

Rights, requests and great expectations: the right to request flexible work in the UK

Presentation

by

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Case of teacher seeking PT work

- ‘Although never rising to an explicit statement we consider that there is an implicit premise in this decision that the **only proper work is full-time work and that anything less is a matter for... grace and favour...** an indulgence to an individual employee.... Yet the **failure to make such adjustments to enable posts to be part-time has a public as well as private consequence.**’

Craddock v Cornwall County Council [2005] UKEAT
0367

Overview of talk

- Background and expectations of R2R (right to request flexible work)
- Description
- How do pre-existing rights contribute to it
- Has it contributed to change?
- The wider environment affecting its success
- What elements does an R2R need?

Justifying hours' requirements

- The working arrangement must be reasonably necessary to the business
- If it is, consideration of the seriousness of the impact on women/individual claimant
- Is the « reasonable need » sufficient to outweigh the discriminatory effect
- Loss of employee's job due to refusal to adjust would weigh heavily against justification
- Role of costs

Some successful appeal cases

- The sole parent tube driver: rotating shifts
London Underground v Edwards (No 2)[1999] IRLR 364, CA

- The airline pilot: applying a blanket rule
Starmer v British Airways [2005] IRLR 862

- The manager of recruitment for a chain of pubs: job share

Hardys & Hanson v Lax [2005] IRLR 276 CA

“The scenario is a familiar one. A full-time female employee acquires child rearing responsibilities and applies for a job sharing arrangement in the same employment.”

BACKGROUND

- Increased number of women working and working part-time in '80s & 90s
- Decline in collective-bargaining, deregulation and unionisation + work intensification
- Govt resistance to EU working time laws
- Absorption of EU discrimination law into domestic legislation
- Attempts to use discrimination law to create some employee control over working time

The evolving FW debate

- 2000 Green (discussion) Paper « Working parents: competitiveness and choice » suggests right to PT work after maternity leave
- ‘there are 3.1m nonworking parents with children under 16, most of whom are mothers... the economy would benefit if more of these parents chose to join the labour market’
- 2003 Right to request flexible work becomes law
- 2004-2006 EOC Investigation into PT + Flexible Work
- 2009 « Working Better » Report from EHRC

<http://www.equalityhumanrights.com/en/projects/workingbetter/pages/workingbetterphase1launch.aspx>

UK R2R – an overview

- Right to have a formal procedure followed
- Right for procedures to be completed within specified time limits
- Breach of the procedure can be challenged in a court
- Very limited compensation + orders available

NB No right to challenge in court whether the employer decision itself is reasonable (merits review)

Who can use the right to request?

- Employees only
- Who have worked with their employer for 26 weeks
- Who have a child under 16, if disabled under 18, or certain carers for adult
- All employers regardless of employer size are covered

The written request must state

- The request is for caring purposes
- The relationship with the person to be cared for
- The change in working patterns sought
- The proposed date for the change
- How the applicant thinks the change will affect the employer and how that might be dealt with

Procedural timetable: c 12 weeks

- 28 days: employer must meet the employee
- 14 days: give written decision, if refusal:
 - Set out the grounds + why they apply
 - The appeal procedure
- 14 days within which employee can appeal
- 14 days: employers to hold appeal meeting
- 14 days: give written decision with reasons if refused

Grounds for refusal

- Costs
- Inability to staff the change
- Detrimental impact on quality or performance
- Too little work when employee proposes to work/too much when they will be absent
- Planned structural changes

Other provisions of the R2R law

- The right applies to the **employee's existing job**, including all its terms and conditions
- There is a **right to be accompanied** to the meetings
- **Variety of working arrangements** may be requested not just reduced hours, incl certainty of hours + increased hours

Enforcement: a merits review?

- There is NO right to challenge the employer decision to refuse the request under the R2R legislation, e.g. that it was unreasonable, in a court
- There IS a right to challenge it under indirect sex discrimination law: mostly only available to women

Enforcement of the procedure

The procedure must be followed once the employee has made the request. The courts will review a decision where it is alleged:

- It is not based on accurate facts
- The procedure has been breached
- It was not arrived at in good faith

Appeal Court decision where employer refusal of FW was challenged for a breach of procedure (incorrect facts)

‘[The employers]... put forward what the Tribunal would suggest are really outdated responses to requests for part-time working, they are off the cuff and made without research... There has not been a shred of evidence that proper enquiry and proper investigation was carried out by [the employers]’

Compton v Ruddy [2006] IRLR 171, EAT

Fair Work Act

Eligibility

- 12 months with the employer OR long-term casual
- child must be under school-age or under 18 if disabled
- parent or responsible for child

Employee: written request to change work arrangements to assist with childcare

- giving details of the change sought
- providing reasons for the change

Employer: written reply in 21 days

- refusal only on reasonable business grounds (unspecified)

Review: limited possibility for merits review

GREAT EXPECTATIONS

- Meet labour market needs for flexible workers
- Promote flexible work and employee WLB
- With better maternity leave, increase women's attachment to the labour market
- Promote better quality PT work
- Encourage men to work flexibly and care more

Evaluation: What's measured?

- Types of FW: PT, flexitime, temp PT, term-time, compressed hours, job share, annualised hours
 - Availability
 - Usage + by whom
 - Requests
 - Refusals
 - Patterns in take-up, requests, refusals by entitlement, gender, work status etc
- Not:** shifts & overtime, staying in same job, refusal reasons + consequences

What's the picture c2001-2006

- **Availability:** increase
- **Usage:** some increase
- **Employee requests:** no change to %
- **Employer refusals:** probably some decline
- **Reducing hours in the same job:** the big issue
- **Return to work after ML**

Some elements of an R2R law

1. A **right** to FW, incl merits review, not just a right to a procedure
2. Who should be covered?
3. Change to occur in existing job
4. Grounds for refusal spelt out + limited
5. What elements for a mandatory procedure?
6. A right to refuse some work patterns
7. Advertise all jobs as potentially flexible