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Commercial Law Network Annual CPD Conference 25 October 2018

WHAT IS THE LAW RELATING TO FLEXIBLE WORKING?

Who can request flexible working?

Any employee with at least 26 weeks service, for any reason (cf old position)

No prescribed form

Request must be

- in writing
- dated
- state that it is an application made under the statutory procedure
- specify the change sought and when the employee wants the change to take effect
- explain what effect, if any, the employee thinks the change would have on the employer and how any such effects could be dealt with
- state whether the employee has previously made a flexible working request to the employer and if so, when?

The last point is because an employee only has the right to make a flexible working request once in any 12 month period.

However, general best practice is probably to hear the case even if there has been a more recent request. Also, it is generally better to avoid refusing to deal with a flexible working request solely because one of the criteria has not been complied with as this may look unreasonable. The better course of action would be to explain to the employee what is missing from their application or, better still, to have a policy on flexible working which sets out the details which should be included in the request.

From the employee's perspective, the more information which the employee gives in the flexible working request the better, as the employer will then have a better understanding of why they are making the request and may be more sympathetic to the application.

What type of change might be sought?

Any change to the employer's standard working arrangements, such as a change to the hours worked, or a change to the working pattern, or a change to the place of work.

How should the employer respond to the application?

Ideally, try to take a relaxed approach. Employers will not be 'bounced into' an arrangement which does not work for the business, so no need to panic. Some employers are hard-wired to think that employees must be present on a full-time basis, so we would urge employers to approach the request with an open mind and with a positive perspective about the possibility of this benefitting both parties.

In terms of the law, all that is required of the employer is that they deal with the request in a reasonable manner; that they notify the employee of the decision within three months of the request, and that they only refuse a request on one of the permitted grounds.

What does '**dealing reasonably**' mean?

You can find recommendations and examples of how employers should deal with flexible working requests by employees in the ACAS Code of Practice and accompanying Guide, both of which are very useful - <http://www.acas.org.uk/index.aspx?articleid=4849>

- Discuss the request with the employee
- Allow the employee to be accompanied to the meeting to discuss the request, and ensure that it is held in a private place
- Consider the request carefully – look at the benefits to the employee and to the business, and weigh those against any adverse impact which the change might have
- If you believe that it will be difficult to accommodate the request, think about whether there are any alternative arrangements to the employee's proposal which you might be able to offer
- Consider allowing the change for a trial period, to see how it works for both sides, and potentially iron out any difficulties that might be encountered

Refusing the request

If the employer feels that it cannot accommodate the request, and cannot suggest an alternative option which might work, they are entitled to refuse the request, provided that the reason falls within one of the permitted grounds. Those are:

- the burden of additional costs
- the detrimental effect on the ability to meet customer demand
- the inability to reorganise work amongst existing staff
- the inability to recruit additional staff
- a detrimental impact on quality
- a detrimental impact on performance
- insufficiency of work during the periods the employee proposes to work
- planned structural change

As you can see, the grounds are very wide, and the test is subjective on the part of the employer so that, if the employer considers that one of the grounds applies, the test is satisfied. On the face of it, there is no consideration of the reasonableness of the employer's view, so the employee can only challenge the merit of a decision if it is based on incorrect facts.

Further, the legislation does not require the employer to allow an appeal against the rejection, but the ACAS Code suggests that employers should allow an appeal and failure to do so may mean that the employer has not dealt reasonably with the request, so better to do so.

The general view is that the statutory right to request flexible working lacks teeth, because employment tribunals can only scrutinise employers' decisions to a limited extent (generally, on grounds of a failure in the process or making a decision based on incorrect facts) and the value of such claims is very low.

So nothing to fear....?

Not quite. Employers are required to deal reasonably with requests, and this probably includes a requirement to deal consistently with employees. However, in practice, employers are likely to be more careful in their consideration where the employee has other forms of statutory protection – most commonly protection from discrimination. The typical scenarios here are where an employee is seeking to vary their working hours because of childcare commitments or religious requirements, or where the employee is seeking an adjustment to their working practices because they are disabled.

Sex discrimination

The general presumption is that women still bear a greater burden of childcare responsibilities than men. This view has been challenged in the courts, but it remains the

case that tribunals will often still accept that a woman who is required to work full time has been put at a disadvantage compared to her male peers, leaving open the possibility that a refusal of a flexible working request may give rise to a claim of sex discrimination.

Claims under the flexible working regulations are almost invariably accompanied by a claim of direct or indirect sex discrimination, which is generally a more effective remedy for women. This is because, in a claim under the flexible working legislation, the tribunal has little scope to consider the commercial basis for the decision, whilst in a claim for indirect sex discrimination, the reason for the decision is fundamental in deciding whether the decision to refuse was justified.

Discrimination on grounds of religion

This may arise where an employee seeks a change to their working pattern because they do not wish to work on the Sabbath, or want time off to pray or attend worship.

Discrimination on grounds of disability

Disability obliges an employer in effect to treat a disabled employee more favourably than others so as to mitigate the disadvantage which the disabled person suffers. This requirement to make 'reasonable adjustments' may include a duty to consider altering the individual's working hours, working pattern or place of work.

Constructive dismissal

Where an employer deals with a flexible working request in an unreasonable manner, this may be sufficient to amount to conduct likely to destroy or seriously damage the relationship of trust and confidence between employer and employee, entitling the employee to resign and claim constructive dismissal.

Where a refusal of a flexible working request amounts also to discrimination, this is likely to amount to a fundamental breach of contract entitling the employee to resign and claim constructive dismissal.

In either case, this will significantly increase the potential award in any tribunal claim.

So, in summary, while the rights and protections offered by the flexible working legislation are limited, they come with other risks which should inform how the employer deals with the request.

Top tips for employers

- Be open minded about the possibility of the role being performed flexibly (and the potential benefits for both parties).
- Listen to the request, consider it fully and properly, and (especially if refusing the request) explain and document the reasons carefully.
- If the employer cannot accept the flexible working proposal as it stands, try to come up with a compromise solution which might work for both parties.

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