JULIAN TAYLOR SOLICITORS

Human Resources & Employment Law

BRIEFING

Requests for Flexible Working

The right to request flexible working

From 30th June 2014 the statutory right to request flexible working which previously only applied to certain employees who had caring responsibilities for certain children and adults has been extended to all employees who have at least 26 weeks' continuous employment. The right is only a right to make a request and to have that request considered. It is not a right to have that request granted. However, requests can come from employees who may have protection under other areas of legislation, and so are often made in the context of the law on discrimination and constructive dismissal (covered below). Consequently, the employee's rights may well be stronger than they first appear.

Acas Statutory Code of Practice and Acas Guide

The statutory scheme is supported by two Acas documents (both available at www.acas.org.uk):

- The Statutory Code of Practice on handling requests to work flexibly in a reasonable manner (the "Acas Code"); and
- Handling requests to work flexibly in a reasonable manner: an Acas Guide (the "Acas Guide").

Tribunals will take the Acas Code into account when deciding complaints brought under the statutory scheme. It should also help employers to comply with the scheme when faced with requests. The Acas Code itself is fairly brief and is supplemented by the lengthier ACAS Guide which provides more detailed good practice guidance. Both documents are recommended reading for anyone making or faced with a flexible working request.

If you are interested in advice or training then please contact the firm

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Who has the right to make a request?

Any employee who:

- has at least 26 weeks continuous service at the date of making the request; and
- has not made a formal request for flexible working during the preceding 12 months.

The right to request flexible working does not apply to agency workers, consultants and self employed contractors.

What is Flexible Working?

An eligible employee can request changes relating to the following:

- the hours they work;
- the times when they are required to work; or
- the place of work.

There is therefore scope to request a wide variety of possible work patterns including part time working, annualised hours, flexi-time, home working, job sharing, shift working and term-time working.

The Employee's Request

An employee's application under the statutory procedure must:

- be in writing (whether on paper, email or fax);
- be dated;
- state that the application is being made under the statutory procedure;
- specify the change that the employee is seeking and the date on which it is proposed that the change should take effect.
- Explain what effect, if any, the employee thinks the proposed change would have on the employer – for example on the employee's work, their colleagues and service delivery, and how, in their opinion, any such effect might be dealt with;
- state whether a previous application has been made to the employer and, if so when it was made.

The Acas Guide also suggests that where employees are making requests in relation to the Equality Act 2010, for example as a reasonable adjustment for a disability, then this should also be stated. This is helpful but employers should not assume that employees will always spell this out for them. Employers should be mindful in all cases of considering whether there is an Equality Act 2010 aspect to things (see below).

The Procedure

Prior to 30 June 2014 the law imposed a strict and detailed procedure for dealing with requests. The new rules are less prescriptive.

The employer must deal with the request in a "reasonable manner". This term is not defined, but the Acas Code and Acas Guide both give recommendations to employers who are dealing with requests.

- An employer should arrange to talk with the employee as soon as possible after receiving their written request, unless it is intended that the request be accepted, in which case

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a meeting is not needed. The Acas Guide suggests that a meeting may still be helpful to ensure that the proposal put forward is the best solution for both parties.

- Whilst it is not compulsory the Acas Code recommends that an employer should allow the employee to be accompanied to meetings by a work colleague, and that employees should be informed of this in advance of any discussion. The Acas Guide supplements this by saying the work colleague can be a trade union representative or any other co-worker at the same workplace.
- Wherever possible discussions should take place in a private place where what is being discussed cannot be overheard. Discussions should ideally take place at a time and location which is convenient to both parties and that where either party cannot make the initial date then another should be arranged.
- An employer should consider the request carefully, looking at the benefits of the requested changes in working conditions for the employee and the business, and weighing these against any adverse business impact of implementing the changes.
- Any decision must be notified to the employee as soon as possible. An employer is not obliged to accept the request, but if it objects to it it must do so on the basis of one of the specific "Grounds for Refusal" – see below.

Grounds for refusal

The employer may reject a request only on one or more of the following eight business grounds:

- the 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; or
- planned structural changes to the business.

Although an employer must state the ground(s) for refusal and give a sufficient explanation as to why those grounds apply, in practice this gives the employer a wide range of permissible reasons for refusal. An employment tribunal cannot question the commercial rationale or business reasons behind an employer's decision to refuse a request. Neither can it substitute its own decision as to whether the request should or should not have been granted. The employer must nevertheless show that the request has been dealt with in a reasonable manner and that the request has been given proper consideration.

Appeals

It is not compulsory for the employee to be given a right to appeal against the decision, but the Acas Code recommends it as good practice to do so. Allowing appeals will help to flag issues and may help prevent grievances. If possible an appeal should be

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heard by a more senior manager who was not previously involved in the decision, but the Acas Guide acknowledges that this will not always be possible.

The Decision Period

The employer must notify the employee of any decision, including the decision on any appeal, within three months of the date on which the original request was made. This period can be extended if both parties agree. It is sensible to ensure that any such agreement is recorded in writing.

Trial Periods

The legislation does not provide for trial periods. – under the statutory regime if a request is accepted the new work pattern will generally amount to a permanent contractual variation to working conditions. However, there is nothing to prevent the parties agreeing to a trial period and this can be a good way of testing whether working arrangements are sustainable rather than simply rejecting the request. Any such arrangements should be recorded in writing so the parties are clear on where they stand.

Withdrawing Requests / Treating Requests as Withdrawn

Employees can withdraw a request, but will not be permitted to bring a new request under the statutory scheme for another 12 months.

An employer can treat an employee's request as withdrawn if an employee fails to attend two meetings arranged to discuss their request. Employers should carefully consider an employee's reasons for failing to attend meetings before their request is treated as withdrawn and genuine reasons should be viewed sympathetically.

Informal requests for Flexible Working

Any employee can make an informal approach to their employer about changing their working arrangements, regardless of length of service. This won't trigger the statutory scheme (which is limited to written requests from employees with at least 26 weeks' service) but employers should still consider such requests carefully given that such staff may still have other statutory protections (for example under the Equality Act 2010).

Claims

An employee whose formal flexible working request is refused may bring an employment tribunal claim on the basis that:

- the employer has failed to consider the employee's request in a reasonable manner;
- the employer has failed to notify the employee of their decision within the decision period;
- the employer has not given one of the permitted grounds for rejecting the request;
- the employer's decision was based on incorrect facts; or
- the employer treated the employee's request as withdrawn when they were not entitled to do so.

An employee will generally have three months in which to bring a claim (subject to the rules on early ACAS conciliation which may lead to an extension of time limits in certain circumstances).

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The Tribunal will not question the business reasons for a refusal or substitute their own view of whether the request should have been permitted. The right to claim in the Tribunal is therefore limited in usefulness for the employee. If the complaint is upheld, the employment tribunal may order a reconsideration of the application and/ or award compensation up to a maximum of eight weeks' pay (subject to the statutory cap on a week's pay, currently £475 as at November 2015). The employment tribunal cannot order the employer to grant a request.

Other Statutory Protections for Employees who Make Flexible Working Requests

- Sex Discrimination

(a) Direct - If a flexible working request is not considered seriously or refused because it comes from a member of a particular sex, when the same request made by person of the opposite sex would have been properly considered or granted, then this would expose an employer to claims of direct sex discrimination for having treated them less favourably because of their sex.

(b) Indirect - If an employer refuses a woman's request to work part time or to change her working pattern because of her childcare commitments, this may give rise to an indirect sex discrimination claim.

Indirect discrimination occurs where a provision, criterion or practice is applied equally to both men and women – (for example, in the context of flexible working requests, a requirement that all employees work full time or in the office) - and where:

- it puts or would put women at a particular disadvantage when compared with men;
- it puts or would put the woman in question at that particular disadvantage; and
- the employer cannot show the provision, criterion or practice to be a proportionate means of achieving a legitimate aim.

Thus, apparently neutral practices that tend to have a discriminatory effect may be unlawful, unless they can be objectively justified.

With regard to showing that a practice has a more adverse effect on women than men, it is well established statistically that more women than men have childcare responsibilities and are therefore disadvantaged by a requirement to work full time and potentially also by other rigid working arrangements (although this is shifting in an environment where many women now return to full-time employment after childbirth, and where more men are taking on childcare responsibilities).

The focus then is on whether the employer can show that the requirement for the employee to work full-time or in the office etc., is a proportionate means of achieving a legitimate aim. This is a harder test for the employer to satisfy

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compared to simply citing one of the statutory reasons for refusal under the right to request procedure. An indirect sex discrimination claim will therefore be much more focused on the substance of the employer's approach and the reasons for refusal rather than whether procedural boxes have been ticked. The employer needs to show that they have approached the request constructively and with an open mind, seeking to accommodate it if they can, and that a refusal is not based on a knee-jerk reaction or untested assumptions. Employers should be prepared to suggest alternatives, which may involve a trial period or might allow the employee's request to be accepted in a modified form.

Moreover, the restrictions under the right to request rules on who the right applies to, and the format and content of the request therefore do not apply. A claim of this type may therefore be brought by someone who does not have 26 weeks' continuous service.

Importantly an indirect sex discrimination claim will have a much more valuable remedy compared to a claim under the statutory right to request rules. There is no cap on the amount of compensation that can be awarded. (The capped compensation under the right to request rules may not go very far in covering a woman's lost income where she has had to resign in the light of a refusal, and finds it difficult to get another job.) In addition an injury to feelings award may also be made.

- Disability Discrimination

The duty to make reasonable adjustments arises in relation to disabled employees, and requires an employee to take steps to attempt to reduce or remove disadvantage suffered by a disabled employee. One of the ways in which an employer may need to do this is by agreeing to alter an employee's working pattern or hours if they request it.

Requests for flexible working should be considered in this context regardless of the length of service of the employee making the request, and regardless of whether they make the request formally or informally.

- Discrimination on grounds of Religion or Belief

Employees may make requests for flexible working to accommodate their religious beliefs and practices, for example they may wish to treat certain days as days for worship or rest, or require time off for prayers or religious holidays. Refusing flexible working in these sorts of cases may lead to indirect discrimination claims, the implications of which are similar to the implications of an indirect sex discrimination claim highlighted above.

Requests for flexible working should be considered in this context regardless of the length of service of the employee making the request, and regardless of whether they make the request formally or informally.

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- Unfair Dismissal

(a) Automatic Unfair Dismissal

An employee has a right to claim for automatic unfair dismissal (for which they need no qualifying period of service) if they are dismissed in connection with making a formal flexible working request or bringing proceedings arising out of it. Compensation will comprise a basic award, equivalent to statutory redundancy pay, and a compensatory award to compensate for losses flowing from their dismissal, which is subject to a statutory cap (currently £79,962 or one year's gross pay, whichever is lower, as at September 2016). The employee is also protected against detriment on the same grounds.

(b) Constructive Dismissal

Employers should also be mindful that if the rejection of a request for flexible working is held to be discriminatory, then this will also amount to a fundamental breach of the employee's contract entitling them to resign and claim constructive unfair dismissal, with compensation assessed as described above (see "Automatic Unfair Dismissal"), save that where discrimination is found any cap on compensation will be disapplied.

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