From "It couldn't possibly work…" to "Why not?!"

By Jason Braier

Flexible Working – the statutory right

1. The statutory right to flexible working is to be found at Part VIIIA of the Employment Rights Act 1996 ("ERA"). The right is to request a variation to the hours, times and where (as between home and place of business) an employee is required to work[1].

2. There are certain thresholds an employee must pass before making a statutory flexible working request. The employee must have at least 26 weeks' continuous service[2], must not be an agency worker (save in very limited circumstances)[3] or an employee shareholder[4], and must not have made a statutory flexible working request within the previous 12 months[5].

3. The application has to be in writing[6], has to state that it is an application under the statutory provisions[7], be dated[8], state whether and when a previous application has been made[9], specify the change sought and from when the employee wants it to take effect[10], and must explain the effect the employee thinks the change would have on the employer and how that might be dealt with[11].

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[1] ERA s.80F(1)(a).
[2] Flexible Working Regulations 2014 ("FWR"), reg 3.
[3] ERA s.80F(8)(a)(i) and (b).
[4] ERA s.205(2)(b).
[5] ERA s.80F(4).
[6] FWR, Reg 4(a).
[7] ERA s.80F(2)(a).
[8] FWR, Reg 4(c).
[9] FWR, reg 4(b).
[10] ERA, s.80F(2)(b).
[11] ERA, s.80F(2)(c).

4. It is possible to make an informal flexible working request without meeting the threshold requirements under the ERA, but that would not be subject to ERA protections. It should also be noted, of course, that to the extent that a flexible working request relates to a protected characteristic under the Equality Act 2010 ("EqA"), the protections under that Act apply. This paper gives only the most limited consideration to matters relating to flexible working and the EqA (which could itself be the subject of another paper), but it is worth emphasising that employers cannot rely on the 12-month bar under ERA s.80F(4) to justify ignoring a request protected under the EqA.

The Employer's Obligations

5. An employer is required by ERA s.80G(1)(a) to deal with the application in a *'reasonable manner'*. The statute is silent on how to fulfil this requirement[12]. There is an accompanying ACAS Code of Practice – ACAS Code of Practice 5: Handling in a Reasonable Manner Requests to Work Flexibly ("CoP") – which does provides best practice[13] guidance on process. That guides employers to:

   5.1. Arrange a meeting to talk with the employee[14];

   5.2. Allow the employee to be accompanied[15];

   5.3. Discuss the request with the employee[16] in (if possible) a private place[17];

   5.4. Weigh up the benefits as against the adverse effects of the request[18];

   5.5. Inform the employee in writing of the decision[19]; and

   5.6. Allow the employee to appeal any rejection[20].

[12] Note that this was not so under when the right was originally granted, with the Flexible Working (Procedural Requirements) Regulations 2002 ("the 2002 Regs") being prescriptive on process.
[13] As emphasised in the Explanatory Note.
[14] CoP, para 4.
[15] CoP, para 5.
[16] CoP, para 6.
[17] CoP, para 7.
[18] CoP, para 8.
[19] CoP, para 9.
[20] CoP, para 12.

6. An employment tribunal is required to take into account any relevant provisions of a Code of Practice when determining a claim to which it is relevant[21]. However, it is unclear (and as yet subject to now appellate decision) to what extent a failure to comply with best practice under the CoP amounts to a failure to deal reasonably with a flexible working request.

7. The employer currently has three months within which to deal with any statutory flexible working request[22]. That time period includes any appeal, to the extent that the employer decides to allow the employee to appeal against rejection of a request[23]. The three-month period can be extended by agreement between the employer and employee, and that extension can be agreed to prospectively or retrospectively[24].

8. Alongside approval or rejection of a request, a third way for the process to end is through withdrawal. That may either be effected by the employee, or through the employer notifying the employee that it is treating the application as withdrawn in circumstances in which the employee fails – without good reason – to attend the first and next meeting (or first and next appeal meeting) arranged to discuss the application[25].

9. The employer is restricted to eight specified reasons to refuse an application. They are set out at ERA s.80G(1)(b):

    9.1. The burden of additional costs;
    9.2. Detrimental impact on ability to meet customer demand;
    9.3. Inability to reorganise work among existing staff;
    9.4. Inability to recruit additional staff;

[21] Trade Unions & Labour Relations (Consolidation) Act 1992 ("TULRCA"), s.207.
[22] ERA s.80G(1)(aa) and (1B)(a).
[23] ERA s.80G(1A).
[24] ERA s.80G(1B) and (1C).
[25] ERA s.80G(1D).

9.5. Detrimental impact on quality;

9.6. Detrimental impact on performance;

9.7. Insufficiency of work during the periods the employee proposes to work; and

9.8. Planned structural changes.

Bringing a Claim

10. There are various grounds on which an employee is entitled to bring a claim[26]:

10.1. Where the employer failed to comply with the process requirements and time periods under s.80G(1) or rejected the application for a reason not set out under s.80G(1)(b)[27];

10.2. Where the employer rejected an application but did so on the basis of incorrect facts[28]; and

10.3. Where the employer wrongly treated the employee's application as withdrawn[29].

11. There is very little appellate case law on the statutory claims, but one case of particular importance is ***Commotion Ltd v Rutty*** [2006] IRLR 171. In this case, a grandmother worked as a warehouse assistant. She took on childcare responsibilities and sought to reduce the number of days per week she worked in order to attend to those responsibilities. A formal request for flexible working was rejected on the basis that it would have a detrimental impact on performance in the warehouse. Ms Rutty presented a claim to the ET, one basis for which was that the employer had relied on incorrect facts in rejecting her request. The ET identified that the employer relied on the 'detrimental impact on performance' ground without carrying out any investigation or proper inquiry. Using its own industrial

[26] There are also opportunities to bring claims for automatically unfair dismissal for having made a flexible working request or having brought a claim in respect of one (ERA s.104C) and for suffering a detriment in like circumstances (ERA s.47E), but those are not the focus of this paper.
[27] ERA s.80H(1)(a).
[28] ERA s.80H(1)(b).
[29] ERA s.80H(1)(c).

experience, the ET considered the work could be organised in a manner excluding diminution in performance and in service to the customers, and allowed Ms Rutty's claim. That decision was upheld by the EAT. In doing so, the EAT explained that:

> *37. … The true position, in our judgment, is that the tribunal is entitled to look at the assertion made by the employer, ie the ground which he asserts is the reason why he has not granted the application, and to see whether it is factually correct…*
>
> *38. In order for by the the tribunal employer to to establish reject the whether application or not was the based on incorrect facts, the tribunal must examine the evidence as to the circumstances surrounding the situation to which the application gave rise. In doing so, the tribunal are entitled to enquire into what would have been the effect of granting the application. Could it have been coped with without disruption? What did other staff feel about it? Could they make up the time? and matters of that type. We do not propose to go exhaustively through the matters at which a tribunal might wish to look, but if the tribunal were to look at such matters in order to test whether the assertion made by the employer was factually correct, that would not be any misuse of their powers and they would not be committing an error of law.*

12. The time limits are akin to those under the unfair dismissal provisions (i.e. 3 months, subject to the ACAS early conciliation extension, and subject to the discretion to extend time where it was not reasonably practicable for the claim to be brought in time)[30]. Time begins to run from the date of notification of the decision to reject the application if there is no appeal, or the decision on any appeal if there is one[31], the date the decision period ends without any decision being made[32], or the date the employer notifies the employee that the application is being treated as withdrawn[33].

Tribunal Remedy Powers

13. The ERA provides for two remedies:

[30] ERA s.80H(5) and (7).
[31] ERA s.80H(2), (3)(a) and (3A).
[32] ERA s.80H(2), (3)(b) and (3B).
[33] ERA s.80H(2) and (3C).

13.1. An order for reconsideration of the application[34]; and

13.2. Up to eight weeks' pay[35], subject to the statutory maximum for a week's pay[36].

Manifesto Promise and Consultation

14. In the Government's 2019 election manifesto[37] the following commitment was made:

> *We will encourage flexible working and consult on making it the default unless employers have good reasons not to.*

15. A consultation followed in September 2021, *'Making Flexible Working the Default'*. This consultation is open until 01.12.21. The consultation acknowledges the role of the pandemic in shifting the way we think about flexible working[38], noting the explosion in forced flexible working through which 47% of the UK workforce worked from height at the height of the first lockdown, as against 11% in 2018[39] and a far greater recognition of the need for flexibility in times worked in order to balance work against personal commitments and responsibilities[40]. That latter need was most acute amongst employees who are also parents, and particularly parents of young children, who had to take on the role of school or nursery teacher and of childminder whilst those services were not available due to enforced closure of premises.

16. The Consultation notes not only the technological advances forced flexibility has necessitated[41] and the benefit of flexible working to many groups, but also that for many homeworking is simply impossible or impractical due to housing circumstances[42]. This

[34] ERA s.80I(1)(a).
[35] ERA s.80I(1)(b) with FWR Reg 6.
[36] ERA s.227(za). The current maximum is £544.
[37] Entitled *'Get Brexit Done: Unleash Britain's Potential'*.
[38] Para 6.
[39] Para 7.
[40] Para 9.
[41] Para 13.
[42] Para 15.

paper is not the place to consider the positives or negatives of flexible working but merely the nature of the statutory protections and how those might change.

17. The Consultation is perhaps disappointing in its approach to meeting the aim of its title, but encouraging in other regards. Dealing with the disappointment first, the Consultation is not strong on how to make flexible working the default. It notes consideration of whether to move from a right to request flexible working to a right to have it (with the concomitant preclusion of the opportunity for the employer to reject an application) but decided that was not sensible or practical[43], and thus chose not to consult on it.

18. However, the Consultation contains five key proposals.

Changing to a 'day one' right

19. First, is a proposal to make flexible working a day one right rather than having a 26 weeks' continuous service threshold[44]. This proposal is described as a *'nudge'* requiring employers to consider flexible working issues at the stage of advertising the role and throughout the application process, knowing that the employee could make a request as soon as they start. The Consultation notes the rejection (at the present time and without consultation) of a possible additional nudge of requiring employers to specify on job adverts whether the job is open to flexible working[45].

20. Unlike the other proposals, given that the continuous service threshold is in the FWR this change could be made by way of secondary legislation.

21. There is, to my mind, an argument for bringing the right forward even further, and for protecting from the point of the job offer being made rather than from the first day in employment. It is at that point that a prospective employee will doubtless wish to

[43] Para 19.
[44] Paras 27-35.
[45] Paras 34-35.

negotiate terms of employment, including when and where they are to work. An earlier statutory protection could sensibly protect their position in those negotiations rather than allowing the employer to reject them without reason at that point (save where the EqA protections are relevant) only to have to revisit the same request a few days, weeks or months later when the employee starts work.

Do the statutory reasons for rejection remain valid?

22. The second proposal on which the government seeks to consult is whether the ERA s.80G(1)(b) reasons for rejection remain valid[46]. The Consultation notes the small number of formal requests rejected, and considers itself *'broadly content'* with the current list of reasons[47]. They appear both sensible and comprehensive. There is also sense in requiring of employers the discipline of settling on a prescribed reason rather than giving carte blanche for the employer to decide whether and why to reject an application. I suspect that the most likely outcome of the consultation is that the status quo will remain.

An obligation to suggest alternatives before rejecting

23. The third proposal is to add in a statutory requirement for the employer to suggest alternatives before rejecting a flexible working request[48]. Many good employers will already do this, but the Consultation suggests building in such a requirement might *'influence organisational norms'* among those businesses which have not yet fully appreciated the benefits to the business of flexible working[49]. If adopted, this proposal could have the benefit of breaking the mindset of those businesses which consider flexible working requests as a choice solely between two stark alternatives – either to allow or to reject the application. There is clearly considerable room for compromise and for parties to meet at a convenient point in the middle, and a statutory emphasis on alternatives might force a change in mindset where needed.

[46] Paras 36-41.
[47] Para 39.
[48] Paras 42-45.
[49] Para 45.

The 12-month bar on additional requests and the 3-month decision period

24. There are two principal elements to the fourth proposal, which concentrates on the administrative process[50].

25. First is a proposal to remove the bar on repeated applications within a 12-month period. The Consultation sets out concern that the 12-month bar acts as a brake on the dynamism of flexible working. A secondary concern stated is that it places an unnecessary barrier in front of those whose situations change within the twelve month period. The Consultation gives as examples the newly disabled and new parents[51]. I am not sure that they are the best examples as they are likely to benefit from the protection under the EqA. Perhaps a better example is the employee whose partner becomes seriously ill, leading to an increase in the employee's out-of-work responsibilities.

26. The Consultation asks whether the bar should be removed entirely or whether there should be limits but set more liberally than just one application in a 12-month period. I am of the opinion that removal of the bar is sensible as the exigencies of life do not mark time awaiting the end of the prescribed period.

27. Moreover, it appears that where an application has been made and there is then an effort to amend it, the bar ought to apply. That is self-defeating given the undoubted benefits to employer and employee of ensuring a request is properly directed to the employee's needs and that there is the opportunity for the employee to seek to modify it to meet the employer's concerns.

28. The second aspect of the administrative process matters being consulted on is the three-month decision period. The government asks whether that should be foreshortened. It is

[50] Paras 46-48.
[51] Para 46.

notable that under the 2002 Regs, which applied until 2014, a meeting had to be held within 28 days of the request being made[52], with a decision being required 14 days after the meeting[53]. There was then 14 days to bring an appeal[54], 14 days thereafter to hold the appeal hearing[55] and 14 days after that to provide any decision on appeal[56]. It may be sensible to revive a similar division of time periods (or perhaps to shorten them still further) rather than the current situation in which there is just one deadline at the end of 3 months, which may encourage an employer to leave consideration to the last minute.

Requests for Temporary Changes

29. The final proposal concerns the making of temporary flexible working requests[57]. The Consultation notes that this is already available, but is under-utilised. The questions asked under this section are thus addressed to awareness of the right and suggestions for how to amplify it rather than in respect of any specific proposal to make a legislative change.

My own additional wish-list

30. The Consultation is not exhaustive. The final question asks respondents for any additional proposals. I set out three in my response.

31. First, a need for clarification of process consistent with the statutory obligation to deal with a request *'in a reasonable manner'*. As set out above, this is not clarified at all in the statute, and there must be questions about the extent to which the statutory obligation is, in effect, to comply with the letter of the CoP. This has not, as yet, been resolved by any appellate decision. My preference is for certainty. There was certainty under to the 2002 Regs, but they were revoked in 2014. Whilst there are other areas of employment law where procedural reasonableness is required without the process being statutorily

[52] 2002 Regs, Reg 3(1).
[53] 2002 Regs, Reg 4.
[54] 2002 Regs, Reg 6.
[55] 2002 Regs, Reg 8.
[56] 2002 Regs, Reg 9.
[57] Consultation, paras 49-51.

prescribed, they tend to have the advantage of detailed appellate consideration and guidance. ERA s.98(4) is a prime example.

32. Secondly, the ability to bring a claim on the basis that the employer has relied on *'incorrect facts'* in rejecting a request. The statutory obligation on the employer under ERA s.80G(1)(b) is to:

> *…only refuse the application because* ***he considers*** *that one or more of the following grounds applies…*
> [Emphasis added]

33. The wording is clearly subjective. There is no statutory obligation any longer to provide underlying reasoning behind reliance on a particular ground, nor even to put the decision in writing. It may be the case, therefore, that the more lackadaisical the employer's approach, the less there is from which subjective consideration can be determined.

34. The saving grace for the *'incorrect facts'* test appears, to my mind, to be its application in ***Rutty***. Whilst the decision to allow scrutiny and investigation of the consideration underlying the decision is undoubtedly a sensible one, it is difficult to tally the statutory wording comfortably with the EAT's decision. It is an approach which, to my mind, fits more comfortably with a reasonableness analysis of the employer's decision and with statutory wording which fits that analysis.

35. Finally, whilst the remedies provided for under the ERA are all well and good, the order for reconsideration lacks teeth and may just lead an employer to having a second bite at justifying an inapt rejection, and a merry-go-round of repeated rejections and claims. There is, perhaps, room for a third remedy under which the Tribunal – on being satisfied to a high threshold as to its practicability – has power to order the employer to vary the employee's terms consistently with the flexible working request made. A possible adjunct

would be a power to increase compensation to penalise an employer who failed to comply.

The impact of the Covid pandemic on flexible working rights

36. In summary, whilst the Covid pandemic has of course had many significant and sometimes tragic impacts, one small benefit from the collective experience has been the cultural shift in the appreciation of flexible working as a result of the forced flexible working so many experienced for the first time at the commencement of the first lockdown. Not only did it change mindsets, but it forced businesses to look for solutions rather than for reasons to reject a request. There was often no choice. This forced flexibility has resulted in considerable technological advances both generally and in respect of the capacity for flexible working of individual businesses. The expansion of virtual and hybrid meetings and workspaces is perhaps the prime example.

37. From the perspective of a party considering an employment claim, the experience of the pandemic must also have made the claimant's position stronger and the employer's position weaker in many cases. The explosion in flexible working will have vastly increased the empirical evidence (both generally and at individual workplaces) as to what is possible and how to avoid or soften a detrimental impact, thus rendering it more difficult for employers to comfortably rest on the statutory grounds for rejection (especially in light of the approach approved in ***Rutty***). Moreover, for EqA claims, it must inevitably weaken many objective justification defences to indirect discrimination claims as well as the defence to failure to make reasonable adjustments claims that the proposed step was not a reasonable one. Finally, were an employee to resign and bring a constructive unfair dismissal claim reliant (in part or wholly) on the rejection of a flexible working request, the employer may well find it more difficult to argue its actions fall outside the definition of the implied term on trust and confidence because it did not act *'without reasonable and proper cause'*[58].

[58] See ***Malik v BCCI*** [1997] IRLR 462.

38. It is early days at present. We can but predict. It will be interesting, however, to see what fruit the Consultation bears, whether it leads to any statutory change, and whether the cultural shift in flexible working requests leads also to an increased case load in which claims under ERA Part VIIIA are brought. Time will tell.