Flexible working

Getting work and home commitments in balance through flexible working

Overview

There may be a number of reasons why you might want to consider changing your hours or working arrangements, including transferring to part time working, a change of location or home working. You may have childcare responsibilities or want to pursue your hobbies or other interests.

From 30 June 2014 the right to request flexible working has been extended to all employees who are entitled to request flexible working for any reason - not just due to caring responsibilities. The employee will however still have to meet the eligibility criteria. It is important to note that the right to request flexible working does not give you a right to work flexibly - but it does mean that your employer has to consider your request properly.

The old procedures have been replaced by a less prescriptive statutory scheme. The scheme is supported by three things:

- The statutory code of practice;
- The ACAS code (handling in a reasonable manner requests to work flexibly); and
- An ACAS guide (The right to request flexible working).

Who has the right?

- You must be an employee - agency workers do not have a statutory right to request flexible working
- The right applies to you once you have been employed with the same employer for 26 weeks or more
- You can only make one request in any 12-month period

What is flexible working?

Flexible working includes a variety of alternative working hours and patterns, such as:

- Alterations to hours of working e.g. earlier or later start to the day
- Flexitime
- Changes to a shift pattern
- Fixed shifts
- Annual hours
- Part-time working/reduced hours
- Job sharing
- Working from a different location
- Home working

How to make a request

Your application must:

- Be in writing
- Be dated
- State that it is an application made under the statutory procedure
- Specify the change you are seeking and when you wish the change to take effect
- Explain what effect, if any, you think the change would have on your employer and how any such effect could be dealt with
- State whether you have previously made an application and, if so, when
- If you are disabled and your request amounts to a 'reasonable adjustment' you should say so in your application

You should check your employee handbook for further information as this may offer further guidance on what to include in your application.

Upon receiving your request, your employer must deal with it in the following way:

- Deal with it in a 'reasonable manner'. According to the ACAS Code this will include discussing your request with you, allowing you to be accompanied to a meeting which your request is discussed (however, there is no legal right to be accompanied), consider the request carefully by looking at the benefits of the requested changes to you and the employer's business, weighing these against any adverse business impact.
- Within three months, of the date your request was made, your employer must notify you of its decision. This period can be extended by mutual agreement
- If your request is refused, your employer must give you reasons for the refusal

Your employer may wish to offer a trial period if it is unsure that your request will be sustainable.

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The legislation does not regulate trial periods and you do not have a right to request a trial period. However, you may be able to argue that in failing to offer a trial period your employer has not dealt with your request in a 'reasonable manner'.

Granting of request

If your request is granted, your employer must issue a written statement of changes to the terms and conditions of your employment within one month of the changes taking effect.

This will mean that there is a permanent change to your terms and conditions of employment, so you cannot go back to your old arrangement without your employers consent.

Refusal of request

Your employer can refuse your request if it does not meet the statutory requirements, so, if you are not eligible or have failed to comply with the procedure, or refusal can be based on one or more of the following eight prescribed reasons:

1. The burden of additional costs
2. Detrimental effect on ability to meet customer demands
3. Inability to reorganise work among existing staff
4. Inability to recruit additional staff
5. Detrimental impact on quality
6. Detrimental impact on performance
7. Insufficiency of work during the periods the employee proposes to work
8. Planned structural changes

Given the wide range of permissible reasons for refusal, it is an unfortunate fact that any employer not wishing to grant a request will easily find a legitimate reason to back its decision. All the same, employers must follow correct procedure and give your request proper consideration.

Appealing the decision

The statutory scheme does not expressly require employers to allow employees a right of appeal. However, the ACAS Code recommends that appeals should be permitted. There are no prescribed grounds of appeal.

Withdrawing a request

You can withdraw your request at anytime after it is made. However, you will not be able to make another request under the statutory scheme for 12 months from the date of your initial request.

Complaints and remedies

Unfortunately, redress under the statutory scheme is limited. If your request is refused, you may bring a claim on one or more of the following grounds:

- Your employer failed to deal with your application in a reasonable manner
- Your employer failed to notify you of its decision within the decision period
- Your employer rejected your application for a reason other than one of the eight statutory grounds
- Your employer's decision to reject the application was based on incorrect facts
- Your employer treated the application as withdrawn when it was not entitled to

A challenge on any of these grounds is brought by making a complaint to an Employment Tribunal. This must be brought within three months less one day of being notified of the decision, subject to the rules of an early conciliation, see below.

There is a right to request flexible working from your employer if you meet the eligibility criteria. This does not give a right to work flexibly, but it does mean that your employer has to consider your request properly.

The Employment Tribunal can order your employer to reconsider its decision. The Tribunal can order compensation in respect of any breach by your employer, but compensation is limited to eight weeks' pay. In these circumstances, one week's pay is currently (as of 6th April 2020) limited to a maximum of £538, which means a maximum award of £4,304 .

Therefore, in a situation where you have had to resign as a result of any failure by your employer to grant your request, and it takes you some time to find alternative employment, you are likely to be undercompensated by the Tribunal unless you have some other form of claim you can pursue such as constructive unfair dismissal.

Indirect sex discrimination

It may be possible to prove that a refusal to allow a request for part time or other form of flexible working is indirectly discriminatory on grounds of sex. These are very complex and technical claims, and what follows is only a summary of the general position.

Indirect sex discrimination against a woman occurs where a provision, criterion or practice (PCP) is applied equally but:

- It puts women as a group at a particular disadvantage when compared with men ;
- It puts her at that disadvantage; and
- It cannot be shown to be a proportionate means of achieving a legitimate aim.

The PCP must have been applied to both men and women (for example,

a requirement that all employees work full time, or from the office, or that all employees are present at work on a given day or at a particular time). This means that general policies or practices which tend to discriminate may be unlawful if they cannot be justified .

You first have to show that a policy is being followed which has an adverse impact on women as a group. In general, an Employment Tribunal will accept that in the workforce as a whole, more women than men are likely to have childcare responsibilities. This means that in many cases, the key question will be whether the employer can justify their action by providing good business reasons for it. The way in which the legislation is formulated and the current pattern of childcare responsibilities in society as a whole means, however, that a refusal of a request made by a man is much more difficult to challenge.

The advantage to a claim of indirect sex discrimination is that the Tribunal will in most cases have to look at the reasons for the employer's decision, not just the process.

The other advantage is that where you bring a claim for indirect sex discrimination, the potential compensation available to you is unlimited, depending on your actual loss.

This means that if you have had to resign as a result of your employer's refusal to allow your request, then you may be able to recover the loss of earnings you suffer as a result.

For more information about pursuing a claim for indirect sex discrimination, please see our factsheet **'Sex Discrimination'**, part of the Employment Law series.

Make a formal request

You should make a request as outlined above, even if you are convinced that your employer will turn down your request. Check your employer's flexible working policy as well.

The approach adopted by your employer in response to your request could be important as evidence for any future indirect sex discrimination claim. If you are hoping for new arrangements to be in place when you return from maternity leave, it is important to make the request as soon as possible after the birth of your child, given the length of time the procedure can take. If not, there is a risk that you would have to return to work full time until the procedure has been completed, which may not fit in with your childcare arrangements.

It is important to remember that you have three months less one day from the date of the last discriminatory act by your employer to start your claim against your employer, subject to the rules of early conciliation, see below. That last discriminatory act might be your employer's refusal to allow your request, the date of your appeal or the date that you resign or are dismissed by your employer. To be on the safe side, you should seek legal advice as soon as possible, preferably whilst you are going through the procedure with your employer. You don't have to tell your employer you are getting advice.

If you are thinking about making an employment tribunal claim, you will first need to notify details of your claim to ACAS, who will then offer early conciliation to try to resolve the dispute. The conciliation period can be up to one month. If the claim does not settle, ACAS will issue a certificate confirming that the mandatory conciliation process has concluded.

There are changes to time periods within which to lodge claims to allow for the period during which a claim is with ACAS. The period within which a claim is with ACAS will not count for calculation of time limits; and if the time limit would usually expire during that period, or within the month after the certificate is issued, then you will have up to one month following receipt of the conciliation certificate in which to lodge a claim.

The process makes the calculation of time limits in employment tribunal cases more complicated. Claimants are advised to be aware of limitation issues and seek legal advice promptly. For further information on the ACAS early conciliation process visit: **www.acas.org.uk**.

Feel that you have been unfairly treated

We have experts in maternity and flexible working issues and have dealt with many claims which are maternity or flexible working related. Many disputes will be capable of being resolved internally without going to an Employment Tribunal. For Further information visit www.slatergordon.co.uk/FW.

For more information on maternity and paternity rights, please see our factsheets **'Maternity Rights'** and **'Pregnancy or Maternity Discrimination'**, part of the Employment Law series.

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