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Flexible working – the right to ask

Inside

Employees seeking a better balance between the demands of work and personal life may seek a change in their working arrangements – for example, through part-time working, job-sharing or a change in working hours. While there is no right to insist on working in a different way, there is a statutory right to ask for a flexible working arrangement and to have that request seriously considered.

The right to make such a request applies to all employees from day one of employment (not just to those with caring responsibilities).

This Inbrief summarises the right to ask for flexible working and explains how discrimination law applies in this context.

Overview of the right

In outline, the right to request flexible working operates as follows:

- it applies to all employees from day one of employment
- employees can ask for changes to hours, times and location of work
- a request can be made for any reason
- the employer can refuse for one of eight specified business-related reasons
- employers must consult with the employee and deal with requests reasonably
- the process must be concluded within two months (unless an extension is agreed).

The right is supported by a statutory Acas Code of Practice on requests for flexible working.

What changes can be requested?

Employees can apply to their employer for a change in terms and conditions (a "contract variation") relating to:

- the hours they are required to work
- the times they are required to work
- where (as between the employee's home and the employer's premises) they are required to work.

This covers work patterns such as part-time working, job-sharing, compressed hours, flexitime, homeworking, remote working, teleworking, term-time working and annualised hours.

Making a request

An employee's application must:

- be in writing and be dated
- state that it is an application under the statutory right to request
- specify the change applied for and the proposed date for the change to become effective
- state whether the employee has made a previous request and, if so, when.

An employee who has already made two applications cannot make a further application to the same employer for a period of 12 months (although there is nothing to prevent an employee from making additional requests informally). An employee also cannot make a new application while a previous application with the same employer is still in process.

Although an employee is not obliged to give details about the reason for asking for a contract variation, employers may find it helpful to ask. Knowing the reasons behind the request helps the employer to understand if it is made for health or care-related purposes and to assess the room for compromise if the employee's preferred arrangement cannot be agreed to.

Grounds for refusing a request

An employer receiving an application for flexible working can only refuse the application where there is a business case for doing so. The employer must consider whether one (or more) of the following statutory grounds applies:

- 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.

The employer should not simply assert that a statutory ground for refusal exists but should provide an adequate explanation to the employee of which ground applies and why it has led to the application being refused.

What is the procedure?

One of the main purposes of the legislation is to require employers to give serious consideration to flexible working requests. Employers are not required to follow a prescribed procedure but must deal with requests in a "reasonable manner". There is no statutory definition of what "reasonable manner" means, the Acas Code of Practice provides some guidance. An Employment Tribunal (ET) will have regard to the Acas Code of Practice when determining whether an employer has behaved reasonably.

The entire process, including dealing with any appeal, must be completed within two months of the request being made (unless both parties agree to extend the time).

The employer is required to consult with the employee about a request before it is rejected, which would usually be done at a meeting. Although there is no statutory obligation to meet with an employee in all cases, we suggest always holding a meeting unless the request can simply be approved without discussion.

If the employer cannot accept the request, the Acas Code says they should discuss whether there is a modified version of the request or alternative options that might work instead. Employers are expected to propose compromises where possible rather than simply rejecting a request outright.

There is no statutory requirement to hold an appeal meeting or allow a companion to accompany an employee to any meetings about a flexible working request. However, the Acas Code says that it is good practice to allow an appeal and to allow employees to be accompanied at all meetings. This would also be evidence that the employer was acting in a reasonable manner.

An employer may treat a flexible working request as having been withdrawn if, without good reason, the employee fails to attend the meeting to discuss their request (or any further rearranged meeting).

We have produced a flowchart which summarises the suggested process for dealing with a request.

Trial periods and competing requests

If the employer is unsure whether a flexible working request will work in practice, one option is to agree a trial period with the employee. This is an agreed fixed period of time to try out the new arrangements.

The employer will need to agree an extension to the two-month decision deadline in order to accommodate a trial period. It is very important to be clear that this is a trial period with a fixed end date, and that the employee will revert to their original working pattern if the trial is not successful (otherwise there is a risk it will be a permanent contractual change). It is also important to set agreed dates for reviewing the new arrangement and clear criteria for deciding whether it has been a success.

Occasionally, employers might receive several requests from employees at around the same time asking to change their working patterns for a variety of different reasons. In many cases, it may not be possible to agree to all the requests.

There are no statutory rules on how to deal with this situation. It is best practice to consider each request on its merits, and have open discussions with the affected employees to see if any adjustments can be made so that everyone can be accommodated. A temporary arrangement for a fixed period might be one way of balancing competing requests.

Complaints to the Employment Tribunal

An employee can make a complaint to an ET in the following circumstances:

- where the employer has failed to deal with the flexible working application in a reasonable manner
- where the employer has failed to consult with the employee before rejecting the request
- where the employer has failed to notify the employee of the decision on the application within two months (or any agreed extended period)
- where the employer has refused the application for a reason other than the statutory grounds
- where the employer's decision to reject the application is based on incorrect facts
- where the employer has treated the application as withdrawn when the grounds entitling it to do so did not apply.

The ET's role is to verify whether the employer has acted in a reasonable manner and consulted with the employee, and to examine any disputed facts as to why the business reasons for refusal apply. The ET does not have the power to question the employer's commercial judgment or to substitute its own judgment for that of the employer.

Unless the employee can persuade the ET that the employer's decision was based on facts that are "incorrect", it is hard to go behind the employer's business case. There is certainly no requirement on the employer to justify its decision on objective grounds.

On the other hand, the statutory scheme at least ensures that employees' requests for alternative working arrangements are given proper consideration by their employer. Managers will need to consult with the employee, ensure that they have their facts straight before rejecting any request, and be prepared to articulate the reasons for the rejection in writing.

Where the ET finds a complaint well-founded, it will make a declaration to that effect and may:

- make an order requiring the employer to reconsider the employee's application for flexible working
- make an award of compensation of up to eight weeks' pay, subject to the upper limit on the amount of a week's pay (see here for the current rate).

Because limited compensation is available for breaches of the flexible working provisions, claims are likely to be brought as part of wider claims for discrimination which have no upper limit on compensation (see below).

Avoiding discrimination

It is important for employers dealing with flexible working requests to be alive to the danger of claims under the Equality Act 2010, based on protected characteristics such as sex, race, age or disability.

In some situations a flexible working arrangement may be a "reasonable adjustment" for a disabled employee, meaning the employer will be in breach of its duty under the Equality Act if it turns the request down. It may be necessary to obtain medical advice on adjustments for disability, which can make it difficult to comply with the two month time limit for dealing with the request. It is important to identify this early and agree an extension to the time limit with the employee if needed.

Another example might be an age discrimination claim by an employee who is not allowed to work part-time in the run-up to retirement, contending that similar requests by younger employees for childcare reasons have been regarded more favourably.

A significant risk for employers continues to be the refusal of flexible working requests by employees with caring responsibilities – particularly women returning from maternity leave - leading to claims of indirect sex discrimination. For an employer to be guilty of unlawful indirect sex discrimination, the following conditions must be satisfied:

- a provision, criterion or practice (PCP) must be applied
- that PCP must disproportionately disadvantage female employees
- it must be to the woman's disadvantage
- the PCP must be unjustified.

In practice, most female employees who wish to work flexibly in order to care for children have no difficulty getting over the first three of these hurdles and cases invariably turn on the question of whether the employer's insistence on full-time working is objectively justified. Sex discrimination may also form the basis of a claim for women who have caring responsibilities for adults, if relevant statistics show that this is also a burden which disproportionately falls on women.

An employer will be in a position to refuse a request from a female employee who wishes to work flexibly if it can objectively justify its practice of requiring full-time working. There have been numerous cases involving women with young children in which employers have sought to justify such a refusal with inconsistent and unpredictable results.

Employers are much more likely to be able to justify the refusal if they have consulted fully with the employee before rejecting the request with a “can do” rather than “can’t do” approach. The employer should seek to find ways around its concerns before rejecting a request. Any blanket policy not to allow flexible working is almost certainly going to be unlawfully discriminatory.

Some jobs can be done flexibly merely by reducing hours. Other jobs may require full-time commitment but be capable of job-sharing. One possible justification for refusing a request to work part-time would be an inability to locate a suitable job-share partner.

Following a change to the Equality Act in January 2024, a male employee wanting to work flexibly for caring reasons may also now be able to claim indirect sex discrimination, if he can show that female employees are disadvantaged and he suffers the same disadvantage.

Practical tips

- Give serious consideration to any flexible working request, consider compromise solutions and engage in meaningful consultation with the employee - even if you believe from the outset that the request will have to be turned down.
- If you are unsure, consider agreeing to the proposed arrangement for a temporary or trial period. Another safeguard is to reserve the right to review the arrangement at regular intervals (e.g. every year).
- Be aware of the possibility of discrimination claims, particularly if a request is related to disability, age or caring responsibilities.
- Consider the right to request flexible working in the context of your overall people strategy. Employees of all ages are increasingly looking for flexibility, and workplaces that can offer this are likely to find it easier to recruit and retain people.

For more information on this subject please contact:

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