THE RIGHT TO WORK PART TIME

This article first appeared in Employment Law & Litigation – volume 7 issue 8 – 2002

Many people (including lawyers) are under the mistaken belief that under UK law there is a statutory right to work part-time. As the law stands there is no such right. A wealth of case law has developed over recent years, dealing with part-time working, the majority of which involves claims of indirect sex discrimination.

THE LAW

Sex Discrimination Act

The Sex Discrimination Act 1975 (SDA), as amended by the Sex Discrimination (Indirect Discrimination and Burden of Proof) Regulations 2001 (SI No 2660), implemented in order to comply with the Burden of Proof Directive (97/80/EC), prohibits direct and indirect sex discrimination.

Section 1 of the SDA states:

‘(1) In any circumstances relevant for the purposes of any provision of this Act, other than a provision to which subsection (2) applies, a person discriminates against a woman if—

(a) on the ground of her sex he treats her less favourably than he treats or would treat a man, or

(b) he applies to her a requirement or condition which he applies or would apply equally to a man but—

(i) which is such that the proportion of women who can comply with it is considerably smaller than the proportion of men who can comply with it, and

(ii) which he cannot show to be justifiable irrespective of the sex of the person to whom it is applied, and

(iii) which is to her detriment because she cannot comply with it.

(2) In any circumstances relevant for the purposes of a provision to which this subsection applies, a person discriminates against a woman if—

(a) on the ground of her sex he treats her less favourably than he treats or would treat a man, or

(b) he applies to her a provision, criterion or practice which he applies or would apply equally to a man but—

(i) which is such that it would be to the detriment of a considerably larger proportion of women than of men, and
(ii) which he cannot show to be justifiable irrespective of the sex of the person to whom it is applied, and

(iii) which is to her detriment.

(3) Subsection (2) applies to—

(a) any provision of Part 2,

(b) sections 35A and 35B, and

(c) any other provision of Part 3, so far as it applies to vocational training.

(4) If a person treats or would treat a man differently according to the man’s marital status, his treatment of a woman is for the purposes of subsection (1)(a) or (2)(a) to be compared to his treatment of a man having the like marital status.’

Note: Section 1(2) applies in relation to employment-related claims (Part 2 of the Act) and to the provisions on training in sections 35A and 35B.

Direct discrimination

This occurs where either a woman or a man is treated less favourably on the ground of his/her sex compared with a person of the opposite sex and they suffer a detriment. This also applies where a married person is treated less favourably than an unmarried person to their detriment and to a person who is treated less favourably because s/he intends to undergo, is undergoing or has undergone gender reassignment.

Therefore, direct discrimination occurs where someone is put at a disadvantage on discriminatory grounds in relation to his/her employment. This may occur unintentionally.

Indirect discrimination

This occurs where an employer applies or would apply to a woman or a man, a provision, criterion or practice which:

(i) is applied to a person of the opposite sex;
(ii) is to the detriment of a considerably larger proportion of women or men than the opposite sex;
(iii) cannot be shown to be justifiable irrespective of the sex of the person to whom it applied; and
(iv) is to the detriment of that woman or man as s/he cannot comply.

(This also applies to a married person).

Consequently, indirect discrimination occurs where an individual’s employment is subject to an unjustified condition which one sex (or married person) finds more difficult to meet, although of itself the provision, criterion or practice is “neutral”.

A requirement of full-time working tends to impact upon women adversely because of their childcare commitments. Therefore, the question is one of justification.

EOC Code of Practice

The Equal Opportunities Commission’s Code of Practice (incorporated into the SDA by virtue of section 56A) recommends that employers should consider whether certain jobs could be performed on a part-time or flexible basis.

Paragraph 43 states:
‘There are other forms of action which could assist both employer and employee by helping to provide continuity of employment to working parents, many of whom will have valuable experience or skills.

Employers may wish to consider with their employees whether:

(a) certain jobs can be carried out on a part-time or flexi-time basis;
(b) personal leave arrangements are adequate and available to both sexes. It should not be assumed that men may not need to undertake domestic responsibilities on occasion, especially at the time of childbirth;
(c) child-care facilities are available locally or whether it would be feasible to establish nursery facilities on the premises or combine with other employers to provide them;
(d) residential training could be facilitated for employees with young children. For example, where this type of training is necessary, by informing staff who are selected well in advance to enable them to make childcare and other personal arrangements; employers with their own residential training centres could also consider whether childcare facilities might be provided;
(e) the statutory maternity leave provisions could be enhanced, for example, by reducing the qualifying service period, extending the leave period, or giving access to part-time arrangements on return.

These arrangements, and others, are helpful to both sexes but are of particular benefit to women in helping them to remain in gainful employment during the years of child-rearing.’

In Berry v Bethlem and Maudsley NHS Trust and Hinks v Riva Systems [1997] DCLD No 31 EAT, the Employment Appeal Tribunal observed that failure by tribunals to consider the Code of Practice could lead to a successful appeal.

European Council Recommendation

The European Council Directive Recommendation on Reconciling Work and Family Life No R(96) 5, recommends flexible working practices. Such recommendations are not legally binding. However, in Grimaldi v Fonds des Maladies Professionelles [1990] IRLR 400 ECJ, the ECJ ruled that national courts are bound to consider recommendations when determining disputes.

The Appendix states:

‘A flexible employment practice

9. Employers should be encouraged to develop flexible employment practices enabling their workers, both women and men, to meet the demands of their family responsibilities in the most satisfactory manner possible. In so far as is possible, account should be taken of the individual circumstances of each worker in relation to their family responsibilities and the needs of the persons dependent on them (for example the size of their family, whether they are a single parent, or whether their dependent relatives are ill, elderly or have a disability).

10. A flexible and voluntary employment practice widely agreed between employers and workers should comprise as many as possible of the following options:

- easier access to part-time work for those workers who so wish;
- easier access, where possible, to options for “distance employment” (e.g. telework or homework for those workers who so wish);
- the possibility for workers to vary their working hours and the organisation of their working time, whilst retaining the possibility of reverting to their original hours;
- leave arrangements to care for family members who are ill or who have a disability.'
11. Flexible employment practices should provide for conditions of employment which are equivalent or comparable to those of similarly placed full-time workers. In particular, member states are encouraged to extend this principle of equal or comparable treatment to the following areas:

- job security;
- work place representation;
- career development including promotion possibilities;
- pay and other benefits.

**European Directive**

The Part-Time Work Directive (97/81/EC) was introduced to implement the Framework Agreement.

Parliament should have had in force, the laws, regulations and administrative provisions necessary to comply with this Directive, by no later than 20 January 2000, or should have ensured that by that date at the latest, the social partners had introduced the necessary measures by agreement.

The Framework Agreement on part-time work preamble states

‘This Framework Agreement is a contribution to the overall European strategy on employment. Part-time work has had an important impact on employment in recent years. For this reason, the parties to this agreement have given priority attention to this form of work. It is the intention of the parties to consider the need for similar agreements relating to other forms of flexible work.’

The purpose of this Framework Agreement is (Clause 1: Purpose):

‘(a) to provide for the removal of discrimination against part-time workers and to improve the quality of part-time work; and
(b) to facilitate the development of part-time work on a voluntary basis and to contribute to the flexible organisation of working time in a manner which takes into account the needs of employers and workers.’

Opportunities for part-time work (Clause 5):

1. In the context of Clause 1 of this Agreement and of the principle of non discrimination between part-time and full-time workers:

(a) Member States, following consultations with the social partners in accordance with national law or practice, should identify and review obstacles of a legal or administrative nature which may limit the opportunities for part-time work and, where appropriate, eliminate them;

(b) the social partners, acting within their sphere of competence and through the procedures set out in collective agreements, should identify and review obstacles which may limit opportunities for part-time work and, where appropriate, eliminate them.

2. A worker’s refusal to transfer from full-time to part-time work or vice-versa should not in itself constitute a valid reason for termination of employment, without prejudice to termination in accordance with national law, collective agreements and practice, for other reasons such as may arise from the operational requirements of the establishment concerned.
3. As far as possible, employers should give consideration to:

(a) requests by workers to transfer from full-time to part-time work that becomes available in the establishment;

(b) requests by workers to transfer from part-time to full-time work or to increase their working time should the opportunity arise;

(c) the provision of timely information on the availability of part-time and full-time positions in the establishment in order to facilitate transfers from full-time to part-time or vice versa;

(d) measures to facilitate access to part-time work at all levels of the enterprise, including skilled and managerial positions, and where appropriate, to facilitate access by part-time workers to vocational training to enhance career opportunities and occupational mobility; and

(e) the provision of appropriate information to existing bodies representing workers about part-time working in the enterprise.

CURRENT POSITION

Parliament has failed to implement the Part-Time Work Directive and therefore, there is no statutory right to request and work part-time.

According to Labour Markets Trends – January to March 2002 (source: Office for National Statistics) the part-time work force is 24.7%, of which women form the overwhelming majority (80% female and 20% male), although in recent years there has been an increase in men working part-time.

Part-time working is often necessary due to childcare responsibilities, especially when caring for children under school age (0-4). Women (and men) frequently seek to change their hours of work from full-time to part-time after the birth of a child.

As there is no statutory right to request and/or work part-time, an employer is not obliged to allow an employee’s request to work part-time or flexible hours. Accordingly, should an employer refuse such a request, the only remedy available to an employee will be to pursue a claim in the employment tribunal of indirect sex discrimination (section 1(2)(b) of the SDA).

Within the context of section 1(2)(b)(i) of the SDA, an affected employee will argue that the employer has imposed a ‘provision or practice’ i.e. full-time work, upon them and that a ‘considerably larger proportion’ cannot comply, compared to employees of the opposite sex who can, and which is to the affected employee’s detriment.

Indirect Sex Discrimination

The component parts of the section 1(2)(b)(i) are defined as follows:

- a ‘provision or practice’ includes an obligation to work full-time:

  *Home Office v Holmes* [1984] IRLR 299 EAT

- it is irrelevant that an applicant could comply with a ‘provision or practice’ e.g. by employing a childminder or carer to look after a child:

  *Price v Civil Service Commission* [1977] IRLR 291 EAT

- the proportion of women (or men) who can comply means “in practice” and not “physically”. But see:

  *Price v Civil Service Commission*, as approved in *Mandla v Dowell Lee* [1983] IRLR 209 HL)
a ‘considerably larger proportion’ of women (or men) who can comply is a matter of fact and common usage. But see:

Staffordshire County Council v Black [1995] IRLR 234 EAT

the proportion of women (or men) who can comply, does not mean the actual number and statistical arguments may be inappropriate:


although where statistical material is used it is important to make the right comparisons:

McCausland v Dungannon District Council [1993] IRLR 583 NICA

where the number of women (or men) employed is so low as to be statistically insignificant (e.g. in a traditionally female job), a purely statistical approach may not be appropriate, and a tribunal may look at whether there would have been a disproportionate effect on women had there been more employed:

London Underground Ltd v Edwards (No 2) [1998] IRLR 364 CA

an employment tribunal is entitled to take judicial notice of the ordinary behaviour of men and women in determining who has primary care responsibilities for a child:

London Underground Ltd v Edwards (No 2)

in order to show adverse impact on an applicant’s ability to comply with a ‘provision or practice’, it is essential to define the appropriate “pool for comparison”, before the necessary comparison is attempted:

Pearse v City of Bradford Metropolitan Council [1988] IRLR 379 EAT and Jones v University of Manchester [1993] IRLR 218 CA

where the applicant produces statistical evidence of disproportionate effect which the respondent seeks to challenge, the respondent must produce rebutting statistics showing a more appropriate pool or at least produce evidence that the applicant’s statistics are distorted:

Greater Manchester Police Authority v Lea [1990] IRLR 372 EAT

the pool is a matter of logic for the employment tribunal:

Allonby v Accrington College [2001] ICR 1189 CA

a ‘provision or practice’ is satisfied in a case where no woman can comply, not just a smaller number:

Greencroft Social Club and Institute v Mullen [1985] ICR 796 EAT

it is necessary for the applicant to show discrimination as between men and women and not simply that the respondent has made an arbitrary decision for refusing flexible or part-time work:

Coker v Lord Chancellor [2002] IRLR 80 CA;

‘detriment’ means putting at a disadvantage and relates to that particular woman/man.

Pool of Comparison

Example:
A company producing widgets employs 100 employees – 80 men and 20 women on the factory floor carrying out the same or similar duties. Due to childcare responsibilities, three women request to work part-time. The company refuses their requests on account that the business needs everyone to work full-time.

The proportionate comparison is determined as follows:

1. calculate the number of women who work with widgets and perform the same or similar duties to the applicants – 20;
2. calculate the number of men who work with widgets and perform the same or similar duties to the applicants – 80;
3. calculate those of the applicants’ gender group who can comply with the provision or practice to work full-time – 17;
4. calculate those of the opposite gender to the applicants who can comply with the provision or practice to work full-time – 80;
5. divide (1) by (3) and then (2) by (4) which will provide a comparable proportion of the applicants’ gender group who can comply with the provision or practice to work full-time against the opposite gender group who can comply: 17 out of 20 (85%) and 80 out of 80 (100%).
6. compare the results in (5) which shows that a considerable larger proportion of the applicant’s gender group (85%) cannot comply with the provision or practice to work full-time as opposed to that of the opposite gender group (100%) who can comply.

Disproportionate impact

An employer’s obligation is to avoid applying an unjustifiable provision or practice, which has a considerable disparate impact on the applicant’s group. The approach adopted by the European Court of Justice is similar to that provided by the SDA. Considerable disparity of treatment can be established more readily, if the statistical evidence covers a long period and the figures show a persistent and relatively constant difference between the applicant and the opposite gender group. A lesser statistical disparity may suffice to show that the difference between the two gender groups is considerable, compared with a case where the statistics cover only a short period or if they present an uneven picture:

*R v Secretary of State for Employment, ex p Seymour-Smith and Perez (No 2) [2000] IRLR 263 HL*

*London Underground Ltd v Edwards (No 2)*

In this case, 20 out of 21 women train drivers could comply with new rostering arrangements, which required longer shifts, compared with all 2,023 male train drivers who could comply. Ms Edwards was a single parent and brought a claim for indirect sex discrimination on the basis of a statutory comparison of 95.2% of female drivers and 100% male drivers who could comply with the new rostering arrangements.

The employer, under the old test of considerably smaller proportion that could comply (compared with the new test of considerably larger proportion who cannot comply), argued that Ms Edwards should fail on the statistical analysis.

The Court of Appeal observed that there should be a ‘margin of appreciation’ in assessing whether the proportion was ‘considerable’ and that the purpose of such a requirement was to eliminate effects which are slight or due to chance.

However, the Court of Appeal upheld the tribunal’s decision that the ratio of lone parents was 10 females to one male and that train driving appeared preferable to men, judging by the numbers of male drivers to female drivers.
The Court of Appeal further agreed with the employment tribunal's determination that a 4.8% disparity impact was at the bottom of the impact range. What ultimately decided the case was that all male drivers could comply with the new roster.

*Chief Constable of Avon & Somerset v Chew* EAT/503/00 (unreported)

The EAT upheld the decision of the employment tribunal, who followed the reasoning in *Edwards (No 2)*, in concluding that where 2.26% fewer women than men could comply with shift rosters which was sufficient to constitute indirect sex discrimination.

The EAT observed that although 2.26% was not a “considerably smaller” proportion in common usage, regard could be given to factors other than the percentage difference. Part of the difficulty relates to the weight to be given to factors other than those identified, in this case female childcare responsibilities. At paragraph 52 the EAT state:

“For the reasons we have given we are of the view that, with the qualification and confirmation referred to in paragraph 36(10), *Edwards (No 2)* remains good law and that:

(a) a flexible approach that has regard to factors other than the identified percentage difference can, and in this case should, be taken in deciding whether the first stage (disparate effect) is established, and

(b) it does not inevitably, or necessarily, follow from the percentage difference between the proportions of men and women who can comply with the requirement identified by the employment tribunal in respect of the pool they have chosen that the first stage is not established.”

**Justification**

Once an applicant has established disparate impact of full-time work, it is for the respondent to show it was justified. In considering whether the provision or practice is justified, an objective balance must be struck between the discriminatory effect of the provision or practice and the reasonable needs of the person who applies it:

*Hampson v Department of Education and Science* [1989] IRLR 69, as approved in *Webb v EMO Cargo (UK) Ltd* [1993] IRLR 27

Reasonable ‘needs of the employer’ are the actual economic needs of the business and not other general factors, however laudable:

*Greater Manchester Police Authority v Lea* [1990] IRLR 372 EAT.

In order to establish that full-time work is justifiable an employer will have to provide cogent evidence. Generalised statements will not suffice. An employer must show that:

(i) the means chosen for achieving the employer’s objective serve a real need on the part of the undertaking; and

(ii) are appropriate with a view to achieving the objective in question; and

(iii) are necessary to that end:

*Bilka-Kaufhaus v Weber von Hartz* [1986] IRLR 317 ECJ.

Therefore, a respondent will have to show that the applicant’s particular job requires a full-time worker in respect of hours and work done.

Refusal to allow an employee to move from full-time to a job share or other part-time working arrangement on return from maternity leave

*Lowe v Peter Bainsbridge Optometrist* [2000] DCLG No 44 – ET
The employment tribunal found that the employer could not justify the requirement that the job could be done only on a full-time basis. The test of justification “really means that the job must be inherently unsuitable for job sharing or that the efficiency of the employer’s service would be significantly impaired by a job sharing arrangement”.

**Cases where the requirement to work full-time were held to be justified:**

- **Ogilvie v Ross and Hall** [2000] DCLD No 43 – ET (managerial responsibilities)
- **Sykes v JP Morgan & Co Ltd** [2000] DCLD No 45 – ET (senior executive)
- **Fox v Betash Fox & Co Solicitors** [2001] DCLD No 49 – ET (legal secretary)
- **Georgiou v Colman Coyle** EAT /535/00 (unreported) (assistant solicitor)

**Other cases:**

- **Given v Scottish Power plc** (Case No S/3172/94 – ET)

  Following the applicant’s request for a job share role after maternity leave, the respondent sought to justify such a refusal on the basis of operational matters and the need for continuity. The employment tribunal held that there was indirect sex discrimination as the respondent had failed properly to assess the applicant’s duties.

- **Stevens v Katherine Lady Berkley’s School** EAT/380/97 (unreported)

  The employment tribunal concluded that there was no disparate treatment as the applicant had failed to satisfy the tribunal that she could not comply with the obligation to work full-time.

- **Eley v Huntleigh Diagnostics Ltd** EAT/1441/96 (unreported)

  The EAT upheld the employment tribunal’s decision, that although there was a discriminatory requirement for the applicant to work full-time, the respondent justified such a practice. In dismissing the appeal the EAT concluded that “necessary” (the third part of the Bilka-Kaufhaus test) could mean anything from “useful” at one end of the spectrum to “indispensable” at the other end, and exactly where it should be placed is a matter for the tribunal.

- **Puttick v Eastbourne Borough Council** [1996] DCLD No 29 – ET
- **Convery v (1) Governors of Rawthorpe CE (C) Infant and Nursery School and (2) Kirklees Metropolitan Council** [1998] DCLD No 37 – ET

  The employment tribunal concluded in both cases that refusal to allow the applicant to job share could not be justified, in light of management’s own job share policy.

- **Amos v IPC Magazines Ltd** [2002] EOR No 101 – ET

  Despite the respondent providing detailed reasons justifying the provision for an editor of a weekly magazine to work full-time, the employment tribunal held that it amounted to unlawful indirect sex discrimination. The respondent had failed to consider the request before turning it down. The tribunal observed that it is currently accepted normal behaviour that a woman with a first child wishes to spend time with her baby.

- **Southall v London Chamber of Commerce and Industry** [2002] EOR No 101 – ET

  The employment tribunal concluded that the respondent was justified in imposing a three-month trial period on the applicant’s request to work part of the week from home, following her return from maternity leave.
Refusal to allow an employee to move from full-time to a job share or other part-time working arrangement during the course of employment

*Feeney v IPC Magazines Ltd* [1999] DCLD No 42 – ET

In this case, your co-editor (Marc Jones) represented the applicant and acted as advocate at the employment tribunal hearing.

The applicant worked as a full-time advertising and promotions manager and had two young children looked after by a nanny five days a week. The applicant's nanny made a request to work part-time and accordingly, the applicant made a request to work three days a week. The respondent rejected the applicant’s request to work three days a week but would consider the feasibility of a job share. The applicant therefore sought a job share with another. The respondent stalled on providing the applicant with a definitive answer and she resigned. That same day, the respondent gave the applicant a letter stating that a job share had been rejected on the grounds of the extra work involved and in the interests of continuity.

The tribunal concluded that the respondent had indirectly discriminated against the applicant on the grounds of her sex as it would have been feasible for the respondent to provide a trial period to determine the feasibility or otherwise of the job share.

**Direct Sex Discrimination**

*Walkingshaw v John Martin Group* [2002] EOR No 101 – ET

This is a case where following the birth of the applicant’s child he, rather than his wife, sought to work part-time. The respondent refused part-time working, as it was “too complicated”. The applicant then sought a job share but this was rejected, as the arrangements were “too messy”.

The employment tribunal found that the respondent always gave consideration to and granted requests from female employees for reduced hours of work due to family responsibilities and that the respondent was conscious of avoiding sexually discriminatory polices against women.

The tribunal held that the applicant could compare his treatment to that of a hypothetical female who had been allowed to work part-time in the same, or not materially different circumstances. The tribunal chose to draw an inference that the difference in treatment was discriminatory and on grounds of the applicant’s sex, and commented:

“ We have no doubt that had the applicant been female, the request for reduced hours would have been examined closely and … the operational requirements of the respondents would have been examined in some depth, and that the respondents would, on a balance of probabilities, have granted such a request from a female hypothetical comparator”.

**THE FUTURE**

**Employment Act**

The Employment Act 2002, is due to come in force in April 2003.

This provides a statutory right for employees with young children to demand that a request for flexible working time arrangements be seriously considered by their employers (by inserting a new Part 8A and new sections 47D and 104C (all entitled “Flexible Working”) into the Employment Rights Act 1996 (ERA)).

‘For the first time, the law will facilitate a dialogue between parents and their employers about working patterns that better meet parents childcare responsibilities and employers’ needs.’ (Hansard (HC) Standing Committee F col. 6325 – 24.1.02)
The new provisions provide that a “qualifying employee” will be able to exercise the right to require flexible working arrangements to enable her (or him) to care for someone who, at the time of application is a child aged under 6 (18 if disabled).

An employer will only be able to refuse a request for flexible working where there is a clear business reason.

The details will be in the Regulations. The draft regulations are in two parts and titled: the ‘Flexible Working (Eligibility, Complaint and Remedies) Regulations 2002’ and the ‘Flexible Working (Procedural Requirements) Regulations 2002’.

The new right will not however prevent an employee from pursuing a claim under the SDA, where, for example, an employee is dissatisfied with an employers’ refusal of a request for flexible working. The procedure will be the same as set above.

Employment Rights Act (as amended by the Employment Act 2002)

Section 80F - Statutory right to request contract variations states:

‘(1) A qualifying employee may apply to his employer for a change in his terms and conditions of employment if –

(a) the change relates to –

(i) the hours he is required to work,

(ii) the times when he is required to work,

(iii) where, as between his home and a place of business of his employer, he is required to work, or

(iv) such other aspect of his terms and conditions of employment as the Secretary of State may specify by regulations, and

(b) his purpose in applying for the change is to enable him to care for someone who, at the time of application, is a child in respect of whom he satisfies such conditions as to relationship as the Secretary of State may specify by regulations.

(2) An application under this section must –

(a) state that it is such an application,

(b) specify the change applied for and the date on which it is proposed the change should become effective,

(c) explain what effect, if any, the employee thinks making the change applied for would have on his employer and how, in his opinion, any such effect might be dealt with, and

(d) explain how the employee meets, in respect of the child concerned, the conditions as to relationship mentioned in subsection (1)(b).

(3) An application under this section must be made before the fourteenth day before the day on which the child concerned reaches the age of six or, if disabled, eighteen.

(4) If an employee has made an application under this section, he may not make a further application under this section to the same employer before the end of the period of twelve months beginning with the date on which the previous application was made.
(5) The Secretary of State may by regulations make provision about –
(a) the form of applications under this section, and
(b) when such an application is to be taken as made.

(6) The Secretary of State may by order substitute a different age for the first of the ages specified in subsection (3).

(7) In subsection (3), the reference to a disabled child is to a child who is entitled to a disability living allowance within the meaning of section 71 of the Social Security Contributions and Benefits Act 1992 (c. 4).

(8) For the purposes of this section, an employee is –
(a) a qualifying employee if he –
   (i) satisfies such conditions as to duration of employment as the Secretary of State may specify by regulations, and
   (ii) is not an agency worker;
(b) an agency worker if he is supplied by a person ("the agent") to do work for another ("the principal") under a contract or other arrangement made between the agent and the principal.

Section 80G - Employer's duties in relation to an application under section 80F are:

(1) An employer to whom an application under section 80F is made –
   (a) shall deal with the application in accordance with regulations made by the Secretary of State, and
   (b) shall only refuse the application because he considers that one or more of the following grounds applies –
      (i) the burden of additional costs,
      (ii) detrimental effect on ability to meet customer demand,
      (iii) inability to re-organise work among existing staff,
      (iv) inability to recruit additional staff,
      (v) detrimental impact on quality,
      (vi) detrimental impact on performance,
      (vii) insufficiency of work during the periods the employee proposes to work,
      (viii) planned structural changes and
      (ix) such other grounds as the Secretary of State may specify by regulations.

(2) Regulations under subsection (1)(a) shall include –
(a) provision for the holding of a meeting between the employer and the employee to discuss an application under section 80F within twenty eight days after the date the application is made;

(b) provision for the giving by the employer to the employee of notice of his decision on the application within fourteen days after the date of the meeting under paragraph (a);

(c) provision for notice under paragraph (b) of a decision to refuse the application to state the grounds for the decision;

(d) provision for the employee to have a right, if he is dissatisfied with the employer's decision, to appeal against it within fourteen days after the date on which notice under paragraph 35 (b) is given;

(e) provision about the procedure for exercising the right of appeal under paragraph (d), including provision requiring the employee to set out the grounds of appeal;

(f) provision for notice under paragraph (b) to include such information as the regulations may specify relating to the right of appeal under paragraph (d);

(g) provision for the holding within fourteen days after the date on which notice of appeal is given by the employee, of a meeting between the employer and the employee to discuss the appeal;

(h) provision for the employer to give the employee notice of his decision on any appeal within fourteen days after the date of the meeting under paragraph (g);

(i) provision for notice under paragraph (h) of a decision to dismiss an appeal to state the grounds for the decision;

(j) provision for a statement under paragraph (c) or (i) to contain a sufficient explanation of the grounds for the decision;

(k) provision for the employee to have a right to be accompanied at meetings under paragraph (a) or (g) by a person of such description as the regulations may specify;

(l) provision for postponement in relation to any meeting under paragraph (a) or (g) which a companion under paragraph (k) is not available to attend;

(m) provision in relation to companions under paragraph (k) corresponding to section 10(6) and (7) of the Employment Relations Act 1999 (c. 26) (right to paid time off to act as companion, etc.);

(n) provision, in relation to the rights under paragraphs (k) and (l), for the application (with or without modification) of sections 11 to 13 of the Employment Relations Act 1999 (provisions ancillary to right to be accompanied under section 10 of that Act).

(3) Regulations under subsection (1)(a) may include –

(a) provision for any requirement of the regulations not to apply where an application is disposed of by agreement or withdrawn;

(b) provision for extension of a time limit where the employer and employee agree, or in such other circumstances as the regulations may specify;

(c) provision for applications to be treated as withdrawn in specified circumstances;
and may make different provision for different cases.

(4) The Secretary of State may by order amend subsection (2).

**Duration of employment**

The draft regulations require an employee to have worked with their employer continuously for no less than 26 weeks before they can make an application.

**Summary**

To be eligible to apply for flexible working under the new right the individual must:

- be an employee;
- have a child aged under six years, or under eighteen years where disabled;
- be responsible for the child as its parent;
- be making the application to enable them to care for the child;
- have worked with their employer continuously for 26 weeks at the date the application is made;
- not be an agency worker;
- not be a member of the armed forces;
- have not made another application to work flexibly under the right during the past twelve months.

**Relationship between the parent and child**

A request for flexible work will depend on the employee’s relationship with their child. The Government was clear in “About Time: Flexible Working”, Work and Parents Taskforce, November 2001 that the right will be limited to parents, and would not include aunts, uncles or grandparents unless they had responsibility as a parent for the child. Furthermore, the Work and Parents Taskforce added that the right should apply equally to anyone who has responsibility as a parent of a child and therefore, should not present any additional barriers to same sex couples.

The draft regulations state that an employee will satisfy the relationship requirements if s/he expects to have responsibility for the upbringing of the child. In addition the employee will have to meet one of the following conditions. That the employee is:

1. the biological parent, guardian, adopter or foster carer of the child; or
2. married to a person within (1) and live with the child; or
3. the partner of a person within (1) and live with the child.

**Form of applications**

The Work and Parents Taskforce recommended that the process of making a request should encourage parents to consider all the options open to them and the ability of the employer to subsequently adopt the preferred pattern of working.

An application for flexible working under the right must:

- state that it is such an application;
- specify the flexible working pattern applied for and the date on which it is proposed the change should become effective;
- explain what effect, if any, the employee thinks the proposed change would have on the employer and how, in their opinion, any such effect might be dealt with;
- explain how the employee satisfies the requirements relating to the relationship with the child;
- be in writing (whether on paper, email or fax);
• state whether a previous application has been made to the employer and, if so when; and
• be signed and dated.

Note: An employee cannot make a further application for flexible working within 12 months of having submitted the previous one (section 80F(4) of the ERA).

The date of making an application

An employer will have a duty to consider applications for flexible working by following a specified procedure. Each step is time dependent. These are set out in the ‘Flexible Working (Procedural Requirements) Regulations 2002’.

The draft regulations take the date when an application is made, to be the date on which it is received by the employer. The regulations detail how this is determined where it is not handed directly to the employer. The onus of making an application is with the employee.

Receipt of application

An employer’s response to an application from an employee for flexible working is a strict one. An employer must comply with the procedure in section 80G(2) of the ERA. An employer must arrange a meeting to discuss the request within 28 days of receiving the application. This is consistent with other related employment legislation. An employer who fails to meet the strict timescale risks a claim from the employee to an employment tribunal.

Information an employer must provide in writing to an employee when notifying them of their decision concerning a request for flexible working, must be within 14 days of the meeting and is as follows:

Request agreed

• A description of the new working pattern.
• The date from which the new working pattern is to take effect.
• The notice must be signed and dated.

Request rejected

• The business grounds for refusing the application as set out section 80G(1)(b) of the ERA.
• A sufficient explanation as to why the business grounds for refusal applies in the circumstances.
• A statement that the employee has a right to appeal within 14 days of the decision.
• The notice must be signed and dated.

Note: An appeal must set out the grounds of appeal and be signed and dated. Within 14 days of receiving the notice of appeal, the employer must hold a meeting to discuss the appeal and provide its decision within a further 14 days.

Breaches of the regulations by the employer

In specific circumstances the employee will be able to take a disputed case to an employment tribunal. The draft regulations set out the breaches of the procedure, which will entitle an employee to make a complaint to a tribunal.

Essentially an employee will be able to take action wherever there is a breach in the procedure that is not a result of the application being rejected, withdrawn or dealt with through agreement.

Remedies

The Work and Parents Taskforce recommended that where a disputed case is taken to an employment tribunal and the tribunal finds against the employer he could be ordered to reconsider the application and pay compensation to the employee. A tribunal will not have the power to order an employer to implement a flexible working arrangement.
Compensation

The amount of compensation shall be an amount that the employment tribunal considers is just and equitable in all the circumstances subject to a permitted maximum, which will be specified in the regulations and will be a specified number of weeks’ pay.

The week’s pay will itself be limited to the maximum provided under section 227 of the ERA. This is reviewed annually and is currently £250.

Employer representatives suggest a range from four to thirteen weeks.

Employee representatives suggest that the permitted maximum be set much higher at 52 weeks’ pay; arguing this should be sufficiently high to ensure that it is meaningful to all potential breaches of the right.

COMMENT

We will provide a more comprehensive review of the Employment Act 2002 and both the Flexible Working (Eligibility, Complaint and Remedies) Regulations 2002 and the Flexible Working (Procedural Requirements) Regulations 2002 in a future edition of Employment Law & Litigation.

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