

Flexible Working – the legal framework

In this talk I will try to set out some details of the legal framework that surrounds requests from employees to work non-standard employment patterns. This will include a look at the detail of the right to request flexible working, but as I shall explain, technical compliance with that right is only the beginning of the story. It is also important that employers can provide objective justification for any refusal of a request in order to forestall a complaint of indirect sex discrimination.

The right to request flexible working

The right to request flexible working was introduced in April 2003 as part of the Government's overall strategy to help employee's balance their work and family life. Although the phrase 'flexible working' is used occasionally in the legislation and extensively in the Government's guidance, it is something of a misnomer. Section 80F of the Employment Rights Act 1996 more accurately refers to a 'right to request contract variation' - reflecting the fact that the right essentially allows a qualifying employee to make a request to make a change in his or her terms and conditions of employment in so far as they relate to:

- The hours the employee is required to work
- The times when he or she is required to work and
- Whether the employee works at the employer's premises or at home

The purpose of the request must be to enable the employee to care either for a child under the age of 6 (or 18 if the child is disabled) or for an adult. In broad outline and employee who makes a request which qualifies under S.80F is entitled to have that request considered by the employer in accordance with a specified procedure and is protected against dismissal or other detriment as a result of making the request.

Qualifying for the right

The right to request flexible working extends to employees only. Independent contractors and freelancers are not covered. Agency workers are specifically excluded from the right (S. 80F(8)(a)) even if they are found to be employees.

In order to make a request an employee must have at least 26 weeks continuous service at the time the request is made – Reg 3(1)(a) Flexible Working (Eligibility, Complaints and Remedies) Regs 2002.

If the request is being made to take care of a child then the employee must be (or be the spouse or civil partner or partner of) either the mother, father, adopter, guardian, special guardian, or foster parent of the child. The employee must also expect to have responsibility for the upbringing of the child – Reg 3(1)(b).

If the request is being made to enable the employee to care for an adult then the employee must be caring for a person 'in need of care' who is either the spouse or civil partner or partner of the employee or his or her relative or living at the same address as the employee – Reg 3B.

'Relative' is given a broad definition in the Eligibility Regs (which were amended in April 2007 to give effect to the Work and Families Act 2006) and means a : mother, father, adopter, guardian, special guardian, parent-in-law, step-parent, son, step-son, son-in-law, daughter, step-daughter, daughter-in-law, brother, step-brother, brother-in-law, sister, step-sister, sister-in-law, uncle aunt or grandparent. It includes adoptive relationships and relationships 'of the full blood or half blood'.

The request

A request made under S.80F must be in writing, be dated, and state when any previous request has been made by the employee (Reg 4). The request must also specify the change that is being applied for and give the date on which the proposed change will become effective. The employee must also explain the nature of the relationship between the employee and the person being cared for. The employee is required to give serious thought to the impact of the proposed change. The request must explain what effect the proposed change will have on the employer and how such effect might be dealt with.

Once an employee has made a request under S.80F then no further request can be made for at least 12 months thereafter – S.80F(4).

Caring for children

As mentioned above, if the request is made to take care of a child then the child must be under the age of 6 at the time the request is made or under the age of 18 if he or she is disabled. Disabled means entitled to disability living allowance and is not dependant on the Disability Discrimination Act.

Note that the age of the child is only relevant at the date of the request. The fact that the child reaches the age of six has no impact (unless otherwise agreed) on the duration of the contractual variation. As long as the request for the variation is made for the purposes of caring for the child, the variation will stay effective even when that purpose no longer applies.

It must be said that it seems somewhat odd that no request for flexible working to care for a child between the ages of 6 and 18 can be made unless the child is disabled, particularly since an application can be made to care for adults. This gap is the result of the Government's consultation which revealed more support for adult care than for extending the right to encompass older children. However it is clear that there is scope for extending the right to cover care for all children in due course.

Employer's duties

When in receipt of a valid request made under S.80F, the employer is obliged to follow the procedure set out in the Flexible Working (Procedural Requirements) Regulations 2002. These provide that the employer must hold a meeting to discuss the application within 28 days after the date of the application – unless the employer simply agrees to the variation requested and informs the employee of that fact.

The employee has a right to be accompanied at the meeting by a colleague. While the colleague may be a trade union representative there is no separate right to a representative who is not employed by the employer – Reg 14(3). The employer does not need to allow outside trade union reps to accompany the employee.

Once the meeting has been held the employer must give the employee written notice of the decision within 14 days after the date of the meeting – Reg 4. Where the employer agrees to the application the notice should give the date on which the variation is to take effect. Where the decision is to refuse the application it must state the grounds of refusal (see below) and explain why those grounds apply to the application – Reg 5. The notice must then set out the procedure the employee should follow in order to appeal against the employer's decision. Essentially this entitled the employee to one further meeting where the employer will give fresh consideration to the request

Although the legislation seems not to contemplate such a thing it is perfectly possible for the employer to make a counter-offer to the employee of a change that would be acceptable. Indeed in reality a more likely procedure to be followed will be a process of negotiation leading to an agreed way forward. This does not sit easily with the procedure set out in the legislation but if it results in agreement then that will not be a problem. If there is no agreement it would be worthwhile to set out the failure to agree in the notice refusing the employee's request.

Grounds for refusal.

An employer may only refuse a request 'because he considers that one or more of the following grounds applies' – S.80G(1)(b). The grounds are:

- 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

There is provision for further grounds to be added by the Secretary of State. However the grounds are so wide that it is difficult to imagine what other grounds could be added.

We come here to a major limitation on the right to request flexible working. All the employer needs to show is that any refusal was genuinely on one of the grounds listed above. There is no obligation under this right for the refusal to be reasonable or for the employer to have made reasonable attempts to accommodate the request. The only way in which the employee can challenge the decision made by the employer – assuming the procedure has been properly followed – is to show that the decision has been based on incorrect facts – S. 80H(1)(b).

This was the basis of the claim in **Commotion Ltd v Ruddy [2006] IRLR 171**. Ms Ruddy was a warehouse assistant who sought to work a three-day week to allow her to look after her granddaughter. Her request was refused by the employer who claimed that they were seeking to promote good team spirit by working a uniform working week. They also claimed that allowing the variation would have a detrimental impact on performance and place a strain on resources. The tribunal held that this was based on incorrect facts in that the employer had made no proper investigation as to whether granting the request would indeed have had a negative impact on the business. The EAT upheld the tribunal's conclusion.

To a limited extent this case suggests that a limited test of reasonableness can make its way in to the tribunal's consideration by the back door. The employer claiming that flexible working will have an adverse impact on the business may be asked to show objective evidence that this is in fact the case. Nevertheless this still falls a considerable way short of requiring the employer to show justification for its refusal of the employee's request.

Remedies

The remedies available to an employee for a failure by the employer to consider the request properly are limited. An employment tribunal may order the employer to reconsider the application but has no power to direct the outcome. Compensation can be awarded but this is strictly capped at eight weeks' pay.

Flexible working and indirect discrimination

It can be seen then that the statutory right to request flexible working has severe limitations. In reality most claims surrounding the refusal of flexible working options will actually revolve around the issue of indirect sex discrimination rather than the statutory right. There are three reasons for this:

- Discrimination claims are not subject to the procedural requirements and qualifications provided for in relation to the right to request flexible working
- In an indirect discrimination claim the tribunal will be able to make a full assessment of the strength of the employer's justification for turning down the request

- There is no cap on the amount of compensation that can be awarded in a discrimination claim and the tribunal will be able to make an award for injury to feelings as well as for any economic loss sustained.

Indirect sex discrimination takes place when the employer adopts a 'provision criterion or practice' which, although applied regardless of sex in fact causes a particular disadvantage to women (or men) and causes the same disadvantage to the claimant – S.1(2) Sex Discrimination Act 1975. The employer can defend a claim of indirect discrimination only if it can show that the provision criterion or practice in question is a 'proportionate means of achieving a legitimate aim'. In practice this is quite a high hurdle for the employer to clear.

Indirect sex discrimination is relevant to the issue of flexible working because the refusal of a request is likely to be seen as the employer applying a provision criterion or practice to the effect that only standard working patterns are appropriate. Because women are overwhelmingly more likely than men to have to adjust their working pattern to accommodate caring responsibilities any such practice from an employer can be seen as causing a particular disadvantage to women and is therefore potentially indirect discrimination. The key issue in such cases is generally whether the refusal on the part of the employer is justified as a proportionate means of achieving a legitimate aim. Experience tells us that as more and more employers demonstrate that flexible working options can be made to work for a whole range of different posts and in a wide range of industries it is becoming harder for employers to establish the requisite level of justification.

The test for justification is an objective one. It is not simply a matter of 'could a reasonable employer take this view?' In **Hardy's & Hansons plc v Lax [2005] IRLR 726** the employee informed her employer that she was pregnant, and asked whether she could return to work part time following her maternity leave. Her request was turned down. A subsequent reorganization resulted in a new post being created which the employer designated as full-time. The employee told the employer that she would be unable to work full time, and accordingly did not want to be considered for the new full-time post. The employer then dismissed her for redundancy.

She claimed that the refusal to allow her a part-time working option amounted to indirect sex discrimination and the tribunal agreed. Having reviewed the evidence, it felt that the employer had 'greatly exaggerated' any disadvantages associated with that job being done on a job-share or part-time basis. The issues relied upon by the employer as justification did not outweigh the serious impact of the employer's requirement that the employee work full time. The case reached the Court of Appeal where the employer argued that when considering whether a potentially discriminatory requirement is justifiable, a tribunal should apply something akin to the 'range of reasonable responses test' used in unfair dismissal cases. The employer argued that it ought to have been granted a margin of discretion within which the tribunal might disagree with the employer's assessment but nonetheless decide that its actions had been lawful.

The Court of Appeal rejected this argument. The true test was the objective standard applied by the Tribunal and the decision stood.

This is not to say that an employer must accede to every flexible working request as a matter of course. A genuine business reason for refusal that is clearly thought through will be capable of providing justification for a refusal. If the employer can demonstrate that it was open minded about the request and genuinely sought ways to make it work then any indirect discrimination claim may be successfully defended.

Requests from men

A man who has made a flexible working request cannot claim that a refusal amounts to indirect discrimination because men are not placed at a particular disadvantage by a requirement to work full-time. However an employer must ensure that requests from men are treated just as sympathetically as requests from women for to do otherwise would amount to direct discrimination. If a man can show that the employer feels that while women may naturally want to balance work with their caring role, men who choose that path are behaving unnaturally or showing a lack of commitment to the employer then that will amount to direct discrimination and there will be no defence of justification open to the employer.

Contractual issues

A request for flexible working is a request for a contractual variation. If there is no agreement to the contrary then the change will be permanent. There will be no right for the employer to simply return to the previous position without obtaining the employee's agreement and if the employer wants to force through the change then it will be necessary to terminate the employee's contract and offer a new one. Since this will amount to a dismissal there is an obvious legal risk not only of a sex discrimination claim but an unfair dismissal claim to boot.

On the employee's part there will also be no right to return to the old pattern of work. If an employee has moved to part-time working and a change of circumstances means that such an arrangement is no longer needed then there will be no right to require the employer to restore full-time hours.

It may suit both parties – but particularly the employer – to agree the initial variation subject to a right to review. The employer may therefore say 'I agree to allow you to work to the pattern you suggest, but we will reserve the right to review the operation of this arrangement and require to return to your initially contracted hours by giving you appropriate notice'. This allows the employer to adjust to changing circumstances. It also allows the employer to try out the suggested working pattern without making a permanent commitment to it. An employer who has at least undertaken a trial of the new arrangement and found that it does not work will be in a stronger position in a tribunal claim than an employer who insists that an untried pattern simply would not work.

A review clause also allows the employer to re-assess the distribution of flexible working options in light of changes within the workforce. For example, an employee with young children might agree a late starting time and wish to keep that arrangement even when the children have grown up. Continuing with those hours may however block an employee with a more pressing need from making a similar arrangement because the employer has already made as much allowance for flexible working as the business can accommodate. If there is a review clause in the arrangement then the employer has the option of 'calling in' the various flexible working arrangements in operation and re-distributing them in the light of employees' changing situations.

Finally – disability and carers

At the time of writing this paper the Advocate General in the European Court of Justice case of **Coleman v Attridge Law (C-303/06)** has just given his opinion to the effect that a woman employed in the UK who was refused a flexible working option to care for her disabled son should be able to claim disability discrimination. If the European Court of Justice agrees later this year then that will be important because as currently drafted the Disability Discrimination Act only allows for claims from individuals who are themselves disabled.

The media have claimed that this represents a significant step forward for the rights of carers – but this is an overreaction. While the case is important in defining the bounds of the Disability Discrimination Act and how it relates to the EU Equal Treatment Framework Directive, the relevance to carers per se is unlikely to have wide-ranging implications.

Ms Coleman's case – which has yet to be tested by the employment tribunal that referred the case to Europe – is that her employers treated her less favourably than other employees who requested flexible working because her son was disabled. She alleges that she was subject to abusive and hurtful treatment in the workplace specifically referring to her son's disability and that she was accused of 'milking' the situation in order to control her working hours. Her case therefore is one of direct rather than indirect discrimination. It would be an important development if she were to succeed but not an altogether surprising or revolutionary one.

For most carers of disabled children the key legal issues governing requests for flexible working will remain indirect sex discrimination and the statutory right to request flexible working. Only where the employer is hostile to the request specifically on the grounds of the child's disability – and one would hope that that would be a rare case – would the DDA and the potential ruling in Coleman be relevant.

One additional word of caution. Much of the press coverage of this case has suggested that the European Court simply rubber stamps an Advocate General's opinion. That is an exaggeration. The Court frequently disregards such opinions – particularly in recent years – or at least arrives at a similar conclusion through its own merry route. Ms Coleman, while her case seems compelling, has some way to go before claiming real victory.

Conclusion

In this talk I have tried to show that despite the enormous detail in the statutory right to request flexible working, the key issue for employers is not the procedure to be followed but rather the question of whether the request can be reasonably accommodated. Tribunals will look for employers to engage positively with such requests and make genuine attempts to agree a way forward with the employee. Further, a tribunal will not hesitate to reach its own view of whether an arrangement would have been workable and judge the employer's reaction accordingly.