LEGAL REFORM

# Legal reform: Keeping the ‘flex’ in flexible working requests

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Louise Skinner and Thomas Twitchett review the government’s proposals to extend the right to request flexible working

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# Legal reform: Keeping the ‘flex’ in flexible working requests

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On 23 September 2021, the UK government published a consultation document entitled *Making flexible working the default*, proposing reforms to the right for employees to request flexible working.

While the title gives the impression that all workers will have an automatic right to work flexibly, the proposal does not in fact go that far. Instead, it contemplates a package of proposals intended to increase the number of employees who can request flexible working and to make it more difficult for employers to justify refusal of such requests. The right to request flexible working respects a balance of competing interests between employer and employee. It is not a stick to beat employers into submitting to flexible working requests. It has always been a nudge: encouragement to employers not to stick their head in the sand and ignore societal changes and everyday demands on employees’ time. The right is aimed at sparking dialogue and (where practicable) agreement or compromise. This dialogue has ignited since mass remote working during the Covid-19 pandemic has prompted many employees who had never done so before to consider working flexibly long term.

## Consultation overview

The government has put forward a range of proposals to broaden the scope of the existing right while continuing to recognise that employers must have autonomy when deciding on the most efficient way to run their business operations. The consultation document seeks views on the following:

- making the right to request flexible working a ‘day one’ right by removing the 26-week qualifying period;
- whether the eight existing business reasons for refusing a statutory request for flexible working remain valid;
- whether to require employers to suggest alternatives if they intend to refuse a request;
- the administrative process underpinning the right to request flexible working; and
- how to encourage employees to request a temporary flexible arrangement.

The consultation will remain open until 1 December 2021 with any changes unlikely to come into force until April 2023 at the earliest, according to the impact assessment accompanying the consultation.

The proposed changes – if implemented – are expected to encourage employers and employees to have meaningful discussions around flexible working arrangements. However, importantly, employees will still only have a right to 'request' flexible working, not to be given it.

## A quick recap

With some commentators suggesting that the proposals do not go far enough, it is worth briefly reflecting on the genesis of the right to request flexible working and the considerable progress that has already been made towards expanding the right.

First introduced in 2003, the right to request flexible working was originally confined to employed mothers and fathers of children under the age of six or disabled children under 18. The right was extended in 2007 to those caring for adults.

In 2014, the right evolved again into the current regime with which we now work. The Children and Families Act 2014 extended the right to all employees with 26 weeks' service, sweeping away any requirement that the request be linked to caring for a child or adult. It also stripped back the previous statutory procedure for dealing with requests, which was perceived as burdensome, instead permitting employers to deal with requests 'in a reasonable manner'.

Whether attributable directly to the statutory right to request or not, the pre-Covid statistics on flexible working were encouraging. The *Taylor Review of Modern Working Practices,* reporting in June 2017, commented that:

> *There has clearly been a significant move towards [flexible working] over the last 10 years: 92% of employers say that they have at least one form of flexible working practice available in their workplace; 60% of employees have said they have done some form of flexible working in the last 12 months.*

The Covid-19 pandemic, which resulted in up to 47% of UK employees working from home (at the various peaks in restrictions), has accelerated the trend towards flexible working. Many employers grappling with return-to-work arrangements say that hybrid working will continue to feature in their workplaces.

## Current framework

Under the provisions set out in the Employment Rights Act 1996 (the ERA), all employees with 26 weeks' service have the right to ask to change their location, hours and times of work. They can make one statutory request for flexible working each year and an employer must deal with that request within three months (unless a longer period is agreed). Employers can decline the request but the refusal must be based on one of the eight prescribed business reasons set out in the ERA:

- granting the request will lead to extra costs that will be a burden on the business;
- the work cannot be reorganised among other staff;
- people cannot be recruited to do the work;
- flexible working will negatively affect quality;
- flexible working will negatively affect performance;
- the organisation's ability to meet customer demand will be negatively affected;
- there is a lack of work to do during the proposed working times; or
- the business is planning structural changes.

Acas has published a Code of Practice on flexible working requests and supplemental guidance, which give advice on how to deal with such requests.

## The proposals

These are the key areas on which the government is seeking views:

### Making the right to request flexible working a 'day one' right

The 26-week qualifying period was introduced, in part, to reduce the business burden of administering statutory requests for flexible working.

The consultation paper proposes that employees should be entitled to the right to request flexible working from the first day of their service. The government believes that removing the current qualifying service requirement will help deliver a cultural change that could lead to advertising jobs as available for flexible working becoming the norm. It may also result in employers considering flexible working options earlier in the design of a job or in the recruitment process and give employees more confidence to make a request.

However, employers may feel that they need time to assess individuals in their new role and decide whether a flexible working model will be an effective option, which could lead to them rejecting early requests.

### Are the business reasons for refusing a request still valid?

The consultation document asks whether the eight business reasons for rejecting a request to work flexibly remain valid. However, the government does not envisage a need for fundamental changes to this list of reasons.

Given the breadth of the existing reasons, it is unlikely that respondents to the consultation will put forward additional grounds, although some respondents may suggest the list should be trimmed.

## Requiring the employer to suggest alternatives where possible

The consultation paper seeks views on whether employers should be required to show that they have considered alternative working arrangements when rejecting a statutory request for flexible working.

The government believes that where the parties co-operate to find a compromise, this could promote stronger working relationships and deliver more of the benefits of flexible working. For example, if an employer cannot accommodate a permanent change, it could look at making the change for (say) six months.

In practice, though, employers are already encouraged (including by the Acas guidance) to consider compromise or other options, rather than rejecting the request out of hand.

## The administrative process underpinning the right

The government also wants to explore whether allowing employees to make more than one statutory request each year would make the framework more responsive to changes in an individual's circumstances. The consultation document asks respondents to consider whether the legislation puts unnecessary barriers in the way of those whose personal situation may have changed within 12 months (such as newly disabled people or new parents).

There is understandable merit in permitting employees whose circumstances have materially changed to put forward new requests. It is likely that most employers, acting reasonably, do this already.

The consultation document also considers whether the three-month deadline for responding to requests remains the right approach. While three months can appear lengthy in certain situations, it is important that employers have the necessary leeway to consider changes in the round. In particular, they may need time to explore the knock-on consequences for other employees of granting the request.

## Requesting a temporary arrangement

The current legislative framework does not prevent the parties from agreeing to a temporary flexible working arrangement. However, the government believes that the ability to request a temporary change is underappreciated and underused. As employees may need to request a contractual change for a limited period, the consultation document seeks views on what would encourage them to make such requests.

Again, there is merit in making the right to request temporary changes explicit, rather than implied. The Equality and Human Rights Commission (EHRC) commented in its 2009 report, *Working better: meeting the changing needs of families, workers and employers in the 21st century*, that a belief that changes to working arrangements must be permanent can lead to gender imbalances. The EHRC highlighted that, at the time of the report, more women than men requested reduced hours, which, in the absence of a right to revert, could lead to the long-term marginalisation of such women. The EHRC therefore recommended that the government should introduce a formal right to request a return to full-time work after a previous change in working hours (subject to business needs).

## What does this mean for employers?

In short, there are no significant changes for employers *for now*. At this stage, it is a consultation only on proposed reforms and those proposals do not seek to introduce an automatic right for employees to work flexibly.

However, the consultation does signal that change may be on the way (such as the removal of the 26-week service requirement). Employers may want to keep this in mind when thinking about their future hybrid working or other working arrangements. The direction of travel is more flexibility, not less – and many employees who have worked from home throughout the Covid-19 pandemic will expect this.

Employers should not be alarmed at the proposed changes. They will still be able to assess whether flexible working requests work for them and, if not, they can decline those requests on one or more business grounds. However, they should look to embrace greater flexibility where they can. As the right has unfolded over nearly 20 years, successive governments, business groups and others have outlined myriad benefits, including:

- opening up opportunities for a broader and more diverse workforce;
- better recruitment and retention rates;
- improved morale;
- lower sickness absence; and
- higher productivity.

Flexible working is clearly not a panacea for all business problems but these are valuable benefits that employers should not ignore – especially if competitors are making great strides in this direction.

## Note of caution

Another reason to treat requests for flexible working seriously is, of course, to minimise the risk of legal claims. If an employee is dissatisfied with the way in which their employer has dealt with their request, they may be able to seek redress from an employment tribunal. An employee can, for example, make a complaint to the tribunal if the employer:

- fails to deal with the flexible working application in a reasonable manner;
- fails to resolve the request one way or the other within three months (including time for any appeal);
- has refused the application for a reason other than the statutory grounds;
- rejects the application based on incorrect facts; or
- has wrongly treated the application as withdrawn.

If the employment tribunal considers the complaint to be well founded, it can order the employer to reconsider the application. It can also make an award of compensation of up to eight weeks' pay, subject to the upper limit on the amount of a week's pay (which is currently £544). The government is not proposing any change to the amount of compensation an employee can claim.

However, in all likelihood, an unhappy employee will use the employer's response as evidence of more troubling behaviour, such as discrimination, victimisation (for example,

for asserting a statutory right) or (if they resign in protest at the alleged behaviour) constructive unfair dismissal. These can be much higher value claims.

The risk of discrimination claims in particular can be high. Although men are increasingly seeking flexibility, the Covid-19 pandemic has demonstrated that women still disproportionately shoulder the childcare burden. If an employer unreasonably denies a request for flexibility that is linked to childcare requirements, this could lead to an indirect sex discrimination claim.

## *Thompson v Scancrown* [2021]

The recent employment tribunal case of *Thompson* is a case in point. In this case, Mrs Thompson was awarded almost £185,000 following the mishandling of her request for flexible working on her return from maternity leave. She had asked to work four days per week and for her working day to end at 5pm rather than 6pm so that she could collect her daughter from nursery before it closed. Her employer, a small estate agent, turned down the request, saying it could not afford for Mrs Thompson to work part time. She resigned and brought a claim for (among other matters) indirect sex discrimination, which succeeded.

The tribunal found that the requirement to work from 9am to 6pm, Monday to Friday, while ostensibly neutral, nevertheless placed more women with children at a substantial disadvantage than men with children, and that Mrs Thompson had suffered that disadvantage. It did not accept that the employer's refusal of Mrs Thompson's request – and insistence on the stated hours – was a proportionate means of achieving a legitimate aim.

## Mitigate the risks

In light of the proposals, now would be a prudent time for employers to revisit their approach to flexible working and their processes for dealing with requests.

Many employers are already forging new paths by offering hybrid working or have altered working patterns that are likely to endure for the foreseeable future. Greater flexibility will naturally diminish the risk of disputes.

But flexibility cannot always be offered. In some industries and sectors, it is simply not practicable, or movement may only be realistic 'around the edges'. Some flexibility though is generally better than none and compromise rather than an outright 'no' will diminish the risks. But if a request must be declined, employers should ensure that they are turning down for the right reasons, within the legislation, and having fully applied their mind to the potential benefits – not just for the employee but for the business too. It may well pay dividends to flex.

## Cases Referenced

- Thompson v Scancrown Ltd [2021] ET 2205199/2019

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