



DEVELOPING GOOD
MANAGEMENT PRACTICE

A HEFCE Initiative

LEGISLATION OVERVIEW

- FROM THE FEO PROJECT REPORT, 2003

There are many areas of legislation that now impact on working arrangements but the Employment Act 2002 is the first to directly address issues of flexibility. With a trend towards more flexibility in the workplace employers need to be increasingly aware of the effect that any new legislation or case-law could have on flexible working arrangements. The areas where employers are most vulnerable are;

- in dealing with requests for part-time working, where they may be open to sex discrimination claims
- in dealing with requests for flexible working arrangements under the Employment Act 2002
- patterns of work that could mean employees working too many hours in contravention of the Working Time Directive
- requests for home-working with Health and Safety implications
- fixed-term contracts

In terms of the most common flexible employment options a more in-depth analysis of the legislative impact is discussed below.

Arrangement of hours

(flexitime schemes, compressed hours, annualised/seasonal hours, shift working)

Number of hours worked

One of the main points in this area is that it is essential to ensure that staff are not working more hours in total than is allowed by the Working Time Regulations. It is also critical that adequate rest breaks are built-in to the working day. One of the dangers of allowing this type of flexibility is that staff can actually work longer hours than is permitted or fail to take breaks as often as they should. If a long-hours culture means that employees are rewarded for 'presenteeism' rather than actual

contribution to the organisation then there is a risk that unless flexibility is properly managed the employee could actually work very long hours although less effectively.

Discrimination

Discrimination could also be an issue in this area of flexibility, for example, if an employee wants to work the same total number of hours but with a slightly different working pattern to cope with childcare arrangements. A number of women have successfully claimed sex discrimination in this area (e.g. *Wright v Rugby Borough Council*).

Location of work (at home or from another part of the organisation)

Health and safety

If individuals are working from home the employer has a responsibility to ensure that the home environment is suitable and safe for the purpose of work. The general duty of care by the employer originated in the 1974 Health and Safety at Work Act which has since been supplemented by numerous regulations. The two most relevant regulations are:

- The Management of Health and Safety at Work Regulations 1999
- Health and Safety (Display Screen Equipment) Regulations 1992

These regulations involve carrying out a risk assessment at the individual's home-working environment to ensure that the work-station is ergonomically correct and that all equipment is safe for use. Hazards must be identified, potential risks assessed and any findings recorded and checked periodically.

Insurance

In terms of insurance an employee is normally covered by the organisation's insurance while they are on the premises but additional insurance would need to be in place for every individual working from home whether they were working from home regularly or infrequently.

Sex Discrimination

Sex discrimination could also be an issue and all requests from employees to work from home must be given very careful consideration. Case law shows that if someone wants to work from home for childcare related reasons then the employer who refuses such a request may be open to a claim of sex discrimination (e.g. *Lockwood v Crawley Warren Group Ltd*).

Disability Discrimination

Requests by disabled employees must also be given serious consideration. An employment tribunal has already ruled in favour of home-working on a temporary basis for a disabled employee, (*London Borough of Hillingdon v Morgan*). The decision was upheld by the EAT which ruled that

such a large organisation should have been able to accommodate a phased return to work and should have considered whether the duties of the job could have been performed at home.

Other issues that need to be considered are, for example, monitoring the number of hours actually worked and also the number of and length of breaks that an employee has while they are working at home. The HE sector is particularly vulnerable in this area as it is accepted practice for many academic staff to work from home on a regular basis.

Leave arrangements

Unpaid leave

Legislation (Employment Relations Act 1999) now provides that employees are entitled to reasonable time off to look after dependants or for domestic crises. Employees are entitled to this right regardless of length of service and employers may face claims of unfair dismissal if employees are not allowed this right (e.g. *Percy v Metcalf*).

The main issue here is to ensure that there is a clear policy on whether or not the leave should be paid or unpaid. If an employer allows an employee a few hours unpaid leave in one particular week they have to notify payroll and a calculation needs to be done to correct their salary for that month. This creates an administrative burden on the organisation. However if the employer chooses to ignore the few hours lost and pays the employee their full salary then they are setting a precedent and must take care to state that payment is at the discretion of the employer.

Number of hours worked

(part-time, job-share, term-time working, pre-retirement reduction in hours)

Number of hours worked

In most cases this involves a reduction in hours for the employee but an individual could be doing more than one job and so again care must be taken to monitor the total number of hours worked.

Sex discrimination

In all cases the employer will have to take care in ensuring that any flexibility is applied consistently so that the organisation is not vulnerable to claims of discrimination. Case law has demonstrated that under the SDA an employer must seriously consider a woman's request to work flexibly so that she can look after her children. If the employer refuses her request without good reason, she can claim indirect sex discrimination at an employment tribunal. The argument is that the requirement to work full-time is a condition with which fewer women than men can comply and that this is to the woman's detriment because her childcare responsibilities prevent her from complying with it. So unless the employer can justify the full-time requirement objectively then the woman is deemed to

have suffered indirect sex discrimination. This applies to all women with children – including those going back to work after having a baby.

There are two methods that an employer can use to defend a claim of sex discrimination. The first is where they have sufficient objective business reasons for insisting that the job continues to be done full-time (e.g. *Bennett-Shaw v The Guide Association*). This argument is becoming increasingly difficult to prove.

In *Hampton v Dept. of Education and Science* (1989) the court ruled that the test for justification in refusing a request to work part-time involves striking a balance between the discriminatory effects of a requirement or condition and the reasonable need of the person who applies it. This principle applies to job-share arrangements as well as part-time working (e.g. *Marshall v Devon County Council*).

This type of case could in turn lead to discrimination claims from men who feel they are being treated less favourably than women if they are not entitled to reduce their hours in order to care for their children (e.g. *Gilbert v Thames Valley Police*).

The second method is to prove that the woman concerned can comply in practice with the requirement to work full-time (e.g. *Willett v Eden District Council*).

Part-time workers must not be treated any less favourably than full-time workers e.g. in terms of being allowed to take career breaks, maternity leave and parental leave. If the number of part-time workers increases in the future then this may become even more of an issue. Employers must be aware that by allowing flexibility, in terms of full-time employees changing to part-time hours, they must not treat employees any less favourably than when they were on full-time hours. If an employee feels that they are being treated any less favourably than a full-time employee (and they can use their own previous terms and conditions as the comparison) then they are entitled (under the Part-time Workers [Prevention of less Favourable Treatment] Regulations 2000) to ask for a written statement from the employer justifying the treatment and ultimately letting an Employment Tribunal decide if detrimental treatment is occurring and whether it is justified.