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Carey Olsen Starting Point Employment Law Guide – flexible working and family friendly rights

Service area / Employment, Pensions and Incentives

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This Starting Point Guide addresses the fundamentals of flexible working and family friendly rights under Jersey employment law.

Introduction

Carey Olsen Starting Point Guides are intended as a general introduction and guide to different aspects of Jersey employment law.

They are a summary of the most important issues that we come across. They are very much edited highlights of those issues. If you would like legal advice in relation to any specific circumstances, please do give us a call.

This Starting Point Guide addresses the fundamentals of flexible working and family friendly rights under Jersey employment law.

Jersey – not just cows

Jersey is the largest of the Channel Islands and is a British Crown dependency.

It has its own financial, legal and judicial systems. It is not part of the UK or of the European Union (although it has close relationships with both). It also has its own breed of instantly recognisable cows.

The aim of this Starting Point Guide is to introduce the key concepts connected with flexible working and "family friendly" rights introduced by the Employment (Amendment No. 8) (Jersey) Law 2014 ("Amendment No. 8"). Amendment No. 8 amends the Employment (Jersey) Law 2003 (the "Employment Law").

The relevant provisions of Amendment No. 8 came into force on 1 September 2015 at the same time as the Discrimination (Sex And Related Characteristics)(Jersey) Regulations 2015 introduced several additional protected characteristics to the scope of the Discrimination (Jersey) Law 2013 including sex and sexual orientation.

Flexible working

Amendment No. 8 introduced a right for employees to request flexible working. It also introduced a statutory regime for the consideration of such applications by employers. The rights given to employees are in fact very limited in nature. They essentially consist of:

- A right to make a request to work flexibly;
- An obligation on the employer to consider the request properly; and
- A limited number of grounds on which the employer can refuse the request.

Amendment No. 8 does not create a right to work flexibly or part-time. It simply provides a statutory framework through which an appropriate request must be considered.

What exactly is flexible working?

Amendment No.8 allows a flexible working request to be made – that is a request to change the employee's terms and conditions. There are many different ways of working flexibly, for instance:

- **Term-time only working** – Employment "pauses" during some or all of school holidays;
- **Job sharing** – Two people do one job and split the hours;
- **Working from home/Remote Working** – It might be possible to do some or all of the work from home or anywhere else other than the normal place of work;
- **Part time** – Working less than full-time hours (usually by working fewer days);
- **Compressed hours** – Working full-time hours but over fewer days;
- **Flexitime** – The employee chooses when to start and end work (within agreed limits) but works certain 'core hours', e.g. 10 am to 4 pm every day;
- **Annualised hours** – The employee has to work a certain number of hours over the year but they have some flexibility about when they work. There are sometimes 'core hours' which the employee regularly works each week, and they work the rest of their hours flexibly or when there's extra demand at work;
- **Staggered hours** – The employee has different start, finish and break times from other workers; and
- **Phased retirement** – If, as expected, age discrimination comes into force in Jersey in 2016 or 2017, it is likely to mean the end of default retirement ages. Providing a phased retirement "pathway" is likely to pay dividends in terms of managing a greater range of age diversity within a workforce.

Managing flexible working – informal applications and eligibility

Experience in the UK (from where Jersey has derived its flexible working legislation) suggests that there are two key practical issues for employers:

- The complexity of the statutory request scheme; and
- Deciding on who should be eligible to make a request.

The statutory request mechanism is undeniably both complex and (ironically) inflexible. It is to the advantage of employers and employees to encourage dialogue on an informal basis prior to a statutory request being made. Not only could this resolve the issues without the need for a potentially lengthy discussion and process, it will ensure that employees who make a request which is denied are not then barred from applying for another twelve months.

Another factor for employers seeking to implement the statutory right to request flexible working has been the fact that only limited categories of employees are entitled to make an application.

Excluding requests from those not entitled to apply may create unrest and resentment within a workforce – and prevent employers from deriving the maximum commercial benefits from flexible working.

Enabling everyone to apply for flexible working often delivers benefits in relation to employee relations – in particular motivation and morale. It is also a potentially powerful recruitment and retention tool.

The right approach is a commercial decision for individual employers, but this should be carefully considered – preferably in advance.

Who can make a statutory request?

Employees who have been employed for 15 months or more are able to request a change to their hours, times or place of work if the reason for the change is to enable them to care for another person.

Employees are only able to make one application for flexible working per year.

The law (rather unhelpfully) does not specify what is meant by the term "caring for another person".

In relation to children, the phrase would suggest having some responsibility for a child's care in a parental capacity (or an equivalent capacity) – however this is by no means certain.

Previous guidance published by the UK Government Department for Business Innovation & Skills provides the following (non exhaustive) suggestions as to what caring for an adult might constitute:

- Help with personal care (e.g. dressing, bathing, toileting);
- Help with mobility (e.g. walking, getting in and out of bed);
- Nursing tasks (e.g. daily blood checking; changing dressings);
- Giving/supervising medicines;
- Escorting to appointments (e.g. General Practitioner (GP), hospital, chiropodist);
- Supervision of the person being looked after;
- Emotional support;
- Keeping the care recipient company;
- Practical household tasks (e.g. preparing meals, doing shopping, domestic labour); or
- Help with financial matters or paperwork.

The position is uncertain – and employers should ensure that they avoid taking too restrictive an approach.

Continued

Making a request

The right to request flexible working legislation requires that employees must make their request in writing, setting out:

- The date of the application, the change to working conditions they are seeking and when they would like the change to come into effect;
- whether the employee will be employed and/or paid to provide care; and
- the reason for the application.

The Law sets out a statutory framework for consideration of flexible working applications. Generally speaking, the initial process should take no longer than 6 weeks assuming no appeal is necessary. The process is summarised below with a flow chart depicting the process attached at Appendix 1.

Handling a request

Once an application is received, the Employer must hold a meeting at a time convenient to both parties in order to discuss the application. The meeting must take place within 28 days after the day on which the application is made.

This discussion:

- Provides an opportunity for the employer to explore with the employee exactly what changes they are seeking and how these might be accommodated; and
- Allows the employee to explain the reasons why they are seeking the change.

It is good practice for an employer to allow employees to be accompanied at a discussion by a work colleague if they wish.

The Employer may either:

- Agree the change in terms and conditions applied for; or
- Agree different terms and conditions to those applied for by the employee; or
- Refuse the requested change.

The Employer must give notice of the decision within 6 weeks after the day on which the application is made. Note that there is no requirement to hold a meeting where the employer agrees to the application and gives notice of the decision within 28 days after the day on which the application is made.

Notice of the employer's decision must be given to the employee in writing.

For instance, where the decision is to agree to a change in terms and conditions, the notice must specify the agreed change and state the date on which it will take effect.

Where a decision is to refuse the application, the notice must state the grounds of refusal which are considered to apply and an explanation as to why those grounds apply.

The notice must also set out the appeals procedure.

Deciding on a request

There may be instances where the employer is unsure whether the arrangements requested are sustainable in the business or about the possible impact on other employees' requests for flexible working and wants to agree flexible working arrangements for a temporary or trial period rather than rejecting the request. Again, to avoid misunderstanding, it is good practice to be clear about this in writing to the employee. It is also good practice to set review points when the employer and employee can jointly discuss how the new arrangements are working and make any adjustments necessary.

If the employee is only looking for an informal change for a short period, employers may wish to consider allowing (or requiring) them to revert back to their old conditions after a specified period or after the occurrence of a specific event.

Employees must be aware that if the employer approves their application under the right to request, they do not have a statutory right to request another variation in contractual terms for a period of 12 months although they may still ask without the statutory right.

Refusing an application

Employers will only be able to deny valid requests for flexible working on the basis of specific grounds set out in the Law, namely:

- Burden of additional costs;
- Detrimental effect of ability to meet customer demand;
- Inability to re-organise work among existing staff or recruit new staff;
- Detrimental effect of quality of business performance;
- Insufficient work during proposed periods of work;
- Planned staffing changes; and/or
- The fact that the employee will be remunerated for care to be provided.

An employer's notice of refusal must:

- State which of the statutory grounds for refusal is being relied upon;
- Contain "sufficient explanation" as to why the chosen ground(s) apply in relation to the application; and
- Set out the appeal procedure.

The decision is a subjective one on the part of the employer. If the employer considers that one of the grounds applies, then the test is satisfied. It would appear that only if the employer's view is based on incorrect facts, could the decision actually be questioned – the tribunal is not permitted to question the employer's commercial judgement.

The requirement to include an explanation as to why the particular ground applies will nevertheless indicate the employer's assessment of the facts upon which the decision has been made – which may be questioned.

Continued

Appeal process

The Law also includes a statutory appeals process. The process is summarised below with a flow chart depicting the process attached at Appendix 2.

Appeals can be made on the basis of an employer's decision to refuse an application or the terms on which the employer grants an application. Notice of an appeal must be given to the employer within 14 days after the day on which notice of the decision is given. The grounds of the appeal must be specified.

Once notice of an appeal is received, the employer must hold a meeting with the employee at a time convenient to both parties. The meeting must be held within 14 days after the employee's notice is given. The employee will have a right to be represented at the appeal meeting.

Following the meeting, the employer must notify the employee in writing of the decision on the appeal within 14 days after the day of the meeting.

However, note that there is no requirement to hold a meeting where within 14 days after the day on which the appeal notice is given, the employer upholds the appeal and notifies the employee in writing of the decision. The notice must state the change in the terms and conditions of the employee's employment and the date on which they will take effect.

Time limits

Amendment No. 8 states that where an individual who would usually consider the application for flexible working is absent from work, the periods set out in the statutory regime will not commence until:

- the day on which the individual returns to work or
- 28 days after the day on which the application is made (or, in the case of an appeal, 28 days after the day on which the notice of appeal is given).

The employee and employer may agree in writing to an extension of any of the periods referred to in the statutory process.

Complaints to the tribunal

Employees can make complaints to the Employment and Discrimination Tribunal (the "Tribunal") where:

- there is a failure to comply with a procedural requirement; or
- a decision to refuse an application is based on incorrect facts.

Broadly speaking, complaints must be made within 8 weeks of the date of the breach of procedure or the date of the final appeal decision. Where a complaint is successful, the Tribunal can award an order for reconsideration of the application and/or compensation not exceeding 4 weeks' pay.

It would appear that a tribunal cannot question the commercial rationale or business reasons behind an employer's decision to refuse a request.

This severely restricts the scrutiny to which an employer's decision may be subjected.

Other issues

Discrimination

Dealing with flexible working requests may lead to discrimination issues under the Discrimination (Jersey) Law 2013. In the UK, this has arisen in two ways:

- Direct sex discrimination claims where requests have been taken more seriously where they come from women rather than men; and
- Indirect sex discrimination claims where women may be disadvantaged by a full time working requirement (or a reluctance to grant flexible working requests).

Constructive dismissal

Getting a flexible working request wrong can lead to constructive dismissal claims– either because the statutory procedure has not been followed (although it may be difficult to base a constructive dismissal claim on this) or because of a discriminatory refusal to grant a request.

Getting flexible working right

- Consider your organisation's policy on eligibility;
- Encourage informal discussion prior to a formal request being made;
- Follow the statutory procedure if it is initiated;
- Take requests seriously;
- Be positive – work with employees to consider how requests can be accommodated;
- Consider alternatives if you cannot accommodate the initial request;
- Ensure consistency;
- Explain your decision and the reasons fully and clearly;
- If the change will be temporary or subject to a trial period (or any other conditions put them in writing and be clear about them;
- Keep records;
- Treat requests around maternity or adoption leave carefully;
- If you think that a role cannot be performed flexibly, consider the reasons for that carefully and keep a record of such reasons.

Continued

Maternity leave

From 1 September 2015, Amendment No. 8 also introduced statutory maternity leave provisions. Regardless of length of service, all employees who have given birth are entitled to two weeks' paid leave following the birth of a child ("Compulsory Maternity Leave").

In addition, employees who comply with the notification requirements set out in the Law are entitled to a further period of unpaid leave, referred to as Ordinary Maternity Leave. The length of Ordinary Maternity Leave will depend on an employee's length of service, i.e.:

- Where an employee has less than 15 months' continuous service: 6 weeks' Ordinary Maternity Leave (in addition to Compulsory Maternity Leave); and
- Where an employee has 15 months' or more continuous service: 16 weeks' Ordinary Maternity Leave (in addition to Compulsory Maternity Leave).

Amendment No. 8 also introduced protections for those returning to work immediately after a period of Compulsory or Ordinary Maternity Leave. Returning individuals are now entitled to return to the job in which they were employed immediately prior to their absence on terms and conditions no less favourable than those that would have applied had they not been absent.

Adoption leave

Amendment No. 8 introduced adoption leave on substantively similar terms to maternity leave, save that there is no Compulsory Leave equivalent. Employees who comply with the notification requirements set out in the Law are entitled to unpaid adoption leave as follows:

- Where an employee has less than 15 months' continuous service: 8 weeks' Ordinary Maternity Leave; and
- Where an employee has 15 months' or more continuous service: 18 weeks' Ordinary Maternity Leave.

Employees absent on adoption leave also have a right to return to work on terms and conditions no less favourable than those that would have applied had they not been absent in the same way as employees who are absent on maternity leave.

Other family friendly rights

There were also a number of other family friendly measures introduced by Amendment No. 8 such as:

- The right to paid time off for antenatal appointments;
- The introduction of parental leave for up to 2 weeks following the birth of a child.

Parental leave is available to employees who are the father of a child or married to, the civil partner of or the partner of the child's mother or adopter (but not the child's father or adopter). Employees wanting to claim parental leave will need to comply with the notification requirements set out in the Law and they must have, or expect to have, responsibility for the upbringing of the child.

Remedies for breach of family friendly rights
Employees who are denied access to the maternity, adoption or parental leave rights provided for by law are able to make a complaint to the Tribunal.

Where an application is successful, the Tribunal can order the employer to pay the whole or any part of any amount to which the employee should have been entitled under the amended Employment (Jersey) Law 2003. In addition, the Tribunal may order the employer to pay compensation to the employee (in respect of each contravention) of an amount not exceeding 4 week's pay.

Dismissal for a family reason

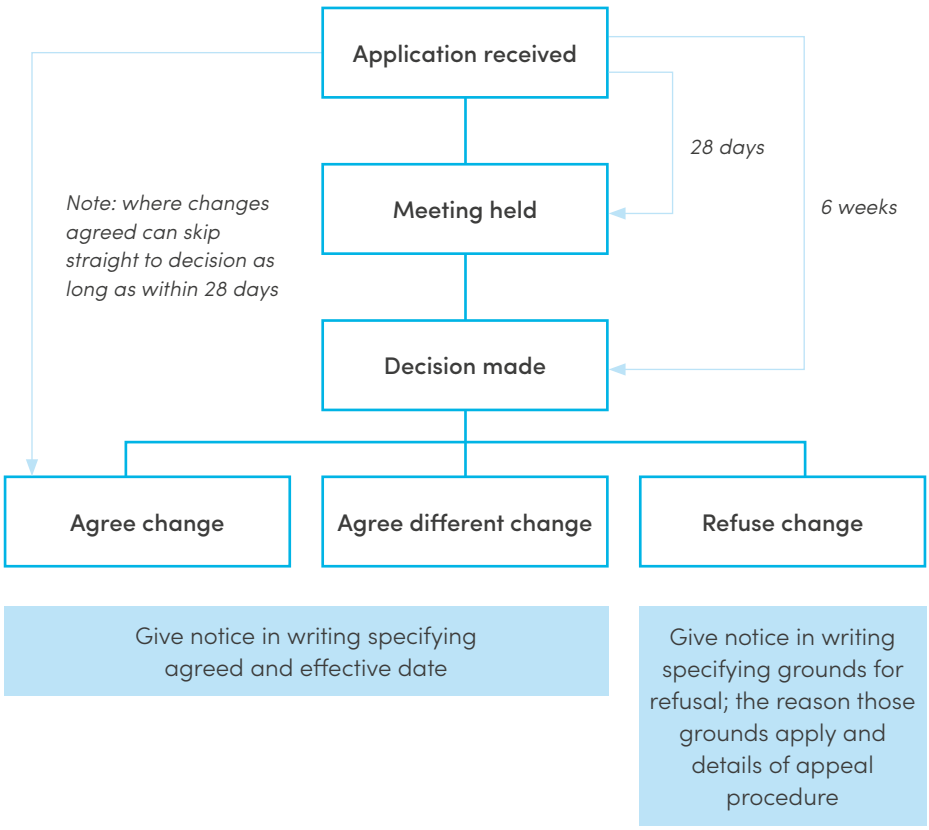
Amendment No. 8 inserts a replacement Article 67 into the Employment (Jersey) Law 2003 and provides that an employee who is dismissed or selected for redundancy shall be treated as having been unfairly dismissed if the reason for dismissal/selection is connected with one or more of the following:

- The pregnancy of the employee;
- The fact that the employee has given birth to or adopted a child;
- The fact that an employee has made a flexible working request (whether successful or not);
- The fact that the employee took, or sought to take, time off under any of the "family friendly" provisions in Amendment No. 8;
- The fact that the employee has not carried out work for her employer during her maternity leave period or during his or her adoption leave period, or made contact with his or her employer during that period; or
- The fact that the employee sought to take or avail himself or herself of any of the benefits of maternity leave, adoption leave or parental leave.

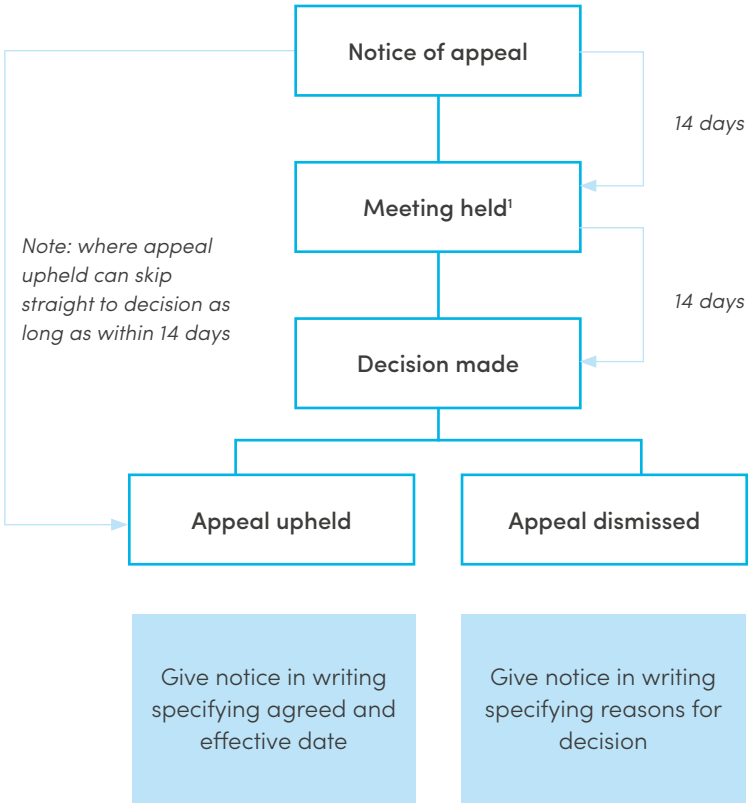
Continued

Appendix

Appendix 1 – flexible working



Appendix 2 – flexible working – appeals



1 Right to be represented – Article 78A and 78B

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