



---

## NUT GUIDANCE ON THE RIGHT TO REQUEST FLEXIBLE WORKING

---

The NUT response to the DTI consultation on the right to request flexible working urged the Government to legislate for a statutory right to work flexibly or to work reduced hours. However, the legislation provides only for a right to 'request' flexible working and does not give employees the right to work flexibly.

Teachers who apply for flexible working will still be able to rely on their superior rights under the Sex Discrimination Act. If a teacher is refused flexible working, they may have been indirectly discriminated against on the grounds of their sex. In such a case, a dual claim could be made under the SDA and the Flexible Working Regulations.

### ***What is flexible working?***

From 6 April 2003, eligible employees (see below) are entitled to apply to their employer for a variation in the terms and conditions of their employment for the purpose of enabling the employee to care for a child.

The change must relate to:

- the hours the employee is required to work;
- the times when the employee is required to work;
- whether the employee can work at home for all or part of the week.

### ***Who is entitled to request flexible working?***

To be eligible to make such a request under the Regulations, the purpose of flexible working must be to enable the employee to care for a child and the employee must satisfy **three** conditions.

- They must have or expect to have responsibility for the upbringing of the child.
- They must be the mother, father, adopter, guardian or foster parent of the child (who is being cared for) or be married to or be the partner of (i.e. in an enduring family relationship with) the child's mother, father, adopter, guardian or foster parent.
- They must have been continuously employed by their current employer for a period of not less than 26 weeks.

The regulations explicitly exclude agency workers from the right to request flexible working.

### ***To whom should a request for flexible working be made?***

The Regulations state that the request should be made to the employer.

The NUT recommends that teachers and lecturers should apply to their headteacher or principal and copy their application to the LEA if they are in a Community or Voluntary Controlled school or to apply to the Chair of Governors if they work in a Foundation or Voluntary Aided school.

### ***When can a request for flexible working be made?***

An employee may apply for flexible working at any time before the 14<sup>th</sup> day before their youngest child's 6<sup>th</sup> birthday or if the youngest child is disabled, the 14<sup>th</sup> day before the child reaches 18.

A prospective parent or adoptive parent may choose to make an application for flexible working before commencing maternity, paternity or adoption leave.

### ***How often can an employee make a request for flexible working?***

The regulations state that an employee can only make a formal request under the regulations to the same employer every 12 months, starting from the date of the first application. For this reason, members should be advised to make informal requests for flexible working which can be made more frequently.

Local agreements could provide for more frequent formal requests.

### ***How should a request for flexible working be made?***

The Regulations state that the request must:

- be in writing (letter, email or fax);
- be dated;
- state that the application is being made under the statutory right to request flexible working;
- state whether a previous application for flexible working has been made by the employee to the employer and if so when;
- give details of the employee's relationship with the child;
- give details of the variation applied for;
- specify the date on which change should become effective; and
- explain what effect, if any, the employee thinks making the change applied for would have on the employer and how the employee thinks such effect might be dealt with.

Unless the contrary is proved, the application for flexible working is taken as having been made on the day it is received.

### ***How long does the employer have to consider the request?***

The Regulations state that, within 28 days<sup>1</sup> after the date of the application, the employer must:

- if the employer agrees to the application, notify the employee in writing of the decision; or
- if the employer does not agree to, or wishes to discuss, the application, hold a meeting<sup>2</sup> with the employee to discuss the request.

It is likely that the employer, even if minded to grant the request, will wish to hold a meeting to discuss the request to ensure that both parties are clear about the proposed changes and the effect of the changes on the employer and the employee.

If the person who would usually consider an application for flexible working is absent on annual leave or sick leave on the day that the application is made, the period during which the employer must respond commences on the day the individual returns to work or 28 days after the application is made, whichever is earlier.

Where the employer holds a meeting to discuss the request, the employer must inform the employee in writing of the decision within 14 days<sup>3</sup> after the date of the meeting.

### ***Does an employee have the right to be accompanied at the meetings?***

The Regulations provide that an employee may request to be accompanied at the initial meeting or the appeal meeting by his or her choice of a worker who must be employed by the same employer as the employee. LEAs should be encouraged to agree to NUT representatives to accompany members whether or not they are employed by the same employer.

The companion may address the meeting and confer with the employee but may not answer questions on behalf of the employee.

If the companion is not available at the time of the proposed meeting, the employee may propose an alternative time within 7 days after the day proposed by the employer which must be convenient for the employer, employee and companion.

---

<sup>1</sup> See paragraph below, *'What if the employer or employee needs more time?'*

<sup>2</sup> See paragraph below, *'Does the employee have the right to be accompanied at the meetings?'*

<sup>3</sup> See paragraph below, *'What if the employer or employee needs more time?'*

The employer is obliged to permit a companion worker time off during working hours to accompany an employee at the meeting.

If the employer fails or threatens to fail to allow a companion to attend a meeting or to change the date of a meeting to accommodate a companion, the employee may complain to an Employment Tribunal.

***What happens if the employer agrees to the request?***

If the employer agrees to the request, the employer must notify the employee within 14 days of the meeting. The notice of the decision must be in writing, it must be dated and it must specify the contract variation agreed to and the date from which the variation is to take effect.

The variation will then begin from the date specified in the notice. The employee is not entitled under the regulations to make a further request to the same employer for a period of 12 months from the date of the application.

Local agreements may provide for requests to be made more frequently.

***What happens if the employer refuses the request?***

The Regulations provide that an application for flexible working cannot be refused unless there is a clear business reason which falls under one of the specific grounds of Section 80(G) 1 of the Employment Rights Act 1996.

If, following the meeting to discuss the application, the employer decides to refuse the request, the employer must notify the employee of the decision within 14 days<sup>4</sup> of the meeting.

The refusal notice must:

- be in writing;
- be dated;
- state which of the grounds (the clear business reasons) under section 80(G) 1 of the Employment Rights Act 1996 the employer considers applies;
- set out the appeal procedure.

The grounds under section 80(G) 1 of the Employment Rights Act 1996 are:

- burden of additional costs;
- detrimental effect on ability to meet customer demand;
- inability to reorganise work among existing staff;
- inability to recruit additional staff;
- detrimental impact on quality;

---

<sup>4</sup> See paragraph below, *'What if the employer or employee needs more time?'*

- detrimental impact on performance;
- insufficiency of work during the periods the employee proposes to work;
- planned structural changes.

The employer must specify one or more grounds for refusing the request and the notice must contain a sufficient explanation as to why the ground(s) apply in relation to the application. The DTI guidance for employers and employees (PL 520) on the Right to Request Flexible Working states that the employers explanation 'should include key facts about why the business ground applies. These should be accurate and clearly relevant to the business ground'.

### ***Is there a right of appeal against a refusal?***

The Regulations provide that an employee is entitled to appeal against his or her employer's decision to refuse an application for flexible working by giving notice within 14 days<sup>5</sup> after the date on which notice of the decision is given.

The notice of appeal must:

- be in writing;
- be dated; and
- must set out the grounds of appeal.

### ***What happens if the employer agrees to the request on appeal?***

If the employer upholds the appeal, the employer must - within 14 days<sup>6</sup> after the date on which notice of the appeal was received - notify the employee of the decision. The notice must be in writing, it must be dated and it must specify the contract variation agreed to and the date which the contract variation is to take effect.

The variation will then begin from the date specified in the notice. The employee is not entitled under the regulations to make a further request for a period of 12 months from the date of the application.

### ***What happens if the employer still wishes to refuse to the request?***

If the employer does not agree to the request after having considered the employee's grounds of appeal, the employer must hold an appeal meeting<sup>7</sup> with the employee to discuss the appeal, at a mutually convenient time and place, within 14 days<sup>8</sup> after receiving the employee's notice of appeal.

---

<sup>5</sup> See paragraph below, 'What if the employer or employee needs more time?'

<sup>6</sup> See paragraph below, 'What if the employer or employee needs more time?'

<sup>7</sup> See paragraph below, 'Does the employee have the right to be accompanied at the meetings?'

<sup>8</sup> See paragraph below, 'What if the employer or employee needs more time?'

Where a meeting is held to discuss the appeal, the employer must notify the employee of the decision within 14 days<sup>9</sup> after the date of the meeting.

The employer's notice must:

- be in writing;
- be dated; and
- where the appeal is upheld, specify the contract variation agreed to and state the date from which the variation is to take effect; or
- where the appeal is dismissed, state the grounds of refusal and contain sufficient explanation as to why those grounds apply.

### ***What if the employer or employee needs more time?***

The Regulations state that an employer and employee may agree to an extension of any of the periods in relation to the meetings, appeal meetings, notices of decisions and notices of appeal under the Flexible Working (Procedural Requirements) Regulations 2002.

For an extension of time to be effective, the employer must record the agreement in writing. The record must:

- be dated;
- specify the period the extension relates to;
- specify the date on which extension is to end;
- be copied to the employee.

### ***What if the employee does not comply with the procedure?***

As stated above, an employee or employer may agree to an extension of any of the periods in relation to the meetings, appeal meetings, notices of decisions and notices of appeal under the Regulations. If an employee feels that they do not have enough time to gather information or to prepare for a meeting they should request that the employer extends the deadline.

The Regulations state that the employer can treat an application for flexible working as withdrawn under specific circumstances:

- if the employee has notified the employer in writing or orally that he or she is withdrawing the application;
- if the employee has without reasonable cause not attended a meeting; or
- if the employee has without reasonable cause refused to provide the employer with information the employer requires in order to assess whether the contract variation should be agreed to.

---

<sup>9</sup> See paragraph below, *'What if the employer or employee needs more time?'*

The employer must confirm in writing to the employee, the withdrawal of an application for flexible working to the employee unless the employee's notice of withdrawal was in writing.

***Is there any other employment protection for someone who wishes to make a request for flexible working?***

Employees have the right not to be subjected to a detriment or to a dismissal for exercising the right to apply for flexible working or for being granted flexible working or for threatening to make a complaint to an Employment Tribunal under the Regulations. A dismissal for one of these reasons would be automatically unfair.

Employees have the right not to be subjected to a detriment for exercising the right to be accompanied or for accompanying a colleague and having paid time off for doing so. If an employee or their companion is dismissed for exercising or seeking to exercise right to be accompanied or the right to accompany, the dismissal will be automatically unfair.

***If the request for flexible working is granted, how long does the variation last?***

Unless otherwise agreed by the employee and the employer, a variation in the terms and conditions of employment for the purpose of enabling the employee to care for a child will be permanent.

It is therefore important that teachers who wish for their variation to be temporary, for example until their child starts primary school, to state clearly in their request and in the subsequent agreement that the variation is to be temporary and the length of time that it is to be effective.

***If the appeal is dismissed, can the matter be taken any further?***

An employee who has applied for flexible working may present a complaint to an Employment Tribunal on the basis that:

- the employer failed to hold a meeting or appeal meeting in accordance with the regulations; or
- the employer failed to give notice of a decision or appeal decision within the time limit; or
- the employer's decision to reject the application was based on incorrect facts.

unless the application has not been disposed of by agreement or withdrawn<sup>10</sup>.

---

<sup>10</sup> See paragraph above, 'What if the employee does not comply with the procedure?'

### ***When should an application to an Employment Tribunal be made?***

The Regulations state that if an application has not been disposed of by agreement or withdrawn an employee cannot make an application to an Employment Tribunal unless and until the employer has notified the employee of the decision to dismiss the appeal or has committed a breach of the statutory procedure.

Any complaint to an Employment Tribunal on the above grounds must be made within three months of the employee being notified of the refusal of the appeal or within three months of the breach of the statutory procedure.

### ***Can Employment Tribunal proceedings be started for any other reason?***

An employee may also make an application to an Employment Tribunal if, as a result of their application for flexible working or the grant of flexible working, they are subjected to a detriment or they are dismissed. Such a dismissal would be automatically unfair.

Both employees and companions may complain to an Employment Tribunal if they have been subjected to a detriment or dismissed for seeking to exercise the right to be accompanied or to accompany with paid time off.

### ***What can an Employment Tribunal do?***

The Tribunal can order the employer to reconsider an application for flexible working and can award compensation to the employee.

The maximum compensation the Tribunal may award for breach of procedure for requesting flexible working is eight weeks' pay.

If the Tribunal finds that the employer has breached the regulations relating to the right to be accompanied, the right to paid time off to accompany, or the right to postpone meetings to accommodate the employee's companion, the Tribunal can order the employer to pay compensation not exceeding two weeks' pay.