



Flexible working RCM guidance paper



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Section 1: Introduction

This guidance has been produced to provide information and guidance for RCM members and local workplace representatives about how to request flexible working. It aims to ensure you understand both your statutory rights and the rights that apply under the NHS Terms and Conditions of Service Handbook *Section 33: Balancing Work and Personal Life* – for those members employed by the NHS. It is also intended as a guide to help you to negotiate an arrangement that meets both your needs and those of your employer and the maternity service.

Section 33 was updated in September 2021 and is referred to as NHST&CH in this document where relevant paragraphs are referenced. This update only relates to NHS staff working in England and Wales. Discussions are underway in Northern Ireland but have not yet concluded at the time of writing. In Scotland these changes will be introduced in line with its ongoing 'Once for Scotland' Workforce Policies Programme

You should check any flexible working policies that may apply to your employing NHS organisation under your contract of employment with that organisation. This may be available via your organisation website or internal staff information sites. If you cannot find it you should ask your local HR department for this or you can ask your local RCM workplace representative to obtain a copy of any relevant agreements.

Those RCM members who work outside the NHS for other employers will need to check their employment contracts or seek information about any flexible working policies that their employer may apply over and above the statutory minima. Some organisations may apply NHS terms and conditions (including Section 33) but you will need to check your employment contract. If your employer does not have a policy you should use the [**Code of Practice on handling in a reasonable manner requests to work flexibly**](#) produced by ACAS (Advisory, Conciliation and Arbitration Service) and give a copy to your employer.

Note that in Northern Ireland slightly different statutory arrangements apply and these are set out in Section 12 Those working in the Isle of Man and Channel Islands will need to check their local policies.

If you want to ask for flexible working and would like our help, please contact your local RCM steward. If you do not have a local steward please call the RCM on 0300 303 0444.

Section 2: Background

Flexible working benefits midwives and maternity support workers by allowing them to create a better balance between their work and home life. There are many reasons why someone may want to work flexibly. For example to fit in with their childcare needs or when caring for a sick, disabled or elderly relative. They may want to work flexibly or reduce their hours as they approach retirement or simply to have a better work/life balance.

The Government itself accepts that there is currently a shortage of 2,000 NHS midwives in England alone, so it is extremely important that midwives and maternity support workers (MSWs) do not leave the profession. The shortage of midwives and the increasingly complex care that women need means that maternity units are struggling and there are high levels of stress and exhaustion among midwives, MSWs and student midwives. This is causing midwives to leave the service. Maternity units are in a catch-22 situation.

If maternity units can hold on to their midwives, staffing levels will improve, which in turn will lead to more midwives and MSWs wanting to stay in the profession. Employers should consider the benefits of granting flexible working requests, particularly if the main benefit is that the service can keep that member of staff in the maternity unit. An RCM member survey carried out in 2021 found that 67% of midwives and MSWs who had left or were considering leaving the NHS could be encouraged to return if there were greater opportunities to work flexibly.

Maternity services operate 24 hours a day, seven days a week, 365 days a year, so maternity units need to work in shifts. In theory, this should mean that units can offer a wide variety of different shift lengths and patterns, so granting flexible working requests should be fairly easy. However the same RCM member survey mentioned above found that over a third (36%) of RCM members who had made a request to work flexibly had their request rejected. The most common flexible working requests were to reduce hours or to work fixed days of the week. Also, e-rostering (an electronic system for working out who works which shifts) and self-rostering (where a team decides among themselves who works which shifts) should make the wide variety of shift patterns and shift lengths easy to manage. However, we know that, in practice, maternity units are very inflexible in the variety of shift patterns and shift lengths they offer to staff. Several RCM surveys have shown that many units only offer 12-hour shifts and ask their staff to go on a rota system so their days and hours of work vary from week to week.

While some staff are happy to work this way and enjoy the variety of different shifts, other staff find it very disruptive to their work-life balance. It can make planning childcare very difficult, as many nurseries want children to attend on set days, so midwives and MSWs have to pay for alternative childcare or rely on family and friends if their shifts do not fit with those set days.

Our evidence suggests that it is becoming more and more difficult for midwives and MSWs to get their flexible working requests granted, and the reason given for this is normally poor staffing levels. However, this is a false economy if the result of refusing a request is that the midwife leaves the service altogether, worsening already poor staffing levels.

We believe that organisations should grant midwives' and MSWs flexible working requests, and offer a variety of shift patterns and lengths, to encourage staff to stay in the service. Without holding on to existing midwives, we cannot hope to end staff shortages.

Self and team rostering can be a good way of enabling teams (including continuity teams) to decide how to organise their working time, arrange schedules and roles while ensuring that intra-partum care is covered. It can give teams the autonomy to develop working patterns that recognise the importance of work-life balance and health and wellbeing. Research shows that high levels of occupational autonomy can support emotional wellbeing.

Anne is a community midwife manager in Northern Ireland, managing a number of small rural community teams. Before being a manager Anne was an RCM Workplace Representative. Being a RCM workplace rep meant she had a good understanding of policies and processes and the importance of ensuring timelines are met and documentation is robust. She supports flexible working to support health and wellbeing and to help retain staff within the team. "I think the most important starting point is to know your team really well, to understand who they are and how they work, but also have a good understanding and knowledge of your current and predicted work flows and overall staffing levels current and predicted. It is also important to communicate requests with senior midwifery management team for advice and guidance". Generally before a member of the team puts in a formal request to work flexibly Anne will have an initial discussion to understand the request and explore alternatives if the initial request might not be possible. This could even include exploring options outside the team, in the hospital for example. The majority of requests in the team come from those with childcare or other caring responsibilities.

Recently Anne was able to agree a request to work three set days per week, with the member of staff still participating with Homebirth on call rota and weekend rota. Agreements through the flexible working policy are not permanent and reviewed 3 monthly to ensure staffing and clinical work is covered and working well. There is also an agreement that mandatory training is completed on days that do not include the set working days and are as part of standard hours. The importance of communicating with staff that flexible working through the policy is an interim measure to help with current work life balance.

Another recent request was to work term time only which Anne was unable to accommodate, but through exploring with the midwife what their needs were it was discussed that there may be the possibility to reduce weekly working hours (from three days to two days per week) over school summer holiday months, July and August with the use of annual leave. Early discussions with staff before requests are made is proactive and can help identify other alternatives.

Section 3: What is flexible working?

You can ask to change your hours of work, your days of work, your place of work or a combination of all of these in relation to your present job.

Flexible working can take many forms including the following which are listed in the NHST&CH para 33.10:

- Reducing your hours to work part-time which can be anything less than standard full time hours
- Changing your start and finish time
- Having flexibility with your start and finish time around core hours (sometimes known as 'flexitime')
- Working your hours over fewer days ('compressed hours')
- Compressed or elongated hours allowing your work to be condensed or stretched in a regular pattern or over a specific time period such as seasonal working
- Fixed working patterns to give certainty over hours worked and/or location
- Average hours working patterns to allow a set number of hours to be averaged out over an agreed period such as annualised, bi-annualised, quarterly, monthly
- Team self-rostering
- Flexible retirement
- Work from home or elsewhere ('remote working')
- A mixture of working from home and working at your workbase ('hybrid working')
- Job sharing where your job is shared with another person
- Term time working

Patricia had numerous periods of sickness absence over a number of years due to a fluctuating long term health condition. Going through sickness absence management processes was not improving her levels of absence and was having a negative impact on her health and wellbeing. A new line manager was keen to break the cycle and keep Sarah at work through using flexible working as part of reasonable adjustments. They met to discuss what could support her health and ensure an experienced midwife wasn't lost to the NHS. Because of regular treatment that Sarah received it was decided that she should work set days and a reduction in her hours by personal choice. Sarah was also put on an annualised hours contract (with the hours worked per roster period), this meant during periods when she was well, she could work more of her hours and less when her condition had flared up.

"Flexible working made my life a bit easier because I could liaise with my manager when I was feeling well and work my hours knowing that when I had a flare up I knew I didn't owe the trust any hours, I felt I had independence and in a partnership with my manager, I didn't feel like a burden and I was supported"

Section 4: Who can request flexible working?

Anyone can make an informal request to change their working arrangements and it is always a good idea to have a discussion with your manager about the kind of flexibility you are seeking to see if you can reach an agreement without having to go through a formal procedure. However if your employer refuses to agree your proposal you will need to consider submitting a formal request. Different rights to request will apply depending on whether you are an NHS employee (or work for an employer who applies NHS terms and conditions of employment) or if you work for an employer outside the NHS in which case the statutory provisions will apply – unless your employer has their own flexible working policy.

NHS employees

All NHS employees in England and Wales have the right to request flexible working from their first day of employment (NHST&CH para 33.5). This is more beneficial than the statutory provisions which require 26 weeks' service with the employer before a request can be made (see below).

The NHS provisions also mean that NHS staff in England and Wales can submit more than one request in any 12 month period, regardless of the reason for submitting their requests (NHST&CH para 33.6). Again this is better than the statutory provisions which only allow one request to be submitted in any 12 month period.

Statutory right to request flexible working

If the NHS provisions do not apply then the statutory provisions may. Only people legally categorised as employees have the statutory right to request flexible working – those who are categorised as workers or who are self-employed do not. The statutory right places certain obligations on the employer about how they consider and respond to that request

All employees (including trainees and apprentices) have the **legal** right to make a request for changes to their hours of work, days of work or place of work providing:

- You have been employed by your employer for at least 26 weeks by the time you make your request, and
- You have not made a request for flexible work in the last 12 months (whether it was granted or refused).

You are still employed during maternity, paternity or periods of parental leave or sick leave, so any weeks of leave count towards your continuous employment.

You can ask to work flexibly even if you are not an employee (for example if you are categorised as a 'worker') or you do not fulfil the requirements set out above, however you will not fall within the legal framework set out below.

Laura an antenatal clinic manager sees flexible working as beneficial to both her staff and the families in their care, she worked with her team to devise working patterns to better support both. Clinic times were changed from 8.00am–4.00pm to 8.00am–6.00pm allowing staff who wanted to compress their hours from a five day to a four day week (whilst ensuring compliance with the Working Time Regulations) to do so whilst also ensuring that those who preferred the more traditional five day week could keep their previous working pattern. Staff with childcare responsibilities were able to start an hour later so that they could take their children to nurseries or childminders. This was a formal arrangement following an application for Flexible Working and trialled on a temporary basis to ensure that the arrangement continued to support the sustainability of the workplace and the midwife or MSW's situation hadn't changed requiring further review.

"I worked with my NHS trust's dedicated e-roster team to set up the system to make it easy to administer the new shift times and also allow those that needed to work set shifts to do so by fitting the set days together like jigsaw. By working with my team and often meeting them halfway morale improved and sickness absence levels were much reduced, I don't think they were ever higher than 0.5%"

Section 5: How to submit a request for flexible working

Throughout, you should remember this is a negotiation. You have the right to ask for flexible working, but not the right to get the arrangement you wish for. In order to maximise your chances of success, it may be a good idea to present your employer with two or three different workable scenarios. It will be more difficult for your employer to justify refusing a number of options than it will be to justify refusing just one scenario. Also bear in mind that you are asking your employer to be flexible so it is a good idea if you can also be flexible and be prepared to make compromises yourself. This may make it much more likely that you can come to a workable solution together.

If you want to request a change to working arrangements – particularly on return from maternity leave – it is important to submit your request as early as possible as it can take a while to negotiate especially if your employer initially refuses your request. It is advisable to submit your request three or four months before you want the new arrangements to come into effect, particularly if you need to dovetail in with other arrangements such as childcare.

Making a request: process for NHS employees

You will need to obtain a copy of your employer’s policy on flexible working– you can ask your RCM rep or your HR department for a copy or it may be available via your organisation’s website or internal staff information sites. The policy should include details of how to submit an application and your organisation may have a template for staff to use to submit a request.

NHS employers are encouraged to work in partnership with local trade unions to develop agreed arrangements that allow for a fair and consistent approach to all applications (NHST&CH para 33.12 – 33.13). They are also encouraged to develop guidelines for managers setting out how requests are to be managed (para 33.15). Any locally agreed policies should be supported by “training, clear supporting materials and ready access to advice for line managers” (para 33.16). You may find it helpful when building your case to get copies of any such documents and quote from them.

Make sure that you are aware of any timescales involved including how quickly your employer should respond to your request and the steps they need to take to consider and discuss your proposal with you. If your request is refused and you wish to appeal you will need to check any deadlines for submitting an appeal.

At any stage you can ask your local RCM rep to get involved in discussions or meetings about your application.

Making a request: statutory process for those employed outside the NHS

First check if your employer has a flexible working policy or procedure – they may have a specific template that you will need to use to submit your request so check with your HR department or local RCM rep.

If you want to use your legal right to ask for flexible work, you must make an application in writing and you **MUST** include all of the following. This is called a **statutory flexible work application** under the Employment Rights Act 1996 s.80F:

- State that this is an application for flexible work under s 80F of the Employment Rights Act 1996.
- If your application is to facilitate a reasonable adjustment for a disability as set out in the Equality Act 2010 make sure this is clearly explained
- State the working pattern you are asking for and the date you want it to start
- Explain what effect, if any, you think the new working pattern would have on your employer and how you think it could be dealt with
- State whether you have asked before and, if so, when
- Sign and date the application

Your application can be made by letter, fax or email and you should keep a copy. Your employer may have a standard form for making an application, so you should check.

Alternatively, you could use the government application form: Form FW(A) available at: www.gov.uk/government/publications/the-right-to-request-flexible-working-form. This form includes an acknowledgment slip for your employer to return to you confirming that they have received your application.

Section 6: Building your case for flexible working

Remember that the right to request flexible working is just that – a right to make a request - so you may need to enter into a negotiation with your employer in order to come to an arrangement that suits you both and meets the needs of the maternity service. Think through what you would ideally like but also have an alternative arrangement that you would be prepared to accept.

You should try to put yourself in your employer's shoes and try to work out what objections or fears they might have about your proposal and then address them as best you can. You probably know your job better than anyone else so think about how the new working pattern could work. The more you can demonstrate to your employer that your proposal is workable, and that you can provide solutions to any objections they may have, the more likely it is that your request will be granted or at the very least, that your employer was not justified in refusing it.

The NHS Terms and Conditions Handbook stresses that there *"should be an emphasis on exploring and mutually agreeing solutions."* (NHST&CH para 33.14).

Here are some tips on what to consider when making your case.



Does your employer have a flexible working policy? If so are there any useful statements that you could quote in your application or refer to when speaking to your manager. For example Section 33 of the NHS Terms and Conditions Handbook notes that a positive work/life balance means that staff are more productive and satisfied at work (NHST&CH para 33.1) The Handbook clearly sets out the expectations for NHS organisations to achieve this:

"Key to achieving work/life balance is the provision and availability of flexible working opportunities accompanied by policies which support managers to take the time to understand what each person needs. Flexible working is part of a wider commitment by the NHS to improve the quality of working life. It also supports the retention of existing staff including those returning to work after family-related leave." (NHST&CH, Para 33.2)

The NHS Terms and Conditions Handbook actively encourages Trusts to promote flexible working by:

- Thinking about how to promote flexible working opportunities in job adverts
- Encouraging open conversations about flexible working for example at regular one to one meetings, staff meetings, annual appraisals and induction meetings

Do you want this to be a **permanent arrangement or do you want it to be temporary?** Most employers will assume that you want the arrangement to be permanent unless you clearly state otherwise. A statutory request will always lead to a permanent change to the contract with no right to revert or change the arrangement in future unless agreed with the employer. If you are seeking a temporary arrangement how long do you want it to last for? It is important that if the arrangement is temporary it is agreed with your employer and the start and end dates are set out in writing so that there is no confusion or dispute at a later date.

You should think about **what will happen on the days when you are not at work** and how any problems could be overcome. For instance, is there someone else who does the same job as you who can cover? If not, you could suggest that your employer takes on another part-timer or job-share partner.

Speak to colleagues who may also be interested in flexible working themselves. If you would like to reduce your hours someone else may want to increase theirs or another midwife or MSW who is working full time might want to reduce their hours and work a job share with you. Perhaps a reduction in your hours could provide an opportunity for someone in the grade below you to get some part-time experience at a higher grade to help them with their career progression.

Is there any evidence about staff turnover or problems with recruitment and retention?

The offer of flexible working opportunities can be an effective tool to attract new staff and retain existing staff. Have any midwives left your service in recent years because they could not get the flexible working arrangements they needed? If so this could be used as evidence that your service is losing staff because of a lack of flexible working opportunities. The NHS Terms and Conditions Handbook encourages organisations to monitor the submission of requests and their outcomes and share this information with trade unions. Ask your RCM rep if they have any monitoring information which you could use in your submission.

If the employer is reluctant consider your request you could **ask for a trial period for the new working arrangement** (e.g. six months) with a review date agreed so that you can see how things are working and iron out any problems.

Are there any **examples of successful flexible working arrangements in your service** or in other departments of the organisation that you could quote? Speak to anyone already working this way to find out how they have overcome any problems.

Section 7: What happens when my employer receives my request for flexible working?

Your employer must consider your request in a reasonable manner. This usually means that your employer should meet with you to discuss your application. Your employer must provide a decision within three months of the date of your application unless you and your employer agree to a longer period.

NHS employees should be able to take their trade union representative to any meetings. Those employed outside the NHS do not have the right to be accompanied by a trade union representative (unless your employer's policy states that you do) but can still ask their employer if they can be accompanied at any meetings to discuss the request. ACAS recommends that employers do allow someone to accompany people to meetings.

ACAS have provided guidance for employers on how to handle requests in a reasonable manner and a Code of Practice on handling requests which may be useful to show to your employer, especially if they do not have their own policy. See: www.acas.org.uk/making-a-flexible-working-request

What happens if I cannot attend the meeting?

You should notify your employer and ask to rearrange the meeting. Your employer should allow you to rearrange if you have a good reason such as illness or childcare difficulties.

If you do not attend two meetings or appeals your employer is entitled to consider your application as withdrawn. If you cannot attend a meeting for a good reason (for example if you are off sick or have a childcare emergency) you should get written confirmation from the employer that they agree this was a 'good reason'. Otherwise you may have to wait 12 months before you can submit another request if the statutory provisions apply. Hopefully any NHS organisational policies will not be so strict and will allow meetings to be postponed more than once, but do check your local policy to make sure this is the case and stick to any rules about the steps you need to take to comply with the policy such as meeting deadlines and attending meetings.

What if my employer needs more time to consider my request?

If either you or your employer would like more time to reach a decision you can both agree to an extension of the time period.

Section 8: What happens next if my employer agrees my request?

If your employer agrees to your request at the outset, they must write to you confirming the new arrangement and the date on which it will start. The new arrangement should start on the date agreed between you and your employer. This will usually be the date you asked to start the new arrangement. When returning from maternity leave this could be the day you go back to work after maternity leave. It should not be backdated to the date you made the application.

Your terms and conditions, such as pay and leave, will remain the same until the date the new arrangement starts when they will be pro-rated to reflect your new working pattern. For example, if you used to work full time, your annual leave will be based on your full time hours up until the date that your full-time contract ends even if you were on maternity leave during that period. Your annual leave will be pro-rated according to the part-time hours agreed with your employer from the start of your part-time contract. Your length of employment should continue from when you first started work for your employer (including any periods on maternity leave). If you are given a new contract make sure it states that your length of service is continuous with your previous period of employment.

The change to your working arrangements will be a permanent change to your contract of employment unless the agreement states that it is only to be for a limited or temporary period. If this is the case make sure you get details of the start and end dates in writing.

Section 9: What reasons can my employer give for refusing my request?

Your employer must properly consider your request. All employers have a duty to consider requests in a reasonable manner. An employer would be justified in refusing flexible work if there were good business reasons and there was no alternative solution. Employers are expected to take account of technological advances e.g. to look at whether you can work from home, and they would be expected to consider any compromises you suggest.

Your employer can only refuse your request if there is a valid business reason for doing so which falls under one of the following eight categories:

- It will cost too much
- There will be a negative effect on the organisation's ability to meet customer demand
- They are unable to reorganise the work among existing staff
- They are unable to recruit additional staff
- There will be a negative effect on quality
- There will be a negative effect on performance
- There is not enough work during the periods you have requested to work, or
- There are planned changes to the business, for example, your employer plans to reorganise or change the business and thinks the request will not fit with these plans

Your employer must explain why that reason for refusing your request applies in your circumstances.

Section 10: What can I do if my employer refuses my request?

For NHS staff the handbook makes it clear that employers should work in partnership with trade unions to agree an appeals procedure that applies to all staff and that employees have the right to be accompanied by a trade union representative at an appeal hearing. The appeal should consider whether the agreed local policy has been properly followed and whether all appropriate options have been fully considered (NHST&CH para 33.17 – 33.18).

Under the statutory provisions (if the NHS provisions do not apply to you) you do not have a legal right to appeal a refusal but many employers do allow you to appeal if they refuse your request. You should write to your employer stating your reasons for appealing and sign and date the letter. Make sure you comply with their policy on appealing including meeting any deadlines. Your employer should hold a meeting to discuss your appeal and should provide a final decision within three months from the date of your initial application. Your employer can ask you for more time to make a decision but only if you agree. You can ask your employer if you can bring someone to a flexible working request meeting, for example, a co-worker or trade union representative. There is no legal right to bring someone, so it's up to your employer to agree but the ACAS Code advises employers that it is good practice to allow this.

If you have asked to appeal your employer's decision and the appeal has been refused, you should continue trying to talk to your employer to try to resolve it and explore all the possibilities. If you think that you are no longer going to be able to resolve it by talking to your employer you should raise it formally (see below). Wherever possible it is more constructive to focus on finding solutions and trying to explore a way forward.

It is important to use the appeal so that you can discuss any misunderstandings or explore other possibilities in relation to your working hours. You now know why your employer is refusing your request so you can respond to their concerns or refute their reasons for refusal. You can also use the appeal to suggest alternative working patterns to the one set out in your original application if you think these would allay your employers concerns.

Here are some tips on how to counter common objections that your employer may come up with



Under the flexible work legislation you can only challenge an employer's refusal if they did not consider the application in a reasonable manner, they refused the request without a legal business reason or the decision was rejected on the basis of incorrect facts so do check your employer's reasoning carefully and see if they need reminding of the correct position. You cannot challenge a decision because you disagree with the business reasons the employer gave, however, you may have a discrimination claim which will allow a tribunal to explore whether your employer was justified in refusing your request.

There are no part-time vacancies

This is NOT a good reason. To avoid discrimination, an employer must seriously consider every request from a woman asking to work different hours because of their childcare responsibilities. A blanket policy of not having part-time work is likely to be seen as discriminatory in itself. Also, your employer should be looking at how you can do your present job on a part-time or more flexible basis, not looking for other part-time work. The reasons for not offering part-time work must be carefully considered. For example, if there is too much work for you to do your job part-time, your employer could recruit a job-share.

The job is too senior

Again, this is not a good reason. To avoid discrimination, an employer must seriously consider any employee's request to work flexibly, no matter how senior. Some organisations now have very senior people who job-share – so see if you can find any examples in yours.

Last minute overtime is an essential part of the job

If you can no longer do last minute overtime, or any overtime, your employer should look at other options such as a job-share or 'on call' rota. By looking at your job carefully you and your employer may find that the overtime you do is not essential or that the overtime you do is quite regular and predictable and you may be able to plan your childcare around it.

It is too expensive

To make this argument stick, your employer needs to show that the sums add up. In fact, this may not be the case as National Insurance costs are no higher for part-timers, because they are worked out as a percentage of salary, and your employer may not have to buy extra equipment if part-timers and job-sharers share desks, computers etc. Your employer also needs to take into account the financial benefits of having flexible workers, for example, flexible cover if someone is off sick or on holiday.

Consistency is crucial

Employers sometimes refuse part-time work or job-sharing because they need someone who can provide consistency. But by looking at the job carefully, you and your employer may be able to think of practical ways around this. When one employer used this argument to say two receptionists could not job-share, the chairman of the employment tribunal said the problem could be overcome 'by the simple means of a notepad'!

It may also be possible to consider what arrangements are already in place for ensuring consistency when you or a colleague take annual leave, sick leave and/or other types of leave. Are there some good practices in place already that preserve consistency?

We can't find a job share partner

Your employer would need to show that they had made reasonable efforts to recruit inside and outside the organisation. They would also need to show that there would be particular difficulty in finding a job share partner, for example, the job was highly skilled and it would be particularly difficult to get someone else to do the work part-time or job share. Otherwise, there may not be a good reason why you could not go part-time while your employer looks for a job share partner.

To overcome this issue, you may be able to suggest that you could assist in finding a job share partner and/or offer training to a new recruit.

There are too many staff working fixed shifts

Employers must consider the impact of requiring employees with childcare responsibilities to work certain shift patterns.

What if my request is refused on appeal or my employer refuses to let me appeal?

If you cannot resolve it and you need to make a claim in the employment tribunal under the statutory right to request flexible working and/or sex discrimination, the tribunal will only have power to declare whether the employer's decision is unlawful and may award you with compensation. They do not have the power to force your employer to grant your flexible working request. Therefore, it is important to try to remain positive and continue with the negotiation wherever possible. If you are considering taking an employment tribunal claim you should contact your local RCM rep for advice first.

What are my rights under sex discrimination law?

There isn't an absolute legal right to change your working pattern but if you need to change the way you work because of your childcare responsibilities, your employer should properly consider your request and look at how you can do your old job in a way that meets your childcare needs. Your employer can only refuse for one of the eight business reasons listed above.

It may be indirect sex discrimination if an employer has a policy or practice that makes it harder for women to balance work and child-caring responsibilities. As women tend to shoulder more childcare responsibilities than men, a policy or practice that requires women to work long or inflexible hours, or full time, or varying shift patterns can have a greater negative impact on larger numbers of women than men because more women will be unable to comply with this requirement to work long or inflexible hours due to childcare responsibilities. Even if you can show this, your employer may be able to defend a claim for indirect sex discrimination if they can show the policy was a proportionate way to achieve a legitimate aim (i.e. it was reasonable and genuinely necessary to run their business this way).

If a man's request to change his working pattern is refused but women in the company have been granted the changes they requested, he may be able to make a claim for direct sex discrimination.

Your employer will only know if they have a good reason for refusing your request by giving it a lot of thought. For example, refusing to even consider your request or having a policy of refusing part-time work would probably be seen as sex discrimination by an employment tribunal. An employer must consider each individual request in order to avoid discriminating against a woman or man with childcare responsibilities. People often assume that a job has to be done full-time or at certain fixed times of day. But, if you and your employer look carefully at your job you may be able to work out a more child-friendly option – perhaps one that neither of you had considered before.

You may also have a claim for disability discrimination if you have a long-term health condition that amounts to a disability and your employer has failed to consider its duty to provide reasonable adjustments.

Section 11: Frequently asked questions

Can I make a request for flexible working because I need to care for a sick or elderly relative?

Yes, the NHS Terms and Conditions Handbook states that all employers must have a carer's policy to address the needs of those with caring responsibilities for children or dependants (NHST&CH paras 33.13 – 33.22). This policy should emphasise the benefits of flexible working arrangements balancing work and personal life.

Can I make a request for flexible working because I am disabled?

Yes, flexible working can be a reasonable adjustment under the Equality Act 2010 so make sure your employer is aware that this is the reason why you are making a request.

My employer agreed to let me work part-time but I would now like to increase my hours. Can I go back to my full-time job?

No, not without your employer's agreement. Once you and your employer have agreed to a new working arrangement it is a permanent change in your contract and you do not have the right to return to a full-time contract unless this was agreed in advance or you and your employer agree on an increase in hours. If you are not sure, you could negotiate a trial period at the outset and/or agree that you will return to your full time job after a set period of time.

It can be a good idea to agree to a trial period of around six months and set a review date. This would mean that neither you nor your employer would be stuck with arrangements permanently if it does not work out. This might also encourage your employer to agree if the reason that is holding them back is that they are reluctant to agree to a permanent change. This also means, if it works well for the six months and you want it to continue, your employer will have little argument against extending it.

Section 12: Links and further information

The Royal College of Midwives has a number of briefings that you may find helpful which can be accessed at www.rcm.org.uk

You can speak to your local RCM workplace representative about any of the issues covered in this guide or, if you don't have a workplace representative, phone RCM Connect on 0300 303 0444.

The NHS Terms and Conditions of Service Handbook sets out the rights of NHS employees working in the UK including parental leave and pay. You can find it via: www.nhsemployers.org/tchandbook Section 33 covers Balancing Work and Personal Life

Maternity Action is the UK's maternity rights charity dedicated to promoting, protecting and enhancing the rights of all pregnant women, new mothers and their families to employment, social security and health care. Their website contains dozens of information papers providing detailed, easy to read information about a huge range of maternity and other parental employment rights. These cover a range of issues including rights for women in casual work; women who have more than one job; welfare benefits that you may be able to claim. You can access this information via www.maternityaction.org.uk

Advisory, Conciliation and Arbitration Service (ACAS) ACAS guides are available at www.acas.org.uk

This includes a Code of Practice on Flexible Working Requests, guidance for employees on how to submit a request and for employers on how to respond to requests and a model flexible working policy template.

Statutory flexible working request provisions in Northern Ireland

NHS staff in Northern Ireland should check their NHS terms and conditions handbook as well as any local flexible working policies their Health Board may have.

For those making a request under the statutory right to request there are detailed timescales relating to responses and appeals in Northern Ireland. These can all be extended by mutual agreement.

Below is a brief summary of those differences but for more information go to www.nidirect.gov.uk/information-and-services/working-hours/flexible-working

There are many similarities with the statutory right to request in the rest of the UK. You must:

- Be an employee, but not an agency worker (other than those returning from a period of parental leave)
- Have worked for your employer for 26 weeks continuously before applying
- Have not made another application to work flexibly under the right during the past 12 months

Under the law your employer must seriously consider any application you make, and only reject it if there are good business reasons for doing so provided they fall within the same 8 business reasons as apply in the rest of the UK. You have the right to ask for flexible working – not the right to have it.

Timescales and other rights

If your employer agrees your request they must write to you within 28 days setting out the agreed changes and the date they begin.

If your employer does not agree to your request, they must hold a meeting with you to discuss their reasons. The meeting must happen within 28 days of your employer receiving your application. You should both agree to the date. If the person who would usually consider your request is away from work, the 28 day time limit will start when they return.

Your employer must let you know, in writing, their decision within 14 days of the meeting. This time limit can be extended if you and your employer agree.

You have the right to appeal your employer's decision. You can do this on a number of grounds, including:

- to bring something to your employer's attention they may not have been aware of when they rejected your application
- to challenge a fact your employer used in applying their business grounds for refusing your request

You cannot appeal if you simply disagree with the business grounds for refusing your request. If you want to appeal, you must appeal in writing within 14 days of the date of notification of the employer's decision.

Your employer must hold a meeting with you to discuss your appeal. They should do this within 14 days of you telling them you want an appeal. They must agree this date with you.

Your employer must notify you in writing of their decision within 14 days of the meeting.

If you cannot attend the meeting, tell your employer as soon as possible and rearrange the meeting. If you miss two appeal meetings, without good reason, your employer can consider your appeal withdrawn.

If your appeal is refused, check with your employer that there hasn't been a misunderstanding of the procedure or facts. If there hasn't, you can complain under the grievance procedure in your employment contract.

Employees have a statutory right to be accompanied by a work colleague or trade union rep at any meetings. They can speak at the meeting and confer with the employee but cannot answer questions on their behalf.

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