

Biography

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Footnotes

¹<http://www.nationalarchives.gov.uk>

²<http://www.familysearch.org>

³<http://www.1901censusonline.gov.uk>

⁴Times, 24 January 1911

⁵<http://www.justice.gov.uk/guidance/foi-exemptions-about.htm>

⁶http://www.nationalarchives.gov.uk/documents/access_rights.pdf

⁷<http://www.visionofbritain.org.uk/census/>

⁸<http://www.census.nationalarchives.ie>

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Flexible Working: a Practical Guide

Abstract: This checklist by Ruth Bonino and Gemma Rosenthal of Reed Smith is the latest in our practical checklist series. They explain the meaning of flexible working; who is entitled to request it; the mechanics of requesting and the procedure to follow if the request is denied.

Keywords: terms and conditions of employment; flexible working

Introduction

Employees can approach their employer informally to request to change their work pattern. However, the Employment Rights Act 1996 (“ERA 1996”), and its associated legislation and regulations (together the “right to request legislation”), provides a statutory right for certain employees to request to work flexibly.

This is not a right for certain employees to work flexibly, but instead a right to ask to do so and to have the request properly considered by their employer. The legislation also provides for valid grounds on which an employer may refuse such a request.

This article will examine how a request for flexible working operates in practical terms, including who is entitled to apply and the responsibilities on each party in following the prescribed process. The UK Government is now consulting on its proposal to extend the right to request flexible working to all parents of children under 16 and it is expected that this change in the law will come into force in April 2009.

Flexible working: what does it mean?

A request can be made for a change relating to the hours the employee may be required to work, the times at

which the employee is required to work, and the place of work.

In reality, this can therefore include working from home, job-sharing, teleworking, term-time working, compressed hours, flexitime or annualised hours to name but a few. Essentially, the employee is able to request a form of working which will suit their needs.

A successful request for flexible working will result in a permanent change to the terms and conditions of the employee's contract of employment.

Who can make a request?

To be eligible to make a formal request to work flexibly, the employee must meet certain criteria. Currently the right to request legislation entitles employees to request a change in their work pattern in order to care for a child under 6 years old (or 18 years old if disabled), or to care for an adult subject to the conditions listed below:

1. The applicant must "be employed". Those who are self-employed, consultants, or agency workers are not considered to be employed for these purposes. (Members of the armed forces are also ineligible to make a request under the right to request legislation).
2. The applicant must have worked with the employer continuously for a period of 26 weeks at the date the application is made. This includes being employed with an associated employer or prior to a TUPE¹ transfer.
3. The applicant must not have made another application for flexible working under the right to request legislation in the previous 12 months.
4. Child carers:
 - a) The child must actually have been born at the time of the application rather than the employee being pregnant;
 - b) The employee must be either the child's mother, father, adoptive parent, guardian, foster parent or spouse, civil partner, or partner² of the child's mother, father, adopter, guardian or foster parent; special guardian; private foster carer; or a person in whose favour a residence order is in force in respect of the child³; and
 - c) The employee making the request must have, or expect to have, responsibility for the child's upbringing and be making the request in order to care for the child.
5. Adult carers:
 - a) An employee who is making a request as an adult carer must be, or expect to be, caring for a person aged 18 or over who is in need of care, and be either the spouse, partner, civil partner; or relative⁴ of the adult who requires care; or

who does not fall into either category but lives at the same address as them;

- b) There is no definition of "caring for". BERR Guidance suggests "caring for" is likely to include (but not limited to) activities such as helping with mobility; giving/supervising medicines; household tasks; helping with personal care; and emotional support.

How to make a request: the process

There is a set framework, with strict time limits, through which a request must be made and dealt with. However, all time periods may be extended by mutual agreement. BERR Guidelines suggest that if all the time limits and possible extensions are taken into consideration, the process may last 14 weeks from start to finish. The full procedure is set out in the Flexible Working (Procedural Requirements) Regulations 2002, which are taken together with sections 80F and G of ERA 1996.

1. Step 1: The employee submits a written request.

This should include:

- a) The proposed work pattern and the date it should become effective;
- b) The statutory grounds for the applicant's entitlement to make a request;
- c) Details of any effect the applicant thinks the proposed change of work pattern may have on the employer's business and how these might be overcome in practice;
- d) Confirmation of the relationship with the person the employee cares for; and
- e) Details of any previous request the employee has made to work flexibly under the right to request legislation.

2. Step 2: The Meeting

The employer must arrange a meeting with the employee to discuss the request within 28 days of receipt. The employee is permitted to be accompanied at this meeting by a fellow employee.

3. Step 3: The employer writes to the employee

The employer must write to the employee within 14 days of the meeting. This letter must either agree a new flexible work pattern or reject the request and, in the latter

case, providing grounds for the rejection and setting out the appeal procedure which the employee can follow.

There is currently a Government Consultation on implementing the recommendations of Imelda Walsh's review on amending and extending the right to request flexible working to parents of older children. This Consultation has also proposed measures to enable businesses to deal with requests more easily, for example dispensing with the need for employers to write to employees to confirm that they agree to a request for flexible working.

4. Step 4: The appeal

If the request to work flexibly is rejected, the employee can appeal against the decision within 14 days of the request being rejected, by sending the employer a notice of appeal. The employer must then arrange a meeting with the employee to discuss the grounds of appeal within 14 days. The appeal should preferably be heard by someone different to the person who held the initial meeting. The appeal decision must be made within 14 days of this meeting.

Outcome A: A new flexible work pattern is agreed

The change should therefore be documented and signed by both parties and the date on which this change commences should be specified. This should be done by either the issue of a new employment contract or by a side letter which expressly sets out the terms and varies the contract.

This is needed because, unless the employer has a wider flexible working policy than that prescribed by the right to request legislation, this change will be permanent with no trial period. No further change can be made to this agreed working arrangement until the time limit permits another statutory request to be made i.e. 12 months later.

Outcome B: The request is rejected

The employer may refuse the request in three circumstances. The employer must provide "sufficient explanation" with the notice of refusal as to why the ground applies.

1. Rejection on procedural grounds

The employer may reject the request if it does not comply with the requirements of section 80F ERA 1996 (see Step 1 above). In *Hussain v Consumer Counselling ET 1804305/04* the claimant's flexible working request did

not comply with section 80F ERA 1996 as it had failed to specify the date on which the change should come into effect and did not explain the effect of the proposal on the employer's business and how these could be addressed.

However, rejecting a claim on a procedural basis may leave employers exposed to a claim for constructive dismissal, or under the sex discrimination legislation. Best practice would therefore be to explain the procedural defect to the employee and to ask them to re-submit their amended request.

2. Rejection, after the initial meeting

Section 80G ERA 1996 sets out the permitted reasons for rejection of the request after the initial meeting. Essentially there must be a sound business reason for declining the request including:

- The burden of additional costs
- Detrimental effect on ability to meet customer demand
- Inability to re-organise work among the 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 test will be satisfied if the employer considers that one (or more) of the grounds applies, so that the employer's decision can only be questioned if it is based on incorrect facts. The notice of refusal should be dated and provide sufficient explanation of which of the above grounds applies and why. Details of the appeal procedure should also be included.

3. The request is rejected on appeal

The employer must provide a notice rejecting the appeal, which must include the same details as the notice of rejection given after the initial meeting.

On appeal, an employer may find that the reason relied upon for rejecting the original request was in fact incorrect, but that another reason under Section 80G ERA 1996 applies and therefore the request can still be rejected.

Complaints to the Employment Tribunal

There are limited grounds on which an employee who has had their request rejected, can complain to the Employment Tribunal. An unsuccessful applicant can

complain if the employer has not complied with the procedural requirements; if the request has been refused other than for a reason set out in section ERA 1996 80G; or if the decision to reject the request was based on incorrect facts. The rejected employee must apply to the tribunal within three months of the procedural breach or within three months of being notified of the appeal decision.

The tribunal has only limited powers in dealing with this type of complaint. It cannot substitute its own decision for the employer's decision and cannot question the employer's business reason for rejecting the request. The Tribunal can, however, order the employer to reconsider the request and may award compensation if the complaint is well-founded (this payment is subject to a statutory maximum of £330 per week and not exceeding eight weeks' pay). The applicant also has the right not to be subjected to any detriment or dismissed by reason of making a flexible working request.

Another way of resolving a complaint regarding the rejection of a flexible working request is via the ACAS arbitration scheme, which has been extended to cover claims under the right to request legislation.

Risk of discrimination claims

A refusal to grant a flexible working request may give rise to a discrimination claim, for which compensation is unlimited. For example, refusing a request by a working mother not to work nights where all employees are occasionally required to work nights, may be open to challenge as discriminatory on the grounds of sex. This requirement puts women at a disadvantage because of their child care responsibilities, so refusing this request may have a disproportionately adverse effect on female employees and that could be indirectly discriminatory. Such a discrimination claim can be defended by showing the decision was objectively justified, as a "proportionate means of achieving a legitimate aim".

A refusal to grant a flexible working request by a carer of a disabled person may give rise to a claim for disability discrimination. This issue is currently being considered by the Courts in the case of *Coleman v Attridge*. Irrespective of the outcome of this case, the discrimination legislation will soon be amended to make it

unlawful to discriminate against a person because of their association with a disabled or elderly person.

The future for flexible working

In November 2007 the Government asked Imelda Walsh to consider the extension of flexible working to employees with children over 6 years old. In May 2008 the Walsh review published its findings in a report. The main recommendation was "that the right to request flexible working is extended to those with parental responsibility for children up to the age of 16 and this extension should be implemented without phasing." It was noted in the report that the effect of implementing the report's recommendations would be to extend the right to request flexible working to an additional 4.5 million parents. However, the report did recognise that by increasing the number of employees who are eligible to make a request, the number of refusals may increase. The Government's public consultation on these proposals will close on 18th November 2008 and it is anticipated they will become law in April 2009.

Practical tips for employers

- Make sure your organisation has a written flexible working policy and that managers are trained on how to deal with requests.
- It is relatively easy to reject a request on substantive grounds, but the main risk is discrimination.
- Tribunals are becoming more and more employee-friendly.
- Always consider alternative work patterns, rather than just rejecting an application.
- Give detailed reasons for any refusal and make sure it is based on a sound business reason.
- Be consistent, flexible and supportive.
- Ensure you have a paper trail of any decisions which have been made.

Biographies

Ruth Bonino is a professional support lawyer and Gemma Rosenthal is a trainee solicitor in the Employment Group at Reed Smith, London.

Footnotes

¹A TUPE transfer is one where the undertaking for which an employee works, is transferred to a new owner or where the employee's employer has changed as the result of outsourcing, change of contractor or in-sourcing. The Transfer of Undertakings (Protection of Employment) Regulations 2006 work to protect the employee's employment when this occurs.

²a partner is the other member of a couple consisting of: either a man and a woman who are living together as husband and wife; or two people of the same sex who are living together as if they were civil partners.

³Note: the omission of grandparents from this list which has received much criticism.

⁴“relative” is defined in Reg 3B Flexible Working (Eligibility, Complaints and Remedies) Regulations 2002.

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Bibliographies

Goldman (Pearl) Legal education and technology II: an annotated bibliography. *Law Library Journal*. Vol. 100, no. 3, 2008. pp. 415–528.

Cataloguing and Classification

Browne (Glenda) Indexing and taxonomies – helping users make choices. *Australian Law Librarian*. Vol. 5, no. 4, 2007. pp. 17–23.

Chapman (Ann) RDA a cataloguing code for the 21st century. *Library & Information Update*. Vol. 7, no. 9, September 2008. pp. 28–30.

Copyright

Angelopoulos (Christina J.) Modern intellectual property legislation: warm for reform. *Entertainment Law Review*. Vol. 19, no. 2, 2008, pp. 35–40.

Prasad (Akhil) & Agarwala (Aditi) Armageddon on the digital superhighway: will Google's e-library project weather the storm? *Computer Law and Security Report*. Vol. 24, no. 3, 2008. pp. 253–260.

Dictionaries

Kaplan (Steven) Essential English/Spanish and Spanish/English Legal Dictionary. The Hague: Kluwer Law International, 2008. 521pp. £25.13. ISBN 9789041127372.

Directories

(Law Society - Great Britain) The Law Society's Directory of Solicitors and Barristers 2008–2009. London: Law Society, 2008. £94.95. ISBN 9781853287336.