



XpertHR Podcast

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- Jeya Thiruchelvam: Hello and welcome to this week's XpertHR podcast with me, Jeya Thiruchelvam. According to a recent survey by My Family Care, employees would rather work flexibly than have a salary increase. Apparently just over half of the employees surveyed would choose flexible working over a 5% salary increase. That figure is even higher for working parents and carers. So there is a real and growing appetite among employees to work flexibly.
- With that in mind, I'm now joined by Employment Law Editor, Fiona Cuming, who is here to give us a brief overview of the right to request flexible working and some recent tribunal decisions in this area.
- So just to make it clear, there isn't an automatic right, is there, to work flexibly? [0:00:49.6]
- Fiona Cuming: No, the right is to make a request but not necessarily to be granted the request. Also it's not an unqualified right and an employee must meet the requirements for exercising the right that are set out in the legislation.
- Jeya Thiruchelvam: Okay, so the right isn't unqualified. So what hurdles does an employee need to overcome to be eligible to make a request and can you just outline those requirements for us? [0:01:10.1]
- Fiona Cuming: Yes, of course. Basically, employees must have 26 weeks' service at the date that they're making the request, and they must not have submitted a previous request in the last twelve months. So effectively, the right to make a request is limited to one a year.
- Jeya Thiruchelvam: And presumably that application has to be in writing? [0:1:25.2]
- Fiona Cuming: Yes, it must be. It must cover certain matters, again that are set out in the legislation. Now I'm not going to go through all of them, but just to highlight a couple, employees should mention in their applications any effects that they think working flexibly might have on the employer's business and any possible solutions that they have themselves that might deal with them.
- Jeya Thiruchelvam: Okay, so that gives us some insight into how an employee should approach making a request. What about employers? How should they handle a request? [0:01:51.4]
- Fiona Cuming: Well all the legislation says on this point is that an employer must deal with a flexible working application in a reasonable manner, and

that it must inform the employee of its decision within three months of the date that the employee makes the application.

- Jeya Thiruchelvam: Okay, so legislation isn't at all prescriptive and it's fairly brief. There is a code of practice, though, isn't there, that employers do need to pay attention to? [0:02:12.7]
- Fiona Cuming: Yes, there's a statutory Acas code, and I'll give it its correct title – it's a bit of a mouthful. It's the Acas code of practice on handling in a reasonable manner requests to work flexibly. And Acas also has produced a separate non-statutory guide, and that provides good practice guidance for employers on handling those requests.
- Jeya Thiruchelvam: Okay, so the guidance is the key document that employers need to pay attention to. So what does it say about how employers should handle a request reasonably? And bearing in mind we're going to break this up, aren't we? So how should employers deal with a request upon receipt of it? [0:02:44.6]
- Fiona Cuming: Well they should arrange to talk to the employee as soon as possible after receiving the request.
- Jeya Thiruchelvam: And does the employee have the right to be accompanied or not? [0:02:52.3]
- Fiona Cuming: Well Acas recommends that the employee should be accompanied by a work colleague at any discussion.
- Jeya Thiruchelvam: And presumably the location of that meeting has to be discreet? [0:03:00.7]
- Fiona Cuming: Absolutely. The discussion really should ideally be conducted in private.
- Jeya Thiruchelvam: And what does the guidance say about the decision-making process itself? [0:03:08.7]
- Fiona Cuming: Well the nub of it is that employers should consider requests carefully and adopt a balancing exercise. So what they should do is to weigh up the benefits to the employee of making the requested change against any adverse business impact that it might have.
- Jeya Thiruchelvam: And once they've done that balancing exercise and made a decision, what are the obligations around communicating that decision? [0:03:29.7]
- Fiona Cuming: They need to inform the employee of the decision in writing as soon as possible.
- Jeya Thiruchelvam: Okay. You said as soon as possible. Is that the only time frame that's given? [0:03:38.2]
- Fiona Cuming: Neither the code nor the guidance gives any further guidance on what is meant by 'as soon as possible'.
- Jeya Thiruchelvam: There are a few possible scenarios, aren't there, even if a request is granted? [0:03:48.7]

Fiona Cuming: That's right because whether the request is granted in its entirety or it's granted with modifications, the employer and the employee will need to discuss exactly how and when the changes are going to be implemented.

Jeya Thiruchelvam: And what about if the employee doesn't fare so well? [0:04:03.5]

Fiona Cuming: Ah. Well if the employee's request is rejected, before the employer does that it really should ensure that the rejection is for one of the business reasons that are permitted by the legislation. And there are eight business reasons set out in the legislation, I'm just going to mention a couple now to give you a flavour. So one of the reasons could be, 'a detrimental effect on ability to meet customer demand'. And another one is, 'an inability to reorganise work among existing staff or to recruit additional staff'.

Jeya Thiruchelvam: And just to conclude, what's the overall time frame then for dealing with a request? [0:04:38.4]

Fiona Cuming: It should be done within three months, unless there's an extension agreed between the employer and the employee, and that's including any appeal process, because ACAS recommends there should be an appeal.

Jeya Thiruchelvam: Okay, that's a really great overview of the flexible working regime and brings us on rather nicely to a tribunal case that you're going to talk about, which is...? [0:04:56.3]

Fiona Cuming: Yes, this is the case of *Whiteman v CPS Interiors Ltd*. Now it's a first-instance decision concerning the flexible working legislation.

Jeya Thiruchelvam: Okay, so that's a really important point, isn't it? It's a first-instance decision so it doesn't bind other tribunals. [0:05:11.3]

Fiona Cuming: Yes, that's right.

Jeya Thiruchelvam: Tell us the facts of this case. [0:05:14.4]

Fiona Cuming: Well Ms Whiteman, she worked as a designer and her employer had agreed that she could reduce her hours when she returned from maternity leave after she'd had twins, but it turned down her further request to work from home and to do most of her work in the evenings. Now her employer thought that working in the evenings might be possible but the homeworking wasn't because she needed to be in the office because she needed to collaborate with other designers and also because designs might need to be changed at very short notice.

Jeya Thiruchelvam: Okay, and what sort of procedure did the employer follow in this instance? We know procedure's important. [0:05:48.1]

Fiona Cuming: Yes, absolutely. Well it held a meeting with her to discuss the request. It also wrote her a letter, explaining the reason why it was rejecting her request. And it also conducted an appeal process.

Jeya Thiruchelvam: Now Ms Whiteman didn't take the rejection lightly, did she? [0:06:00.7]

Fiona Cuming: No, she resigned.

Jeya Thiruchelvam: And just to make it explicit, did she resign because the request was rejected? [0:06:05.9]

Fiona Cuming: Absolutely. And then she brought a claim in the employment tribunal for breach of the flexible working legislation, amongst other claims, I should say.

Jeya Thiruchelvam: And how did she fare in the employment tribunal? [0:06:15.8]

Fiona Cuming: Not well. The tribunal rejected her complaint and in so doing, the tribunal actually then made some observations about the flexible working legislation.

Jeya Thiruchelvam: So tell us about those observations. [0:06:25.8]

Fiona Cuming: Well the tribunal said that the onus isn't on the employer to show that the request is impossible or very difficult to accommodate, and that it is sufficient for an employer to say, and I'm going to quote exactly what the tribunal said, that "Granting this request would not be in the best interests of our business. We believe what has been requested would be detrimental to our business in that, at best, it would cause us minor, but more than minimal, inconvenience". And the tribunal went on to say that in its view, if the ACAS Code is followed, then the request has been dealt with reasonably.

Jeya Thiruchelvam: Now it's fair to say that sounds like a fairly low threshold, and that will sound like a fairly low threshold to many of our listeners. So can we take from this decision that if an employer can show it has thought about the request, it has a business reason for refusing it and follows the Acas code, it won't fall foul of the legislation? [0:07:11.1]

Fiona Cuming: Yes, but with the caveat, as we've mentioned, that this is a first-instance decision and it's not binding.

Jeya Thiruchelvam: Now that is a huge caveat and it's not the only health warning that you're attaching to this case, is it? [0:07:02.4]

Fiona Cuming: No, certainly not. Because the complaint we've talked about is one under the flexible working legislation, and of course complaints around flexible working requests can also give rise to claims of indirect sex discrimination, and there's always a heightened risk of this in cases where women are returning from maternity leave and want to change their hours. And indeed, Ms Whiteman also brought an unsuccessful claim of indirect sex discrimination in the case we've just discussed.

But probably now it's better to turn to another case to look at this area of law, although this is also a first-instance decision.

Jeya Thiruchelvam: And what's the name of that second case that we'll be discussing? [0:07:56.7]

Fiona Cuming: It's called *Smith v Gleacher Shacklock LLP*.

Jeya Thiruchelvam: And before you dive into the facts of this case, can you give us a quick reminder of the basis for an indirect sex discrimination claim? [0:08:07.7]

Fiona Cuming: Yes. Well basically, indirect discrimination occurs when an employer provides a provision, criterion or practice, which is often referred to as a PCP, which on the face of it is neutral but has a discriminatory effect. So the relevant example would be an employer requiring all employees to work full-time and women may be less able to meet this because a lot more women than men have childcare responsibilities or responsibilities for caring for dependent adults.

However, this doesn't mean that all of these cases will be successful because unlike direct discrimination, indirect discrimination can be justified.

Jeya Thiruchelvam: I suppose it's important for employers to be aware of that, and there are two steps to establishing a justification defence. So the first step involves establishing a legitimate aim. So what are you trying to achieve? And the second step involves showing that the provision, criterion or practice is a proportionate way of achieving that aim. So that would involve looking into whether the aim could be achieved by another means that involved, for example, less or no discrimination.

So now that we've got that out of the way, which is the basis for an indirect sex discrimination claim, tell us about the facts of *Smith v Gleacher Shacklock*. [0:09:14.8]

Fiona Cuming: Well Ms Smith, she worked full time as an executive secretary for a small investment banking firm. She worked for two of the partners, dealt with logistics, and she had general HR responsibility.

Now she went on maternity leave and before her return she put in a flexible working request to accommodate her childcare arrangements because she was a single parent. So she asked if she could change her hours to working three days a week in the office, followed by homeworking on Thursdays and not working on Fridays.

Jeya Thiruchelvam: And how did the firm respond to her request? [0:09:44.7]

Fiona Cuming: They held a meeting with her, but then they rejected her request because the firm considered that it was going to impact on their ability to look after its clients. They thought it was vital that clients had a consistent point of contact.

The firm also thought that it may impact on other members of staff because they might have to cover for her when she wasn't in the office. And also because the firm was working in a very pressurised and competitive field and it has tight timescales, which they thought necessitated her presence in the office.

Jeya Thiruchelvam: Did the firm make any efforts to go back to Ms Smith with a compromise? [0:10:16.9]

Fiona Cuming: Well both parties suggested alternatives but they were unable to find a compromise solution.

Jeya Thiruchelvam: And how did Ms Smith respond to the rejection of her request?
[0:10:24.5]

Fiona Cuming: Well she brought claims against the firm, including one for indirect sex discrimination.

Jeya Thiruchelvam: Okay, so what happened once they got to the employment tribunal?
[0:10:32.9]

Fiona Cuming: Well the tribunal accepted that the requirement for Ms Smith to work full time amounted to a PCP, and they also agreed that the PCP (which is to work full time) places women at a particular disadvantage compared with men, because women are more likely to be sole parents than men.

However, the tribunal did not agree that the PCP placed Ms Smith, who was also a sole parent, at a particular disadvantage.

Jeya Thiruchelvam: And what were the tribunal's reasons for this? [0:11:00.3]

Fiona Cuming: It had two main reasons. Firstly, it found that Ms Smith wasn't disadvantaged because she was on quite a good salary and she had conceded that she could afford the costs of childcare, and the fact that she'd be better financially off working full time.

And secondly, the tribunal found that she'd be no more disadvantaged working full time than any other parent who worked full time and had to feed and put their children to bed every evening.

Jeya Thiruchelvam: So on that basis presumably the tribunal dismissed Ms Smith's claim?
[0:11:28.6]

Fiona Cuming: Yes it did. But before it did so, it said that even if it was wrong about the lack of disadvantage, that the employer's stance was justified because the PCP has a legitimate aim of ensuring that its partners and clients receive high-quality, efficient secretarial support throughout the week, without problematic handovers.

Jeya Thiruchelvam: That sounds like an incredibly robust judgement. [0:11:48.5]

Fiona Cuming: Yes, it was very robust. But I must emphasise again that this case and the one before it are both first-instance decisions and not binding. And also, these types of cases always depend on their own particular facts, and it remains the case that employers really should exercise extreme caution when dealing with flexible working requests, particularly from female employees returning from maternity leave, as the airline Flybe discovered recently.

Jeya Thiruchelvam: Okay. So this case has attracted quite a lot of press coverage. So can you give us just a quick rundown of what we know so far? [0:12:20.6]

Fiona Cuming: Yes. Well this case involved a member of Flybe's cabin crew. Now she put in a flexible working request during her maternity leave because she was having difficulty finding nurseries because of the unusual hours that she worked. So she asked if, when she returned, she could be on a pre-arranged rota or if she could job-share. And Flybe said no because it said a significant part of the workforce was already working fixed hours and they couldn't get any more people in

that pot, and that it would have a detrimental effect on their business if they were to do so.

So she brought a claim of indirect sex discrimination and also a claim for breach of the flexible working request legislation.

Jeya Thiruchelvam: And she presumably won? [0:12:58.9]

Fiona Cuming: Yes. She won her claim of sex discrimination because the tribunal found that the PCP that she had to work a set rota placed women at a disadvantage compared to men because cabin crew work is dominated by women mainly of childbearing age. And the tribunal went on to find that the PCP in this instance was not justified.

Jeya Thiruchelvam: And what about her claim under the flexible working regulations? [0:13:22.6]

Fiona Cuming: Well she lost that, and that's why this case really is a good reminder to employers that even if they can successfully defend a claim for breach of the flexible working legislation, they may still be exposed to a claim for sex discrimination. And as we know, there is no ceiling on the damages that can be awarded for successful discrimination claims.

Jeya Thiruchelvam: Thanks Fiona for that really useful insight into flexible working. And I suppose three key takeaways are: Firstly remember that the right is to *request* flexible working, not to be *granted* flexible working.

Secondly, as the cases that we've talked about show, although the bar for rejecting a flexible working request is fairly low and the consequences of breaching that legislation are limited, employers must be mindful that a rejection *may* expose them to a potential indirect sex discrimination claim.

And thirdly, even if an employer is found guilty of applying a discriminatory provision, criterion or practice, as you said earlier, it may be able to successfully defeat an indirect discrimination claim if it can justify that provision, criterion or practice.

Now we have a wealth of resources on flexible working in XpertHR in the form of, among other things, interactive workflow chart, a dedicated section in the Employment law manual and numerous FAQs.

Thank you again, Fiona. That brings us to the end of this week's XpertHR podcast, which you've been listening to with me, Jeya Thiruchelvam. We're back next Friday but until then, it's goodbye from us.