EMPLOYERS’ E-GUIDE NO. 8

A GUIDE TO CAREER BREAKS

October 2007, Employment Relations Unit

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Introduction

For employers, career breaks can be a means of retaining valued staff, in which the employer might have invested significant training and development. They can also help to retain staff in areas where there are skills shortages.

For employees, a career break means that they can take time away from work, for example to care for dependants (young or elderly), to do voluntary work, to travel, or for private study, knowing that they have the security of a job to return to.

The key for both parties is that expectations and obligations are clearly understood and documented before an employee goes on a career break.

The term “career break” has no meaning in law, but is a concept many employers will be familiar with. This guide examines decided cases and the issues around the status of the contract, continuity of employment and the right to return to work.

The terms “career break” and “sabbatical” are often used interchangeably. It has been difficult to find definitive definitions of the two terms, but more commonly, a career break involves a resignation from work, with a promise of re-employment in the future, whereas sabbatical is often used to describe an unpaid release from duties, without ending the contract of employment. This guide will use the term “career break” to describe both scenarios, although the two types – (a) where the contract continues, and (b) where the contract ceases – will be considered separately throughout the guide as appropriate.

1 Status of the contract

A career break may occur in one of two ways:

- Type one: the individual remains an employee, but agrees to vary the terms and conditions of his or her contract; or,

- Type two: an employee might be required to resign from employment at the commencement of the career break.

The employer should set out clearly the terms on which a career break is offered and the employee can then decide whether or not to accept them. These terms might include the non-accrual of service for contractual rights if the individuals remain as employees.
If the contract of employment remains in force it is important to remember that certain entitlements will continue to accrue. For example, an employee could continue accruing more beneficial contractual entitlements to maternity pay.

In either scenario, it may be possible for the employee to take other employment, or alternatively, an employer may ask the individual to agree not to take other employment while on the break.

2 Effect on continuity of employment

Statutory rights

In terms of the statutory rights contained in the Employment Rights Act (ERA) 1996, e.g. the right to claim unfair dismissal or the right to a redundancy payment, entitlement is based on minimum periods of continuous service. Continuity of employment is governed by s.212 of the ERA. Section 212(1) states that continuity is preserved during any week when a contract of employment is in force. Section 212(3) applies to cases where there is no contract. Section 212(3)(c) preserves continuity where an employee is ‘absent from work in circumstances such that, by arrangement or custom, he is regarded as continuing in the employment of his employer for any purpose’.

Generally, where the contract of employment is terminated at the commencement of the career break, continuity under these provisions will not be preserved and therefore statutory employment protection rights will not be maintained. This is illustrated by the case of Curr v Marks & Spencer plc (Advisory Bulletin 464).

Curr v Marks & Spencer plc – no continuity

The Court of Appeal held that continuity was not preserved. The employee had resigned and therefore there was no contract of employment during the break. For ERA s.212(3)(c) to apply, both parties must regard the individual as continuing in employment for some purpose, e.g., for pension purposes. An intention that there should be some ongoing relationship was not enough. The Court did comment, however, that it would have been good practice for Marks and Spencer to have explained the effect of the break on Mrs Curr’s continuity of employment.

Unwin v Barclays Bank – career break terms might confer continuity

The decision in Curr was followed by Unwin v Barclays Bank (see Advisory Bulletin 470), where continuity was preserved. In Unwin, the EAT’s decision turned on the terms of the Bank’s career break scheme. Specifically, while staff were required to resign, with an offer of re-employment on return, they had to work at least two weeks per year during the break, and were provided with a monthly information pack to enable them to keep in touch. Whilst on a career break staff also qualified for concessionary rates of subscription with the Chartered Institute of Bankers.

Despite the fact that many of the terms of the career break scheme pointed to a break in continuity, the EAT considered that other terms, such as the concessionary
rate of membership to the Chartered Institute of Bankers, the requirement to work for short periods during the break, and continued benefits in relation to staff bank accounts and loans demonstrated that Mrs Unwin’s employment was regarded as continuing in force, at least for certain purposes. That was sufficient to enable Mrs Unwin to satisfy the requirements of the ERA s.212(3)(c).

Note: This case turns on the terms of the Bank’s career break scheme, rather than providing authority for a general assumption that continuity is not broken by a career break scheme. However, the Bank clearly did not intend its scheme to preserve continuity, and authorities should look at the terms and operation of any career break scheme and apply the broad approach adopted by the EAT in relation to ERA s.212(3)(c). It will not be sufficient to rely on express terms that specify that continuity is broken if some benefits or obligations remain in place.

Clear written terms needed

Authorities should be mindful then, that if they require an employee to resign in order to commence a career break, but also to return to work from time to time in order to refresh his or her skills, following Unwin, there is still a risk of a finding that the employee’s service was continuous. The important thing for authorities, therefore, is to be very clear about whether or not an individual is intended to remain employed or not, and to give effect to that intention in the terms of the career break agreement.

Conditions of service

Where the contract continues

In the first type of career break, where the contract continues because the employee has not resigned, the general position will be that continuity of service for contractual benefits will continue. However, it is possible for the authority to vary contractual terms. The authority should set out any proposed variation in the offer, e.g. the authority could provide that the period of the career break will not count for the purposes of accruing additional sick leave entitlement or the five days’ extra annual leave provided by the National Agreement on Pay and Conditions of Service (Green Book).

However, if the employee’s contract of employment remains in force during the break, subject to agreed variations, employers may wish to consider specifying that there will be no entitlement to Occupational Maternity Pay while the employee is on a career break. Alternatively, as the career break agreement should specify that the employee will not be paid throughout the career break, a week’s pay will be nil, and therefore no Occupational Maternity Pay will be payable.

Where the employee is required to resign with the promise of a job on return

However, with regards to the second type of career break, that is, where the contract does not continue and where the employee has resigned, paragraph 14 of Part 2 of the Green Book specifically provides:
'Where an employee returns to local government service following a break for maternity reasons, or reasons concerned with caring for children or other dependants, he or she will be entitled to have previous service taken into account in respect of the sickness and maternity schemes, provided that the break in service does not exceed eight years and that no permanent paid full time employment has intervened. For the purpose of the calculation of entitlement to annual leave the eight years’ time limit does not apply provided that no permanent full time employment has intervened.'

It is not expected that this provision will preserve continuity, as there is no intention for the employment to continue during the break. Rather, it is saying that if an employee returns (and no guarantee is made in that respect), and meets the condition restricting intervening employment, previous service will be recognised.

Also, following the Court of Appeal’s decision in Commissioners of Inland Revenue v Ainsworth (Advisory Bulletin 500), which has been appealed to the House of Lords and referred to the ECJ, annual leave might not be available to an employee who is already on leave from work, subject to any contractual provisions. Also, as the court held that a worker has to be at work to take leave, the entitlement is to be paid the amount the employee would receive for working the normal working hours as required by the contract in force when the holiday is taken. Since the normal working hours on a career break would be nil, the employee would not be entitled to any pay while on the career break, but would still accrue leave to be taken upon return to work within the current leave year or in the next leave year subject to contractual arrangements or the carry-over of untaken leave.

3 Right to return to work

Where the employee is required to resign with the promise of a job on return

With the second type of career break (when the employee has resigned and there is no contract) authorities must decide appropriate terms relating to how far a right to return is guaranteed and what kind of post can be offered and on what terms. Schemes offering career breaks fall into two categories, those that guarantee re-appointment in the same or a similar position, and those that do not guarantee re-appointment, but offer individuals preferential consideration for employment when they wish to return.

If an authority wishes to guarantee re-appointment, it should carefully consider what guarantees it can make. Re-appointment to the same role may not be feasible if there has been a re-organisation, so an authority may agree that a returning employee will be offered a post similar in grade and responsibilities to the former post, and/or re-appointment on an equivalent salary. However, authorities should be cautious when guaranteeing re-appointment as certain extenuating circumstances may intervene – for example, a redundancy situation may arise. However, it is worth bearing in mind that, if an employee is on the first type of career break and thus has resigned, because they are no longer employed, technically, they cannot be made redundant, although authorities should beware of relying on this kind of technicality.
Individuals should be required to give sufficient notice of their intention to return to work to give the authority time to find a suitable position. This also allows time, where an employee has been appointed on a fixed-term basis to cover the work of an employee on a career break, for the employer to go through the statutory dismissal procedure in respect of the fixed term employee.

If an individual is offered preferential consideration for re-appointment, authorities should consider how this will be facilitated, for example, by sending them a list of vacancies. However, consideration will also need to be given to s.7 of the Local Government and Housing Act 1989, which states that all appointments must be based on merit.

4 Pension contributions

Where the contract continues

If the contract continues, even though the employee is not receiving pay, the employee and employer must pay contributions for the first 30 days of the leave of absence.

Within 30 days (or such longer period as the authority allows) of returning to work or resigning (if sooner) the employee can opt to pay basic contributions for the remainder of the period of the leave of absence, up to a maximum period of three years including the first 30 days. The employer will then have to pay their contributions.

If the employee is paying any Additional Regular Contributions (ARCs), additional contributions to purchase added years or additional contributions to buy back part-time service, these remain payable (based on the employee’s notional full pay), regardless of whether or not the employee chooses to pay basic contributions beyond the first 30 days. The employee can choose whether or not to continue paying any Additional Voluntary Contributions (AVCs).

If the career break scheme requires the employee to work for one week a year, for example, then this will be viewed as a return to work. This would mean that after the end of that week the employee would be viewed as starting their leave again and both employee and employer would have to pay contributions for another 30 days and the employee could pay contributions for another three years inclusive of the first 30 days.

Where the employee is required to resign with the promise of a job on return

An employee cannot opt to make up the pension shortfall unless they return to work and buy added years, or pay either ARCs or AVCs.

Further information on pensions can be found on the LGE website (see Sources of Information, below).
5 A career break policy?

Given the potential pitfalls of agreeing to a career break, and in order to ensure that all such requests are dealt with fairly and consistently, authorities may wish to consider implementing a career break policy, or amending any flexible working policy to include career break requests.

The following is a checklist of items authorities might wish to consider when drafting a policy:

- Make it clear that career breaks are at the employer’s discretion, not an entitlement. Paragraph 7.9 of Part 2 of the Green Book (Special Leave) states that additional leave, either with or without pay, may be granted in special circumstances, at the employer’s discretion.

- Eligibility requirements, such as a minimum period of continuous service required before an employee may apply, e.g. two years.

- Whether an employee may apply for more than one career break, and if so whether a minimum period must elapse between applications.

- Career breaks should be available to both full-time and part-time employees who are permanently employed. However, authorities will also need to consider carefully the position of employees on fixed term contracts, especially where these are of a few years’ duration. For example, it may well be justified for an authority to allow an employee on a five year fixed term contract to take a career break of six months. Authorities will need to consider each case on its merits and may wish to include the possibility of career breaks for staff on fixed term contracts in any policy it may produce.

- What is required in an application? For example, how far in advance is an application required; must the employee indicate the intended duration and reasons for the career break?

- Minimum and maximum periods for career breaks (shorter breaks may be dealt with through other forms of leave). Typically career breaks can last from one to five years.

- Provision for reviewing the arrangement if circumstances change, and for employees to give notice of intended return to work, including early return or resignation.

- Factors the employer will take into account in considering requests, such as the ability to engage temporary staff to provide cover during a period of absence - this may be more difficult in specialist or technical roles. Employers may also wish to consider the number of career breaks already approved and the impact of a further break on the work of the department.
• Equalities impact in both granting and refusing requests - employers will wish to avoid discrimination claims.

• Any restrictions on alternative employment during the career break.

• Maintaining current knowledge about the area of work – is the employee engaged in an area of work where up-to-date knowledge is required? Can this be maintained during the break?

• Communication, particularly if the individual remains employed - how will the authority communicate information and consult the employee about, for example, a proposed restructure?

• Pay and benefits – what will an employee come back to? For example, they may return to the same grade, including any cost of living increases, but without increments.

• What effect the career break will have on any other employment terms and conditions? For example, if an employee is required to resign, it may lead to a loss of continuity of service, which will affect the employee’s statutory rights.

• Will employees returning from a career break be subject to a probationary period? What training will be provided?

• A model application form and career break agreement.

6 Sources of Information

Advisory Bulletin 470 – Continuity of Employment: Career Break Schemes – Unwin v Barclays Bank plc (EAT/027/02)
Advisory Bulletin 500 – Paid Annual Leave during Sickness Absence – Commissioners of Inland Revenue v Ainsworth and others, unreported [2005] EWCA Civ 441 (22 April 2005)

The Advisory Bulletin is available by e-mail to all local authorities and subscribers. For further details, please e-mail eru@lge.gov.uk.

LGE Website
www.lge.gov.uk
**Legislation**

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<td>s.212 - Weeks counting in computing period of continuous employment</td>
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