The future is flexible

June 2022

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Flexible working, in the form of working from home, during the pandemic has resulted in many benefits for employers, including increased productivity and for employees in achieving a better work-life balance and this approach has particularly been welcomed by working parents.

The Office for National Statistics in Business and individual attitudes towards the future of homeworking reported on data which found that 85% of employees who took up homeworking because of the pandemic would like to continue in a "hybrid" form in the future. McKinsey Global Institute also forecasts that a quarter of workers in advanced economies will work permanently in a hybrid way in the future. But, according to a recent article in the Financial Times, many Financial Services employers are tending to be more office-centric and rigid, favouring a return to five days a week in the office. However, this is not an FCA requirement as it has set out its Expectations for firms on remote or hybrid working to help them plan and continue to meet their regulatory responsibilities. So, what risks and liabilities do those in the sector face if they refuse requests to work flexibly on a permanent basis going forwards?

Statutory right to request

There is currently a statutory right to request a flexible working arrangement which applies to all employees with at least 26 weeks' continuous employment. However, this is a right to request, not a right to work flexibly. The type of request covered is wider than working from home and includes hours of work, the times of day worked and covers different forms of working such as job-sharing, compressed hours and annualised hours. An employer can only refuse for one or more of the eight specific reasons set out in the legislation and there are limited grounds for complaining to an employment tribunal (with a maximum award of 8 weeks' capped pay if an employer is found to be in breach).

Government reforms

The Government has been promising to reform flexible working since 2019 and the pandemic has increased the focus on this with the CIPD, among others, calling for flexible working to be made the default. In September 2021 the Government published a consultation on *Making flexible working the default* with the most notable proposal being to make the right to request a "day one" right along with widening the scope of other aspects of the existing right. However, it doesn't propose making flexible working the default position and we are still awaiting the outcome of the consultation. The Queen's Speech in May 2022 failed to mention the Employment Bill which would have included provisions on flexible working and we currently have no timescale for its introduction. Put in the vernacular, it looks like the can is being firmly kicked down the road.

“Day one” claims under discrimination law?

Although the statutory scheme is in any event quite limited and we’re still waiting for legislative reform, a key issue employers need to bear in mind is that a flexible working application could be an employee’s first step towards bringing a direct or indirect discrimination claim if they are turned down. Employees do not need any length of service to make such a claim and there is no (technical) limit on compensation for a successful claim. Employees who make a flexible working request may be seeking to vary their hours, days or to work from home to help with childcare commitments, to accommodate religious requirements, or as an adjustment because they have a disability.

A refusal will need to be justified if it is a policy or practice the employer follows which disproportionately affects a person with a protected characteristic. The employer will need to show it has a fair system in place for assessing the impact of the proposed change on the business and other workers, based on proven facts in order to be able to objectively justify such a refusal and to successfully defend any claim. This risk is something that can easily be overlooked by employers.

Employers in the sector should ensure they continue to meet their regulatory responsibilities while also considering any requests for flexible working very carefully. We recommend being wary of adopting a rigid approach and consider requests with an open mind. Moreover, be alive to potential discrimination claims and ensure that if a request is turned down you can justify any refusal on objective grounds. By way of illustration box 1 below outlines some of the case law in this area and demonstrates the cost of falling foul of the law.

The compensation awarded is just part of the risk that employers take in refusing requests. Aside irrecoverable legal costs in defending claims of this sort there is also the damage to reputation that accompanies adverse publicity. At a time where competition for quality labour is fierce, ensuring that your employer proposition is seen as strong and progressive is something that employers should really bear in mind. In every interview we have undertaken in the last 6 months the first candidate question has always been about the firm’s hybrid working policy. This issue is unlikely to quietly go away any time soon and is part of the new norm in working patterns.

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Box 1

Cost of refusal - Tribunal cases on flexible working and sex discrimination

- A sales manager made an unsuccessful application to work shorter hours to collect her daughter from nursery following a period of maternity leave. She brought a claim for indirect sex discrimination. The Tribunal found that the Respondent's failure to consider the flexible working request put her at a disadvantage and upheld her claim for indirect sex discrimination, awarding £184,961.32 for loss of earnings, loss of pension contributions, injury to feelings, and interest - *Thompson v Scancrown Ltd trading as Manors.*

- The EAT has confirmed that tribunals should take "judicial notice" (i.e. a legal given) of the so-called "childcare disparity" which still persists i.e. that women, because of their childcare responsibilities, are less likely to be able to accommodate certain working patterns than men, in cases where indirect sex discrimination is alleged. It reinforces the point that employers are still at risk of claims of indirect sex discrimination when they impose working patterns which are likely to disadvantage women who have less flexibility - *Dobson v North Cumbria Integrated Care NHS Foundation Trust.*

A man who was denied the right to work part-time following his wife's maternity leave brought a claim for direct sex discrimination because women in his company were regularly allowed to work part-time. He was successful because he was able to compare his treatment with how a hypothetical comparator in the same post, performing the same tasks, would have been treated - *Walkingshaw v John Martin Group.*

Box 2

Claims in discrimination for a refusal to accommodate flexible "hybrid" work request – at a glance

Day 1 right ✓

No limit on compensation ✓

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Not constrained by the existing statutory right to request rules ✓

Can cause adverse media and PR and damage employer proposition ✓

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