

the little book of
business law 2007

**FLEXIBLE
WORKING'S
BIG PUSH**



in association with **ProfessionalBroking**



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the 3rd little book of business law

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Introduction

Following the success of the “difficult second book” towards the end of 2006, we didn’t have to wait long for the subject matter for this, the 3rd Little Book of Business Law, to start piling up.

While employers across the country were still waiting to hear about the first tribunal applications to rest on last year’s age discrimination legislation, the business news agenda had moved on to other items, such as this year’s smoking ban.

Although it’s been a favourite with journalists since long before the UK finally jumped on the clean air bandwagon (this may have more to do with “researching the story” in Dublin’s pubs) the smoking ban is unlikely to prove as significant a legal development for most businesses as the changes to flexible working rights.

Statistics suggest that most of us should now be familiar with the concept of flexible working. In all likelihood the majority will now work with someone who has exercised their right to request a change in their working conditions so that they can look after a child.

However, this year’s extension to those rights is a major one, and will give millions more employees the right to request flexible working if they need to help look after someone, young or old.

Like most new business regulations, the impact will be more gradual than some headline writers would have us believe. But this is no excuse for employers not to be prepared.

Adjusting to the new regulations will be manageable and the overall impact on business may be minimal, but falling foul of employment law could be disastrous for any company.

Fortunately, DAS policyholders, can refer to the DASbusinesslaw website to keep abreast of new legislation and keep their policies and practices bang up-to-date, while specific problems can always be referred to the free legal advice helpline.

A 'flexible friend' of the family

The government's commitment to creating a better work-life balance for employees has seen consistent and often significant legislation coming out of the Department of Trade and Industry.

This year sees the introduction of more family-friendly working provisions, with new maternity and paternity benefits, as well as an extension to the rights to request flexible working that have been created in recent years.

The new legislation should not prove too onerous for most employers, as many businesses have already embraced flexible working in some form, but there are still plenty of pitfalls awaiting the ill-prepared.

Several high-profile claims have been made against businesses refusing flexible working requests and, while employers do have a right to decline, a number of successful actions have demonstrated that both the reasons for refusal and the procedures followed need to be watertight.

Making the news....

It was reported yesterday that

BA finally agrees flexibility over pilot's hours

The story of British Airways pilot Jessica Starmer which featured in our first Little Book of Business Law has been back in the news again.

Ms Starmer exercised her right as a mother to make a formal request to her employer, to reduce her working hours by 50%. BA refused, citing safety concerns, but the airline lost the ensuing case at tribunal and a subsequent appeal.

It was only in March this year that BA finally withdrew a further appeal to have the case heard by the Court of Appeal and granted Ms Starmer her request.

In a statement jointly released with the pilots' union, BALPA, the airline recognised that flexibility could benefit the employer as well as the employee.

BA also agreed to make a contribution towards Ms Starmer's costs and a donation to a charity of her choice.



Millions more gain right to request flexible working

The right for employees with young children to request flexible working is now firmly established, the legislation having been introduced in 2003.

The government estimates that as many as a quarter of eligible parents have made such a request with the overwhelming majority of requests being accepted by employers.

Since April though, anyone who helps to care for a relative or someone who lives with them also has the right to make a formal request to work flexibly. Estimates of how many employees this might describe vary significantly, but it is clear that the numbers run into millions.

There are estimated to be at least 6 million carers in the UK, with approximately half currently in the workforce. With an ageing population and an apparently growing appetite for flexible working, how companies choose to deal with such matters will be crucial to business success.

Who can now request flexible working?

• Parents

An employee who is a parent or has parental responsibility for:

- a child under the age of six; or
- a disabled child under the age of 18.

• Carers

An employee who is or is expecting to be caring for:

- a spouse, partner, civil partner or relative; or
- an adult in need of care that lives at the same address.

The employee must have worked for the company for at least six months and only one request can be made per year.

Why flex?

The benefits of successfully implementing a flexible working policy can be higher retention of staff, better company loyalty, motivation, productivity and a decrease in sickness absence.

Proof of this recently came from BT who reported a 20% increase in overall productivity since 2001, which the company directly attributes to allowing 80% of staff to work outside the office for at least one day per week.

A spokesperson for the company recently commented, "BT has 11,500 home workers and another 64,000 equipped to work flexibly. It also has a return to work rate after maternity leave of 99% and annual staff turnover below 4%, compared with a sector average of 17%".

The not-for-profit initiative Work Wise UK, which campaigns for the extension and adoption of more flexible working practices in this country, has launched a Work Wise Week which starts on May 16th.

An indication of how widespread is the support for flexible working, lies in the fact that the CBI and the TUC have come together to support the Work Wise initiative, in what some have referred to as an unlikely alliance.

The two organisations have come together to sign the Work Wise flexible working pledge, which will also be supported by the British Chambers of Commerce and a number of large businesses

Work Wise UK calls for companies in the UK to adopt smarter and more flexible working practices and to significantly increase use by 2011.

Work Wise quotes DTI statistics to support its claim that businesses operating flexibly benefit from improved motivation amongst staff (75% of companies surveyed) and reduced staff turnover (60%). The organisation further advises that businesses will achieve reduced absence through sickness and infrastructure cost savings.

Basic procedure for handling a flexible working request

- Employer needs to arrange a meeting within 28 days of receiving a request to work flexibly
- The employer should advise the applicant of their right to be accompanied
- The decision on the request must be sent in writing within 14 days
- A refusal must be based on one of the specified grounds (see opposite)
- The employee has the right to appeal a decision
- An appeal must be held within 14 days of the employee's notice of appeal

Acceptable grounds for declining a request

- The burden of additional costs
- Detrimental effect on ability to meet customer demand
- Inability to reorganise work amongst 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

Making the news....

INFLEXIBLE ESTATE AGENT...

An estate agency employee came into work during her maternity leave to attend a meeting with the manager responsible for HR matters.

During the discussion, she submitted a written application to work part-time on her return from maternity leave.

When, after more than 3 weeks, the company rejected her application and a subsequent appeal, and further suggested that a job-share might be acceptable if she could find a suitable candidate herself,

she resigned and took her employer to the employment tribunal.

The tribunal found that the estate agent had “wholly flouted” the rules concerning flexible working. Importantly, the suggestion that the initial discussion with the employee could be considered a meeting for the purposes of the regulations, was entirely rejected.

The employee won her claim for constructive dismissal and indirect discrimination.

Discrimination creeps into flex requests

Statistics derived from the DTI’s national survey of employees about flexible working show a worrying trend concerning formal requests to work flexibly that are being declined.

Apparently, employers are statistically much more likely to turn down a request for flexible working from a man than a woman.

The third Work-Life Balance Employees’ Survey, carried out on behalf of the DTI in 2006, showed that requests to work flexibly that came from men were turned down nearly twice as often as requests from women.


Looking solely at the private sector, the differential was even more pronounced. Only 10% of women who had exercised their right to request a change in working hours had been declined, whereas some 24% of men making similar requests were turned down.

Discrimination creeps into flex requests (continued)

Obviously, in individual cases there may be perfectly legitimate reasons why a particular request has to be turned down, but these statistics should serve as a warning to employers who are receiving multiple flexible working requests from their workforce.

As with all things employment related, consistency is extremely important. The reasons for declining a request to work flexibly must be clear, reasonable and properly communicated to the employee.

> DASbusinesslaw tip



It is clearly worth monitoring the outcomes of formal requests to work flexibly. A regular audit of all requests that have been accepted or declined should reveal if any gender bias or some other form of discrimination has crept into the process of considering employees' requests.

Maternity leave extended

Another big change introduced in April by the Work and Families Act 2006, is the extension of paid maternity leave to 39 weeks.

Some employers have expressed concern that the increase from 26 weeks will have an adverse effect on business, but the government has calculated that the impact will be minimal and claims that the move will ultimately encourage working mothers to return to work and may even make them more productive.

A further change to the legislation that has been very well received, is the introduction of a system under which mothers will be allowed to return to work for up to 10 days during their maternity leave without adversely affecting Statutory Maternity Pay.

The 'keeping in touch' days are intended to benefit both employer and employee by giving new mums an opportunity to keep up to speed with changes at work while they are on maternity leave, and reducing the 'shock' of returning to work.

Maternity leave extended (continued)

In order to accommodate this improvement to the existing system, the method of calculating Statutory Maternity Pay (SMP) has changed. Since April, SMP is calculated daily rather than weekly.

The Act also has a change designed specifically to help businesses accommodate maternity leave. Since April, the notice that mothers must give their employers of their intention to return to work has increased from 28 days to two months. This should assist businesses in planning staffing levels and preparing for staff to return to the workplace.

The latest improvements to the terms under which parents can take time off to look after their children still only represent partial progress towards the government's ultimate objective.

It is intended that, by the end of this parliament, the total paid maternity leave will be extended to a full year, and fathers will also have the opportunity to receive up to 26 weeks of paternity leave, some of which could attract statutory pay if the mother has returned to work.

Making the news....

It was reported yesterday that

Bumpy ride for Newcastle bar

While the government is extending provisions designed to help mothers return to work, it seems that some businesses have yet to get to grips with the basics of sex discrimination.

A pregnant finance manager who worked for a bar and restaurant business was told to choose between her baby and her job. She was told that, if she wanted to keep her baby then the business would not be able to keep her.

An employment tribunal found that Angela Hildreth had been constructively, wrongfully and unfairly dismissed by her employers.

Following the case, the business had to be sold, but a remedies hearing was scheduled for April to decide how Ms Hildreth should be compensated for the sex discrimination, loss of earnings and harassment that she endured.



National Minimum Wage

Some eight years since it was introduced, the National Minimum Wage still appears to be causing problems for a surprisingly large number of businesses.

HM Revenue and Customs (HMRC), which is responsible for enforcing the minimum wage, conducted some 4,900 investigations in the 2005/06 reporting year and found failures to comply in some 32% of cases.

In total, HMRC identified more than £3 million in wage arrears that was owed to approximately 25,000 workers by their employers who had failed to comply with minimum wage legislation.

An education and enforcement campaign launched back in July 2005 targeted key low paying business sectors. Hairdressing was the first trade to come under the special scrutiny of this initiative, with 500 cases registered by HM Revenue and Customs. To date, 49% of employers investigated in the campaign have been shown not to comply with the minimum wage law.

HMRC has made it clear that this sort of targeted education and enforcement campaign will be more common in the future and, from April 2007, the resources dedicated to National Minimum Wage enforcement will be increased by 50%.

There is also now a criminal prosecution policy in place for employers found to be repeat or major offenders against the legislation. Cases will be submitted to the Revenue and Customs Prosecutions Office, which was created in 2005 to primarily prosecute major drugs trafficking and tax fraud cases.

Once again, the National Minimum Wage will increase in October, though more modestly than last year. For employees over the age of 21, the rate will increase just 3% to £5.52 per hour. For 18-21 year olds, the minimum will similarly increase to £4.60.

There has been some concern that having a specific band for younger workers constitutes discrimination under the age regulations which became law in October 2006.

WEEE care a lot

At the start of this year, the Waste Electrical and Electronic Equipment (WEEE) Regulations 2006 came into force in the UK, implementing most aspects of the EU's WEEE Directive of 2003.

The aim of the directive is to keep electrical equipment out of landfill sites through separate collection, treatment and recycling. Under the principle of 'producer responsibility', the EU plans to make manufacturers responsible for proper disposal at the end of a product's life.

Science Minister Malcolm Wicks has commented, "Electrical waste such as toasters, fridges and washing machines are a growing environmental problem here in the UK with over 2 million tonnes being dumped in landfill last year alone".

In the UK, any company that manufactures, brands or imports electrical or electronic equipment will now have to pay for its recovery, treatment and environmentally safe disposal. The new rules also affect distributors and retailers of electronic equipment, as well as the end user.

Any organisation or business using electrical or electronic goods will now have a responsibility to ensure that they are collected separately, treated and disposed of properly. The cost of this will often be borne by the supplier, but businesses will have to make sure that proper measures are in place.

Retailers have special responsibilities if they sell electrical or electronic equipment to the public. While there is no specific compulsion for individuals to return electrical items for proper disposal, retailers must offer a free facility for the return of unwanted equipment.

> DASbusinesslaw tip



The requirement to offer a free take-back facility to consumers does not mean that retailers have to take back the goods themselves. National schemes have been set up, that smaller retailers can buy into.

Age discrimination update

It is still early days for Employment Equality (Age) Regulations 2006, and a clear picture of how the legislation is being used will not really take shape until the Tribunals Service publishes its annual report for the 2006/07 period.

Predictions of how the law would change office life have often focused on the danger of inappropriate birthday cards rather than more serious issues. While derogatory greetings cards may serve as a useful illustration when teaching staff how not to treat colleagues, other everyday working challenges are more likely to present real business problems.

Ironically, one of the groups that might be most adversely affected by the new rules is those workers over 65. Previously, employers could keep older employees on different terms and conditions, avoiding higher benefit costs for older workers for insurances such as life, medical and critical illness. Now, such a policy would be discriminatory and it is feared employers will let employees over 65 go rather than bear the additional costs.

Making the news....

It was reported yesterday that

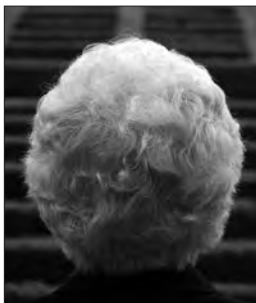
Challenge to age legislation goes to Europe

No sooner had the Employment Equality (Age) Regulations 2006 become law, than they were facing a legal challenge in Europe.

The case is being pursued by Heyday, a new membership organisation for those in or nearing retirement, which claims that the legal provision for businesses to set a mandatory retirement age for those over the age of 65 amounts to discrimination.

In December, just two months after the law was introduced, the High Court ruled that Heyday's legal action should be referred to the European Court of Justice to decide whether or not the UK regulations contravene the Europe's Equal Treatment Directive.

The court's decision will be awaited with a great deal of interest from various groups, not least those representing older workers, but a judgment is unlikely until well into 2008.



'Fresh approach' to recruitment ads sought

Of all the possible implications of the new age discrimination rules, the impact on recruitment is one area that has perhaps caused the most uncertainty, especially the language of recruitment advertising.

Even if employers avoid the more obvious pitfalls, recruitment could still be ruled unlawful if a job advertisement were to come under the scrutiny of an employment tribunal.

Most employers now know enough to avoid using phrases such as "youthful", "mature", "junior" or "recent graduate", but words such as "dynamic", "energetic" or "enthusiastic" might still be ruled unlawful on the basis that they suggest the employer is seeking "youthful" qualities.

> DASbusinesslaw tip

Many legal professionals have advised that avoiding potentially discriminatory language in recruitment advertising is easier if the focus is placed on describing a position rather than an ideal candidate.

Better late than never

Delayed to give administrators more time to adapt and revised amidst concerns that the original version might be unworkable, the new rules relating to age discrimination in pension schemes were introduced at the very end of last year, some two months behind schedule.

Whether "watered down" or "tidied up" by an extended period of consultation, the new rules achieve the government's objective of having as little impact as possible on pension structures while dovetailing with new age discrimination law.

As a result, pensions administrators are still allowed to specify a normal retirement date, exercise minimum and maximum ages to join, and close a scheme to new entrants.

In spite of the limited impact that the legislation is intended to have on pension schemes, it is still essential that schemes are reviewed in the light of new legislation.

Making the news....

FIRST "AGEISM CASE" PREDATES LEGISLATION

A clerical worker at a hospital in Cornwall has been reinstated along with several colleagues, after their employer dismissed them the day before age discrimination law was introduced in the UK last October.

The 66 year-old employee, Ann Southcott, was dismissed on September 30th and told she would receive just 11 weeks' wages instead of the 11 months' pay she would have been entitled to, were she dismissed a day later.

While the case, which was settled out of court after negotiations involving the employees' union UNISON, may not be the landmark victory some have claimed, it is clear that the decision to dismiss some 30 staff all over the age of 65 would be difficult to defend at tribunal.

Mrs Southcott was reinstated in her job with her continuity of service restored and received back pay for the time she was out of work.

No ifs, no butts – smoking banned indoors

Already introduced in Wales and Northern Ireland in April, and in Scotland last year, smoking inside public places will also be banned in England from July 1st.

Those responsible for premises could be charged a £200 on-the-spot fine for allowing smoking indoors or failing to display appropriate no smoking signs, and could face prosecution and up to £2,500 in fines for the manager or person in control of premises where people are permitted to smoke.

It will also become a criminal offence to smoke in a defined no smoking area in England. Individuals could be charged on-the-spot fines of £50, or face prosecution and a fine of up to £200 for smoking in a no smoking area.

The new law is introduced under the Health Act 2006 and will be enforced by local authorities, with Environmental Health Officers likely to take a role in enforcement. The government has made some £30 million available to councils for training additional enforcement officers to police the ban.

UK plays catch up on holiday

Some employers have expressed concern at the government's intention to increase workers' annual holiday entitlement from 20 days to 28 days a year, but the move would help to bring the UK more in line with European holiday levels.

The legislation, which is expected to be introduced in October 2007, will only affect companies who have included the UK's 8 Bank Holidays as part of their employees' annual leave.

The DTI is expected to answer the response to its second consultation on the subject, which closed on April 13th, sometime in May.

If the change is adopted, the consultation proposes increasing statutory annual leave entitlement in two stages, rising from 20 to 24 days on 1st October 2007, and from 24 to 28 days on 1st October 2008.

The DTI estimates that 6 million workers would benefit from such a development, many of whom work in positions attracting lower levels of pay and other benefits.

It has long been regarded as something of a loophole that employers can force employees to take public holidays out of their annual holiday entitlement of which they are legally entitled to at least 20 days.

The UK comes in at the back of the field in terms of the amount of statutory and public holidays that employees enjoy.

The average total of statutory leave and public holiday across the EU has been calculated at as much as 34 days. The most generous countries include Greece, Austria and Finland whose workers enjoy nearly 40 days of statutory and public holiday.

Burdens Barometer tops £55 billion

The 2007 calculation of the financial impact of regulation on UK businesses, published each year by the British Chambers of Commerce (BCC), claims that the total cost since 1998 topped £50 billion in 2005 and now stands at £55.66 billion.

The controversial table, published by the BCC as “Burdens Barometer” includes some 77 different regulations covering matters as diverse as money laundering and food hygiene.

The figures are taken from the individual Regulatory Impact Assessments that government departments are required to complete when preparing legislation, but do not take into account the benefits that legislation is also intended to bring.

The figures include more than £20 billion in costs that the BCC attributes to legislation in employment matters, with 1999’s Working Time Regulations topping the list with £14 billion in associated expense for business.

Sally Low, Director of Policy and External Affairs at the BCC, said that this year’s figures were “once again painful reading for business.”

However, the view from abroad about the level of economic freedom in the UK is somewhat different.

The Index of Economic Freedom, published by the right-wing Washington think-tank, the Heritage Foundation, places the UK 6th out of 161 countries.

The Index ranks countries around the world on a series of “freedoms” to provide a total percentage score. The UK’s overall score was level with 5th placed New Zealand and just 0.4% behind the United States in 4th position.

The accompanying report claims of the UK that: “Almost all commercial operations are simple and transparent, and support for private enterprise is a world model.”

Who says tax doesn't have to be taxing?

The additional tax collected through full and aspect enquiries conducted by HM Revenue and Customs (HMRC) has topped £1 billion pounds for the first time.

Despite an overall decline in the number of enquiries carried out by HMRC, the amount of additional tax collected has gone up by nearly a quarter of a billion pounds in the past three years, largely as a result of a more focused and "risk-based" approach to conducting enquiries.

A high percentage of risk-based enquiries result in additional revenue being raised, so it is very important that businesses seek proper advice from tax specialists in the event of an enquiry into their tax affairs.

Increase in revenue collected

	2003/04	2004/05	2005/06
Full Enquiries	40,864	38,826	32,211
Aspect Enquiries	83,852	77,786	75,830
Additional Tax Collected	£838.3m	£886.4m	£1.065bn

The total revenue raised far outstrips the Chancellor's objective of bringing in an additional £1.6 billion in unpaid taxes over the 3 years in question, set when he dedicated an extra £66 million to compliance work in April 2003.

> DASbusinesslaw tip

DAS commercial policyholders targeted by HMRC for a Full or Aspect Enquiry into their business affairs, will have an accountant appointed to represent them, and any related accountants' fees and legal costs are covered under the policy.

And finally...

If you ever wondered precisely who last year's age discrimination legislation was designed to protect, spare a thought for Britain's oldest known workers.

Buster Martin, who is employed as a van cleaner in South London, was told by his employers to take the day of his 100th birthday off, last September.

Mr Martin was still reported to be working for the same plumbing business as recently as March, and also made the papers when he fought off a gang of muggers who attacked him on his way home from the local pub.

The muggers fled empty handed and Buster returned to work the day after the attack, but his employers would not let him work so soon after the incident.

His boss commented "It's typical of Buster to carry on as usual. He couldn't see what all the fuss was about".

Mr Martin says of his plans to carry on "As long as I still wake up in the morning I will continue to work". He did briefly retire at 97, but returned after 3 months because he was bored.

Another, even older employee was forced to retire in April this year. Jim Webber, a great-grandfather, was thought to be Britain's oldest worker at 104.

The retired farmer worked as a pub gardener in Dorset for more than twenty years without taking holidays because he claimed he "never fancied one".

Mr Webber was still making use of his full driving licence at work, using a tractor to move his mower until arthritis prevented him from getting onto it.

Both Buster and Jim cited alcohol in moderation as secrets of their longevity. The former favouring a pint of bitter and the latter, a little whisky.

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