

Employment
Employment Law Update
Rosling King LLP



Background

On 30 June 2014 the Government opened up requests for flexible working to all employees with 26 weeks' continuous employment. Whereas previously the entitlement was confined to those with dependents any employee can now make the request for any reason. We take a look at what's happened in the last three months.

How it works

The employee triggers the procedure by making a written request. The employer then has the three-month decision period (which can be extended by agreement) within which to consider the request, discuss it with the employee (if appropriate) and notify the employee of the outcome.

The employer can still only refuse a request for one (or more) of the eight reasons. These are:

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

Did the mortgage lender breach any duties in entering the entering and administering the mortgage contract?

The Masons brought a claim against Godiva on the basis that they were owed a duty of care to exercise care and skill in entering and administering the mortgage, which Godiva allegedly breached in offering them the mortgage. Significantly, the Masons raised the fact that Godiva should have known that an income figure of £100,000 per Mason was implausible and that the mortgage was thus unaffordable. Godiva resisted this claim on the basis that no duty of care arose as it did not offer the Masons any advice. Instead, Godiva argued that it was Mr Balm's job to advise the Masons on the RMC.

Common law and statutory duty of care

In reaching the conclusion that Godiva did not owe the Masons a duty to exercise care and skill, Martin Chamberlain QC, sitting as a Deputy Judge of the High Court, emphasised the importance of the express terms of a contract. Godiva offered no advice to the Masons and more importantly this was documented in its offer. To impose a duty of care on Godiva would create inconsistency with the express terms of the contract. The Deputy Judge agreed that it was Mr Balm and ABF who were responsible for advising the Masons on the suitability of the mortgage.

Duties owed under the Mortgage Conduct of Business Rules ("MCOB")

The Deputy Judge also considered the duties owed by Godiva under MCOB. Under MCOB, Godiva was required to show that prior to considering whether to enter into the mortgage contract, account was taken of the Masons' ability to pay. In doing so, Godiva was entitled to rely upon self-certification of income if it considered this appropriate. The Deputy Judge raised

the additional measures Godiva undertook in successfully discharging this duty. Namely, Godiva:

- Refused to offer self-certification products to first-time buyers; the Masons had an existing mortgage on which they had not defaulted.
- Employed a fraud detection system which flagged prospective buyers who had applied for and been refused a product requiring verification of income; nothing was implausible to Godiva about the income figure stated on the application form. Indeed, prior to the financial crisis, a property development company may well have generated such income per year.
- Raised concerns about the age of the Masons; they requested and obtained proof that the Masons intended to continue working beyond the age of 75.
- Required the intermediary, Mr Balm on behalf of ABF, to complete a checklist saying that the client had checked the application form and signed a declaration in respect of this; this was done and Godiva was entitled to assume that ABF, as a regulated intermediary, was telling the truth when it said that the Masons verified the contents of the application form.

This demonstrated to the Deputy Judge that Godiva adopted a proactive approach in entering and administering the mortgage to the Masons, as it did not operate a streamlined procedure but considered the individual circumstances of the Masons. Godiva also maintained an internal policy relating to self-certification loans and had documented various steps taken to satisfy themselves of the reasonable of the stated income.

The Deputy Judge also considered the actions of Mr Balm, acting on behalf of ABF. The Masons initially queried the figure of £100,000 income when they were asked to check the application form prior to it being submitted to Godiva. Indeed, Mr Balm was asked to amend this figure as the Masons did not consider it accurate, but failed to do this. Significantly, the Deputy Judge accepted the Masons' evidence, one reason being that they did not use computers and thus relied upon Mr Balm to liaise with Godiva. Conversely, Godiva, correctly, relied on the intermediary checklist as completed by ABF.

Additional commercial considerations included the fact that the Masons intended to repay the capital sum through the sale of a dwelling or other property, a valuation of which confirmed that the property was worth more than the sum advanced. In this case, it was not a mortgage lender's role to consider whether it was prudent or realistic, particularly as they were obtaining advice from an authorised intermediary.

For further information, please contact [Georgina Squire](#) or the Partner with whom you usually deal.