Flexible working for carers:

A guide to your rights when juggling caring and work

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Introduction

This brief guide summarises employees’ legal rights to flexible working.

The right to request flexible working was first introduced in April 2003. Initially it was limited to parents caring for children under 6 years old or under 18 for disabled children. It was extended to specified carers in 2007 and to parents of all children under 17 in 2009. There are regulations setting out the procedure to be followed and an ACAS Code on the right to apply for flexible working. The regulations do not apply to employee shareholders.

The statutory procedure will be repealed in 2014. Instead, there will be a duty on employers to consider requests in a reasonable manner, which includes considering whether they can be accommodated on business grounds. The requirement to be a parent or carer will be removed. ACAS has produced a new draft Code setting out best practice. The Code will be taken into account by employment tribunals. The main remedy will still be compensation for discrimination.

This guide provides an overview of the following:

- The flexible working procedure
- Indirect sex discrimination
- Direct sex discrimination
- Discrimination against carers of disabled people

Please note that these issues are complex and this guide is not a substitute for legal advice. We would always recommend that you take advice on your specific situation.

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Employment trends and context

Substantially more women than men are still primary carers for children so are more likely to need flexible working to combine work and caring. 43% of women work part-time compared to 13% of men;¹

For those on low incomes affordable childcare is often hard to find which restricts the hours that parents can work;

Many women care for both children and elderly parents or relatives; a quarter of women in their 50s have carer responsibilities;

1 in 8 adults (6.5million people) are carers of an ill, frail or disabled family member, friend or partner; 58% of carers are women and 42% are men;²

Those caring for young children or elderly parents often need to take some time off to deal with emergencies. Women are more likely to drop out of work to care and find it very difficult to return after a period of unemployment;

More grandparents are regularly caring for their grandchildren to enable their children to work;

60% of those near retirement would like to continue working after state pension age but on a part time basis; 40% would like to stay in their current jobs but with greater flexibility in hours or days worked;³

The employment rate of both men and women aged 50-64 increased between 1995 and 2010;

Employees with no caring responsibilities may want to work flexible/ reduced hours; conversely there is also an increasing number of part-time employees wanting and needing to work longer hours.
Overview and changes

1. **Flexible Working Regulations**

**Current Position**

There is a statutory procedure whereby an employee who has worked for his/her employer for 26 weeks can apply for flexible working to care for a child or adult dependant. The procedure sets out who can apply, for what, how to apply and the procedure that both employer and employee must follow within prescribed time periods. Breach of the procedure, refusal of a request for a non-permitted reason (see below), or a decision based on incorrect facts, may entitle the employee to compensation of a maximum of 8 weeks’ pay (capped at £450 per week, or £464 from April 2014). [https://www.gov.uk/flexible-working](https://www.gov.uk/flexible-working)

**From 30 June 2014**

The procedure will be replaced with a new duty on employers to consider requests from any employee, whether or not s/he has caring responsibilities. The request must be considered within a reasonable time and in a fair and reasonable manner. Employers should follow the new ACAS Code of Practice (still in draft). The employee may bring a tribunal claim if the employer wrongly treats the request as withdrawn or the employer’s decision is not made in time. However the main claim will be for discrimination as compensation for this is not capped. These changes are due to come into force on 30 June 2014.

**Who can apply now?**

**Employees who:**

- Have 26 weeks’ service caring for a child under 17 or a disabled child under 18; the parent must have parental responsibility for the child which includes adoptive and foster parents, spouses and same sex partners;
- Are carers for an adult dependant, which includes an adult child;
- Are not an agency worker or member of the armed forces;
- Are not an employee shareholder.

**From 30 June 2014 any employee can apply irrespective of caring obligations.**
Flexible Working Requests

*What flexible working can the employee request?*

The employee with 26 weeks’ service may request:

- A change to the hours they work,
- A change to the times when they are required to work,
- To work from home.

This would include for example:

- Flexi-time, eg there are core hours, such as 10-4pm with flexibility either side,
- Compressed hours, eg working full-time but in 4 days per week,
- Term time working,
- Career breaks.

This would cover most work patterns an employee may want to request. Examples are set out in the ACAS Code. The change is intended to be permanent unless otherwise agreed. The employee cannot make a second application within the next 12 months.

**The Legislation and guidance**

- Employment Rights Act 1996 S80F - S80I
- Flexible working (Eligibility, Complaints and Remedies) Regulations 2002, SI 2002/3236
- Flexible Working (Procedural Requirements) Regulations 2002 SI 2002/3207
- ACAS guide: The right to apply for flexible working April 2013
Flexible Working Requests cont...

What is the current procedure?

a. The employee submits a written dated application explaining the work pattern s/he wants and from when, and anticipating any effect this would have on the employer’s business and how such effects might be accommodated; the application must also explain how s/he meets the conditions as to relationship with the person cared for, and state that it is an application under section 80F Employment Rights Act 1996

b. Within 28 days the employer must arrange to meet with the employee;

c. Within 14 days of the meeting the employer must write to the employee agreeing to the new work pattern and setting a start date, or provide grounds for rejecting the application. The letter must advise the employee of a right to appeal;

d. If the employee wants to appeal s/he must do so within 14 days of the rejection;

e. Within 14 days of receiving the appeal the employer must arrange a further meeting to discuss the appeal;

f. Within 14 days of the meeting the employer must write to the employee giving the result of the appeal.

The time limits can be extended by agreement.

There is a right to be accompanied at the meetings.
The request can be refused for one or more of the following business reasons:

• The burden of additional costs,
• Detrimental effect on ability to meet customer demand,
• Inability to re-organise 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 employer must carry out a proper enquiry and investigation or it may be in breach of the procedure (Commission Ltd v Rutty EAT/0418/05).

Employees have the right not to be subjected to a detriment (i.e. treated badly) or dismissed because of exercising their rights under the flexible working legislation.
Flexible Working Requests cont...

Procedure from 30 June 2014

The draft ACAS Code does not define the type of flexible working an employee can request but it is likely to be similar. It sets out the ‘keys to handling requests in a reasonable manner’:

• The employee submits a request in writing, again containing the required information (see above);

• The employer should talk to the employee as soon as possible after receiving the written request;

• If the request is not agreed, the employer should hold a meeting to which the employee should be allowed to be accompanied;

• The employer should consider the request from the presumption that it will be granted unless there is a business reason for not doing so;

• The employer should weigh the benefits of the changes in working conditions against any cost of implementing the changes;

• If the request is agreed the employer should confirm this in writing and discuss with the employee how and when the change might be implemented;

• If the request is rejected it must be for one of the business reasons set out above;

• The employee should be allowed to appeal. The draft Code suggests that it can be helpful to allow an employee to speak with the employer about the decision as this may reveal new information or an omission in following a reasonable procedure;

• All requests and appeals must be considered and decided on within a period of three months from first receipt, unless an extension is agreed.
Options if Request Refused

a. You could put in a grievance and hope that this resolves matters though, in practice, it rarely does, particularly if there has already been an appeal;

b. If you cannot work the required hours you may decide to resign. If so, you may have a claim for discrimination under the Equality Act 2010 and unfair constructive dismissal (see page 17);

c. You could ask to be considered for another job which would accommodate your preferred working pattern;

d. If in doubt seek advice!

Top tips for employees

• When preparing a request for flexible working consider what concerns the employer may raise and try and address them in advance;

• Be very clear what working patterns you can manage and, if you are willing to be flexible, it is worth making this clear;

• Consider whether you could offer a trial period to convince the employer that your proposed working patterns are feasible;

• Usually any change to the employee’s hours is permanent but there is nothing to stop you asking for flexible hours on a temporary basis.
Indirect sex discrimination

Indirect sex discrimination is concerned with unjustified employment practices which apply equally to men and women but which have the effect of disadvantaging women compared to men. Claims often arise where the employer imposes requirements on its employees to work certain hours or at a particular location. The disadvantage suffered by women in this context is usually due to women’s primary caring role which makes it more difficult to work long, inflexible or anti-social hours. A claim may be made where either:

- A worker is seeking to change her working patterns (whether by way of a statutory flexible working request or otherwise), and is refused, or
- The employer makes a change to her working patterns to her detriment, such as requiring her to increase her hours, work different hours or to move to a different location.

In both cases an employer can seek to justify the refusal or the change.

The legal test (S19 Equality Act 2010):

a. The employer (A) applies, or would apply, a provision, criterion or practice (PCP) to the worker (B) which is applied regardless of gender,

b. The PCP puts, or would put, women at a particular disadvantage when compared with men,

c. The PCP puts B at that disadvantage,

d. The employer (A) cannot justify the PCP, ie show that the PCP is a ‘proportionate means of achieving a legitimate aim’.

Examples of PCPs which may be unlawful

- Refusing to allow a female worker to work part-time, job-share, work remotely, or benefit from other ‘family friendly’ working practices;
- Imposing hours or times of work that are incompatible with childcare, such as long hours, shift work (particularly if rotating shifts), overtime (particularly without notice), weekend working, travelling;
- Treating female workers less favourably on the grounds that they work part-time, cannot work long hours or overtime etc.
- A mobility clause requiring a worker to change work location;
- To work as and when required.
Disproportionate impact

In order to succeed in a claim for indirect discrimination, the worker must show that the practice, provision or criterion imposed by the employer, such as full-time working, particularly disadvantages women as compared to men. The way to show this is to compare the proportion of women who are or would be disadvantaged by a requirement to work full-time with the proportion of men disadvantaged. This comparison is usually done within the workplace, or the part where the employee works, but account can be taken of labour market statistics. For example 43% of women in employment work part-time compared to 13% of men. This shows that the vast majority of people working part-time are women so a requirement to work full-time would particularly disadvantage them.

Until the Equality Act questionnaire procedure is repealed, the worker can ask for information about the breakdown of the workforce by gender and part-time/full time status. This may help to establish that women in the workplace are more adversely affected than men by long inflexible hours.

Individual disadvantage

To succeed in a claim, the worker must also show that she has suffered a disadvantage herself because of her inability to work the required hours or working pattern due to her caring responsibilities.
Justification in indirect discrimination

Even where it is established that the employer’s working requirements disadvantage women, the employer can defend a claim successfully if it can show that the particular requirement is justified. The employer must show first that there is a legitimate aim of the business that requires, for example, full-time working. The aim must not be discriminatory in itself and must represent a real, objective consideration. Examples of legitimate aims could include:

- The health, welfare and safety of individuals,
- Operational efficiency,
- Meeting client needs,
- Reasonable business needs and economic efficiency, though saving costs alone will not normally be enough.

In addition, the employer must show that its refusal of flexible working is a proportionate means of achieving the aim. This is a balancing act between the needs of the business and the needs of the employee. Employers should:

- Consider whether there are any **alternatives**, such as appointing another person to cover the employee’s reduced hours,
- Take account of any **advantages of the flexible working**, such as retention of staff, or the fact that with job-sharers there will be some holiday cover,
- **Not over-estimate the problems**, such as communication issues if there is more than one person doing a job,
- Approach the request with a ‘**can do**’ positive attitude, not a ‘**can’t do**’ negative attitude.
Example

In *Hardys & Hansons plc* [2005] IRLR 726 the Court of Appeal decided that the employer could not justify refusing a job-share request. There was a legitimate aim of ensuring a constant flow of information about the work but the employer had overstated the problem of job-sharing because another employee could assist with the flow of information. The employer had also ignored the advantages of job-sharing in that cover would be available for holidays and sickness.

Direct sex discrimination

It is generally only women who can claim indirect sex discrimination as it is women who are particularly disadvantaged by ‘inflexible hours’. A man may be able to claim direct discrimination if he is refused a request to work flexibly, eg part-time or remotely, if a woman would have been granted such a request. The question to ask is whether the man can show that the reason for the refusal is because he is a man and that a woman in similar circumstances would have been treated more favourably.

In *Walkingshaw v John Martin Group* ETS/401126/10 a man was refused part-time working even though women in his firm were regularly allowed to work part-time.
Part-time Workers

Prevention of Less Favourable Treatment Regulations 2000

Part-time workers must not, without justification, be treated less favourably than full-time workers who:

• are employed by the same employer,
• have the same type of contract, and
• are doing broadly similar work having regard to whether they have a similar level of qualification, skills and experience.

Note
• The less favourable treatment must be on the ground that the worker was a part-time worker.
• If the employer can show that the less favourable treatment is justified the claim will fail.

Part-time workers must not be treated less favourably in relation to the terms of their contract, or by being subjected to any other detriment. This would include:

• Being given lower pay pro rata, or having other less good terms and conditions; this may also be a breach of the Equality Act;
• Dismissal because of the worker’s part-time status;

Part-time workers must also not be victimised because they have exercised, or are likely to exercise, their rights under the regulations.

Justifications
An employer will not breach the regulations if it can show that the treatment was objectively justified. This is similar to the test applied in indirect discrimination cases (page 11), ie the employer must show that the difference in treatment was a proportionate means of achieving a legitimate aim.

Example
A part-time worker is dismissed because the employer wants to replace her with a full-time worker. Because of family commitments the worker cannot work full-time. The employer argued that the dismissal was not because of her being part-time but the need to have a full-time worker. This may be less favourable treatment by reason of her part-time status if the employer cannot show it is justified.
Disability discrimination by association

Where an employer treats a worker less favourably because of the disability of someone with whom s/he is associated (for example son, partner, parent) this is direct disability discrimination. The worker must compare how s/he was treated to how a worker who is associated with a non-disabled person in comparable circumstances is or would be treated.

Example:

- If a worker was refused promotion because she had a disabled son and the employer thought she would be unreliable as a result, this may be direct disability discrimination;
- If a worker was the subject of jokes about his son’s disability this may be harassment on grounds of the son’s disability;
- If a worker is not invited to family social events because his daughter has a disability, this may be direct disability discrimination.

Useful website: www.carersuk.org
Note:
Disability discrimination by association only applies to direct discrimination and harassment, not indirect discrimination, the duty to make reasonable adjustments or disability related discrimination. So, there is no duty to make reasonable adjustments to enable a worker to care for a disabled dependant nor would a refusal of flexible working be indirect disability discrimination.

Therefore:
• A woman refused flexible working to care for her disabled son may have a claim for indirect sex discrimination, and direct (not indirect) disability discrimination if the reason for the refusal is because her son is disabled;
• A man refused flexible working to care for his disabled father may have a claim for direct sex discrimination if a woman in a similar situation would have been granted flexible working, and direct (not indirect) disability discrimination if the reason for the refusal is because his father is disabled.

Constructive Dismissal
(Unfair and discriminatory)

Where an employee resigns because s/he cannot work the required hours and the tribunal finds that the requirement to work those hours was discrimination, (see above) it is likely that this will be unfair and discriminatory constructive dismissal. An employee must show that:

a. S/he resigned because of a fundamental breach of contract by the employer, which could be discrimination;
b. S/he did not delay in resigning, otherwise the tribunal may find that s/he accepted the employer’s conduct.

See Shaw v CLL Ltd UKEAT/0512/06.

Note: It is not easy to win a constructive dismissal claim so it is best to take advice.
Summary of possible claims

If you have been refused a request for flexible working, you may have one or more of the following claims:

a. A breach of the flexible working regulations (there will be no claim for procedural breaches from 30 June 2014)
b. Indirect sex discrimination if the refusal of flexible working to a woman is not justified;
c. Direct sex discrimination if a man is refused flexible working where a woman in a similar situation would be granted it;
d. A breach of the Part-time Workers (Less favourable treatment) Regulations if a part-time worker is treated less favourably than a comparable full-time worker and the treatment is not justified;
e. Direct disability discrimination if a worker is treated less favourably because s/he has a disabled child or other dependant;
f. Unfair and/or discriminatory dismissal, if a worker is dismissed because s/he cannot work the required hours;
g. Unfair and/or discriminatory constructive dismissal if the employee resigns because s/he has been refused flexible working.

Note: Only employees can make a request for flexible working. The wider category of workers (which includes employees) are protected from discrimination and are covered by the part-time workers regulations.

Time limits
A claim must be brought no later than three months less one day of the date of the discrimination or the last act of discrimination. If the complaint relates to a dismissal, whether by the employer or arising out of the employee’s resignation, the deadline is three months less one day from the end of the employment. The tribunal can hear a claim which is out of time but only if there are fairly exceptional circumstances. From early May 2014 in most cases it will be compulsory to contact ACAS before starting a claim (known as “Early Conciliation”), and there will be related new rules on time limits. Further information can be found by clicking here. If in doubt it is always a good idea to take prompt legal advice.

Remedies
The tribunal can award:

a. Compensation for loss of earnings, which is not capped for discrimination claims, but is capped for unfair dismissal claims,
b. A basic award if the dismissal is unfair,
c. An award for loss of statutory rights if the dismissal is unfair,
d. Injury to feelings and health,
e. Interest on any discrimination award,
f. Re-employment (unfair dismissal only),
g. Recommendations, for example that you be allowed to work part-time.
For further information

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