

Changes to flexible working in the NHS and "childcare disparity"

08 September 2021

On 13 September 2021 the previously announced changes to section 33 of the NHS Terms and Conditions of Service Handbook come into effect, giving increased rights to request flexible working to all staff covered by those terms within England and Wales. These changes go beyond the current statutory flexible working regime and are designed to give contractual force to part of the NHS People Promise: “we work flexibly”, and support the commitment to moving to flexibility by default.

The change in working practices brought about by Covid and the recent media attention on the successful indirect discrimination claim brought by a female estate agent (see Thompson v Scancrown Limited t/a Manors below) highlights the importance of considering requests carefully. Although the reason for the request in this case was childcare related (and flexible working requests can be made for any reason), it does highlight the potential costs of getting it wrong.

Current legal framework

The right to request flexible working has been around for many years but was initially a right limited to those caring for children, before being extended to those with wider care responsibilities. In June 2014, it was extended further to include all qualifying employees, regardless of their reason for seeking flexible working. Employees with at least 26 weeks' continuous employment can make a request for flexible working and employers then have three months to consider the request and notify the employee of the outcome (including dealing with any appeal). Employers must deal with the application in a reasonable manner and may only refuse a request for one of the eight reasons set out in the legislation:

- the burden of additional costs;
- a detrimental effect on the ability to meet customer demand;
- an inability to reorganise work amongst existing staff;
- an inability to recruit additional staff;
- a detrimental impact on quality;
- a detrimental impact on performance;
- insufficient work for the periods the employee proposes to work; and
- a planned structural change.

Only one request can be made under the statutory scheme within a 12-month period.

Section 33 changes

The new section 33 will give all NHS employees in England and Wales covered by section 33:

- the right to request flexible working from day one; and
- the right to make more than one request a year (regardless of the reason for the request).

Although the phrase “more than one request” is used in the section 33 wording, the Joint Statement on behalf of the NHS Staff Counsel confirms that this is intended to mean that there is “no limit” on the number of applications that can be made.

The wording places new obligations on employers to consider how they will encourage flexible working, both as part of general recruitment practices and for existing staff. Additional wording is also included as to the procedure that should be followed for dealing with flexible working requests, to ensure greater consistency. Local policies should therefore provide for:

- An exploratory stage (where requests may be agreed, but not rejected);
- An escalation stage for those requests that cannot immediately be agreed, to allow for greater consideration;
- A final stage for confirming agreed requests, or objectively justifying requests which cannot be agreed; and
- An appeal stage.

The right to request v the right to work flexibly

The changes to section 33 are limited to the right to request flexible working – they do not give a right to insist on this. However, section 33.14 does stress that employers will need to give all requests due consideration, including exploring any equality implications, with an emphasis on exploring and mutually agreeing solutions. It is clear that the intention is that any such requests are approached with an open mindset considering whether a request can be agreed' rather than 'which of the statutory scheme reasons for refusal can I rely on to reject the request?'.

Focus on 'childcare disparity' cases in the Employment Tribunal

In the recent case of Thompson v Scancrown Limited t/a Manors, the Claimant, a female employed as a sales manager by the Respondent, an estate agent, made a flexible working request on her return from maternity leave, asking to work a four rather than five-day week, and to finish at 5pm rather than 6pm to allow her to get to her child's nursery which closed at 6pm. Her request was refused, with her employer relying on five of the eight statutory reasons for refusal but without substantial explanation as to why they applied. Her flexible working appeal was also rejected.

The Claimant pursued a number of separate claims in the Employment Tribunal, relating to matters significantly wider than simply her flexible working request; these wider claims were unsuccessful. However, her claim of indirect sex discrimination in respect of the refusal to allow flexible working was upheld by the Tribunal.

The Tribunal (in a judgment dated 4 May 2021) was willing to accept that notwithstanding 'encouraging shifts' in societal attitudes, it was still the case that mothers are more likely to carry primary responsibility for children than fathers meaning that as a group women suffer a greater disadvantage. This view has more recently been reinforced by the Employment Appeal Tribunal in Dobson v North Cumbria Integrated Care NHS Foundation Trust, in which it held that the 'childcare disparity' still exists in 2021 (see our update on this case [here](#)).

Having established that the Claimant was at a disadvantage, the Tribunal went on to consider justification, and whether the reasons for refusal were proportionate to achieving a legitimate aim – here, maintaining successful relations with customers. The Tribunal concluded that they were not, and the Claimant's indirect discrimination claim was upheld.

The Tribunal's [remedy judgment](#) dated 24 August 2021, confirms that the Claimant was awarded just shy of £185,000 in respect of her indirect discrimination claim.

Points to take away

As a result of the changes to section 33 and the greater emphasis within the NHS of the desire to provide a flexible place to work, NHS organisations are likely to receive an increase in flexible working requests. Some things to consider include:

- thinking about how to promote flexible working and making sure that this is considered at the point of recruitment, as well as in departmental and one-to-one meetings with staff and appraisals etc.;
- making sure local policies are appropriate and reviewed and updated as necessary to meet the section 33 amendments and change in ethos;
- training managers, including making sure they are aware of the new rights and any changes in procedure, and that they are clear on the approach to be taken to flexible working requests and the importance of being able to justify any refusals.

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