

FLEXIBLE WORKING

Mishcon de Reya

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PEOPLE
IN
LAW

1. Pressures on employers when dealing with workforce post pandemic
2. Statutory requests
3. Penalties for getting it wrong & potential avenues for litigation
4. Particular challenges when considering requests for flexible working
5. Drafting an effective policy

I. PRESSURES ON EMPLOYERS

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THE GREAT RETURN – OR THE GREAT RESIGNATION?

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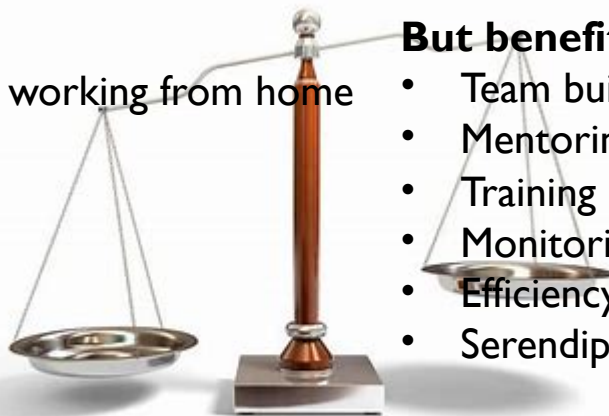
WHAT WILL THE NEW NORMAL LOOK LIKE?

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40% of employers say that more than 50% of workforce will be continuing to work from home on a hybrid or permanent basis for the near to medium term

Benefits include:

Productivity may be improved if working from home
Better for the environment
Less office overheads
Better work/life balance
Better for carers (i.e. women)
Improves retention and morale
Promotes diversity & inclusivity



But benefits of being in the office include:

- Team building
- Mentoring
- Training
- Monitoring mental health and wellbeing
- Efficiency
- Serendipity

“Can I require my staff to return to the office?”

- Yes, but consult and listen to concerns
 - Remember the ‘six steps’?
 - Watch for vulnerable groups
 - Consider how lives have changed –
 - More childcare responsibilities?
 - Relocation outside the cities?

1. Complete a health and safety risk assessment
2. Ventilate everything as much as possible
3. Keep things clean
4. Turn away those with symptoms or who should be self isolating
5. Enable people to check in on the NHS app (even though they don't have to)
6. Communicate what your safety procedures are and give training

- Consider if insisting on a full return may affect staff retention and make the business less competitive
- Check contract
 - Did you amend it during lockdown to change place of work?
 - Did it change through custom and practice?

“Can I cut pay for people who are only coming in occasionally?”

- May be part of the discussion about agreeing to a change to the contract
- Why pay London weighting if no longer working in London?
- Consider gender pay gap issues
- Consider equal pay issues



“What if people refuse to return”

- Discuss flexible working arrangements
 - Reduce hours
 - Change hours
 - Change location
- Consider dismissing



2. THE STATUTORY FRAMEWORK

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FLEXIBLE WORKING REQUESTS

STATUTORY FRAMEWORK

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- Currently, employees with 26 weeks' service may apply up to once every 12 months (but Government consulting about extending this to default, day one right, per Employment Bill)
- Application must (in addition to some technical requirements) set out what they are asking for, explain how it may impact the business, and suggest ways of mitigating the impact
- Employer must promptly consider the request, meet to discuss it (and allow a companion to attend), give decision in writing, and give right to appeal
- Permitted reasons for rejection:
 - the burden of additional costs
 - an inability to reorganise work amongst existing staff
 - an inability to recruit additional staff
 - a detrimental impact on quality
 - a detrimental impact on performance
 - a detrimental effect on ability to meet customer demand
 - insufficient work for the periods the employee proposes to work
 - a planned structural change to your business

FLEXIBLE WORKING REQUESTS STATUTORY FRAMEWORK

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The screenshot shows the Acas website interface. At the top left is the Acas logo with the tagline 'working for everyone'. To the right is a search bar labeled 'Search website'. Below the logo is a navigation menu with tabs for 'Advice', 'Dispute resolution', 'Training', 'Research and commentary', and 'About us'. Underneath this is a secondary menu with categories: 'Contracts, hours and pay', 'Holiday, sickness and leave', 'Health and wellbeing', and 'Dealing with problems at work'. The breadcrumb trail reads 'Home > Advice > Contracts, hours and pay'. The main heading is 'Flexible working'. There are five content boxes arranged in two rows. The first row contains three boxes: 'Working from home and hybrid working', 'Making a flexible working request', and 'Responding to a flexible working request'. The second row contains two boxes: 'Flexible working policy template' and 'Acas Code of Practice on flexible working requests'. Each box has a title and a brief description of the content.

acas working for everyone

Search website

Advice Dispute resolution Training Research and commentary About us

Contracts, hours and pay Holiday, sickness and leave Health and wellbeing Dealing with problems at work

Home > Advice > Contracts, hours and pay

Flexible working

[Working from home and hybrid working](#)
Advice on introducing, requesting and managing working from home and hybrid working.

[Making a flexible working request](#)
How to make a flexible working request. For employees.

[Responding to a flexible working request](#)
How to respond to your employee's flexible working request, while following the law. For employers and managers.

[Flexible working policy template](#)
Example policy including how flexible working requests are handled.

[Acas Code of Practice on flexible working requests](#)
The minimum standard of fairness that workplaces should follow.

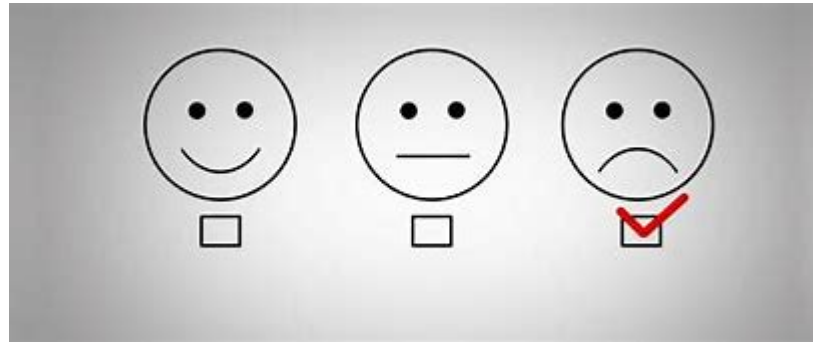
Challenges may include:

“It worked fine when we were locked down. Why can’t I continue?”

- Point to specific reasons (see earlier slide)
- Explain why important

“Lots of other people have been granted it. Why can’t I have it?”

- You can take into account existing state of workforce at the time the request is made



3. PENALTIES AND AVENUES OF LITIGATION

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Failure to comply with statutory request: order for reconsideration, or 8 weeks' pay
(with statutory cap)

Protection from detriment (victimisation) for making a request

Direct discrimination

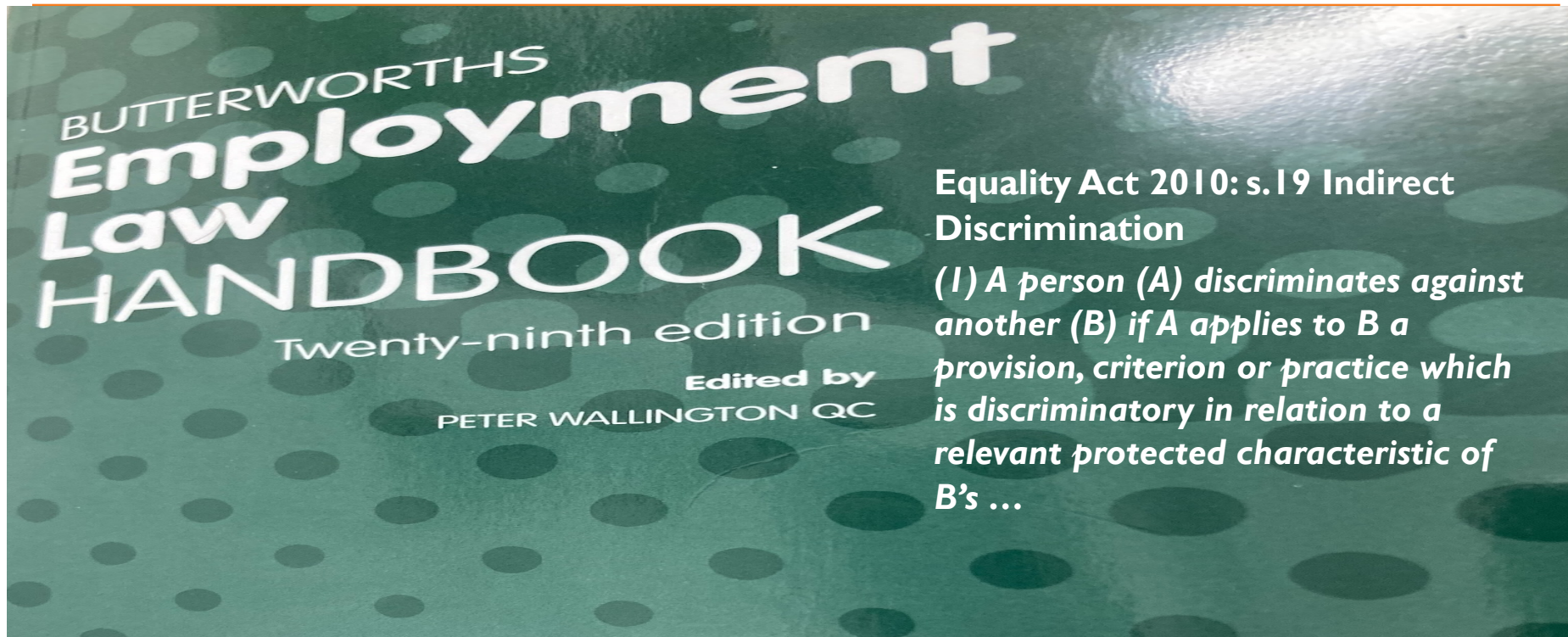
Walkingshaw v John Martin Group – man refused flexible work where a woman would have been granted it

Indirect discrimination

London Underground v Edwards (No 2) - women more likely than men to be single parents with caring responsibilities “Childcare disparity”

Constructive dismissal

Following statutory process may give some protection



Equality Act 2010: s.19 Indirect
Discrimination

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's ...

But...

CHEZ Razpredelenie Bulgaria (Case C-83/14)

Directive 2000/43 (Article 1): Purpose of the Directive is to lay down a framework for combating 'discrimination on the grounds of racial or ethnic origin'

Article 2(1): there is to be no 'direct or indirect discrimination based on racial or ethnic origin'

Claimant was "suffering alongside"

Opened the door to claims of direct and, potentially, indirect discrimination being brought under the same principle

Photo credit: Comfr

ASSOCIATIVE INDIRECT DISCRIMINATION FOLLOWS V NATIONWIDE BUILDING SOCIETY

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Cared for disabled mother

Worked from home

Redundancies in team

PCP was that managers needed to be in the office

- Greater need to supervise team and be available to answer ad hoc questions
- Junior team members had raised lack of supervision as a problem in coffee meetings

Redundancy reason disappeared during the process – enough people voluntarily left



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ASSOCIATIVE INDIRECT DISCRIMINATION FOLLOWS *V* NATIONWIDE BUILDING SOCIETY

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Brought claims of:

- Unfair dismissal
- Direct discrimination (disability)
- Indirect discrimination (disability)
- Indirect discrimination (sex and age)



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ASSOCIATIVE INDIRECT DISCRIMINATION FOLLOWS V NATIONWIDE BUILDING SOCIETY

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Indirect discrimination (disability):

Claimant was not disabled

But:

“...the Directive is intended to benefit those who are associated with a protected class who suffer “less favourable treatment or a particular disadvantage on one of those grounds”

so the Equality Act must be read in a manner consistent with CHEZ – and therefore it applied to associated persons.

ASSOCIATIVE INDIRECT DISCRIMINATION FOLLOWS *V* NATIONWIDE BUILDING SOCIETY

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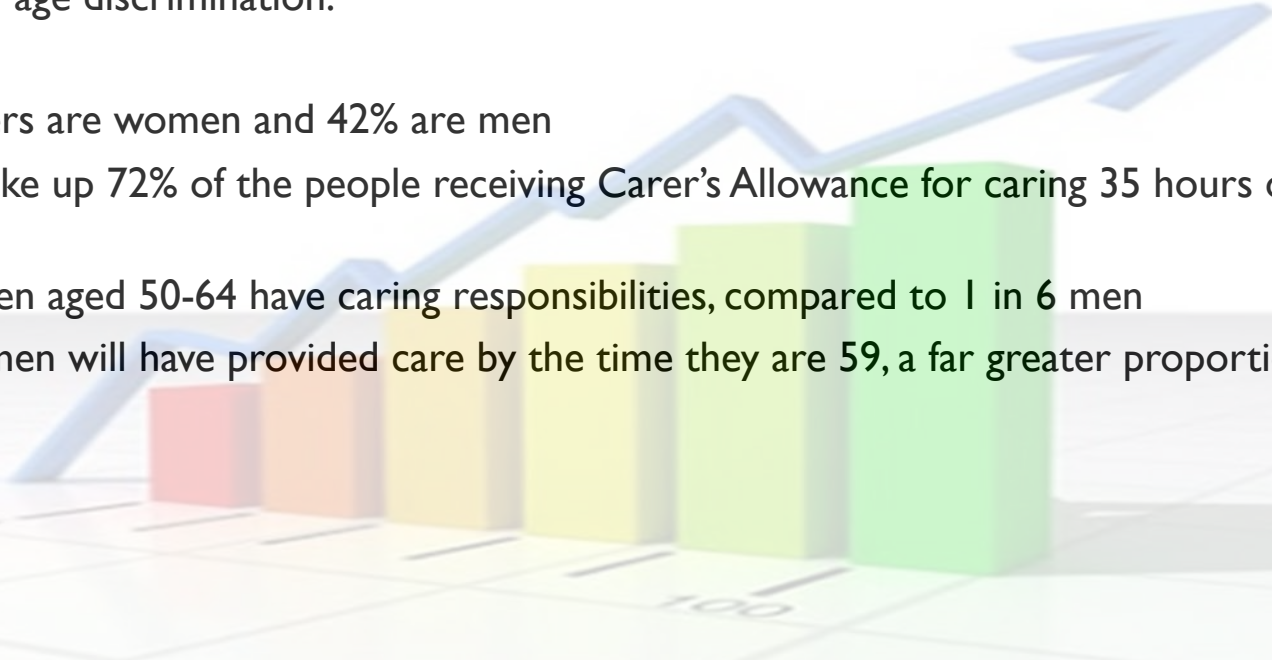
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Indirect sex and age discrimination:

- 58% of carers are women and 42% are men
 - Women make up 72% of the people receiving Carer's Allowance for caring 35 hours or more a week
 - 1 in 4 women aged 50-64 have caring responsibilities, compared to 1 in 6 men
 - 50% of women will have provided care by the time they are 59, a far greater proportion than that of men
- 

ASSOCIATIVE INDIRECT DISCRIMINATION FOLLOWS V NATIONWIDE BUILDING SOCIETY

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Points to note:

- ✓ First instance decision, so not binding
- ✓ Important for employees returning post pandemic
- ✓ Post Brexit scepticism in the Tribunal for future cases?
- ✓ Reasonable adjustments have been held not to be caught by the 'associated person' extension (see Court of Appeal in *Hainsworth v MoD*) – wording in Article 5 of the Directive much narrower

4. PARTICULAR CHALLENGES

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Mental health
Working abroad



WORKING FROM HOME: MENTAL HEALTH THINGS TO CONSIDER

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Manage the risks of stress from working at home

- Be open with them about the possibility of them becoming stressed or mentally unwell
- Involve them in completing risk assessments to identify potential problems and solutions
- Keep them updated on what is happening so they feel involved and reassured
- Have regular keep-in-touch meetings or calls so they can share any concerns
- Ensure they aren't excluded from office life
- Make home workers aware of any occupational support available to them
- Take account the needs of the individual – if someone is a home worker for medical reasons you may need to meet their needs differently
- You may need to review how the work is done to reduce any potential causes of stress. Talk to your workers to find out if they are facing any issues
- Encourage home workers to take regular breaks and use their annual leave

REQUESTS TO WORK ABROAD

THINGS TO CONSIDER

Legal obstacles:

- Tax issues:
 - Do local income tax/social security obligations arise?
 - Does employer have withholding/reporting obligations?
 - Risk of corporate tax residence / permanent establishment?
- Immigration status of individual
- Whose law is it anyway: keep UK employment rights, or acquire local ones (or a mixture)?
- Employer obligations re regulatory registration?
- Local health & safety obligations?
- Data Protection issues (particularly if working outside EEA)?

REQUESTS TO WORK ABROAD

THINGS TO CONSIDER

Practical obstacles:

- Expat or local treatment (eg. salary, pension, medical cover)?
- Time zones
- Supervision
- Client contact
- When does 'working abroad' become a problem – after a fortnight in August?

5. DRAFTING A POLICY

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DRAFTING A POLICY

THINGS TO CONSIDER

Who is covered? Those on probationary periods?

Three categories:

- homeworkers (always work from home / remotely)
- those with flexible working arrangements (formal agreement reached)
- hybrid workers (occasionally work from home, normally in the office)

Is the role suitable for homeworking?

- How much can be done from home?
- Will client service be compromised, or will colleagues be inconvenienced?
- Will security be compromised?
- Is the home environment suitable (flatmates / children / other)

DRAFTING A POLICY

THINGS TO CONSIDER

Reasons not to allow flexible working:

- Poor performance
- Misconduct

Degree of permission required?

- Once only?
- Beginning of the week / month?
- Each day?

Keep days the same or vary them (certainty vs fairness for others to take certain days)?

Days when attendance required:

- Attending training
- Attending client events
- Crunch points for team

DRAFTING A POLICY

THINGS TO CONSIDER

Equipment and workstation:

- Who supplies?
- Access for employer to inspect for H&S and security, and to collect equipment
- Insurance required?

Health and safety issues – see HSE guidance

Confidentiality issues

Method of terminating arrangement: notice required?

Trial period

Require an acknowledgement form

HEALTH AND WELLBEING

- Staff retention a priority - skills shortage may make recruitment harder
- Staff will be nervous about returning / reluctant to return for personal reasons
- Consultation is key
 - Town hall meetings re plans for return
 - One to ones with line managers re particular concerns
- Watch for conflict, particularly if some have been furloughed and others at full capacity
- Consider bereavement counselling for those affected; have a policy on bereavement leave
- Manage holidays – many will have a surfeit

THANK YOU

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