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# Flexible working: the right to ask

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## Introduction

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

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

### Who can ask?

The right to ask for a flexible working arrangement applies to 'qualifying employees'. A qualifying employee is one who:

- > has, at the date of the application, been continuously employed for at least 26 weeks;
- > has not made a formal application to work flexibly within the last year; and
- > meets the criteria below, which depend on whether they are caring for a child or an adult.

In respect of carers for children, the employee must:

- > be the mother, father, adopter, guardian or foster parent of the child (or be someone who is married to or the partner or civil partner of such a person and be living with them and the child); and
- > have or expect to have responsibility for the upbringing of the child.

The legislation therefore covers anyone who has responsibility as a parent of a child - including biological parents, adoptive parents and partners of parents. It does not extend to anyone who lives in the same house as the child but does not have responsibility for caring for the child (e.g. grandparents, aunts, uncles) unless they specifically have parental responsibility.

The right originally applied to employees caring for children under six, but it was extended in April 2009 to all employees with parental responsibility for children aged 16 and under. Employees whose children are disabled can request flexible working until their child reaches the age of 18.

In respect of carers for adults, the employee must be:

- > caring for an adult (aged 18 or over) who needs care; and who is also
- > married to, the civil partner or the partner of the employee; or
- > a relative of the employee; or
- > living at the same address as the employee.

The definition of 'relative' includes

parents, siblings, uncles, aunts, grandparents, including both full and half blood relationships, 'in-laws' and adoption and guardianship relationships.

There is no definition of 'care' in the legislation, though government guidance (available on the government's Business Link website) gives the following examples:

- > help with personal care (e.g. dressing, bathing, toileting);
- > help with mobility (e.g. walking, getting in and out of bed);
- > nursing tasks (e.g. daily blood checking, changing dressings);
- > giving/supervising medicines;
- > escorting to appointments (e.g. GP, hospital, chiropodist);
- > supervision of the person being looked after;
- > emotional support;
- > keeping the care recipient company;
- > practical household tasks (e.g. preparing meals, doing shopping, domestic labour);
- > help with financial matters or paperwork.

### 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; and/or
- > where (as between the employee's home and the employer's premises) they are required to work.

The provisions cover work patterns such as part-time working, job-sharing, compressed hours, flexitime, home-working, teleworking, term-time working and annualised hours.

### Form and time of request

An employee's application must:

- > be in writing and be signed and

dated;

- > state that it is an application under the statutory right to request a change in terms and conditions;
- > specify the change applied for and the proposed date for the change to become effective;
- > explain what effect, if any, the employee thinks the change would have on the employer and how any such effect might be dealt with; and
- > explain how the employee meets the required conditions in terms of his or her relationship with the person who needs care.

The employee does not have to specify in the application the reason for requiring a contract variation, but it must be for the purpose of caring for a child or an adult who needs care.

An employee who has already made one application cannot make a further application to the same employer for a period of 12 months.

### Grounds for rejecting request

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

- > The burden of additional costs.
- > Detrimental effect on ability to meet customer demand.
- > Inability to re-organise 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. It should provide a sufficient explanation to the employee of why the ground applies to the business and why it results in refusal of the application.

### What is the procedure?

One of the main purposes of the legislation is to require employers to give serious consideration to flexible working requests following a prescribed, and fairly rigorous, procedure.

In outline:

- > Once an employer has received an application, it must hold a meeting with the employee to discuss the application within 28 days, unless it can agree to the contract variation without discussion.
- > The time and place of the meeting must be convenient to the employer and employee, and the employee has the right to be accompanied by a fellow worker.
- > After the meeting, the employer must give the employee notice of its decision within 14 days. The notice must be written, signed and dated. Where the decision is to agree to the contract variation, the notice must specify the agreed change and the date it is to take effect.
- > Where the decision is to refuse the application, the notice must:
  - > set out the relevant ground(s) for refusal (see above);
  - > contain a sufficient explanation as to why those grounds apply; and
  - > set out the appeal procedure.
- > The employee is entitled to appeal by giving notice within 14 days of the employer's decision being given. The notice of appeal must be in writing, must set out the grounds of appeal and must be dated.
- > The employer must hear the appeal within 14 days of receiving the notice of appeal. Once again, the employee has the right to be accompanied.
- > The employer must give the employee notice of its decision on the appeal within 14 days of the meeting to discuss it.

### Employment tribunal complaint

An employee can make a complaint to an employment tribunal in three circumstances:

- > where the employer has failed to comply with the prescribed procedure for handling the flexible working application;
- > where the employer has refused the application for a reason other than the statutory grounds; or
- > where the employer's decision to reject the application is based on incorrect facts.

The tribunal's role is to verify whether the employer has followed all the proper procedural steps and to examine any disputed facts as to why the business reasons for refusal apply. The tribunal 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 somehow persuade the tribunal 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 little scope for the employee to challenge the reasonableness of the employer's decision to refuse a request for flexible working and 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 ensure that they have their facts straight before rejecting any request - and be prepared to articulate the reasons for the rejection in writing.

### What can a tribunal do?

Where the tribunal 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; and/or

- > make an award of compensation of up to eight weeks' pay. (The amount of a week's pay is subject to an upper limit for these purposes, currently £380, so the maximum that can be awarded is currently £3,040).

Because of the limited compensation available for breach of the flexible working provisions, it is likely that they will be used as a precursor to more powerful remedies available for indirect sex discrimination (where there is no upper limit on the compensation recoverable).

### Sex discrimination

Under the Sex Discrimination Act 1975, the argument put forward by women (particularly those returning from maternity leave) is that an unjustified refusal to allow them to work flexibly amounts to unlawful indirect sex discrimination.

In order for an employer to be guilty of unlawful indirect sex discrimination, the following conditions must be satisfied:

- > A provision, criterion or practice must be applied.
- > That provision, criterion or practice must disproportionately disadvantage female employees.
- > It must be to the woman's detriment.
- > The provision, criterion or practice must be unjustified.

In practice, most women 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 justified. Sex

discrimination may also form the basis of a claim for women who have caring responsibilities for adults, if the statistics show that this is also a burden which disproportionately falls on women.

### Justification

An employer will be in a position to refuse a request from a woman 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 work 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.

### Male employees

Male employees wanting to work on a part-time basis for caring reasons will not generally be able to claim indirect sex discrimination because it will not be possible to show that the employer's practice is disproportionately disadvantageous to men. However, if a comparable female employee either has been or would be likely to be granted the right to work

flexibly, it may be possible for a male employee to claim direct sex discrimination - i.e. less favourable treatment on grounds of sex.

### Practical tips

- > Make sure you stick to the statutory procedure when dealing with a request for a flexible working arrangement.
- > Give serious consideration to the request and engage in real consultation with the individual concerned, even if you believe from the outset that the request will have to be turned down. Consider a trial period if the issue is not clear-cut.
- > So far as possible, frame responses to statutory requests in terms of judgments rather than facts. Keep in mind the possibility of indirect sex discrimination claims.
- > Consider setting up active programmes to encourage a 'work-life balance', including working arrangements with flexible and reduced hours. An increasing number of employers are seeing this as a way to encourage experienced and highly trained employees to return to work.

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