

Employment Law Briefing

■ Taking time off during working hours

The Employment Appeal Tribunal recently held that an employee who knew in advance that her childminder would be unavailable was entitled to take time off to look after her children. Sarah Embleton, Associate in the employment team at Burges Salmon LLP, looks at the implications of this decision and offers practical advice to employers.

“Sorry, I can’t come to work — my childminder has let me down,” is a not unfamiliar phone call and one that can cause a great deal of stress and inconvenience for employers. Last-minute cancellation of childcare and similar situations can mean that an employee may need to take time off with little or no warning. Below we look at an employee’s right to take a reasonable amount of time off to care for, or make arrangements for, a dependant and at how employers can handle these situations effectively and lawfully.

Although the right to take time off in the circumstances mentioned above (and set out in detail below) has been in force since 1999, there has been relatively little case law on the exercise of the right. This suggests that, on a day-to-day basis, employers and employees manage these situations with relative ease. However, there is now the Employment Appeal Tribunal (EAT) case of *Royal Bank of Scotland v Harrison*, which potentially extends the scope of the right beyond scenarios previously envisaged.

Before considering the *Royal Bank of Scotland* case, however, it is worth reminding ourselves of the nature of the right, which sets out specific circumstances in which an employee can take time off.

Emergencies

The right allows employees to take reasonable (unpaid) time off where necessary:

- to provide assistance to a dependant who becomes ill, gives birth, is injured or is assaulted (the illness/injury does not have to be serious)
- to make longer-term care arrangements, eg taking time off to find and employ a temporary carer (but not taking further time off to care for the dependant himself or herself)
- to deal with logistical aspects following the death of a dependant (eg arranging or attending a funeral)
- to deal with unexpected disruption, termination, or breakdown of arrangements for a dependant’s care
- to deal with an unexpected incident involving the employee’s child during school hours.

The right does not cover household emergencies (eg a burglary). Equally, it does not apply to time off planned in advance (eg to attend a dependant’s hospital appointment) for which the employee will need to take annual leave, agree paid or unpaid leave, or unpaid parental leave (if eligible).

Employers should also be aware that “dependant” is defined widely — it includes children, spouses, civil partners, parents (but not grandparents) and others who live with the employee. Where the time off is needed due to illness, “dependant” also includes those who “reasonably rely” on the employee for such assistance. Further, where the absence is due to a breakdown in care arrangements, “dependant” includes those who reasonably rely on the employee to make arrangements for the provision of care. This could, for example, cover a grandparent or a frail neighbour.

Employees’ obligations

An employee must notify his or her employer as soon as possible that he or she needs to be absent and how long he or she expects the absence to last (this can be only an estimate). The employee does not need to do this in writing, nor does evidence have to be provided to prove that the time off is needed



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(although the employer may choose to ask for evidence if it doubts the employee's story).

As circumstances will usually provide little, if any, opportunity to discuss the situation prior to taking the leave, it is often left until the employee's return to work to determine whether the leave was appropriately taken.

The RBS case

In the case of *Royal Bank of Scotland Plc v Harrison* [2008] UKEAT/0093/08, the EAT considered how the right should operate in relation to the "unexpected disruption" of care.

Mrs Harrison had two young children. Her regular childminder told her on 8 December 2006 that she could not care for the children on 22 December. Mrs Harrison tried to get someone else to help, but failed. On 13 December she notified her employer that she had to take a day's leave on 22 December and asked for the time off. On 20 December her employer said that she could not have the leave and, if she took the time off, that it would be treated as unauthorised absence.

Mrs Harrison stayed at home on 22 December with her children. She was given a verbal warning. She challenged this at tribunal, complaining that she had been subjected to an unlawful detriment (the imposition of the warning) for exercising the right to time off. The question for the EAT to decide was whether she had been entitled to take the time off.

The EAT found that, whilst Mrs Harrison knew in advance that her childminder would be unavailable, it was, nonetheless, "unexpected" that Mrs Harrison's childminder would cancel. If an employee has had sufficient time to make alternative arrangements but has not done so, it is unlikely that it would be deemed necessary for the employee to take the time off. However, there could be no hard and fast rules and Mrs Harrison had done all she could to avoid the need to take the time off. In the circumstances, it was an "unexpected" event

and, therefore, necessary for her to take the time off.

The EAT also held that "unexpected" did not incorporate a time element — something was unexpected if it was unexpected at the moment before the employee learned of what was about to happen. Here, Mrs Harrison's childminder's absence was unexpected at the time that Mrs Harrison learnt of it and she had tried to make alternative arrangements.

Practical advice

Employers need to be familiar with the different scenarios in which this right to time off arises. In certain situations, the event giving rise to the right need not be unexpected, eg where it is in consequence of the death of a dependant. Policies should, therefore, be drafted to reflect the legislation accurately. Equally, where it is left to line managers to operate the policy, care should be taken to ensure they understand how to respond to the different scenarios and to ensure consistency across teams and departments.

It is also worth noting that there is no requirement under this right to pay employees who take time off. Employers may choose to reflect this in their policies. Specifically, employers may also wish to:

- review their existing policy to ensure that it lists the circumstances in which employees may take such time off, setting out the employer's notification procedures
- ensure their disciplinary policy states that breach or abuse of the policy may result in disciplinary action
- train line managers in how the policy should operate and in how to deal with employees who ask for time off
- publicise the policy among employees in the same way as other policies
- ensure consistency in the application of the policy. ■