BACKGROUND PAPER 3

Fair Work Act 2009
s.156–4 yearly review of modern awards

4 Yearly Review of modern awards–family friendly work arrangements common issue (AM2015/2)

Note: This is a background document only. It has been prepared by the Commission research area and does not represent the view of the Commission on any issue.

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1. Summary of Research Paper

[1] The purpose of this research paper is to outline:

- the statutory right to request a contract variation to enable flexible working in the United Kingdom;
- the review process for negative decisions for flexible working applications to an Employment Tribunal;
- the policy imperatives behind the right to make a claim to an Employment Tribunal in the *Employment Rights Act 1996* (UK); and
- Tribunal decisions considering the refusal.

2. Background

[2] The United Kingdom *Employment Rights Act 1996* (UK) ('Employment Rights Act') contains a right to request flexible working conditions that is similarly drafted to the right to request flexible working arrangements in the *Fair Work Act 2009* (Cth) ('Fair Work Act'). The UK legislation extends the right further than the the Fair Work Act in two respects: employees are not limited to a particular purpose in requesting flexible working conditions, and employees are able to make a claim to an Employment Tribunal concerning the refusal of their applications on certain grounds.

The review of a negative decision to an Employment Tribunal is primarily concerned with whether the employer's decision making process was 'factually correct.' This refers to whether the employer considered the relevant factors in s 80(G) of the Employment Rights Act in making the decision. The Tribunal is able to review evidence concerning the decision making process to establish whether the decision was 'factually correct.' The review is not an objective test of whether the decision was reasonable in the circumstances of the kind found in discrimination claims.

[3] The Tribunal is limited to ordering compensation or an order of reconsideration of the application.

3. Current legislative provisions

[4] The Employment Rights Act includes the right for all qualifying employees to request flexible working conditions.[1] A qualifying employee is an employee who has been continuously employed for a period of at least 26 weeks other than an agency worker or an office holder. [2] Since June 2014, all employees have been able to apply for flexible working conditions without limitation to certain categories such as employees requiring flexibility for caring purposes or due to a specified relationship.

[5] Qualifying employees may apply for a change in their terms and conditions of employment if it relates to the hours, times or where an employee is required to work, or such other aspect of terms and

[1] *Employment Rights Act 1996 (UK)* c 18, s 80F.

[2] *Employment Rights Act 1996 (UK)* c 18, s 80F(8) ; *Flexible Working Regulations 2014 (UK)* SI2014/1398, r 3.

conditions as specified by regulations.[3] Employees are only able to make one request in a 12 month period and there is no right to revert to previous hours.[4]

[6] Employees are required to make a request in writing,[5] addressing requirements in the Employment Rights Act and Regulations.[6] An employee's application must address what effect if any, the employee thinks making the change applied for would have on his employer and how, in his opinion, any such effect might be dealt with.[7]

3.1 Decisions to be made in a 'reasonable manner'

[7] An employer who receives an application for flexible working conditions shall deal with the application in a reasonable manner.[8] Employers shall only refuse an application because they consider that one or more of the following grounds applies—

> '*(i)the burden of additional costs,*
> *(ii)detrimental effect on ability to meet customer demand,*
> *(iii)inability to re-organise work among existing staff,*
> *(iv)inability to recruit additional staff,*
> *(v)detrimental impact on quality,*
> *(vi)detrimental impact on performance,*
> *(vii)insufficiency of work during the periods the employee proposes to work,*
> *(viii)planned structural changes, and*
> *(ix)such other grounds as the Secretary of State may specify by regulations.* '[9]

[8] All requests must be finalised, including appeals, within 3 months of the initial request, however, an employer and employee may agree a longer period[10].

[9] The UK Advisory, Conciliation and Arbitration Service (Acas) has published a Code of Practice on 'Handling in a reasonable manner requests to work flexibly' (Code of Practice) which is taken into

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[3] *Employment Rights Act 1996 (UK)* c 18, s 80F(2)
[4] *Employment Rights Act 1996 (UK)* c 18, s 80F(4)
[5] *Flexible Working Regulations 2014 (UK)* SI2014/1398, r 4.
[6] *Employment Rights Act 1996 (UK)* c 18, s80F(2); *Flexible Working Regulations 2014 (UK)* SI2014/1398, r 4.
[7] *Employment Rights Act 1996 (UK)* c 18, s80F(2)(c).
[8] *Employment Rights Act 1996 (UK)* c 18, s80G(1)(a).
[9] *Employment Rights Act 1996 (UK)* c 18, s80G(1)(b)(i)-(ix).
[10] *Employment Rights Act 1996 (UK)* c 18, s80G(1B)

account by Employment Tribunals.[11] The Code of Practice provides guidance and examples of consideration of grounds that would be reasonable:

> ***'Deciding on a request***
> *An employer should consider the request carefully looking at the benefits of the requested changes in working conditions for the employee and the business and weighing these against any adverse business impact of implementing the changes, employers are under no statutory obligation to grant a request to work flexibly if it cannot be accommodated by the business on the grounds listed in the following section'.*[12]

[10] By agreement, parties are also able to refer disputes to Acas for confidential arbitration. The *Right to request flexible working: an Acas Guide* notes that:

> *'There is no right to go to an employment tribunal if the parties have opted to use this scheme instead. The remedies and compensation which an arbitrator can award are the same as those at an employment tribunal.'* [13]

3.2 Review to an Employment Tribunal

[11] Employees who have their applications refused may present a complaint to an Employment Tribunal[14] or to Acas with the consent of both parties. An employee may present a complaint on the basis that:

> *'his employer has failed in relation to the application to comply with section 80G(1)*
> *(a) that a decision by his employer to reject the application was based on incorrect facts, or*
> (b) *that the employer's notification under section 80G(1D) was given in circumstances that did not satisfy one of the requirements in section 80G(1D)(a) and (b).'*[15]

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[11] Acas, *The right to request flexible working: an Acas guide (including guidance on handling requests in a reasonable manner to work flexibly)*

[12] Acas, *The right to request flexible working: an Acas guide (including guidance on handling requests in a reasonable manner to work flexibly)* ,p 6.

[13] Acas, *The right to request flexible working: an Acas guide (including guidance on handling requests in a reasonable manner to work flexibly)* ,p 17.

[14] *Employment Rights Act 1996 (UK)* c 18, s80H(1).

[15] *Employment Rights Act 1996 (UK)* c 18, s80H(1)(a)-(c).

[12] The reference to failure to comply with s80G(1) refers to the requirements to deal with the application in a reasonable manner, notification within the proscribed decision period and only refusing the application because the employer considers that one or more of the specified grounds applies.

[13] Employees must make an application within 3 months[16] from the first date on which the employee may make a complaint[17] or within such further period as the Tribunal considers reasonable.[18]

3.3 Penalties

[14] If an Employment Tribunal finds that a complaint under section 80H is well-founded it shall make a declaration to that effect and may—

(a)make an order for reconsideration of the application, and

(b)make an award of compensation to be paid by the employer to the employee.[19]

[15] The maximum amount of compensation that an Employment Tribunal can order is 8 weeks' pay of the employee.[20] A weeks pay is subject to a statutory maximum set annually by regulations.[21] The most recently prescribed limits are 489 pounds per week.[22]

4. Policy background of the right of appeal to a Tribunal

[16] Employees have had the ability to present a complaint to an Employment Tribunal since the right to request was introduced in the *Employment Act 2002* (UK). The right of appeal to an Employment Tribunal was initially recommended in a Government appointed Work and Parents Taskforce considering the introduction of right to request flexible working conditions.

[17] The Taskforce noted that there were 'clearly strongly held views on this issue. It gave us more difficulty than any other'[23] and that attendance at the Tribunal should not be viewed as 'the first port of call.'[24] The Taskforce considered how far the business reasons of a decision should be tested :[25]

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[16] *Employment Rights Act 1996 (UK)* c 18, s80H(5)(a).

[17] *Employment Rights Act 1996 (UK)* c 18, s80(H)(6).

[18] *Employment Rights Act 1996 (UK)* c 18, s80(H)(5)(b)

[19] *Employment Rights Act 1996 (UK)* c 18, s 80I(1).

[20] *Flexible Working Regulations 2014 (UK)* SI2014/1398, r 6. The Explanatory Note to the Regulations outlines the basis for calculating a weeks' pay and the maximum limit.

[21] *Employment Rights Act 1996 (UK)* c 18, s 227; *The Employment Rights (Increase of Limits) Order 2017 (UK),* SI 2017/175

[22] *The Employment Rights (Increase of Limits) Order 2017 (UK) SI 2017/175)*

[23] *Work and Parents Taskforce, Report to UK Government*, 20 November 2001, para 4.19

'…we have developed a test that will require employers to demonstrate that they have established a business case and held the appropriate meetings but that will not open employers' reasoning or conclusions to examination by a tribunal. We believe that employers should have to demonstrate that they have a business case to the tribunal. If the letters to parents have been sufficiently full and candid, this should be enough.[26]

The employment tribunal will not be able to ask an employer to provide additional explanation over and above the level defined, but they will be able to verify any disputed facts. They will not have the power to question the employer's actual reasons for declining a request... For example, if a parent who has responsibility for opening a small shop asks to start work at 9:30am it would not be sufficient for the employer to say, without explanation, that this would mean that the store could not open at its usual time. They would need to explain why. For example, the employer might explain in the letter that for security reasons staff who are key holders must have worked for the company for more than a year… Parents would have the power to raise matters of fact not of judgements; for example, they might dispute… that the policy is that they have to work for that length of time to be key holders… The employment tribunal will look to satisfy itself on these points of fact...'[27]

[18] The Taskforce recommended:

'Recommendation 8

…Where cases go to employment tribunals, they should test whether the procedure has been properly carried out; whether the business case has been explained to the parent; and whether, if the parent has challenged any facts, these are true. They should send cases back to the employer to be reconsidered if they find procedural or factual defects, giving if they wish directions as to what needs to be remedied. Where a case is sent back, tribunals will be able to award compensation to the parent making the request.

Where parents link their cases under the duty to consider to other areas of legislation, such as sex discrimination and unfair dismissal, tribunals will apply other tests…'[28]

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[24] *Work and Parents Taskforce, Report to UK Government*, 20 November 2001, para 4.15

[25] *Work and Parents Taskforce, Report to UK Government*, 20 November 2001, para 4.18

[26] *Work and Parents Taskforce, Report to UK Government*, 20 November 2001, para 4.20

[27] *Work and Parents Taskforce, Report to UK Government*, 20 November 2001, para 4.21

[28] *Work and Parents Taskforce, Report to UK Government*, 20 November 2001, para 8, page xiv.

5. Examples of Employment Tribunal decisions

[19] The following cases indicate the Tribunal's approach in determining what constitutes incorrect facts.

Commotion Ltd. v. Rutty [2006] ICR 290[29]

[20] The leading example of the Tribunal's consideration of a complaint is *Commotion Ltd. v. Rutty* [2006] ICR 290.[30] By originating application, an employee (Mrs Rutty) claimed that she had been the subject of an unreasonable rejection of her application for flexible working by her employer Commotion Ltd (Commotion).[31]

[21] Mrs Rutty worked at a warehouse packing goods and had primary caring responsibilities for her granddaughter. She made a formal application under the Employment Rights Act to work 3 days a week. Commotion rejected her claim and gave the following reasons for refusal:

> *'The packing is a fundamental requirement of a mail order company, with you being unable to work on Thursdays and Fridays, starting late and finishing early on the other three days, there will be a detrimental impact on performance in the warehouse.*
>
> …
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> *Since my appointment as Warehouse Manager [said Mr Brown who wrote the letter] we have plans to change the structure of working hours in the warehouse. We feel it is very important for staff working there to start work at the same time and finish at the same time. There is nothing we can do about existing staff if they are employed on a part-time basis. You are employed as a full-time member of staff, and if you choose to remain as a full-time employee, we would be pleased to carry on as before.'*[32]

[22] At first instance, the Employment Tribunal found that her application had been unreasonably rejected. The Tribunal concluded:

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[29] Note paragraph references in this paper refer to the unauthorised report available at *Commotion Ltd. v. Rutty* [2005] UKEAT/0418/05/ZT (13 October 2005) publicly accessible online at http://employmentappeals.decisions.tribunals.gov.uk/Public/results.aspx

[30] Commotion Ltd. v. Rutty [2005] UKEAT/0418/05/ZT (13 October 2005)

[31] At this point, the legislative requirements concerning the process and consideration of requests was different, see *The Flexible Working (Procedural Requirements) Regulations 2002 (UK)*, SI 2002/3207

[32] *Commotion Ltd. v. Rutty* [2005] UKEAT/0418/05/ZT (13 October 2005) at [6]

‘So far as breach of the Flexible Working Regulations are concerned, the Tribunal are not satisfied that the Respondents complied with requirements under section 80G of the 1996 Act. Whilst they have 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. The Tribunal's experience is, and no evidence has been brought before us in this case to show that working as a part-time warehouse assistant is not feasible, that with thought the workforce and the work required to be done can be organised so that there is no diminution in the service to customers, that the whole workforce can be organised to cope with that work with some people who have other commitments working on a part-time basis and others full-time. There has not been a shred of evidence that proper enquiry and proper investigation was carried out by the Respondents when dealing with this request. It must follow that our findings in this respect also go on to the question of justification in the indirect discrimination claim’.[33]

[23] Commotion appealed on the basis of the Tribunal's conclusion that it had failed to properly respond to Mrs Rutty's request. On appeal, the Employment Appeal Tribunal outlined its approach in investigating the factual basis of a decision to determine whether it was based on incorrect facts:

‘The Tribunal is entitled to investigate the evidence to see whether the decision was based on incorrect facts. There is, we would suggest, a sliding scale of the considerations which a Tribunal may be permitted to enter into in looking at such a refusal. The one end is the possibility that all that the employer has to do is to state his ground and there can be no investigation of the correctness or accuracy or truthfulness of that ground. At the other end is perhaps a full enquiry looking to see whether the employer has acted fairly, reasonably, and sensibly in putting forward that ground. Neither extreme is the position, in our judgment, which applies in the relevant statutory situation… ’[34]

[24] In relation to the establishing whether a matter is ‘factually correct,’ the Employment Appeal Tribunal gave the following guidance:

In order for the Tribunal to establish whether or not the decision by the employer to reject the application was based on incorrect facts, the Tribunal must examine the evidence as to the circumstances surrounding the situation to which the application gave rise. In doing so, the

[33] *Commotion Ltd. v. Rutty* [2005] UKEAT/0418/05/ZT (13 October 2005) at [22]

[34] Commotion Ltd. v. Rutty [2005] UKEAT/0418/05/ZT (13 October 2005) at [37]

Tribunal are entitled to enquire into what would have been the effect of granting the application. Could it have been coped with without disruption? What did other staff feel about it?'[35]

[25] The following two decisions indicate where a Tribunal will be satisfied that an employer has not made a decision based on 'incorrect facts.'

Littlejohn v Transport for London [2007] ET 2200224/07 (13 July 2007)

[26] This case concerned an employee's claim that the refusal was based on mistaken fact. The employee requested flexible working conditions to work part-time in order to return from maternity leave. The employer rejected the request on the following basis:

'*We believe that your reduced availability would have a detrimental impact on business performance. Direct reports within your school liaison officer and voluntary school liaison officer team would be unable to access sufficient management support in the time available and staff would be unable to receive the continuity of management throughout the week. There will also be an inability to reorganise the remaining workload amongst existing staff, consequently certain accountabilities that require direct staff presence such as CRB disclosures, stakeholder liaison, on site risk assessments would not be picked up leading to a detrimental impact on quality.'*[36]

[27] The Tribunal concluded that:

'…there was no mistake of fact; the Respondents simply took a different view of the requirements of the job to the Claimant but there was no mistake as to the nature of the job or the nature of the request. As the Respondent complied with the statutory procedure and the decision is not based on incorrect facts the Claimant's claim under section 80H must fail'[37].

[28] It should be noted that while the claim of incorrect facts failed, the employee was successful in her other claims of sex discrimination and constructive unfair dismissal. This case highlights the limited review of flexible working conditions to the process of consideration in comparison to the objective test of reasonableness in discrimination.

[29] In relation to discrimination claim, the Tribunal considered whether the requirement to work full-time was proportionate and reasonable. The Tribunal noted that

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[35] *Commotion Ltd. v. Rutty* [2005] UKEAT/0418/05/ZT (13 October 2005) at [38]

[36] *Littlejohn v Transport for London* [2007] ET 2200224/07 (13 July 2007) at [14]

[37] *Littlejohn v Transport for London* [2007] ET 2200224/07 (13 July 2007) at [26]

The principle of proportionality requires us to take into account the reasonable needs of the business but make our judgment based on a fair analysis of the working practices and business considerations as to whether the proposal is reasonably necessary. We do consider that more could have been done by Transport for London to consider job share or part-time working; we do not accept that the management function was incapable of being split or being performed by two individuals.[38]

Singh v Pennine Care NHS Foundation Trust [2016] UKEAT/0027/16/DA (6 December 2016)

[30] In this case, the applicant was a Nursing Assistant who requested to work day shifts to assist in fulfilling her caring responsibilities. Her request was refused on the basis of the burden of additional costs, detrimental effect on employer ability to provide service, detrimental impact on the quality of service and inability to reorganise work amongst existing staff. At first instance, the Tribunal rejected Miss Singh's claim.

[31] On appeal, the claim was dismissed. The Appeal Tribunal noted 'it was not for the Employment Tribunal to agree or disagree with whether that was fair or not, only with whether it was in any way based on 'incorrect facts'.[39]

'*The Claimant did and does, however, understand that an employer is not bound in law to accept a request for flexible working. What the employer must do, among other things, is base any refusal of such a request on correct facts….* '[40]

[38] *Littlejohn v Transport for London* [2007] ET 2200224/07 (13 July 2007) at [29]

[39] *Singh v Pennine Care NHS Foundation Trust* [2016] UKEAT/0027/16/DA (6 December 2016) at [9]

[40] *Singh v Pennine Care NHS Foundation Trust* [2016] UKEAT/0027/16/DA (6 December 2016 at [20]