


# Managing flexible working requests – how to stay on the right side of the law

17 April 2023  James Tait

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The right to request flexible working was introduced under the Employment Act 2002 and came into force on 6 April 2003. Despite the right being in existence for nearly 20 years prior to the pandemic, flexible working undoubtedly became more mainstream due to lockdowns as employees were required to work from home overnight (although flexible working is broader than either just working remotely for some or part of the time). However, employers still regularly run into trouble when responding to requests which can give rise to claims of discrimination and/or constructive unfair dismissal as well as a failure to follow the procedural requirement relating to requests.

This was highlighted in the recent case of *Glover v Lacoste*, where an employee succeeded in a claim of indirect sex discrimination after her employer initially rejected her flexible working request prior to her return from maternity leave. This was despite the employer agreeing to the request in part on appeal and subsequently agreeing to the request in full upon receipt of a letter from the Claimant's solicitor saying that the Claimant might have no option but to resign and claim constructive dismissal if her request couldn't be accommodated.

The Employment Relations (Flexible Working) Bill 2022-23, currently making its way through parliament will extend the right to request flexible working to all employees from day one of employment. It will also increase the number of requests an employee can make from one to two in any twelve-month period; require an employer to consult with the employee if it is considering rejecting a flexible working request and remove the requirement for employees to set out how the employer might deal with the effects of that request. Therefore, employers could see an increase in the number of requests being made.

In light of this we look at some of the practical steps for employers to consider when dealing with requests:

- **Diarise key dates.** Currently the employer must notify the employee of the decision, including any appeal, within three months (two months if the new bill becomes law).
- **Be open minded.** Do an impact assessment, engaging with key stakeholders (including the employee and their manager) to discuss how the request would work in practise, identify any key challenges and how they could be overcome.
- **Document your decision-making process.** Clearly document what you considered, any reasons why it is not feasible and back this up with evidence. Therefore, if you are later challenged you can demonstrate the reasonableness of your decision.
- **Consider alternatives.** If you are not able to agree to the request in full discuss with the employee what you could accommodate. However, if you do not agree to the request in full, you still need to offer a right of appeal.
- **Trial periods.** Agree a trial period before agreeing to any permanent change to see how the new pattern works in practise. It is also useful set reviews throughout so that if something isn't working you can discuss and adjust if possible.
- **Record any agreement in writing.** This ensures there is no ambiguity about what has been agreed and should set out the new work pattern and any impact on pay, holidays, benefits and pension. However, remember part-time workers have the right not to be treated less favourably because of their part-time status under the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000.

It is prudent to flag that in some cases requests may be made to accommodate health conditions or religious beliefs. Therefore, this should be factored into the decision-making process.

Given the proposed changes to the law, you may need to update your existing policy and communicate any changes to your managers. Alternatively, if you want to take a progressive approach you could do these things now irrespective of whether they become law or not. Demonstrating such a commitment to flexible working may in turn assist with retention and recruitment which is always a benefit to businesses.

## Key contact



**James Tait**

Partner

[james.tait@brownejacobson.com](mailto:james.tait@brownejacobson.com)

+44 (0)121 237 3999

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