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*Flexible Working Requests in a
Covid-19 World*

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Outline of webinar

- 1) Statutory flexible working request scheme
- 2) Other types of claims arising
- 3) Challenges and tips for a Covid-19 world

STATUTORY FLEXIBLE WORKING REGIME



*[Secs 80F – 80I Employment Rights Act, 1996 &
Flexible Working Regulations 2014 SI 2014/1398]*

Flexible working generally

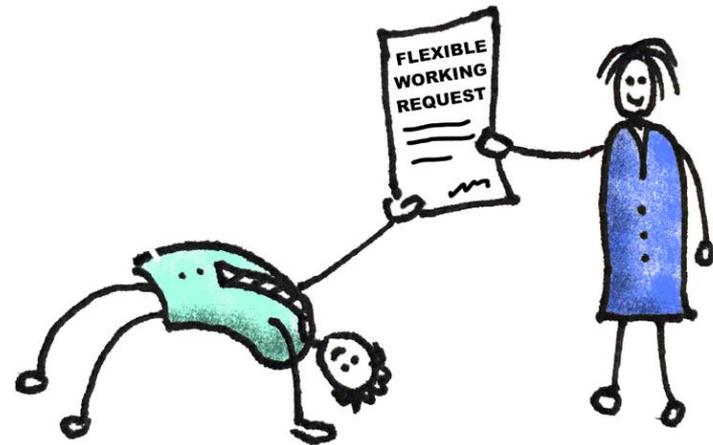
- Initially the right to request flexible working was introduced to help parents balance their work and family life.
- However, the current legislation no longer restricts the right to request flexible working to parents.
- Therefore qualifying employees who want to manage a better work life balance or are carers of children such as grandparents and other relatives also have the right to request flexible working.

Scope of the right to request flexible working - Sec 80F(1)(a)

- A request for flexible working is in essence a request to change the relevant employment terms and conditions.
 - Such a change can be temporary or permanent in nature.
- This change can relate to the hours required to work, the times required to work, the place required to work, etc.
- This allows for a wide variety of possible working patterns.

Examples of flexible working

- Part-time working
- Flexitime
- Compressed hours
- Home working
- Annualised hours
- Term-time working
- Structured time off in lieu
- Job-sharing
- Varied-hours working or time banking



Who can apply - Reg 3

- An employee who has been employed for at least 26 consecutive weeks.
- There are however certain categories of employees who are excluded from making such a request.
- Further, this right therefore does not extend to workers.
- Individuals who do not qualify for the statutory right to request flexible working may still make an informal request for flexible working.

Excluded categories of employees

- Agency workers (Sec 80F(8)(a)(ii) ERA).
- Members of the armed forces (Sec 192 read together with para 16 of Sch 2 of the ERA).
 - There is a limited right to request flexible working for regular members of the armed forces as provided for by the Armed Forces (Terms of Service) (Amendments Relating to Flexible Working) Regulations 2018 SI 2018/1166.
- Share fishermen / women (Sec 199(2) ERA).
- Employee shareholders as defined by section 205A(1) of the ERA (Sec 205A(2)(b)).

Requirements - Sec 80F(2) & Reg 4

- A request for flexible working must:
 - State that it is an application for a change in terms and conditions under S.80F ERA.
 - Specify the change applied for and the date on which it is proposed the change should become effective.
 - Explain what effect, if any, the employee thinks making the change applied for would have on their employer and how, in their opinion, any such effect might be dealt with.
- The application must also be in writing, dated and state whether a previous application has been made by the employee to the employer and, if so, when.

Reason for making the request

- There is no requirement for the request for flexible working to state the reason for making such a request.
- However, where there are a number of requests and only limited availability of flexible working, it will be reasonable for the employer to ask about the employee's reason for making the request as this will:
 - assist the employer in making a decision under the flexible working provisions; and
 - avoid discrimination.
- For similar reasons an employee may want to include their reason in their request.

Requests that do not comply with the requirements in sec 80F

- Where a flexible working request does not comply with sec 80F, the employee cannot bring a claim under sec 80H.
 - *Hussain v Consumer Credit Counselling ET Case No.1804305/04.*
 - However, pragmatically the best approach may be for the employer to inform the employee that information is missing and ask the employee to resubmit the application including the missing information.
- In any event employers should not merely ignore or reject non-compliant requests as, depending on the circumstances, this may expose them to discrimination claims.

Procedure for considering requests

- The legislation no longer prescribes a fixed procedure that an employer must follow when considering request for flexible working, rather the employer must deal with such requests in a “*reasonable manner*”. (Sec 80G(1))
- The ACAS Code of Practice on ‘Handling in a reasonable manner requests to work flexibly’ however sets out the basic requirements that should be met:
 - Discuss the request with the employee as soon as possible.
 - Allow the employee to be accompanied to such meetings.
 - Consider the request carefully.
 - The employer will have to weigh up the benefits of the request for the employee (and the business) against any adverse business impact of implementing the changes.
 - Deal with the request without delay.
 - A decision, including the decision on any appeal, must be taken within three months from when the request was made, or such longer period as agreed by the parties. (Secs 80G(1)(aa), (1B))

Grounds on which employer can refuse requests – Sec 80G(1)(b)

- Burden of additional costs
- Detrimental effect on ability to meet customer demand
- Inability to reorganise 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

The Decision

- The employer can accept the request, reject it, or accept it in modified form.
- Where the employer rejects the decision it must do so based on the fact that **it** considers that one or more of the grounds set out in sec 80G(1)(b) apply.
 - This is a subjective test. It is therefore irrelevant whether the employer's position in this regard was objectively correct, as long as the employer genuinely considered that a ground applied.
 - However, a Tribunal can consider whether the decision was made on incorrect facts. (sec 80H(1)(b)).
 - Tribunals are therefore entitled to examine and decide on the factual correctness of an employer's asserted ground for refusing a flexible working request, although not its fairness and reasonableness.
 - For an example see *Commotion Ltd v Ratty* 2006 ICR 290 (EAT).

Drawbacks - Sec 80F(4)

- The legislation provides that employees making a statutory flexible working request may only make one such request to the same employer within 12 months of the last request.
 - This restriction applies regardless of whether: the employee applied for a permanent or temporary change in terms and conditions; the request was accepted or rejected; or the circumstances of the employer's business have changed.
- Therefore where an employee makes a request that is dealt with in a reasonable manner by the employer and rejected, the employee has to wait 12 months before making another statutory request
 - During this 12 month period an employee can make an informal request.
 - This restriction is not applicable where the employee has previously made an informal request.

Claims under sec 80H – Sec 80H(1)

- Employees who have made a statutory flexible working request which was refused by their employer can bring claims under sec 80H on the following grounds:
 - the employer has failed to deal with the request for flexible working in a ‘reasonable manner’.
 - the application was refused on a ground that is not a valid business reason under sec 80G(1)(b).
 - the employer has failed to notify the employee of its decision within the decision period.
 - the decision by the employer to reject the request was based on incorrect facts.
 - the employer sought to treat the employee’s flexible working request as withdrawn under sec 80G(1D), without having good grounds for so doing.

Time periods – Secs 80H(5) & (6)

- A claim under sec 80H must be brought:
 - within three months of the relevant date, i.e. the first date on which the employee may make a claim; **OR**
 - In respect of the first four grounds: secs 80H(3), (3A) and (3B) set out when a claim can be made.
 - In respect of the fifth ground: sec 80H(3C) provides that a claim can be made as soon as the employer has notified the employee that it has decided to treat the application as having been withdrawn.
 - within such further period as the Tribunal considers reasonable where it is satisfied that it was not reasonably practicable for the claim to have been brought within the three-month period.

Specific flexible working remedies - S 80I

- Where a complaint brought under section 80H is held to be well founded the Tribunal **must** make a declaration to that effect and **may**:
 - make an order for reconsideration of the application, and
 - make an award of compensation.
- The amount of compensation will be such amount as the Tribunal considers just and equitable in all the circumstances of the case.
- However, the maximum amount of compensation that a Tribunal can award under this section is, at present, **£4,304.00**.
 - This is because such compensation cannot exceed 8 weeks' pay (Reg 6) and is subject to the upper limit specified in S 227 ERA which provides that the amount of a week's pay shall not exceed £538.00 (with effect from 6 April 2020).

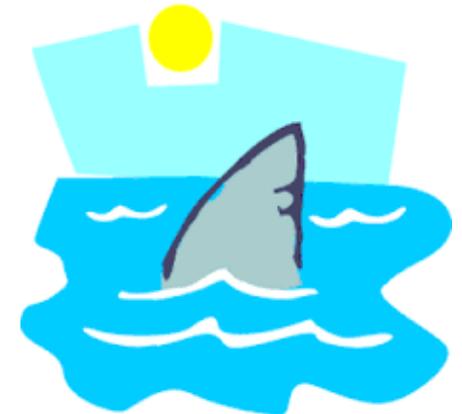
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DISCRIMINATION AND DISMISSAL



A right without bite?

- Limited scrutiny and 8 weeks' pay maximum award – so what's the incentive to deal with flexible working requests?
- Lurking beneath every request could be a potential discrimination or dismissal claim.
- Failure to deal with request properly will leave employer exposed.



Indirect sex discrimination

- Request made by women on basis of childcaring responsibilities could lead to indirect discrimination claim.
- If claimant can show particular disadvantage, employer will have to establish objective justification. Harder than test under s.80G(1)(b) ERA.
- Note danger for claimants of relying on assumptions about impact of working patterns e.g. Hacking v Paterson v Wilson UKEATS/0054/09/BI.

Other protected characteristics

- Changes to work pattern may be requested to accommodate religious observance. Again employer will have to show objective justification.
- Certain work patterns may give rise to a duty to make reasonable adjustments for disability. Employer would have to show took reasonable steps to avoid the disadvantage.
- In both cases employer's reasons will be scrutinised by ET.

Direct discrimination

- If refuse request because of a protected characteristic will be directly discriminatory.
- See Walkingshaw v John Martin Group
ETS/401126/00.
- But claimants face challenge of finding actual comparator or succeeding with hypothetical comparator.

Part-time workers

- Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000, SI 2000/1551.
- Flexible working request from an employee who is a part-time worker must be treated consistently with equivalent applications from full-time employees.
- Unless different treatment can be justified on objective grounds.

Constructive dismissal

- Breach of statutory flexible working request regime may be a fundamental breach of employment contract: *Craddock v Cornwall County Council and another* UKEAT/0367/05.
- If refusal of request discriminatory will also be fundamental breach of employment contract: *Shaw v CCL Ltd* UKEAT/0512/06.

Interplay with flexible working scheme

- ET has limited scope to look into reasons for refusal under statutory scheme; different for other types of claim.
- If lose ERA claim exposed for other claims e.g. Shaw v CLL Ltd. But even if win ERA claim could still lose discrimination claim e.g. Caswell v Advance Travel Partners UK Ltd ET/2304832/04.
- Employers should do more than box ticking if want to avoid claims.

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FLEXIBLE WORKING IN A COVID WORLD – CHALLENGES AND TIPS



 @Ramireztoons

The BRAVE NEW WORLD

michaelpramirez.com

Covid impact on working patterns

- Working from home
- Use of remote working tech
- Compressed hours
- More flexibility over organising day
- More family time
- Changing finances



And the survey says...

- 45% of workforce predict permanent change to their company's attitude to flexible working after lockdown*.
- 81% of those expect to work from home at least 1 day/wk, 33% expect to do so at least 3 days/wk*.

*YouGov, ICM and O2 Business polling, May 2020

- 86% of employers said employees were working productively*.
- 59% said they will be more supportive of home working in future*.

*Tiger Recruitment Survey, May 2020

A wave of requests to come?

- Some offices starting to re-open
- How to deal with high number of requests?
 - In order received?
 - Relevance of different reasons?
 - Consistency?
 - Appoint same person/team to oversee?

Making decisions in uncertain times

- Harder to refuse requests because of lockdown?
- Lots of uncertainty facing businesses:
 - Demand from customers
 - Possible redundancies
 - Decisions on office premises and overheads
- Consider asking for more time if needed or use of trial period.

When should employee make request?

- Employee can only make one formal request within 12-month period.
- Better to make request sooner so it is considered before others? Or to wait for more certainty over future?
- Nothing to prevent informal requests being made during 12-month period.

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