

LANCASHIRE COUNTY COUNCIL

THE RIGHT TO REQUEST FLEXIBLE WORKING (REVISED MAY 2019)

Introduction

All employees with over 26 weeks continuous service have the right to request flexible working.

Governing Bodies have a duty to consider requests seriously and are able to refuse only where there is a clear “business reason”. If a change is agreed, it is a permanent variation of contract and there is no right for the member of staff to revert to the former arrangement.

There is, however, legislation that needs to be taken onto account when considering requests eg the Equality Act. If a member of staff feels that an unsuccessful request also breaches other legislation, it will be possible for both matters to be heard jointly at an Employment Tribunal. In such circumstances, The Tribunal will examine not only the procedure that has been followed, but also the “business reason” put forward by the school and has the power to award compensation under the provisions of that other legislation, on which there is no upper limit.

Who does the right apply to?

The right applies to all staff who meet the following criteria:

Have 26 weeks’ continuous service with the employer at the date of application.

If a request is rejected a further request cannot be made for 12 months.

An application will be taken as being made on the day that it is received.

What can be requested?

Changes to:

- The number of hours the member of staff is required to work;
- The times a member of staff is required to work;

- Where the member of staff is required to work-at home or the normal place of work.

This also covers working patterns such as annualised hours, compressed hours, flexitime, home working, job-sharing, shift working, staggered hours and term-time working.

How should the member of staff make an application?

The member of staff must apply in writing and

- State that it is an application under the legal right to request flexible working;
- State whether a previous application has been made and if so when;
- Set out the change applied for, e.g. a new working pattern and, the date they wish it to become effective;
- Explain the effect that they envisage the change will have on the school/service, including how it might be accommodated;
- Be signed and dated.

An application form is set out at Annex A.

Procedure for considering applications

The initial request:

- If the Headteacher agrees with the proposal, it should be put before the relevant committee of the Governing Body for approval, following which the member of staff should be notified in writing that the variation has been agreed to and the date from which it will take effect.
- If the Headteacher does not agree with the proposal he/she must meet with the member of staff to discuss the request within 28 days of it being made. This provides an opportunity to discuss any problems and consider alternatives.
- The Headteacher must inform the member of staff of his/her decision within 14 days of the meeting.
- If the proposal is agreed, it should be put before the relevant committee of the Governing Body for approval, following which the member of staff should be notified in writing that the variation has been agreed to and the date from which it will take effect.
- If the Headteacher does not support the proposal, he/she must write to the member of staff setting out the grounds of refusal and why they apply in the circumstances and setting out the appeals procedure.

The appeal:

- The member of staff has 14 days after the date of notification of the Headteacher's decision to appeal in writing, to the Clerk to the Governors, setting out the grounds of appeal.
- Within 10 working days of receipt of the written notification, the Clerk to the Governors will arrange for a meeting of the Grievance Committee. Not later than 5 working days prior to the meeting, all interested parties will receive a copy of all supporting documentation.

Procedure at the Appeal Hearing:

- The member of staff and the Headteacher to be present at all times, except when any matter falls solely for the Committee to consider or adjudicate on.
- The Chair will allow the member of staff and the Headteacher, in that order, to make submissions to the meeting and for questioning to occur.
- The introduction of relevant documentary evidence will be allowed.
- The member of staff and the Headteacher will, in that order, have the right to call witnesses, who will be available to be questioned by both sides and by the Committee.
- The Chair will ensure that the members of the Committee may ask questions of the member of staff and the Headteacher and any witnesses.
- Witnesses will only remain at the hearing for so long as they are giving evidence or being questioned.
- The member of staff and the Headteacher will, in that order, have the right to make a final or closing statement to the Committee.
- All other parties will then withdraw and the Committee will consider the case and come to a decision. Advice offered by the Director for Children's Services or his/her representative, will be available to the Committee.
- If, for any reason, the Committee wishes to ask further questions or clarification is required, the Chair will reconvene the full hearing.
- When the Committee has reached a decision, the member of staff and the Headteacher will be asked to return to the meeting and the Clerk to the Governors will communicate the decision.
- The Clerk to the Governors will document the proceedings of the hearing and will confirm the decision in writing to the member of staff within 3 working days of the conclusion of the hearing.
- If the Committee decides to accept the request, the member of staff should be informed in writing of the variation that has been agreed to and the date from which it is to take effect.
- If the Committee decides to refuse the request, the member of staff must be informed in writing of the grounds for refusal, explaining why they apply.

What if time limits cannot be met?

There may be a number of reasons why the time limits specified above are too short and an extension may be required. For example, more time may be needed to explore an alternative working pattern. Time limits can be extended where the member of staff and the Headteacher/Committee agree. A written record of the agreement must be made which states which period the extension relates to and the date the extension is to end. This must be dated and sent to the member of staff. This is to prevent a dispute arising as to whether the “employer” has complied with the time limits required or not.

Time limits will be automatically extended where the Headteacher who would ordinarily consider the application is absent when the application is received. The 28 day period begins when the Headteacher returns to work or 28 days after the application is made, whichever is the sooner. The process should be completed, including appeals, within 3 months of the application being made, unless a time limit extension has been agreed.

Can a trial period be used to test whether or not the proposed arrangement will work?

A trial period allows both the school and the employee an opportunity to review how the arrangements work in practice, and whether or not they are likely to create any practical difficulties for the employee's department or for the business as a whole.

Before embarking on a trial period, the parties should agree to extend the statutory time limit under the flexible working procedure (unless the trial period will be completed within the three-month decision period).

In addition, the Headteacher and employee should document the new working pattern, making clear that it is only a temporary variation to the terms of the employee's contract. The written agreement should state the start and end date of the trial period (with the school reserving the right to cut it short or lengthen it as necessary) and the changes that have been agreed. It should record that the school reserves the right, at the end of the agreed trial period, to require the employee to revert to his or her previous working arrangement. The document should be signed by both parties.

What are the grounds for refusing a request?

If the request is rejected then the member of staff must be informed in writing, setting out the grounds for refusal. The only valid grounds for rejecting a request are set out in the Employment Rights Act 1996 and are as follows:

- The burden of additional costs

- Detrimental effect on ability to meet client demand
- Inability to re-organise work among existing staff
- Inability to recruit additional staff
- Detrimental impact on quality
- Detrimental impact on performance
- Insufficiency of work during the periods the member of staff proposes to work
- Planned structural changes

The member of staff must also be provided with a sufficient explanation as to why the reason applies in the circumstances.

Can the member of staff be represented or accompanied?

A member of staff has the right to be accompanied at any meeting by a fellow worker employed by the same employer. This is narrower than the right to be accompanied at discipline and grievance hearings, where the member of staff is also able to ask a full time official employed by a union, or lay union official, who has been certified as having had experience of or training in acting as a worker's companion. The companion is not permitted to answer questions on their behalf.

If the chosen companion is unavailable at the time proposed for a meeting, then the meeting must be postponed to a time that is convenient for the Headteacher/Committee and within five working days beginning with the day after the date initially proposed.

Can an application be withdrawn?

If the member of staff verbally withdraws their application then the Headteacher should write to the member of staff to confirm this.

Where a member of staff fails to meet their responsibilities an application may be treated as withdrawn. This will apply when a member of staff fails to attend, without reasonable cause, a meeting more than once or unreasonably refuses to provide the information required to assess whether the contract variation can be agreed to. In these circumstances, the Headteacher should write to the member of staff to confirm that the application has been withdrawn.

Can a member of staff complain to an Employment Tribunal?

The member of staff can complain to an Employment Tribunal on the following grounds:

- Failure to hold an initial meeting or appeal meeting
- Failure to provide notice of a decision in accordance with timescales
- Rejection of the application based on incorrect facts (a claim for this reason can only be brought after the application has been rejected on appeal)

A claim cannot be made where the application has been disposed of by agreement or withdrawn.

Complaints must be brought within 3 months of:

- The date of the failure to follow the procedure e.g. after the relevant time limit has elapsed, or
- The date of the rejection of the request following the appeal

Or of this is not reasonably practicable, in such further period as the Tribunal considers reasonable.

The Tribunal will verify whether or not the proper procedures have been followed and will examine any disputed facts relating to why the grounds for refusal apply.

Where a Tribunal upholds a member of staff's complaint it can order the request to be reconsidered. In such cases, the request is regarded as having been made on the date of the order.

Compensation can also be awarded. This will be subject to a statutory maximum of 8 weeks' pay, capped at the statutory rate.

Employers should also be aware that, even where they are not under a duty to comply with the statutory procedure because, for example, the employee in question has insufficient service, they may be liable to discrimination claims where they reject requests for flexible working. For this reason all requests for flexible working should be taken seriously and given due consideration