Department for Business & Trade

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Dear Baroness Penn,

Clarification on discrimination in relation to flexible working requests

Following our committee stage debate on the Employment Rights Bill on 8 May, I am writing to clarify the position in relation to how flexible working requests interact with discrimination law. As I explain below, I am happy to reassure you that if a job offer is withdrawn because an employee had made a flexible working request, then that would be covered by unfair dismissal legislation. If they have a job offer withdrawn because of a protected characteristic following a flexible working request, then this will be covered by discrimination law.

As defined by the Employment Rights Act 1996 (ERA), a candidate becomes an employee as soon as they accept a job offer. If they have accepted a job offer, they can currently make a statutory flexible working request in the period between accepting the offer and starting work, as they are deemed to have entered into a contract of employment. If the request is refused, then an employee might be able to make one of the following claims, depending on the circumstances:

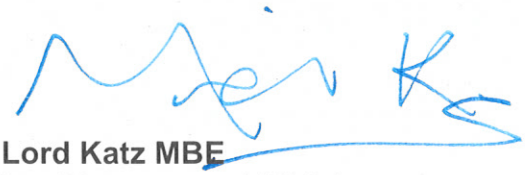
- Under the Equality Act 2010, if the refusal was discriminatory (either directly or indirectly). If the refusal of the request was made because of their sex, for example, a claim of unlawful direct sex discrimination could be made. If the refusal was made as a result of a policy that applies in the same way for everybody but disadvantages women, and the employer cannot objectively justify that policy, a claim of unlawful indirect sex discrimination could be made.
- Under the flexible working provisions in section 80H and 80I of the ERA, including if the employer has not acted in a reasonable manner or based the decision on incorrect facts.
- For automatic unfair dismissal under section 104C of the ERA, if they are either dismissed by the employer, or they can prove that they have been constructively dismissed, and the reason for the dismissal is that they have requested flexible working.

They cannot claim for 'ordinary' unfair dismissal [section 98 of the ERA], because currently that requires a two-year period of service; and after the Bill's provisions on unfair dismissal come into force, it will require the employee to have started work.

A statutory request cannot be made before there is a contract. If an employee were to make a request before a job offer is made it is not counted as a statutory request and they are unable to claim either automatically unfair or 'ordinary' unfair dismissal. They may be able to make a claim under the Equality Act 2010 depending on the circumstances, as detailed above.

I am copying this letter to all Noble Lords who spoke in the debate. I am also depositing a copy of this letter in the Library of the House.

Best wishes,



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