



Flexible Working

An overview of the Flexible Working (Eligibility,
Complaints and Remedies) Regulations 2006

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Introduction

In April 2003 provisions of the Employment Act 2002 came into force, introducing a process whereby qualifying employees could formally request a change to their hours, times or place of work. Qualifying employees were employees who were parents of non-disabled children under the age of 6, or parents of disabled children under the age of 18. These provisions were based upon the recommendations of the Working Parents Taskforce that had been established by the Government in response to the numbers of parents who drop out of the labour market because they cannot find ways of combining work and family life. The DTI has reported that the right to request as been a 'great success' with around 47% of new mothers working flexibly, compared to 17% in 2002, and almost triple the number of new fathers now working flexibly.

As a result the right to request flexible working was further extended on 6 April 2007 (as a result of The Flexible Working (Eligibility, Complaints and Remedies) (Amendment) Regulations 2006) to a much wider category of employees: in essence, employees who care for, or expect to care for, adults.

The Government hopes and anticipates that reduced recruitment costs, increased productivity and savings in costs of absence will be achieved by all employers as a result of this regime.

It is important to remember that the right is actually a right to *request* flexible working – there is no automatic right to actually work flexibly, and a set procedure has to be followed for making and dealing with such a request.

Eligibility

To be eligible to apply to work flexibly, an individual must:

- be an employee (the right does not extend to "workers" and agency workers are specifically excluded);
- have worked for his/her employer continuously for 26 weeks as at the date of making the application; and
- not have made another application to work flexibly under the right during the previous 12 months.

In addition, the employee must either:

- be the mother, father, adopter, guardian or foster parent, or the spouse or partner¹ of the mother, father, adopter, guardian or foster parent, of a child under the age of 6 or under 18 where disabled²; and
- have or expect to have responsibility for the upbringing of the child; and
- be making the application to enable him or her to care for the child

OR

- be married to or the partner or civil partner of a person aged 18 or over; *or*
- be a *relative* of a person aged 18 or over; *or*
- be living at the same address as a person aged 18 or over; *and*
- be or expecting to be caring for that person.

The term '*relative*' is defined under the regulations. The definition is very extensive and includes the following:

- parents (including adopters and guardians and special guardians³);
- parents in law and step-parents (including special guardian parent-in-law);
- children (including step-children and children-in-law);
- siblings (including step-siblings and siblings-in-law);
- uncles, aunts and grandparents; and
- half-blood relatives and relationships which would have existed but for adoption (i.e. an employee's natural relatives).

¹ 'Partner' means the other member of a couple constituting of a man and a woman who are not married to each other but are living together as if they were husband and wife or two people of the same sex who are not civil partners of each other but are living together as if they were civil partners.

² 'Disabled' means entitled to a disability living allowance within the meaning of section 71 of the Social Security Contributions and Benefits Act 1992.

³ 'Special guardians' means a person appointed as a special guardian under section 14A of the Children Act 1989

Whilst establishing the relationship will probably be relatively straightforward in most instances, what is more problematical for employers is to assess whether the employee is 'caring' for another adult. The Government opted to define the relationship as opposed to what amounted to 'care', largely due to the fact that patterns of care vary considerably on a case by case basis. It was thought impossible to provide an exhaustive list of what would or would not amount to care or that any one definition would adequately cover all. As the new regulations are only just in force it is impossible to be categorical as to what is covered. That said, as a guide it is thought that the nature of care will generally include matters such as,:

- help with personal care (dressing, bathing);
- help with mobility (getting out of bed or downstairs);
- nursing tasks including administering medicine and attendance at GP/hospital appointments; or
- general supervision and emotional support including assistance in household tasks or financial matters.

Who Is Not Covered?

The obvious group of employees that still do not benefit from the flexible working regime will of course be those parents or carers who are responsible for children (who are not in receipt of a Disability Living Allowance) aged between 7 and 18. Also employees who have no caring responsibilities have no right to request flexible working under the statutory regime.

These employees still do not have the right to request to work flexibly under the Regulations. However, an employer's refusal to allow an employee to change to more flexible working arrangements can, in certain circumstances (more particularly parents of children between 7 and 18), constitute indirect sex discrimination under the Sex Discrimination Act 1975 and the right not to be discriminated against will apply to all employees (see below).

The Procedure

The procedure is set out in the original regulations and will apply if an eligible employee is seeking a change in:-

- the total hours worked, i.e. a move to part time
- the times worked, i.e. a change in shift patterns
- the place worked i.e. a request to work from home

This covers working patterns such as annualised hours, compressed hours, flexitime, home-working, job-sharing, self-fostering, shift working, staggered hours and term time working. Applications may be for a significant change, or quite a small change such as requesting a start time half an hour later to enable a parent to take a child to school or to enable a carer of an adult to administer medication.

Any employee seeking to change his or her hours, times or place of work will be required to make a formal written request. The initial onus is on the employee to make a considered application in writing. An accepted application will mean a permanent change to the employee's terms and conditions of employment. It will be important therefore for an employee to give careful consideration to which working pattern will best enable them to look after the child or adult needing care, any financial considerations following a drop in salary, the impact on the employer's business and how the proposed change might be accommodated. The application must be in writing (including email), state whether a previous application has been made and if so when and be dated.

If the employer agrees to the proposed change, this should be confirmed in writing, specifying the contract variation agreed to and the date from which the variation is to take effect.

Employers who do not immediately agree are required to meet with the employee to discuss the request within 28 days. The meeting is intended to be an opportunity for the employer and the employee to fully consider and discuss the proposal and alternatives to the initial proposal.

Following the meeting, the employee must be notified of the employer's decision and the grounds for it within 14 days of the meeting. Where the employee's request is accepted, this must be confirmed in writing in the same form as described above.

If the decision is to reject the application, this must be confirmed in writing within 14 days of the meeting. The employer's letter must set out the reasons for the rejection and include a sufficient explanation as to why the reason or reasons apply in the particular case.

The only reasons which are considered acceptable for an employer to refuse such a request are laid out in the Act. These are quite wide in scope, as follows:-

- the burden of additional costs
- the detrimental effect on the ability to meet customer demand
- inability to re-organise work amongst 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
- other grounds as prescribed by the Secretary of State

The employee has a right of appeal against the employer's decision which he or she must exercise in writing and setting out the grounds for the appeal within 14 days. If an appeal is received, a further meeting must be held within 14 days and the employee notified of the outcome in writing within a further 14 days. Once a request has been made and rejected, no further requests can be made for a period of 12 months.

The employee has the right to be accompanied at all meetings. Unlike in the case of disciplinary and grievance meetings only a work colleague can act as a companion. There is no obligation on an employer to permit a trade union official to accompany the employee.

The employer and employee can agree an extension of any of the periods referred to above. Any agreed extension must be recorded in writing and be sent to the employee. If at any time an employee fails to attend a meeting without reasonable cause the employer can treat the employee's application as having been withdrawn. This also applies if the employee fails (without reasonable cause) to provide the employer with any information which the employer requires in order to assess the request. The employer must confirm the "deemed" withdrawal in writing.

Enforcing the New Right

An employee can make a complaint to a tribunal that his or her employer has failed to comply with the statutory obligations on them in relation to the new flexible working procedure. Such a complaint might be that:-

- there was a procedural failing; or
- that the employer's reason for refusing was not one of the reasons permitted by the legislation; or
- the employer's decision to reject the request has been based on incorrect facts.

Provided the employer cites one of the reasons for refusing the request set out in the legislation, the tribunal has no scope to consider whether the reason genuinely applies. In addition, the maximum award any employee who is successful can be awarded in such a claim is 8 weeks' pay. The statutory cap on weekly pay (currently £310 per week) will apply. The employee does have a statutory right to be accompanied at any meetings under the flexible working procedure and if the employee is denied this right to be accompanied at a meeting, the maximum award for that specific failure is 2 weeks' pay.

If a qualifying employee suffers a detriment or is dismissed as a result of seeking to exercise their rights, he or she will also be able to bring claims to the tribunal in relation to this. Any dismissal will be considered to be automatically unfair.

Indirect Sex Discrimination

Other legislation, more specifically the Sex Discrimination Act 1975, has reinforced the rights of those who wish to work flexibly. An employer's refusal to allow an employee to change to more flexible working arrangements can constitute indirect sex discrimination. An employer is said to indirectly discriminate against a woman on the grounds of her sex when:-

- it applies to her a provision, criterion or practice;
- which is such that it would be to the detriment of a considerably larger proportion of women than of men;
- which is to her detriment; and
- which it cannot objectively justify.

In the case of a woman who has been refused a request to change from full time working to some other form of flexible working, this is considered to be indirect sex discrimination as:-

- the provision, criterion or practice which the employer has applied to the employee is the requirement to work full time; and
- as women are in the main responsible for child care, a considerably larger proportion of women are detrimentally affected by the requirement to work full time and are therefore disadvantaged; and
- applying the requirement to work full time to the employee is clearly to her detriment.

Some examples of cases demonstrating how this operates in practice are:

Mitchell v David Evans Agricultural Ltd

In this case, the tribunal found on appeal that David Evans Agricultural Ltd discriminated against Mrs Mitchell on the ground of her sex by not accepting her request to remain working part time and refusing to work full time due to the need to care for her child. The original tribunal's decision, that for business reasons the discrimination was justifiable, was rejected on appeal on the basis that a full enough analysis of the reasonable needs of the business balanced against the discriminatory effect of the decision had not been carried out.

Hardys & Hansons plc v Lax

In this case, Hardys & Hansons Plc rejected Mrs Lax's request to be allowed to work part time on her return from maternity leave. Before Mrs Lax had returned to work from maternity leave, her role had become redundant and a new role had been created. The tribunal found that the new job could have been done by two job sharers or part time workers and that therefore Hardys & Hansons Plc had unlawfully discriminated against Mrs Lax by insisting that the new job had to be performed on a full time basis.

Marshall v Langtree Community School

In this case, a head teacher returning from maternity leave applied to work as part of a job share. The School Governors refused her application because the school was a failing school and they felt it was essential that they had a full-time head teacher. Mrs Marshall won her case for indirect sex discrimination. The tribunal found that the School Governors had not properly considered whether it was justifiable to require a full-time head teacher but had assumed that this was the case.

Chew v Chief Constable of Avon and Somerset Constabulary

In this case, the Avon and Somerset Police Force refused a request by a woman police officer not to have to work night shifts so that she could take care of her two young children. Mrs Chew also won her case. The tribunal held that the police force, like the School Governors in the previous case, had not properly considered the issue of whether or not working arrangements could be re-organised so as to allow Mrs Chew to look after her children as she wished.

Walkingshaw v John Martin Group

In this case the applicant was a man. He submitted a request to work shorter hours so that he could help take care of his son. He was able to show the tribunal that although his employer had managed to reduce the hours of four female employees, they had refused his request on the grounds that to allow him to work shorter hours would be "too messy". He successfully established direct sex discrimination because he had been treated less favourably than the women.



Although an indirect sex discrimination claim can be defended using objective justification arguments, unless reasons for refusing the employee's request, the employee will have a successful claim for indirect sex discrimination. The employer must be able to demonstrate that it gave careful and thorough consideration to the request and did not merely refuse because of a blanket policy against requests for flexible working.

It is also the case that employers will need to exercise caution when rejecting an application from any employee (irrespective of whether they are a qualifying employee under the regulations) to work flexibly and best practice advice is that the set procedure for applying to work flexibly is applied to all categories of carers as this will assist in defending claims of indirect sex discrimination.

This briefing note is intended solely as an overview of the law. It was last updated on 5 April 2007. No responsibility can be accepted for the completeness or accuracy of this briefing note and professional advice should be taken in relation to any specific problems.

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