Employment Lawyers Association

Response to BIS Consultation

TIME TO TRAIN? CONSULTATION ON THE FUTURE OF THE RIGHT TO REQUEST TIME TO TRAIN POLICY

15 September 2010

ELA WORKING PARTY

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Introduction

The Employment Lawyers Association ("ELA") is a non-political group of specialists in the field of employment law and includes those who represent Applicants and Respondents in the Courts and Employment Tribunals. It is therefore not ELA's role to comment on the political merits or policy aims of proposed legislation, rather to make observations from a legal standpoint. ELA's Legislative & Policy Committee is made up of both Barristers and Solicitors who meet regularly for a number of purposes including to consider and respond to proposed new legislation.

A sub-committee was set up by the Legislative & Policy committee of ELA to consider and comment on the consultation document "Time to Train? – Consultation on the future of the right to request time to train policy" ("the 2010 Consultation Document"). A full list of the members of the sub-committee is annexed to the report.

ELA Response

The 2010 Consultation Document seeks replies to a number of questions, several of which, given the nature of our organisation, are not applicable to us. We offer some comments in relation to Question 5 – with an emphasis on options that could be considered in the Government's review, whilst also noting that a number of those observations were set out in our response in September 2008 on the consultation document "Time to Train – Consulting on a New Right to Request Time to Train for Employees in England". A copy of the latter response is also attached for convenience ("the September 2008 Consultation Response").

Question 5:

Should the right to be retained, but made to function better for example by:

a. exempting employees who can already access training from being able to use the right or introducing exemptions for other employees.

Response

The Working Party's view was that this option may be problematic to operate in practice.

It is not clear whether such an exemption would be intended to apply to employees who could access training from or via their employer - which may be the implication – or from other broader sources, such as trade union, outside their normal working hours. If it was an exemption in relation to access to any training which excluded the relevant employee, that would appear to preclude them from applying for training that was relevant to their particular interest. For example, if an employee has or is able to receive trade union supplied training on health and safety matters, it may be perceived as inappropriate to exclude that employee from making a boarder skills request.

The implication may well be that 5(a) is focusing on access to employer provided training programmes within a 12 month period. Whilst this may well be an important reason for an employer to decline a request, particularly within larger employers, it would appear to run counter to some of the broader aims articulated in the Impact Assessment in terms of affording opportunities for employees to take a greater interest in the development of the key

skills that they wish to develop. We acknowledge readily that this point is a policy matter but mention it in outline because of the overlap with question 5(b) below – namely the difficulty in defining or determining what would be "accredited training" (see also our response to Question 3 in the September 2008 Consultation Response).

We can see the practical attraction for employers who already invest significant resources in tailored training arrangements being able to focus solely on their internal training regimes. Clearly, if an employee has applied for certain employer supplied training and that request is refused, it may be viewed as counter-productive, or duplication of resources to utilise the statutory right to repeat the request by another means (namely through external provision), for example. Also, that employee would be able to raise a grievance if they were dissatisfied with the rejection of the non statutory request, without the need for a specific statutory right. We also considered that the existing grounds for refusing a request in the Regulations would give sufficient protection to these employers.

Consequently, the Working Party considers that the drafting necessary to create such qualitative exemptions may ultimately create greater complexity (and create scope for further dispute/litigation) and so, on balance, felt that the answer to 5(a) is no, as it is considered it would be likely to increase complexity and reduce legal certainty.

b. Adding new reasons for refusal where good training review systems already exist.

Response

We refer to the difficulties identified above in respect of determining what would be "good training review systems" or "recognised and accredited training" in the September 2008 Consultation Response. We comment more broadly on the reasons for refusal in the September 2008 Consultation Response.

Again, the Working Party can see the advantage in avoiding a two-pronged dispute between an employer or employee through the grievance process and the statutory right.

It may be possible to formulate a right of refusal similar to the concept of "some other substantial reason" such as that used for the potentially fair reasons for dismissal. That could encompass/include the existence of good internal training options. The broader description may avoid the need for prescriptive regulation over what amounts to "good training review systems" etc, and this would then become a matter for Guidance.

c. Introducing different procedures for dealing with requests.

Response

The Working Party's view is that much is to be gained in retaining the consistency between the procedure to apply to exercise the right to request to work flexibility and the right to request time to train. Therefore, the Working Party considered that different procedures would not make the right function better.

Further comments

- The experience of the Working Party to date is that the right is not prompting employers to seek external advice currently. We are unable to form a view as to whether that is because the right is not being utilised currently and whether that indicates that larger employers already have in place effective methods of dealing satisfactorily with training requests and training provision for employees. Clearly the right has only been available for approximately 5 months so it may simply be early days.

- We note the observations in Chapter 7 of the National Employer Skills Survey for England 2009 prepared by the UK Commission for England & Skills, published in August 2010 ("the UKCES Report"), regarding the impact of the recession on the training decisions being taken by smaller employers. Clearly, however, it is a policy matter for Government whether the introduction of the right to apply to employees of medium and smaller employers should be deferred or delayed (as an alternative to its removal).

- In terms of reasons to restrict training per se in a recessionary climate, the UKCES Report appears to indicate that various employers have reduced the amount of training available on grounds of cost to the business. Many employers also appear to cite the existence of adequate skills within the work force generally or for particular roles within their workplace as a reason to reduce training budgets. Again the latter would appear to be covered by S63F(7)(a) and (b) ERA 1996.

- We note the exclusion of agency workers from the ambit of this right and the comments at Paragraphs 5.28 – 5.31 (at Pages 36-37) of the (then) Government's Response on the Draft Agency Workers Regulations in January 2010. We wondered whether the Government intended to give further thought to the scope for inclusion of agency workers within the right as this would go some way to avoiding any assertion of a failure to transpose effectively Article 6.5(b).

Working Party

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