

The future of flexible working

BY JO KEDDIE

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Feature

LEGISLATION

The pandemic has made flexible working an everyday reality. With new rules in the pipeline businesses need to take care how they handle requests if they are to stay on the right side of the law

In the post-pandemic working world, flexible, or “hybrid”, working has become a much-discussed topic among employees and employers as businesses encourage their workforces to return to the office. With many employees having enjoyed the flexibility and advantages of working from home and proven, in some cases, to have increased productivity, many businesses are seeing a rise in requests for flexible working arrangements. Many businesses are, quite rightly, concerned about their ability to refuse flexible working requests given that their workforces have proven how well they have worked remotely during the pandemic.

Are businesses obliged to approve flexible working requests from their employee to work flexibly? From a legal perspective, the answer is “no” as the right to request is exactly that, a right to request, and there are a number of reasons that a business can rely on to refuse the request. Each request, however, should be considered on its own facts and merits and dealt with reasonably by the business.

Current law

Presently, only those employees who have been continuously employed for at least 26 weeks can make a formal flexible working request under UK law. The request can cover a change regarding the days or hours worked, when they



are required to work or where they are required to work. Employees can only make one flexible working request in any 12-month period.

Such requests must be in writing, be dated and state that it is a flexible working request. It should also explain the change being requested and propose



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a commencement date for the change as well as identifying any impact or effect the change would have on the business and how that impact might be mitigated. Finally, it should state whether the employee has made any previous requests and, if so, when.

Responding to requests

It is paramount that businesses deal with any request for flexible working in a reasonable manner. First, the employee should be notified of the business's decision within three months

of the request being made, unless extended by agreement. However, it is good practice to deal with such requests within a few weeks of receipt rather than wait out the full legal period.

The current legal framework provides businesses with eight business grounds on which they can rely to justify refusing a flexible working request. These grounds are wide and are as follows: granting the request will result in a financial burden for the business; the business will be unable to reorganise work among its existing staff; the business would be unable to recruit additional staff (i.e. to fill a one- or two-hour void period); the request would lead to a detrimental impact on quality, performance or the ability of the business to meet its customer demands; there would be insufficient work for the periods the employee proposes to work; and, finally, the business is undergoing a restructure or redundancy exercise.

The Acas Code of Practice on making and responding to flexible working requests provides useful guidance to employers for handling requests to work flexibly. It recommends acknowledging the request in writing so as to set a timescale for dealing with the request; notifying the employee if they have omitted any required information or information which might assist the business in considering their request and, importantly, inviting the employee to a meeting to discuss the request. The employee should

FIVE POINTS BUSINESSES SHOULD CONSIDER WHEN RESPONDING TO FLEXIBLE WORKING REQUESTS

- Treat each application for flexible working carefully, and consider each application on its own merits. Ideally, have in place a clear policy, timeline and process in relation to how the business will approach and handle such requests.
- Be flexible and consider possible options or alternatives once the flexible working request has been put forward. Engage and consider carefully any evidence and justification presented by the employee, not least, if they have worked effectively in this way for the last 20 months.
- Consider any legal and factual justification and reasons for refusing the request; for example, most of the workforce and the business's clients are no longer working remotely and are requiring face-to-face meetings and contact. Consider training needs and measures needed to support and nurture more junior employees.
- Consider whether any changes should be temporary or permanent while the pandemic evolves. Allow for trial periods where it is reasonable to do so. Also, be mindful of long-term strategy and how others in the sector may be responding to flexible working requests to ensure that talent is retained and not attracted elsewhere by more flexible arrangements.
- Keep careful written reasons of the considerations and decision-making process, and try to be consistent where possible in the approach and consideration applied to requests.

also be informed that a colleague or trade union representative can accompany them to the meeting with their employer.

Implications of refusal

From a legal standpoint, refusing a request to work part-time or insistence on set working hours may result in a claim for indirect discrimination under the Equality Act 2010. Indirect discrimination occurs where an employer unjustifiably applies a general rule which is also known as a provision, criterion or practice ("PCP") which puts a group sharing the same protected characteristic at a particular disadvantage and which also places the individual at a particular disadvantage.

A successful employment tribunal claim for indirect discrimination can be costly for a business in a variety of ways. First, from a monetary point of view, the tribunal can award compensation of up to eight weeks' pay (based on a maximum of £544 per week) along with an essentially unrestricted amount of damages to an employee who has been unlawfully discriminated against. There may also be a separate award for injury to

feelings (which can be up to £45,600). Secondly, defending such claims can be time-consuming and expensive in terms of management time and legal fees. Thirdly, it can affect employee morale and the culture of the organisation if a public judgment goes against the business by upholding a discrimination claim.

disproportionately affected women and placed her at a disadvantage. The tribunal upheld Mrs Thompson's claim on the basis that the business had not provided adequate evidence to support its refusal of her request. As a result, Mrs Thompson was awarded almost £185,000 in damages.

As well as the obvious financial

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The recent case of *Mrs Thompson v Scancrown t/a Manors* should serve as a warning to businesses when considering flexible working requests. Mrs Thompson put in a flexible working request which was ultimately refused by her estate agency employer. She brought a tribunal claim for indirect disability discrimination on the basis that her business's PCP requiring employees to work from 9am to 6pm, Monday to Friday,

cost to Mrs Thompson's employer, there is also the consequent risk that other claims may follow if other employees' requests had been breached in a similar manner. Further, such an adverse finding may deter potential future talent and recruits.

The future


The government is currently consulting over making flexible working the "default position"

by including the right to make a statutory flexible working request as a “day-one right”. This would mean that, from the first day of an employee’s employment

20 months has shown that for many sectors, working remotely does not hinder the ability of large parts of the workforce to work as effectively at home as in the office.

inevitably have to be mindful of the fact that many of their workforces have worked well from home over the last 20 months.

There will be some sectors, of course, where working remotely is simply not viable, and refusal to grant a request can easily be justified by one of the eight statutory reasons, for example, design and manufacturing businesses and many of those in the retail and hospitality sectors.

However, in many other sectors, the need to be present at business premises on a permanent basis is less clear-cut especially as a consequence of the lessons we have all learnt as a result of the prolonged periods of enforced lockdown. Businesses therefore should err on the side of caution, consider requests individually and carefully, and be mindful of their sector’s approach as flexible working will be here to stay in the long term, and for many employees it will become a key feature of their requirements when searching for new roles or deciding to stay with their present businesses. 

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with a new business, they could submit a flexible working request under the statutory regime.

The timing of this proposal is interesting, as many would assume that it was born out of the success of home working during the pandemic and the government’s Good Work Plan, which suggested making it mandatory for businesses to state whether a job was flexible in the recruitment process. The fact that the discussion has come to the fore now is undeniably advantageous to those employees who prefer working from home. Evidence collated during the past

It is important to note, however, that the government’s proposal to include flexible working requests as a day-one right is not analogous with a right to work from home; it simply negates the requirement for an employee having to serve a minimum 26-week period with their employer before being allowed to make a request.

Responding to requests

The legal position for businesses has not changed as a result of the pandemic. That being so, there has and will continue to be a marked increase in such requests, and businesses

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