Employment Law

Simpson Millar LLP Solicitors

Review

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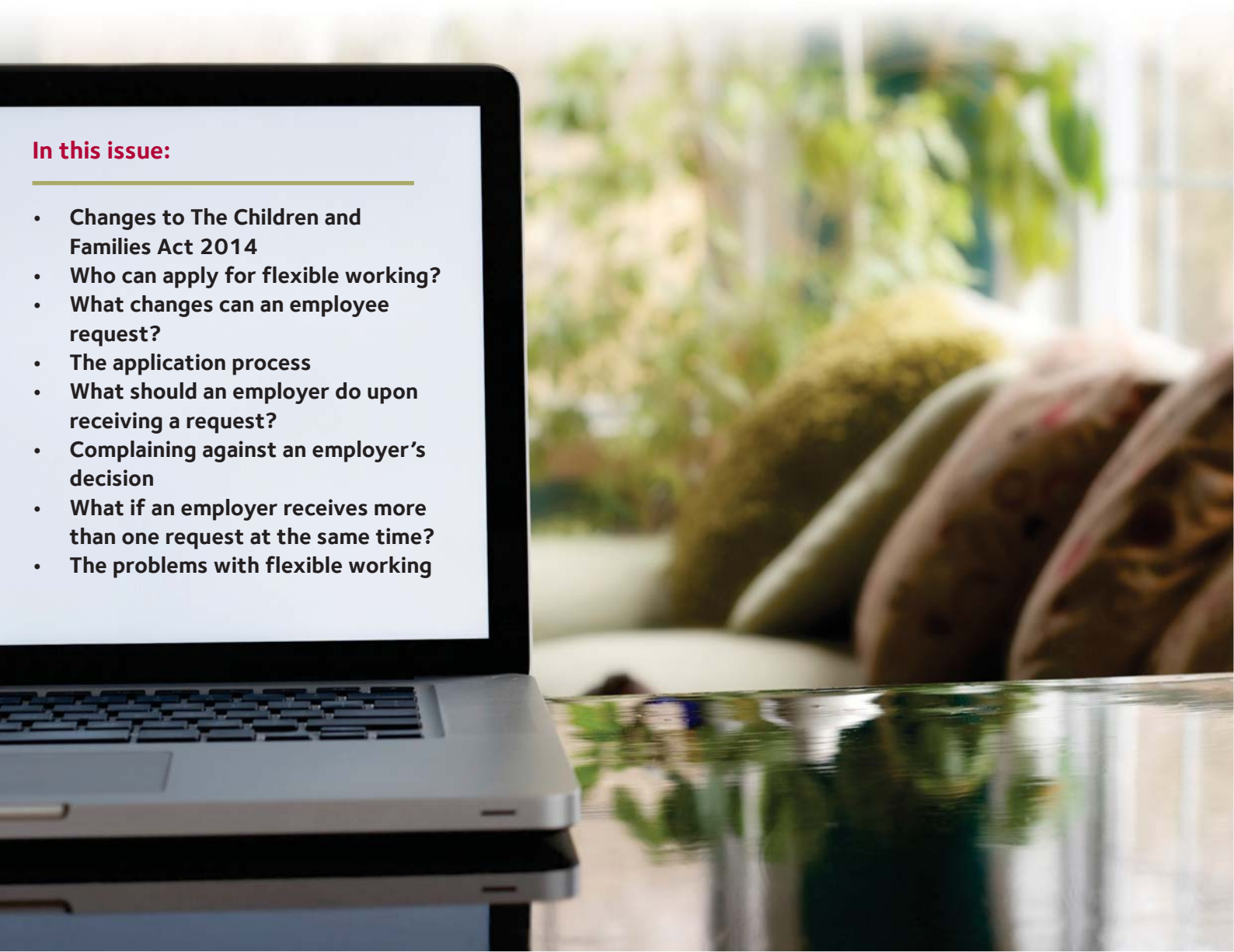
THE RIGHT TO REQUEST FLEXIBLE WORKING FOR ALL: BUT PROCEDURE WEAKENED



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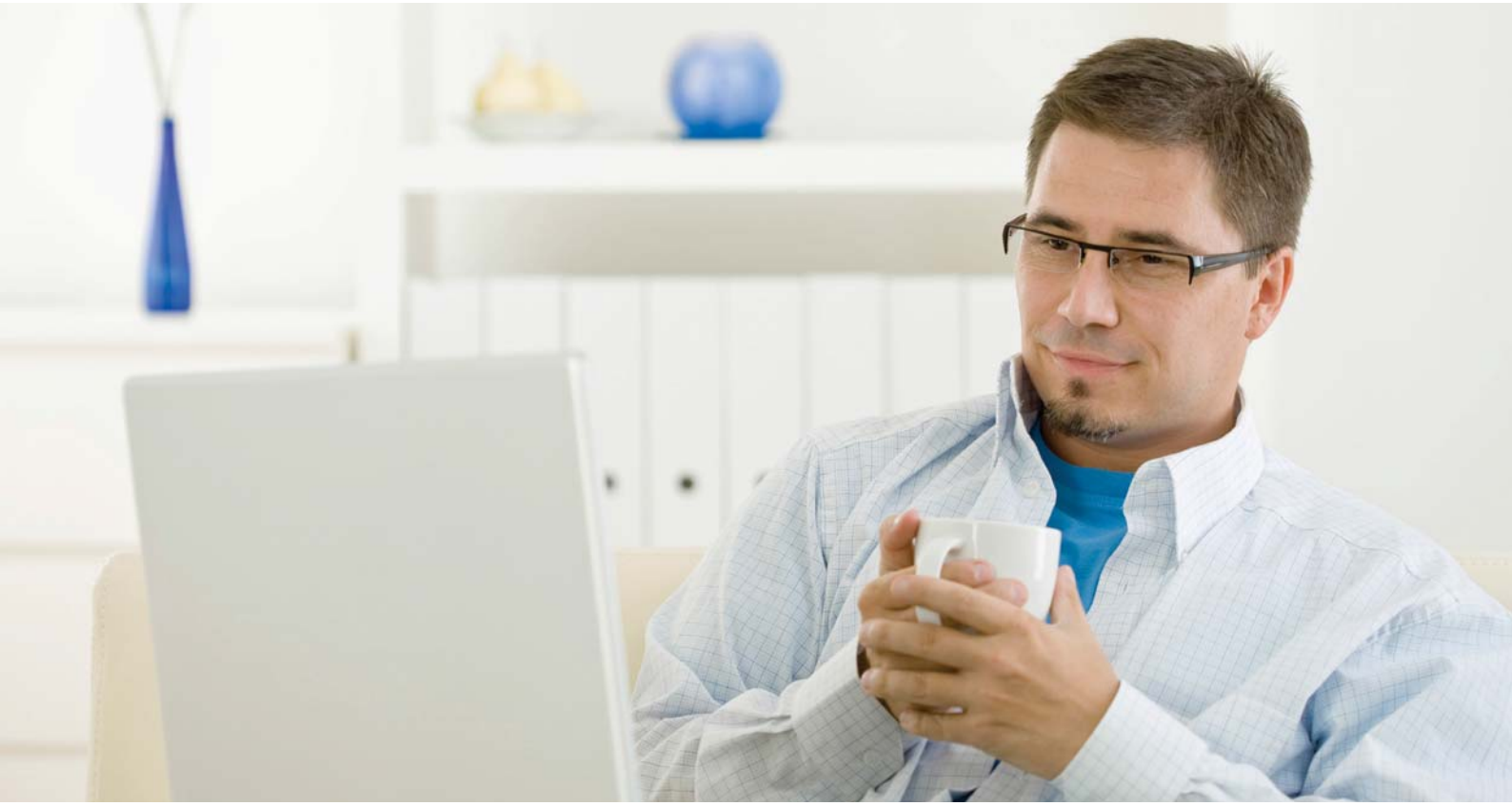
Introduction

The right to request flexible working came into force on 6 April 2003. Under the old scheme, a request could be made by any employee who was a parent of a child aged 17 or below, a parent of a disabled child under 18 or a carer. On 16 May 2011, the Government published the Modern Workplaces Consultation seeking responses to a proposal to extend this right to all employees. The Government considered that a reform would be beneficial to both employees and employers. Some of the reasons put forward for the change included greater flexibility for employees by allowing them to balance their work life with family responsibilities or other commitments and to remove the cultural belief that flexible working only benefitted parents and carers. For employers, it was felt that flexible working could help retain experienced and skilled staff and lead to staff feeling committed and loyal towards their employers. This could lead to increasing productivity, profitability and economic growth.



In November 2012, the Government Response to the Modern Workplaces Consultation was published. 85% of the respondents were in favour of the right to flexible working to be extended to all employees. The key comments for support included business benefits such as increased retention and productivity and reduced absenteeism. The right to request flexible working for all employees would also remove the stigma attached to requests and encourage discussions between employers and employees on this subject. Respondents also commented that caring was not the only reason why employees applied for flexible working. However, respondents also raised concerns that the proposal would burden employers with threats of employment tribunal claims and the number of flexible working requests would rise which employers would be unable to accommodate leading to an increase in the number of declined requests. Further, some respondents said that an extension of the right to flexible working for all employees was not needed as employers already offered flexible working more widely than in the legislation. Nevertheless, the Government decided to proceed with the extension to allow the right to request flexible working by all employees.

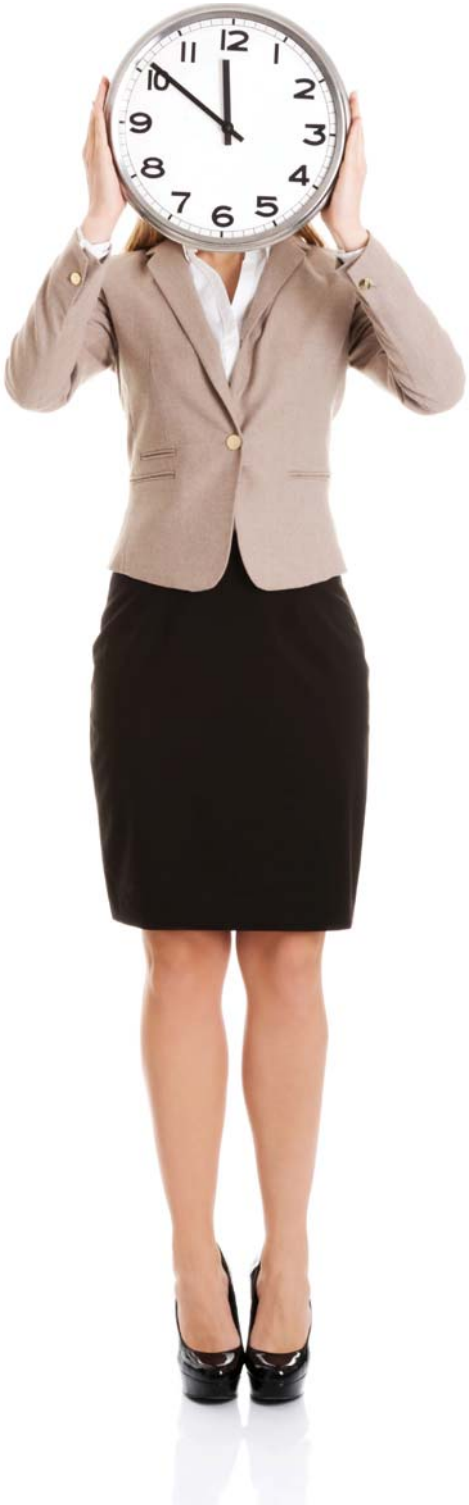
The Children and Families Act 2014 (CFA)

The Children and Families Act 2014 (CFA) which came into force on 30th June 2014 made a number of changes to the Employment Rights Act 1996 (ERA) governing flexible working.

These are:

- Section 131 of the CFA removes the condition in section 80F(b) of the ERA that an employee must be a carer for a child or adult, therefore all employees can now apply for flexible working.

- Section 132(2) of the CFA substitutes the previous statutory procedure in section 80G(1) of the ERA for dealing with applications and replaces this with a new framework that applications must be dealt in a 'reasonable manner' and the employee shall be notified of the decision on the application within the 'decision period'. The 'decision period' is defined as three months beginning with the date on which the application is made or such longer period agreed by the employer and the employee. (Previously, there were legal requirements that an employer had to discuss the application within 28 days of receiving the application. This would be followed by an employer's decision within 14 days after which an employee had 14 days from the date of the decision to appeal.)



- Section 132(3) of the CFA inserts subsection 1A into section 80(G) of the ERA which gives an employer the option to allow an employee to appeal a decision where the application has been rejected. (Previously, an employee had a right to appeal the decision.)

- Section 132(4) of the CFA inserts a new subsection 80(G)(1D) in the ERA which provides that an application will be treated as having been withdrawn by the employee if (a) the employee without good reason has failed to attend the first meeting and a second meeting arranged for that purpose or (b) where the employer has allowed an employee to appeal a decision but the employee has failed to attend the first meeting to discuss that appeal or a second meeting arranged for that purpose. The employer must notify the employee that the employee's conduct has been treated as a withdrawal of the application.

- Section 132(5) of the CFA repeals section 80G(2) of the ERA completely which provided timeframes for the employer considering the application, the provision for a meeting, notice of decision on the application and the right to appeal the decision within 14 days. It has also removed an employee's right to be accompanied at a meeting.

The new flexible working scheme will continue to be set out in sections 80F to 80I of the ERA but it will be supported by the Flexible Working Regulations 2014. ACAS has also produced a Statutory Code of Practice, Handling in a reasonable manner requests to work flexibly (ACAS Code) and The right to request flexible working: an ACAS Guide (ACAS Guide).

Who can apply to work flexibly?

An applicant must satisfy the following conditions:

1. He/she must be an employee (Section 80(F)(1) ERA)
2. The employee must have worked for a continuous period of 26 weeks prior to making an application (Regulation 3 Flexible Working Regulations 2014)
3. The employee can only make one request in a 12 month period (Section 80(F)(4) ERA)

The scheme is not applicable to agency workers, self-employed contractors or consultants.

What changes can an employee request?

Under section 80(F)(1) of the ERA, an employee can request a change in relation to the following:

- Hours of work
- Times of work
- Place of work (between his home and a place of business of his/her employer)

The Application

An application must be in writing and state the following as required by section 80(F) of the ERA:

- It is an application for flexible working
- The change requested and the date the proposed change should take place
- The effect the change will have on the employer and how this may be dealt with

The ACAS Guide states that employers should provide guidance on the information needed in an application. The application should also mention whether the employee is making a request under the Equality Act 2010 for e.g. a reasonable adjustment for a disability.

The ACAS Guide provides that employees can also request an informal change for a temporary period such as to cope with bereavement or during a period of a short educational course. However, if this request is considered as a statutory request, the employee will not be able to make another flexible working request within the next 12 months.

What should an employer do upon receiving a request?

The ACAS Code provides guidance to handling requests in a reasonable manner and states that an employer should:

1. Consider the request and arrange to discuss the request with the employee. A meeting is not needed if the request will be granted.

2. Allow the employee to be accompanied by a work colleague during the meeting/appeal and inform them of this prior to the meeting.

3. Discuss the request with the employee. This will give the employer a better understanding of the changes the employee is looking for and how it may benefit the business.

4. Wherever possible, the employer should hold the discussion in a private place.

5. Inform the employee of the decision as soon as possible. It is recommended that this is done in writing.

6. Discuss with the employee whether it is accepting the request or accepting it with modifications and how and when the changes will be implemented.

7. Discuss with the employee whether it is rejecting the request. Section 80(G)(1) ERA states that an employer shall only refuse the application because it considers that one or more of the following grounds applies:

a) The burden of additional costs
b) Detrimental effect on ability to meet customer demand
c) Inability to re-organise work among existing staff
d) Inability to recruit additional staff
e) Detrimental impact on quality
f) Detrimental impact on performance
g) Insufficiency of work during the periods the employee proposes to work
h) Planned structural changes

The ACAS Code goes on to state that all requests, including appeals should be dealt within a period of 3 months from receipt of the request unless an extension is agreed with the employee.

Complaining against an employer's decision

Provided a claimant has obtained an Early Conciliation certificate from ACAS confirming that the Early Conciliation (EC) process has been completed, a claim can be lodged at the Employment Tribunal (ET). The time limit is within three months beginning with the relevant date. The 'relevant date' is defined as the first date on which the employee can make a complaint about the employer failing to deal with the application in a reasonable manner, for failure to notify the employee of the decision during the 'decision period' or that the employer's decision to reject the application was based on incorrect facts. The tribunal can extend the time limit by such period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months (section 80I, ERA). Where the ET time limit would expire between the prospective claimant contacting ACAS for EC and ending a month after the EC certificate is received from ACAS, the time limit will instead expire one month after the receipt of the EC certificate. Where the ET time limit would expire one month or more after the prospective claimant applies for EC, the ET time limit is extended by the period of the EC (of one month or, if extended 6 weeks). Prospective claimants must keep in mind that if limitation has expired before EC has been initiated, then the claim will remain out of time for the purpose of EC and ET proceedings.

Under section 80(H)(1), an employee may bring a claim on the following grounds:

a) The employer failed to deal with the application in a reasonable manner;
b) The employer failed to notify the employee of the decision within the decision period;
c) The employer rejected the application for a reason other than under the statutory grounds;
d) The employer's decision to reject the application was based on incorrect facts;
e) The employer treated the application as withdrawn but the grounds for doing so did not apply.

In order for the first four grounds to apply, an employee must wait until either the employer has notified the decision period/extension period has come to an end.

Under section 80I of the ERA, if a claimant is successful, an Employment Tribunal must make a declaration and may order either or both:

1. That the request be re-considered
2. Compensation of up to a maximum of 8 weeks' pay. The current maximum weekly pay being £464.

There is, of course, nothing to prevent an employee (or indeed someone working on another type of contract) asking for flexible working outside of these provisions, but any refusal would not be subject to legal challenge unless, for example, it was discriminatory, that is, because of a 'protected characteristic' such as race or sex.

What if an employer receives more than one request at the same time?

The ACAS Guide states that it may be possible that an employer can grant all requests but an employer must consider the impact this would have on the business. The employer should consider each request on its merits and the impact on the business as well as the effect of refusing the request. An employer can have a discussion with the employees making the requests to ascertain whether they can come to a compromise before it takes its decision.

The employer must consider the requests in the order they are received.

The ACAS Guide also suggests that if an employer already has existing employees working flexibly, it can ask whether those employees can change their existing contracts back to their original arrangements so it can consider granting new requests.

The problems with flexible working for all

Smaller businesses may argue that they find it difficult to accommodate flexible working requests and that it burdens them with additional costs and extra administration. The right to request flexible working has been extended to all employees but the stricter time scales and statutory procedure for dealing with requests, such as an employee's right to be accompanied to a meeting and the right to appeal have been removed. As a result, it will be more difficult for some employees to challenge refusals by their employers. As before, the employee only has the right to 'request' flexible working; ultimately, it is up to the employer as to whether or not it decides to grant the request. A refusal to grant flexible working requested by a woman for reasons related to her responsibilities to care for her children or the elderly may be indirect sex discrimination.

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