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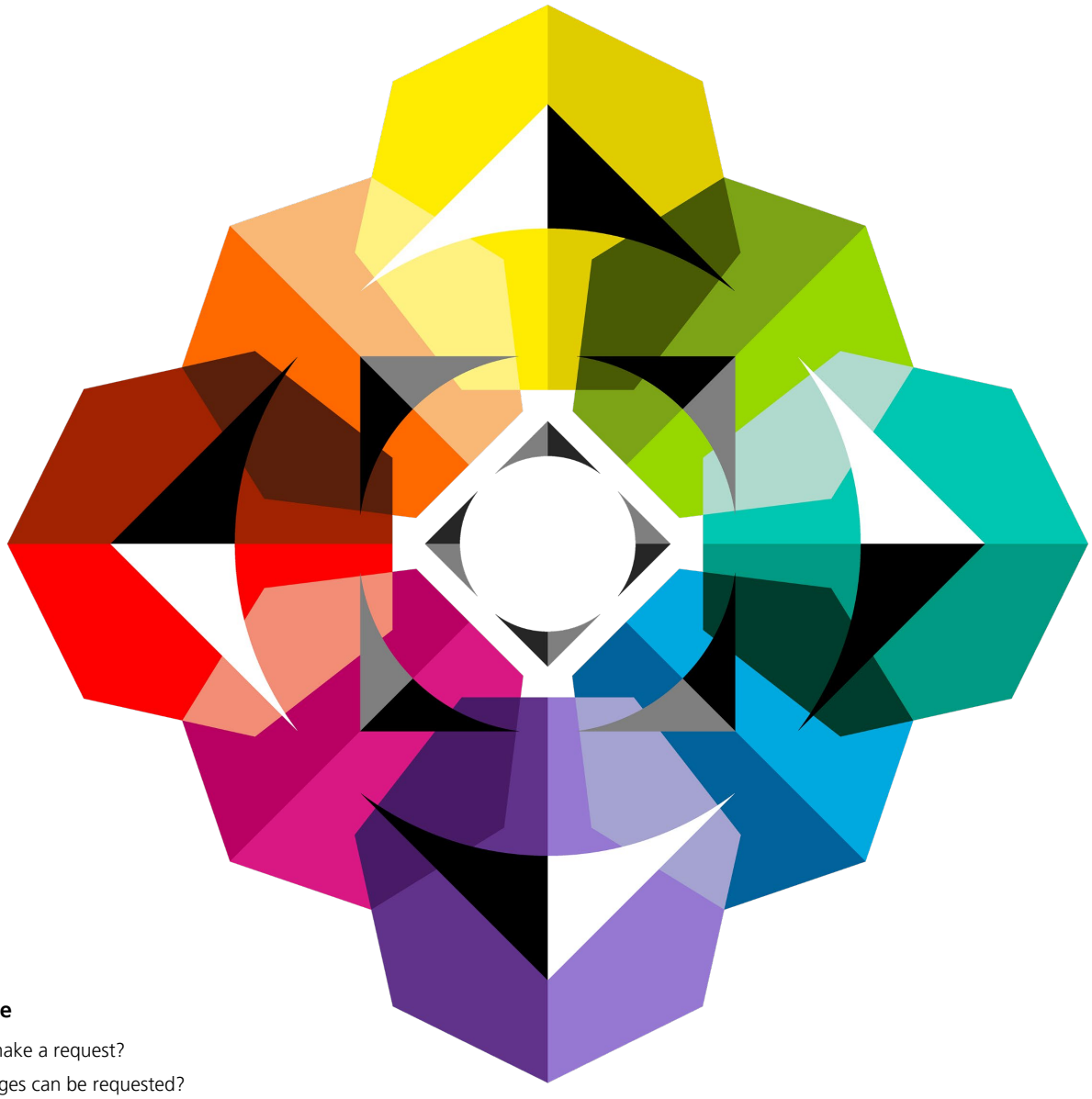
Flexible working – the right to ask



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 was extended in 2014 to all employees with at least 26 weeks' service (not just those with caring responsibilities). The regime is supported by a statutory Acas Code of Practice and an Acas guide.

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

Who can make a request?

The right to ask for a flexible working arrangement applies to "qualifying employees", which is an employee 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.

Qualifying employees can request a flexible working arrangement for any reason. Although the right originally applied to employees with caring responsibilities, since June 2014 all employees with at least 26 weeks' service are entitled to make a flexible working request.

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, home-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
- explain what effect, if any, the employee thinks the change would have on the employer and how any such effect might be dealt with
- state whether the employee has made a previous request and, if so, when

An employee who has already made one application 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).

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. This will be particularly useful in circumstances where the employer has received competing requests (i.e. where two or more employees have asked for the same or a similar change at or around the same time) as it may help to understand the scope of any compromise.

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 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

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 no longer required to follow a prescribed procedure (this was repealed in 2014) but must deal with requests in a "reasonable manner".

There is no statutory definition of what "reasonable manner" means, but both the Acas Code of Practice and the Acas guide make recommendations. 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 three months of the request being made (unless both parties agree to extend the time).

There is no longer a statutory obligation to meet with an employee or hold an appeal meeting. Employers are also no longer required to allow a companion to accompany an employee to any meeting held. Acas nonetheless strongly recommends that employers meet with an employee to discuss the request (and any appeal) and allow them to be accompanied.

Accordingly, we therefore suggest holding a meeting and any appeal unless the request can be approved (not rejected) without discussion. A companion should also be allowed to attend any meetings arranged to discuss the request. It would be good practice to do so and also 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).

Dealing with competing requests

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.

The Acas guide suggests that employers are not required to make value judgements about the most deserving request and should instead consider each case on its merits. Acas recommends that employers have open discussions with the employees making the requests and consider asking other staff already working flexibly to reconsider their needs to see whether any adjustments can be made so that everyone can be accommodated.

Complaints to the 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 notify the employee of the decision on the application within three 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 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 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 (which is £571 from April 2022)

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

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.

For instance, in some situations a flexible working arrangement may be a "reasonable adjustment" for a disabled employee, so the employer will be in breach of its duty under the Equality Act if it turns the request down.

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.

Male employees wanting to work on a part-time basis for caring reasons will not generally be able to claim indirect sex discrimination as 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

Give serious consideration to any flexible working request and engage in meaningful consultation with the individual concerned, even if you believe from the outset that the request will have to be turned down.

If you are unsure, the Acas guide suggests agreeing 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).

So far as possible, frame responses to statutory requests in terms of judgments rather than facts. Keep in mind the possibility of 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 part of their strategy to retain experienced and highly trained employees.

For more information on this subject please contact:

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