which should be designed to at least meet ACAS Code of Practice on disciplinary and grievance procedures.

4) Acknowledge receipt of and investigate the grievance to establish the facts. This would normally include an initial conversation with the employee asking any questions necessary to help you fully understand their grievance and desired outcome which should help you focus your line of inquiry. Written acknowledgement of the grievance should be provided including a summary of this discussion and what will happen next, with anticipated timescales. Interview witnesses to the grievance, obtain any written or electronic evidence pertaining to the grievance as well as any CCTV or other form of evidence. If issues are complex or the employee is particularly upset a "catch-up" meeting whilst investigations are carried out may be beneficial to assure them that appropriate investigations are ongoing and to check on their well-being. Direct them to any internal or external support services available.

5) Confidentiality of witnesses must be protected at all times, only disclosing witness evidence to those on a need to know basis. However, this may include the Employment Tribunal or other court of law, proceedings then of course become a public record. You should make this clear to the witnesses before interviewing them and taking their statements.

6) Invite the employee to a grievance hearing, giving the employee raising the grievance reasonable notice (we suggest giving least three working days), informing them of their right to be accompanied at the hearing, and what to expect.

7) Conduct the hearing which, unlike disciplinary action, can be chaired by the same staff member who conducted the investigation. The chair must not, however, be a key witness to the investigation. At the hearing you should invite the employee to discuss their grievance and talk them through the evidence gathered at a high level (e.g. do not read out witness statements word for word), protecting the identity of any witness who requested anonymity. Ask the individual what outcome they are seeking or confirm that any preferred outcome previously indicated has not changed. Consider if any follow up investigations are required.

8) Communicate a decision to the employee, taking time following the hearing to digest matters discussed before reaching a conclusion. Whilst this should always be confirmed in writing, consider if a meeting with the employee to explain the conclusions reached would be beneficial. The right to be accompanied will still apply to any such meeting.

9) Document everything to keep an audit trail in case the employee raising the grievance escalates it to an Employment Tribunal. Everything must be documented in writing to evidence the investigation, the fair process followed, the hearing outcome, and any decisions made. This includes minutes of many meetings within which the grievance was discussed.

10) Allow an appeal if the employee's grievance is not accepted. Send an outcome letter to the employee detailing the time limit to bring an appeal. Note, the appeal must be conducted and heard by a different manager to the one who chaired the grievance hearing.

Lightfoots can assist in drafting grievance procedures and advising you how to deal with grievances, specific or otherwise, in a way that helps you minimise the risk of claims.



WORLD MENOPAUSE DAY

World Menopause Day is on Monday 18 October. Whilst the number of Employment Tribunal discrimination cases citing menopause as a contributing factor are small, they are on the increase.

The average age to go through the menopause is 51, with women aged 50-64 being the fastest growing demographic in the workplace.⁽²⁾ Some women will experience the menopause earlier or later than this, with symptoms often starting earlier, known as the perimenopause.

Several Employment Tribunal decisions⁽³⁾ confirm that the menopause can amount to a disability. This will depend on the symptoms experienced and the impact they have for the individual concerned. Symptoms of the menopause can be both physical such as hot flushes, night sweats, headaches/migraines and joint pain, as well as psychological including mood swings, anxiety as well as brain fog, problems with memory and concentration. Not all women will experience the same symptoms. However, for approximately 25% of women⁽⁴⁾ the symptoms experienced are severe and can be quite debilitating.

Section 6 of the Equality Act 2010 confirms that a disability is: *A physical or mental impairment which has a substantial and long-term adverse effect on the ability to carry out normal day to day activities.*

Given that menopausal symptoms start during the perimenopause and lasts on average for around four years from a woman's final menstrual cycle⁽⁵⁾ it is therefore not difficult to see why Employment Tribunals have been prepared to consider the menopause a disability for those women experiencing severe symptoms. In such circumstances, as an employer, there will fall a duty on you to consider reasonable adjustments as well as ensuring the individual is not treated less favourably because of their disability.

Even if the symptoms experienced do not amount to a disability, it will also be appreciated that only women will experience the menopause, as well as the menopause being linked to age. There will therefore also be both direct and indirect sex and age discrimination implications to consider. This will be the case not only when it comes to managing any drops in performance linked to the menopause but also office gossip or banter. When it comes to jokes relating to the menopause, whilst some women may find them humorous others may find them offensive and could lead to harassment claims.

[2] www.menopauseatwork.co.uk Article July 2020

[3] *Merchant v BT Plc* (2012), *A v Bon Marche Ltd* (In administration) 4107766/2019, *Davies v Scottish Courts and Tribunals* S/4104575/2017, and *Daley v Optiva* 2021 1308074/2019

[4] www.menopauseatwork.co.uk article November 2017

[5] www.nhs.uk/conditions/menopause/symptoms/

[6] As an example only visit www.menopauseatwork.co.uk

So what can you do as an employer? We recommend putting in place a menopause policy, which will aid both line managers and menopausal employees. This is something we can assist with.

Also consider whether any workplace training would be of benefit to ensure all staff have a greater understanding of what the menopause is, the symptoms that can be experienced, and the impact this can have on a woman's daily life. Creating a culture where your staff feel able to openly discuss their symptoms and seek appropriate workplace support is also vital. There are specialist organisations that offer such training.⁽⁶⁾

Finally, it is also important if performance issues arise at work which may be linked to the menopause that you look to provide the individual with appropriate support and take early legal advice.



RIGHT TO WORK CHECKS

Further to our June newsletter which reminded employers of the temporary adjustments the Home Office allowed for remote right to work checks, and the requisite certification wording, the temporary adjustments have now been extended until 5 April 2022. The Home Office announced this extension on 26 August 2021 and the government has updated its guidance accordingly (no other material updates have been made recently as at the date of this newsletter other than to reflect the extended date): **Coronavirus (COVID-19): right to work checks.**

HOW CAN WE HELP?

Of course we can help you with any employment law needs, but we thought it would be useful to summarise how we can assist you if you come across any issues or needs relating to the content of this newsletter so please do get in touch with us if that's the case (contact details below):

- Advice and drafting on flexible working policies and any flexible working decisions you may be contemplating that you are unsure of the impact of (in particular, if you are contemplating rejecting a flexible working request from a new parent to accommodate their childcare)
- Advice and drafting of grievance procedures and any grievance procedures pending that you would like us to guide you through in order to minimise the risk of claims
- The implementation of a menopause policy as well as advice and assistance if you are concerned if performance related issues are linked to menopausal symptoms
- Specific advice on conducting right to work checks

For those employers who are only just recruiting, or looking to recruit, now for the first time since March last year do not forget the changes to employment contracts mentioned in our legal alert of April last year. It is important to ensure your templates are up to date, including your staff handbook, so please let us assist you - do not hesitate to contact us for a no obligation quote today.

You should seek legal advice before relying on the content of this newsletter as every situation is different and the law in employment is ever changing.

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